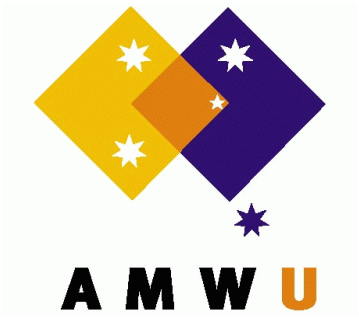
AUSTRALIAN MANUFACTURING WORKERS' UNION



Submission to the Senate Education, Employment and Workplace Relations Committees Inquiry into the *Fair Work Amendment Bill 2012*

November 2012

1. The "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) welcomes the opportunity to make this submission to the Senate Education, Employment and Workplace Relations Committees Inquiry into the Fair Work Amendment Bill 2012 ("the Bill"), further to the Union's two submissions provided to the Fair Work Act Review Panel ("the Panel") in February and March 2012.

2. The Union broadly welcomes the Government's implementation of a "first tranche" of the Panel's recommendations[1] in this Bill, to amend the *Fair Work Act 2009* ("the Act"). In so doing, we support the submission of the ACTU to this inquiry.

3. In particular, we welcome the Government's adoption of recommendations we made to the Panel that an "opt out clause" be unlawful terms of a collective agreement,[2] and that collective agreements not be capable of being made with a single employee. Certain decisions of Fair Work Australia permitted both such circumstances, despite both opt out clauses and single employee "collective" agreements being inimical to the objects of the Act that statutory individual agreements can never be part of a fair workplace relations system[3], and that it is *collective* bargaining that allows the achievement productivity *and* fairness.[4]

4. As we noted in our submission to the Panel, permitting opt-out clauses can lead to manipulation of bargaining and agreement-making to undermine good faith bargaining entirely. When the good faith bargaining framework provided by the Act is premised on a majority vote for an agreement following good faith negotiations with the group of employees to be covered by that agreement, the facility of "opting out" of an agreement renders the framework meaningless. Those who can "opt out" can negotiate and bargain for a new agreement, including potentially taking protected industrial action. Those who do not "opt out" are at risk from manipulation of the real group of employees ultimately to be covered by the agreement.

5. As we further submitted to the Panel, to provide that a collective enterprise agreement can be made with a single employee flies in the face of a structure of bargaining and agreement making in an Act premised upon collective bargaining, that is, employees negotiating collectively with their employer. The extensive public discussion, and phasing out of

[1] In *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* ("the Panel Report").
[2] Proposed s.194(ba)
[3] s.3(c)
[4] s.3(f)

Australian Workplace Agreements through the use of Individual Transitional Enterprise Agreements prior to the commencement of the Act, together with the explicit provisions of the Explanatory Memorandum make it abundantly clear that an individual agreement is not a collective agreement, and collective agreement making provisions in the Act should not be able to be manipulated in this way. To remedy any remaining confusion about this aspect of the Act, we welcome proposed s.172(6).

6. We also welcome other technical changes in the Amendment Bill to address matters identified by the Panel as currently undermining the cohesive operation of the Act and tribunal processes.

7. Certainly, however, the job is not done by this Bill. As an example, we note that the Panel's recommendation 36 was to amend ss.492 and 505 to provide FWA with greater power to resolve disputes about the location for interviews and discussions during the exercise of right of entry by union officials. This is further to frustrations currently experienced by union officials in exercising their rights, such as the examples provided to the Panel:

- an employer providing access to only one room across a site 3 km long, where employees have a 20-minute break;
- an employer providing access to half of a manager's office, divided by a petition, where the manager sits on the other side;
- an employer providing access to a meeting room in an administration area that accommodates six employees where two lunchrooms are available, accommodating around 100 and around 30 employees respectively;
- an employer providing access to a training room seating only 30 people for a workplace of 250 employees with six work areas and various shift and break arrangements;
- an employer requiring three unions entering to address common issues to be located in separate rooms, despite many of the employees being jointly covered by the unions.[5]

This recommendation is not addressed by this Bill. Nor is the Panel's recommendation that good faith bargaining obligations be extended when bargaining for a new agreement commences prior to 90 days before the expiry of an existing agreement, and to variations of agreements.[6] Further to our submissions to the Panel, the AMWU strongly commends these

[5] Panel Report p.197
[6] Recommendation 17

recommendations to the Government, to be addressed in future tranches of legislation to amend the Act.

