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SUBMISSIONS OF THE AUSTRALIAN WORKERS' UNION

FAIR WORK AMENDMENT (BARGAINING PROCESSES) BILL 2014

SENATE EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE

OUR INTERNATIONAL TREATY OBLIGATIONS

One of the principle objects of the Fair Work Act 2009 ("**FW Act**") is to provide workplace relations laws that take into account Australia's international labour obligations,[1] including the *Freedom of Association and Protection of the Right to Organise Convention* and the *International Covenant on Economic, Social and Cultural Rights* ("**ICESCR**"), to which Australia is a signatory. The ICESCR declares the following as Human Rights: [2]

Article 8(1)(c): "*The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others*",[3] and

Article 8(1)(d): "*The right to strike, provided that it is exercised in conformity with the laws of the particular country.*"[4]

In the Explanatory Memorandum to the Fair Work Amendment (Bargaining Processes) Bill 2014 ("**Bill**"), Senator Abetz concludes the statement of compatibility with Human Rights, by stating:

> "*To the extent that the amendments may limit human rights and freedoms, those limitations are reasonable, necessary and proportionate.*"[5]

We reject this assertion. The proposed amendments limit the Human Rights of Australians. They are not reasonable, necessary or proportionate and do not fall

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[1] *Fair Work Act 2009*, s. 3

[2] Recognised in *The Human Rights (Parliamentary Scrutiny) Act 2011*

[3] Article 8(1)(c) of the *International Covenant on Economic, Social and Cultural Rights* (New York, 16 December 1966), Entry into force generally: 3 January 1976, Entry into force for Australia: 10 March 1976

[4] Ibid, at Article 8(1)(d)

[5] *Fair Work Amendment (Bargaining Processes) Bill 2014 Explanatory Memorandum*, page v

within the allowable exceptions contained in the ICESCR. The International Labour Organisation Committee on Freedom of Association has consistently stated:

> *"the conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union organisations."*[6]

The table below shows a decrease of over 1,850% in the number of working days lost due to industrial activity in Australia over the past 30 years. 1,691,900 working days were lost due to industrial activity in 1983[7] compared to the 90,600 working days in the year ending September 2014,[8] despite increases in the number of working Australians.

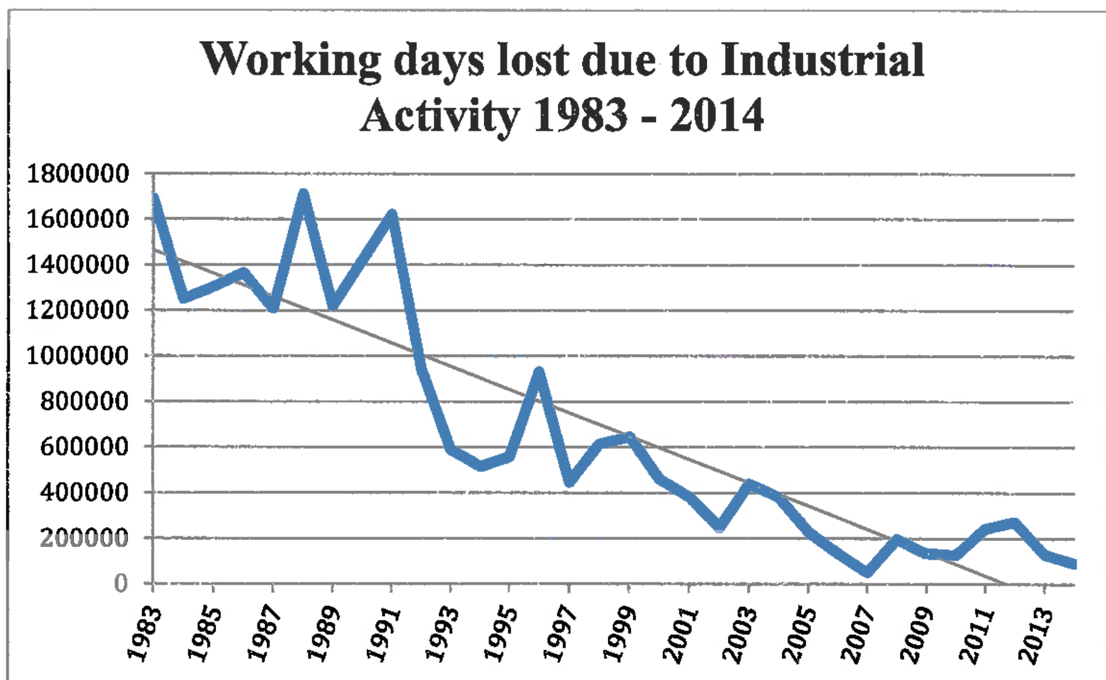

Figure 1[9]

