AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY

Fair Work Amendment (Bargaining Processes) Bill 2014

23 January 2015

EXECUTIVE SUMMARY

ACCI welcomes the opportunity to make submissions to the Senate Education and Employment Committee (Committee) in relation to the *Fair Work Amendment (Bargaining Processes) Bill 2014* (Bill). ACCI supports the amendments and the Committee ought recommend the Bill's passage. Members of ACCI may also provide separate submissions. This submission is made without prejudice to the views ACCI's members expressed in their submissions.

While the proposed amendments do not resolve all of the deficiencies in the bargaining system and there remains significant scope for structural reforms to the *Fair Work Act 2009* (Act) to facilitate productive and harmonious enterprise bargaining, they make some modest enhancements to the framework by:

- requiring the Fair Work Commission (FWC) to be satisfied as a condition of approval that productivity improvements at the workplace were discussed during bargaining; and
- providing greater transparency regarding the circumstances in which a protected action ballot can be made by requiring the Fair Work Commission to be satisfied, based on new guidance, that the applicant for a protected action ballot order has been, and is, genuinely trying to reach agreement with the employer before making the order

The Bill does this in the following way:

- **Item 1 of Schedule 1** requires the FWC to be satisfied that improvements to productivity at the workplace were discussed during bargaining for the agreement. It does not require agreement to or inclusion of terms about improving productivity.
- **Item 3 of Schedule 1** requires that when considering whether an applicant for a protected action ballot order has been, and is, genuinely trying to reach an agreement, the FWC must have regard to all relevant circumstances, including a non-exhaustive list of matters which include:
    - the steps taken by each applicant to try to reach an agreement
    - the extent to which each applicant has communicated its claims in relation to the agreement;
    - whether each applicant has provided a considered response to proposals made by the employer; and
    - the extent to which bargaining for the agreement has progressed.
- **Item 4 of Schedule 1** provides that the FWC must not make a protected action ballot order in relation to a proposed enterprise agreement if it is satisfied that an applicant's claims are manifestly excessive, having regard to the conditions at the workplace and the industry in which the employer operates, or that the claims would have a significant adverse impact on productivity at the workplace.

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1. NEED FOR PRODUCTIVITY IMPROVEMENT

As observed by the Fair Work Commission in its report '*Productivity and innovation in enterprise agreement clauses: an overview of literature, data and case studies at the workplace level*' the need to improve Australia's productivity performance is widely acknowledged.[1] Ideologically driven resistance to sensible policy aimed at addressing impediments in the workplace relations framework that detract from improved productivity outcomes cannot continue. It is time for a rational discussion regarding the work systems and conditions required to support optimal productivity growth as this directly impacts national prosperity and living standards.

The need for Australia's policy settings to support productivity growth is essential if we are to meet the 1.8% growth target set by the G20 Finance Ministers and improve the competitiveness of the national economy. The Word Economic Forum has acknowledged that:

> *…policymakers as well as business and civil society leaders must work together in order to ensure robust economic growth that supports more inclusive economies. Economic and social agendas must go hand in hand and focus on reforms that will render economies more productive and open up new and better job opportunities for all segments of the population.*[2]

Of note, the Explanatory Memorandum to the *Fair Work Bill 2008* made a number of representations about 'promoting productivity', as reflected in the following statements:

- "*The Fair Work Bill 2008 (the Bill) creates a national workplace relations system that is fair to working people, flexible for business and promotes productivity and economic growth".*
- *"It promotes productivity and fairness through enterprise agreements that are tailored to suit the needs of businesses and the needs of employee, including by… enabling FWA to facilitate good faith bargaining…"*
- *"The new workplace relations system will be built on…an enterprise-level collective bargaining system focussed on promoting productivity".*
- *"The new system is designed to provide a fair and simple framework for employees and employers to determine their arrangements in a way that encourages productivity at the enterprise level".*
- *"Enterprise agreements can ensure that increases in pay and entitlements are linked to productivity increases at the enterprise. This is due to negotiations at the level of the enterprise. Furthermore, collective bargaining will shift the focus of negotiations towards boosting productivity."*

[1] '*Productivity and innovation in enterprise agreement clauses: an overview of literature, data and case studies at the workplace level*', Fair Work Commission, 2014, page 1.
[2] *The Global Competitiveness Report 2014-2015*, World Economic Forum, page xiii.

