Submission to the Senate Standing Committee on Education and Employment on the proposed *Fair Work Amendment (Bargaining Processes) Bill 2014*

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1. Introduction

Job Watch Inc (**JobWatch**) welcomes this opportunity to make a submission to the Senate Standing Committee on Education and Employment on the proposed *Fair Work Amendment (Bargaining Processes) Bill 2014* (the **Bill**).

In the following submission each proposed Item of Schedule 1 to the Bill has been addressed collectively.

2. About JobWatch

JobWatch is an employment rights community legal centre committed to improving the lives of workers, particularly the most vulnerable and disadvantaged. It is an independent, not-for-profit organisation which is a member of the Federation of Community Legal Centres (Victoria).

JobWatch was established in 1980 and is the only service of its type in Victoria. JobWatch receives state and federal funding to do the following:

- Provide information and referral to Victorian workers via a free and confidential telephone information service;
- Engage in community legal education through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other organisations;
- Represent and advise vulnerable and disadvantaged workers; and
- Conduct law reform work with a view to promoting workplace justice and equity for all Victorian workers.

Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our TIS. To date we have collected over **165,000** records (we start a new record for each new caller or for callers who have contacted us before but who are calling about a new matter. One record may canvass multiple workplace problems, including, for example, discrimination, sexual harassment, bullying and underpayment of wages). Our database allows us to report on our callers' experiences, including what particular workplace problems they face and what remedies, if any, they may have available to them at any given time.

JobWatch's TIS receives in excess of 10,000 calls per year.

3. Approval of Enterprise Agreement

If the *Fair Work Act 2009* ("**Act**") was amended to include a provision that requires the Fair Work Commission ("**Commission**") to be satisfied that "*improvements to productivity at the workplace were discussed during bargaining for the agreement*"[1], in JobWatch's opinion, this would create a superfluous requirement on the Commission, and both the employer and employee parties when the Enterprise Agreement is to be approved.

Whether the employer and employees have had discussions regarding improvements to productivity should not impact on whether an Enterprise Agreement passes the Better Off Overall Test and is approved. Whilst presumably discussions regarding productivity, and thus the improvement of productivity, already occur during the Enterprise Agreement negotiation process, this should be left to the parties to discuss ~~amongst themselves~~. ~~Productivity discussions are very subjective, and depend on the~~ individuality of the employer and their employees. What one employer may determine as a "productivity discussion" could be completely different to that which is defined as productivity for the purposes of the Act. Regardless, if an employer doesn't want to discuss productivity improvements (which would be unlikely) why should it have to? Therefore, this aspect of the Bill ultimately increases 'red tape' and compliance costs for employers which, in and of itself, will have a negative impact on productivity.

The Commission already has multiple considerations that must be satisfied before an Enterprise Agreement is approved. These considerations already provide sufficient grounds for the Commission to determine in light of the overall objectives of the Act[2]. in the approval of Enterprise Agreements.

Further, JobWatch is concerned by the term "improvements", as such term is highly subjective, and whilst the Bill had provided some indication of what these improvements would include, the risk is that such language could lead to further unnecessary jurisprudence, which is ultimately costly for both parties and places a greater administrative burden on the Commission. Arguably this burden is felt greater by employee representative bodies, such as Unions, because they have lower capacity to afford representation and often rely on in-house resources to run such

[1] Fair Work Amendment (Bargaining Processes) Bill 2014 Explanatory Memorandum
[2] Section 3(f) *Fair Work Act 2009*

advocacy, and so JobWatch is concerned by the impact this provision would have on the "fairness" of the Enterprise Agreement approval process[3].

Recommendation 1: **The proposed section 187(1A) is not incorporated into the *Fair Work Act 2009*.**

4. Protected Action Ballot

The application for a Protected Action Ballot is, as the name suggests, an application not for the automatic entering into protected industrial action for the applicant, but for a ballot to occur to determine whether protected industrial action will occur and how. This process provides a democratic process for determining whether those who will be engaging in the proposed protected industrial action, wish to do so. It is therefore important to remember that, in light of these proposed amendments, the granting of a protected action ballot order, will not automatically result in the taking of protected industrial action.

As in the course of most negotiations that occur within the employment relationship, both parties may often rely on leverage to be able to more actively and successfully negotiate. The threat, or possible threat, of employees taking protected industrial action can be lawfully used to progress negotiations and the concept of 'ambit claims' is an accepted bargaining strategy in industrial relations.

It is highly inappropriate for the Act to be amended to replace the current section 443(2) provision with that which requires the Commission to not make the protected action ballot order in circumstances where the Commission deems that the "*bargaining claims of the applicant:*

- *are manifestly excessive, having regard to the conditions at the workplace and the industry in which the employer operates; or*
- *would have a significant adverse impact on productivity at the workplace.* "[4]

It is inappropriate for the Commission to have the power to reject an application for a protected action ballot in circumstances where, subjectively, claims appear to be "manifestly excessive". Historically, employee associations such as Unions have utilised "ambit" claims when commencing Enterprise Agreement negotiations knowing that the parties will have to compromise to reach agreement.

Further, so-called 'ambit' claims are often the actual claims of employees, who have advised their bargaining representative of what changes they would like made to the Enterprise Agreement. It should not be the role of the Union to 'strike out' the claims of their members even before these claims are made to the employer. Arguably, if this amendment was made, this may occur.

Essentially then, the net effect of this proposed amendment will be to drive down the starting point of Enterprise Agreement negotiations meaning any future agreement

[3] Section 425 *Fair Work Act 2009*
[4] Fair Work Amendment (Bargaining Processes) Bill 2014 Explanatory Memorandum

will likely be less beneficial to relevant employees than it otherwise would have been. This represents unfair and unnecessary support and assistance for employers and therefore fails to met the objective of the Act to provide 'a fair go all round'.

In granting a protected action ballot, the Commission is already required to assess whether the applicant has been genuinely trying to reach agreement. This requirement is already a sufficient safeguard in determining whether the applicant has been negotiating with the employer in good faith, and so the further proposed provision is not required. It is therefore an unnecessary step to insert the proposed 443(1A) into the Act.

It is grossly unfair that this Bill proposes to have an "all in approach" when there are multiple applicants to the Protected Action Ballot. This refers to part 23 of the Bill which proposes that "*where a protected action ballot application is made by two applicants and one of the applicants is pursuing a claim that would have a significant adverse impact on productivity, the FWC could not make the protected action ballot order in respect of that joint application, whether or not another joint applicant is pursuing the same claim*". This is unacceptable and the Act should not be amended to include this provision because it is manifestly unfair and potentially costly (from both a financial and organising point of view not to mention the increased burden on the Commission) to have to lodge subsequent or repeated Protected Action Ballot applications.

Additionally, according to the Australian Bureau of Statistics, there were 27 fewer industrial disputes in the year ended September 2014 than in the previous year[5]. Therefore, on a statistical basis, JobWatch questions whether there is a genuine need for these proposed amendment.

Recommendation 2: **That the proposed section 443(1A) not be inserted into the *Fair Work Act 2009***

Recommendation 3: **That subsection 443(2) not be amended in the *Fair Work Act 2009***

Please contact Ian Scott on 9662 9458 if you have any queries.

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[5] ABS Declaration 6321.0.55.001