[6] International Labour Organisation, 1996d, [498]

[7] Macintyre S & Issac J, *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration*, Cambridge University Press, 21 Sep 2004

[8] Australian Bureau of Statistics, Industrial Disputes, Australia, Sept 2014, Catalogue No. 6321.0.55.001

[9] Data Source: Australian Bureau of Statistics, Industrial Disputes, Australia, Sept 2014, Catalogue No. 6321.0.55.001; Macintyre S & Issac J, *The New Province for Law and Order: 100 Years of Australian*

These figures debunk the Coalition's claim that the current legislative scheme promotes a "strike first, talk later" approach to enterprise bargaining and highlights the fact that the Coalition is fabricating the issue in order to achieve amendments to the FW Act that are not reasonable, necessary or proportionate.

Under the proposed amendments, the Fair Work Commission (**"FWC"**) will be required to reach a positive determination that an applicant is "genuinely trying to reach agreement" regardless of whether the relevant employer contests the protected action ballot (**"PAB"**) order application. In contrast, s. 413(3) of the FW Act contains common requirements for both employers and employees/unions to be "genuinely trying to reach agreement" before industrial action taken by that party is deemed protected. However, only employees/unions will be burdened with the additional requirements in the proposed s. 443(1A). This is contrary to the Coalition's policy document, in which it is claimed the solution is to ensure that "workers and businesses" are genuine in their attempts to bargain.[10]

Further, the Coalition is proposing to place limitations on the type of claims trade unions may make during enterprise agreement negotiations. This is at odds with Australia's international treaty obligations in Article 8(1)(c) of the ICESCR.

This Bill is a clear attack on the right to strike and the rights of trade unions to function freely. The Bill cannot be reconciled with our international treaty commitments or with the Coalition's own policy document.

Industrial Conciliation and Arbitration, Cambridge University Press, 21 Sep 2004. Note: This data includes industrial activity in public sector disputes, which is not covered by the Fair Work Act 2009 (except in Victoria).

[10] *The Coalition's Policy to Improve the Fair Work Laws May 2013,* at page 34

AMENDMENTS TO THE APPROVAL PROCESS FOR ENTERPRISE AGREEMENTS

Section 187(1A) - Requirement that productivity improvements be discussed during bargaining

The proposed amendment requiring the FWC to be satisfied that improvements to productivity were discussed during bargaining will result in inequitable bargaining positions between employers and employees.

The Bill seeks to add the following additional requirement before the FWC may approve an enterprise agreement:

> *"If the agreement is not a greenfields agreement, the FWC must be satisfied that, during bargaining for the agreement, improvements to productivity at the workplace were discussed."*[11]

Data and information relating to productivity improvements in the workplace are generally not available to employees and the unions, except at the discretion of the employer. The inclusion of this requirement may result in an employer withholding such information and data, and refusing to discuss possible improvements to productivity unless or until other matters have been settled to their satisfaction, thus providing employers with an effective veto over the approval of an agreement.

The requirement to discuss improvements to productivity may also protract the bargaining process or prevent an agreement being approved that is to the satisfaction of all bargaining parties. In cases where bargaining parties are satisfied with the status quo of the enterprise agreement, they may choose to "roll over" a previous agreement and the parties will essentially lodge the previous enterprise agreement for approval (with minor changes). The requirement for parties to discuss productivity before an agreement may be approved by the FWC ignores the fact that most Australian businesses discuss and implement productivity improvements with employees

[11] *Fair Work Amendment (bargaining Processes) Bill 2014*, Schedule 1, Item 1

consistently and in an ongoing fashion, regardless of whether an agreement is being negotiated. This amendment is unnecessary and not proportionate.