8. The AMWU welcomes the amendment to align time limits for unfair dismissal and dismissal-related general protections applications, to reduce confusion and allow applicants to choose the most suitable application for their circumstances. However, 21 days remains a very short period during which employees with little experience of legal or industrial matters can find and receive proper advice and take steps so that applications are made and lodged correctly. More appropriate would be alignment of both types of applications to the current 60 day application period for general protections claims involving dismissal.

9. Certainly, the AMWU is not in agreement with all of the recommendations of the Panel. For example, we do not agree with recommendation 12, or any other recommendation which would allow an "Individual Flexibility Arrangement" to become more akin to an individual statutory agreement displacing awards or collective agreements. Similarly recommendation 24 would prevent an employer agreeing in a collective agreement to limit the scope of what it will make an individual flexibility agreement about. Such a recommendation is inconsistent with the core role of collective bargaining in providing for the terms and condition of employment for employees under the Act.

10. Similarly, the AMWU is disappointed that the Panel did not address the limitations of the current Act in ensuring that all employees who want to have a collective agreement can have such an agreement. The Panel appeared to adopt a "wait and see" approach[7] – the employees at Cochlear in Sydney voted for a majority support determination to collectively bargain in August 2009. More than three years later, there is still no collective agreement, despite lengthy FWA proceedings. The AMWU is of the view that these employees have waited long enough to see the outcome they have voted for.

11. Unless there is a facility for employees to turn to an arbitrator such as FWA to arbitrate bargaining disputes, then employers who do not wish to make a collective agreement are able to continue to ignore the wishes of their employees. In contrast, employers such as Qantas have used the current Act to cause FWA to arbitrate when the employer has chosen to. Alternatively, employers are able to put an agreement out to vote without other bargaining representatives agreeing on the "agreement". Employees have no such "circuit breaker" to prolonged bargaining. The AMWU made recommendations that "majority

[7] Panel Report p 138

support arbitration" be introduced, and a model code for good faith bargaining. We recommend that the Government look again at these submissions.

12. Similarly, the AMWU remains concerned that the Panel missed its opportunity to amend the Act to remove the constraints on the achievement industry-wide productivity measures – such as industry-wide regulation of education and training. As the AMWU noted in its Panel submission, when productivity depends on industry-wide concerns, or economy-wide concerns, to have enterprise-level answers alone is simply too shallow an approach. The Act is currently fixated on enterprise-level bargaining. This prevents collective bargaining addressing these wider productivity concerns, like training. This state of affairs is further ensured when the Act:

- prohibits "pattern bargaining";
- limits the subject matter of collective agreements; and
- undermines the achievement of multi-employer agreements through the absence of good faith bargaining or protected industrial action during their negotiation.

13. The adherence of employer groups to the "pertaining matters" restriction on bargaining is both unnecessary and counterproductive to industrial regulation having a role in raising the multi-factor productivity growth of Australian industries, as is the obsession of employers with maintaining and enhancing statutory prohibitions on "pattern bargaining". We would recommend that the Government not consider itself beholden to such irrational complaints. If productivity is an objective of this Act, such unnecessary constraints on bargaining restrain the Act from achieving its aims.

14. The AMWU thanks the Committees for the opportunity to comment on the proposed Bill. We welcome the Bill, but nonetheless look forward to the Government addressing further constraints on the effective and fair operation of the Act in future tranches of legislation.