- *"Collective bargaining under the Bill will be less bound by regulation and red tape and is designed to have a positive impact on labour productivity".*

The general objects of the *Fair Work Act 2009* (the Act) as set out in section 3 include provision of "a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians" through, among other things "achieving productivity and fairness through an emphasis on enterprise-level collective bargaining".[3] The Act's objects relating to agreement making as contained in Part 2-4 also seek to underpin "collective bargaining in good faith, particularly at the enterprise level for enterprise agreements that deliver productivity benefits".[4]

Yet despite these references to productivity within the Act's objects and the Explanatory Memorandum, aspects of the current framework are currently acting as barriers to productivity improvement. ACCI proposes to address these impediments more broadly via submissions to the Productivity Commission's Inquiry into the Workplace Relations Framework however for the purposes of this submission, specific consideration is given to the problems which the Bill targets and proposes to overcome.

2. DISCUSSING PRODUCTIVITY

Part 2-4 of Act currently requires the FWC to be satisfied of certain matters prior to approving a workplace agreement. Notably and in spite of the reflection of productivity based considerations in the Act's objects, these approval requirements make no reference to productivity improvement. The Act does not even require the FWC to consider the impact of the agreement on productivity when deciding to approve it, unlike the requirement to do so in the making or variation of modern awards.

The Explanatory Memorandum to the *Fair Work Bill 2008* had expressed the desire for the bargaining framework to operate in a way that improves productivity, with the following statements set out at paragraphs 186 – 190 of the regulatory analysis advancing a business case for enterprise bargaining in pursuit of productivity:

> *Collective bargaining at the level of the enterprise is a productive form of agreement making that allows employer and employees to examine the way they work, discover new ways to improve productivity and efficiency and communicate to make workplaces more flexible. Research by the Melbourne Institute and Productivity Commission links productivity gains to collective bargaining.*
> *…*
> *Furthermore, Tseng and Wooden found that firms with employees on collective agreements experienced a 9 per cent increase in productivity levels, when compared to firms with employees on awards…*

[3] *Fair Work Act (2009)* (Cth), s 3(1).
[4] *Fair Work Act (2009)* (Cth), s 171(b) and 576(1)(c).

However the purported benefits of bargaining as represented above are undermined in the absence of genuine discussions by the parties exploring productivity improvements that agreements can deliver at the enterprise level. While sections 3 and 171 of the Act make reference to productivity, many aspects of the bargaining framework in fact work against productivity improvement, some of which are discussed in this submission.

The Australian Mines and Minerals Association made the following observations in its submission to the Fair Work Act Review Panel in suggesting a disconnect between the Act's objectives and bargaining practices in the resources sector:

> *In the 2009-10 vessel operators' dispute in the offshore oil and gas industry, maritime unions were able to secure, on the back of ongoing strike action, 37 per cent pay rises plus a $200 a day construction allowance in return for zero productivity improvements.*[5]
> …
>
> *The reality is that the overwhelming majority of resource industry employers have not been able to achieve productivity increases in exchange for wage increases during enterprise bargaining under the Fair Work Act, even where those wage increases are exorbitant by community standards.*[6]

The Bill's proposal to include a new subsection 187(1A) requiring the FWC to be satisfied as a condition of approval of enterprise agreements (other than greenfields agreements) "that, during bargaining for the agreements, improvements to productivity at the workplace were discussed", while not a guarantee of enhanced productivity arising from bargaining, will at least assist in getting the 'issue' of productivity onto the table. The proposed amendment is modest and may deliver some benefit if operating in conjunction with other measures set out in the Bill. ACCI does not foresee this requirement adding any significant additional administrative burden to the approval process.

3. PROTECTED INDUSTRIAL ACTION IN ADVANCING CLAIMS

The Act currently requires the FWC to be satisfied of certain requirements prior to issuing a protected action ballot order authorising a secret ballot of employees to determine whether they wish to take protected industrial action. In particular, an application must be made under section 437 of the Act and section 443(1)(b) requires an applicant for a protected action ballot order to satisfy the FWC that they have been and are "genuinely trying to reach agreement". However, the Act does

[5] Australian Mines and Minerals Association, *'Submission to the Fair Work Act Review Panel On the post-implementation review of the Fair Work Act 2009',* page 38.
[6] Australian Mines and Minerals Association, *'Submission to the Fair Work Act Review Panel On the post-implementation review of the Fair Work Act 2009',* page 39.

not provide guidance to the FWC on matters it needs to be considering in determining this latter pre-condition.