REQUIREMENTS FOR GRANTING A PROTECTED ACTION BALLOT

Section 443(1A) - Criteria for determining whether or not the applicant is genuinely trying to reach agreement

The Bill seeks the insertion of the following new requirements for determining whether an applicant for a PAB order is genuinely trying to reach agreement:

> *"For the purposes of paragraph (1)(b), the FWC must have regard to all relevant circumstances, including the following matters:*
>
> *(a) the steps taken by each applicant to try to reach an agreement;*
>
> *(b) the extent to which each applicant has communicated its claims in relation to the agreement;*
>
> *(c) whether each applicant has provided a considered response to proposals made by the employer;*
>
> (d) *the extent to which bargaining for the agreement has progressed."*[12]

In the explanatory memorandum to the Bill,[13] Senator Abetz claims that the proposed section 443(1A) is drawn from the principles in the Fair Work Australia Full Bench decision: *Total Marine Services v Maritime Union of Australia* [2009] FWAFB 368 ("**TMS**"). However, rather than forming any principles for the determination of whether a PAB applicant is genuinely trying to reach agreement, the Full Bench in TMS specifically noted the following:

[12] *Fair Work Amendment (bargaining Processes) Bill 2014*, Schedule 1, Item 3

[13] Op. cit., page 3

"[31] In our view the concept of genuinely trying to reach an agreement involves a finding of fact applied by reference to the circumstances of the particular negotiations.[14] It is not useful to formulate any alternative test or criteria for applying the statutory test because it is the words of s 443 which must be applied. In the course of examining all of the circumstances it may be relevant to consider related matters but ultimately the test in s 443 must be applied.

[32] We agree that it is not appropriate or possible to establish rigid rules for the required point of negotiations that must be reached. All the relevant circumstances must be assessed to establish whether the applicant has met the test or not".[15]

The Full Bench went on to make the following observations:

"This will <u>frequently</u> involve considering the extent of progress in negotiations and the steps taken in order to try and reach an agreement. At the very least one would <u>normally</u> expect the applicant to be able to demonstrate that it has clearly articulated the major items it is seeking for inclusion in the agreement, and to have provided a considered response to any demands made by the other side. Premature applications, where sufficient steps have not been taken to satisfy the test that the applicant has genuinely tried to reach an agreement, cannot be granted. (Emphasis added)"[16]

It is clear that the Full Bench anticipated that these observations, which form the basis for the proposed s. 443(1A), should not be applied universally to all PAB order applications. This position has been confirmed by subsequent Full Bench decisions.[17]

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[14] *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union Print T1982; Re Media, Entertainment and Arts Alliance* <u>PR928033</u>

[15] *Total Marine Services Pty Ltd v Maritime Union of Australia* [2009] FWAFB 368 at [31]-[32]

[16] *Total Marine Services Pty Ltd v Maritime Union of Australia* [2009] FWAFB 368 at [32]

[17] *J.J. Richards & Sons Pty Ltd v Transport Workers' Union of Australia* [2010] FWAFB 9963 at [61] - [64] and [85] - [90]; Farstad Shipping (Indian Pacific) Pty Ltd v Maritime Union of Australia [2011] FWAFB 1686 at [8];

Further, in *J.J. Richards & Sons Pty Ltd v Transport Workers' Union of Australia* [2010] FWAFB 9963 ("**JJR**"), the Full Bench noted the following difficulties with the Bench's observations in TMS[18]:

> "*[89] The TMS observations, in describing what one would "normally expect" and in the reference to "premature applications", suggest that in the typical case referred to in paragraph [63] above, a union bargaining representative will not be "genuinely trying to reach an agreement" until "it has clearly articulated the major items it is seeking for inclusion in the agreement, and to have provided a considered response to any demands made by the other side". With respect, this is at odds with the reality of the typical case to which we have referred.*"

The Full bench in JJR gave specific examples of why a bargaining party might reasonably and rationally withhold communicating certain claims or offers, or refrain from providing considered responses to particular proposals:

> "[86] *We note further, as a matter within the direct experience of the Tribunal, that it is often the case that a union or employer will decline to adopt a position on an offer or claim for increased wages until after other, non-wage related claims, have been agreed upon. For example, it is not unusual for an employer that is a subsidiary of a foreign corporation to be given a budget by its parent company in connection with the bargaining. In such a case, it will typically be perfectly rational and reasonable for that employer to refrain from making an offer of increased wages, or responding to a union claim for a particular increase in wages, until all significant non-wage related claims have been resolved. This is because until such claims are resolved the employer will not be in a position to assess the total cost of non-wage related claims and therefore be in a position to ascertain the amount of any increase that can be offered within the available budget. In the same way, it is not unusual for a union to advance non-wage related claims that it regards as*

[18] [2010] FWAFB 9963 at [85]

important to its members with a view to later setting its claim for increased wages depending upon the outcome of bargaining in relation to those non-wage related claims (sometimes a union will be prepared to accept a lower increase in wages than it would otherwise have insisted upon in order to achieve important non-wage related gains)." (Emphasis added)

The Full Bench observes that communicating all claims at the outset and/or providing considered responses to all offers, particularly a wage-related offer/claim, may be an impediment to reaching an overall agreement in the event that it becomes necessary to alter the wage offer/claim because other non-wage related claims do not settle as hoped or anticipated.[19] As such, this proposed amendment may actually lead to protracted bargaining and even increase the likelihood of industrial action.

Section 443(1) - Inserting "only" after "must"

Section 443(1) of the FW Act currently provides that the FWC "must" approve a PAB order application, provided the applicant has met the requirements of s. 437 and is genuinely trying to reach agreement. The FWC has no discretion to dismiss an application that meets these requirements.

The Bill proposes to include the word "only" after the word "must" in s. 443(1) as follows:

"The FWC must only make a protected action ballot order in relation to a proposed enterprise agreement if:

(a) an application has been made under section 437; and

(b) the FWC is satisfied that each applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted."[20]

[19] *J.J. Richards & Sons Pty Ltd v Transport Workers' Union of Australia* [2010] FWAFB 9963 at [86]

[20] *Fair Work Amendment (bargaining Processes) Bill 2014*, Schedule 1, Item 2

This is a significant departure from the current legislative scheme. By including the word "only", subsections 443(1)(a) and (b) become prerequisites to the approval of a PAB order application rather than the sole requirements. This equips the FWC with discretion to dismiss an application, even when it is compliant with subsections 443(1)(a) and (b).

Section 433(2) - New restrictions on applicant claims during bargaining

The Bill proposes to require the FWC to dismiss a PAB order application in circumstances where any one of the applicant's claims, or all the applicants' claims, when taken as a whole, will have a significant adverse impact on productivity or is deemed manifestly excessive having regard to the workplace and the industry. The proposed s. 443(2) states:

> *"Despite subsection (1), the FWC must not make a protected action ballot order in relation to a proposed enterprise agreement if it is satisfied that a claim of an applicant, or, when taken as a whole, the claims of an applicant:*
>
> *(a) are manifestly excessive, having regard to the conditions at the workplace and the industry in which the employer operates; or*
>
> *(b) would have a significant adverse impact on productivity at the workplace."*[21]

In addition to this exclusion, the Bill proposes to repeal the current s. 443(2), which states:

> *"The FWC must not make a protected action ballot order in relation to a proposed enterprise agreement except in the circumstances referred to in subsection (1)."*[22]

[21] *Fair Work Amendment (bargaining Processes) Bill 2014*, Schedule 1, Item 4

[22] Ibid

Section 433(2)(a) - Manifestly excessive claims having regard to the conditions of the workplace and the industry

As discussed above, an applicant will be obliged to communicate all their major claims before making a PAB order application or risk falling foul of the "genuinely trying to reach agreement" test in the proposed new s. 443(1A) of the FW Act.

However, as the Full Bench of the FWC noted in the JJR decision, it is not uncommon for unions to withhold wage claims until other non-wage related claims have been settled, as unions are often willing to accept lower wage increases in exchange for non-wage related gains.[23]

If the applicant communicates both their wage and non-wage related claims at the time the PAB order application is made, when taken as a whole those claims will inevitably be an inflated representation of the applicant's true bargaining position and may unfairly be considered manifestly excessive.

Further, any determination of "excessiveness" requires the FWC to compare what is being claimed with the current conditions in the workplace. Low paid employees seeking improved wages and conditions that will have a meaningful impact on their financial security run the risk of their claims being found to be manifestly excessive because the claims are compared to their current wages and conditions on a proportionate basis.

Section 443(2)(b) - Significant adverse impact on productivity in the workplace

The Coalition has provided no examples of circumstances in which a bargaining claim has had, or would have, a significant impact on productivity. In their policy document[24], the coalition talks of productivity improvements and a need to encourage discussions about productivity, but sheds no light on the rationale behind, or the effect of, this proposed amendment.

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[23] *J.J. Richards & Sons Pty Ltd v Transport Workers' Union of Australia* [2010] FWAFB 9963 at [86]

[24] *The Coalition's Policy to Improve the Fair Work Laws May 2013,* at pages 32-33

If an employer objects to a PAB order application on the grounds that one or all of the applicant's claims would have a significant adverse impact on productivity, it becomes necessary for the parties to adduce evidence in relation to productivity in the workplace, upon which the FWC may make its determination.

As discussed above, data and documents relating to productivity in the workplace are generally not available to employees or unions, except at the discretion of the employer. This means that employers may pick and choose which data and information to present as evidence to the FWC, and in what form to present it, so as to exaggerate the actual impact of the proposed claim.

An applicant may request this information be provided but if the employer is not forthcoming, the only avenue to obtain it is to apply to the FWC for an order to produce.[25] There are a number of problems associated with this option:

- This will significantly lengthen proceedings before the FWC, resulting in delays in the determination of the PAB order application and the bargaining process as a whole.

- Orders to produce may be refused if the documents sought are not identified in the application with reasonable particularity.[26] They may also be refused on the grounds that the category of documents sought is so wide as to be oppressive to the employer.[27]

Due to the nature of the material sought and the likelihood that the employer will be in possession of large quantities of relevant material, the applicant must be very specific about what documents or data they seek in the order to produce. For example, an order to produce "all relevant documents in the possession of the employer relating

[25] *Fair Work Commission Rules 2013*, r. 54; *Fair Work Act 2009*, s. 590(2)(c)

[26] *McIlwain v Ramsey Food Packaging Pty Ltd* [2005] FCA 1233; cited with approval in *Tamawood Ltd v Habitare Developments Pty Ltd* [2009] FCA 364 and *Faulkner v BHP Coal Pty* Ltd [2014] FWC 5134

[27] ibid

to the potential impact on productivity by the proposed claim" would likely be refused due to the administrative burden placed on the employer in complying with the order, and because the specific documents sought are not adequately identified.

However, an applicant is unlikely to know what documents the employer possesses, or the nature of those documents, so will be unable to adequately identify what they are seeking. Further, the employer will often be in possession of large swathes of information relating to productivity, the totality of which can never form the basis of a valid order to produce.

The employer will inevitably hold a significant evidentiary advantage in any FWC determination of whether an applicant's claim will have a significant adverse effect on productivity. The applicant will be forced to accept and rely on the evidence adduced by the employer.

Therefore, it is also inevitable that many employee claims seeking to improve working conditions could be presented by the employer, through the manipulation of data, as having adverse effects on productivity.

It is unclear at what point those adverse effects will be deemed to be "significant". The term "significant adverse impact" exists in several federal and state planning/environment Acts. In this context, the courts have interpreted the term "significant" as meaning *"important, notable, or of consequence having regard to its context or intensity"*.[28] Whether an adverse impact on productivity is "important, notable or of consequence" requires a subjective and discretionary determination by the FWC, which is likely to result in inconsistencies across decisions.

Further, the Productivity Commission has commented that any initiative requiring the FWC to determine whether specific clauses in enterprise agreements achieve productivity improvements:

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[28] *Krajniw v Brisbane City Council (No 2)* [2011] FCA 563 at [10]; *Booth v Bosworth [*2001] FCA 1453; (2001) 114 FCR 39 at [99]; *Minister for the Environment & Heritage v Greentree (No 2)* [2004] FCA 741; (2004) 138 FCR 198 at [191]- [192]; *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts* [2011] FCA 113 at [109].

> "... might involve significant subjective judgement by a party that is not aware of the commercial circumstances of the firm, could entail delay in registering agreements, and open up a fresh area for disputes."[29]

These comments apply equally to an FWC determination about whether an applicant's claim would have a significant adverse impact on productivity.

LIKELY INCREASE IN THE NUMBER AND LENGTH OF DISPUTES IN THE FWC

The proposed amendments will invariably increase the number and length of disputed protected action ballot order applications in the FWC. Section 441(1) of the FW Act requires the FWC to, as far as practicable, determine a PAB order application within 2 days of the application being made.

In the 2013-2014 financial year, the FWC made 989 orders relating to industrial action, with each matter being determined in median time of 2 days. Of those matters, 627 were PAB order applications.[30]

Similarly, in the 2012-2013 financial year, the FWC made 1446 orders relating to industrial action, with each matter determined within a median time of 3 days. Of those matters, 915 were PAB order applications.[31]

An FWC determination of whether a claim is manifestly excessive having regard to the conditions of the workplace and the industry in which the employer operates will require considerable evidence to be adduced by both the applicant and the employer. Similarly, the evidence required for a determination of whether a claim would have a

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[29] Australian Government Productivity Commission, *Issues Paper 3: Workplace Relations Framework: The Bargaining Framework*, January 2015, page 6

[30] *Fair Work Commission Annual Report 2013-2014*, Appendix K

[31] *Fair Work Commission Annual Report 2012-2013*, Appendix H

significant effect on productivity is likely to be lengthy, detailed and employer specific.

The Coalition amendments will inevitably lead to more and lengthier PAB order application hearings, putting a substantial strain on FWC resources.

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