The decision in *JJ Richards & Sons Pty Ltd v Transport Workers Union of Australia*[7] opened the door for unions to pursue industrial action in relation to a proposed enterprise agreement, even before bargaining has commenced, resulting in a number of significant and negative implications for the bargaining system. It is hard to imagine this was the intended outcome when the Act was being drafted. The threat of industrial action pursuant to such tactics not only undermines the voluntary nature of agreement making through 'practical compulsion' but has potential productivity stifling and damaging consequences from the outset. Critically, as things currently stand, the prerequisite that the applicant for a protected action ballot order is "genuinely trying to reach agreement" does not present as a significant hurdle.

Notwithstanding the observations of Justice Tracey that the other provisions of the Act "suggest that a less confrontational and more ordered process was available to the Union had it wished to avail itself of it", the Federal Court considered that constraining the operation of section 443(1) to prevent such behaviour would "confront the difficulty of reading into a statutory provision words which are not there" and would result in the Court diverting "from its accepted role of interpreting the will of the Legislature into the territory of itself redrafting legislation".[8] The decision indicates the clear need to amend the Act as the operation of the current s. 443 offends the notion of a regime underpinned by genuine 'good faith' bargaining.

'Strike first, talk later' tactics undermine the economy and a stable industrial relations system. The implications arising from the JJ Richards case are also inconsistent with the former Government's commitment that:

> *Under Labor, protected industrial action will be available during good faith collective bargaining, but only in accordance with Labor's clear, tough rules.*[9]

The Explanatory Memorandum to the *Fair Work Bill 2008* also made representations that did not live up to expectation, stating at paragraph 14:

> *Industrial action can have a negative impact, particularly in terms of productivity. Regulations that encourage industrial action can have a negative impact on the ability of employers to operate their business and on the take home pay of employees. Bargaining participants should have the right to take protected industrial action and an employer should have a right to provide a proportionate response. The provisions in the Bill largely retain previous rules on industrial action, with some provisions streamlined and simplified.*

However the reality is that under the *Fair Work Act*, employers have had their right to take industrial action against employees restrained. Employers can only take

[7] J.J. Richards & Sons Pty Ltd v Fair Work Australia [2012] FCAFC 53 (20 April 2012).
[8] J.J. Richards & Sons Pty Ltd v Fair Work Australia [2012] FCAFC 53 (20 April 2012).
[9] P 16, *Forward with Fairness - Labor's plan for fairer and more productive Australian workplaces*, April 2007

industrial action against their employees in response to industrial action already underway by employees (i.e. through lock outs). ACCI's submission in relation to the 2012 Inquiry into the *Fair Work Act 2009* highlighted the following concerns with the system and inconsistencies with the commitments of the former Government which remain unresolved:

> *30. The agreement making system, as interpreted and applied, gives unions the right to by-pass good faith bargaining, and threaten protected strike action at an early stage in making demand. This is at odds with government promises about how the good faith bargaining provisions would operate. The system needs to be amended to provide that protected strike action can only be a final resort in intractable disputes.*[10]

The Bill proposes amendment to section 443 that would trigger the FWC's consideration of the following non-exhaustive matters in determining whether to grant a protected action ballot order:

- steps taken by the applicant to try to reach agreement;
- the extent to which the applicant has communicated its claims in relation to the agreement;
- whether the applicant has provided a considered response to the proposals made by the employer;
- the extent to which bargaining for the agreement has commenced.

These principles are drawn from the matter of *Total Marine Services Pty Ltd v Maritime Union of Australia [2009] FCAFB 368* and will enhance the operation of s 443. Consideration of such matters is entirely appropriate and reasonable in the context of bargaining purported to be occurring in 'good faith' and does not constrain the FWC's discretion to have regard to other matters.

The recent report of the Fair Work Commission '*Productivity and innovation in enterprise agreement clauses: an overview of literature, data and case studies at the workplace level*' explores participants' perceptions of the ways in which clauses they nominated enhanced productivity or innovation, finding:

> *The case studies also highlight the complex issues associated with any exploration of enterprise agreements and productivity. In particular, in each case the operation and effect of the clauses discussed was highly dependent on organisational context and shaped by the policies or practices and particular work or operations to which they relate.*

Such observations highlight why practices such as 'strike first, bargain later' and pattern bargaining undermine not only the principle of bargaining in good faith but also the likelihood of securing gains in the mutual interests of the employer and employees at the enterprise. Triggering damaging and disruptive processes in the absence of any meaningful discussion designed to identify needs and common

[10] ACCI Submission in relation to the Inquiry into the *Fair Work Act 2009*, February 2012, Page 5.

interests in the organisational context is at odds with the achievement of positive productivity outcomes and workplace harmony.

As noted by the Australian Mines and Minerals Association in its submission to the Fair Work Act Review Panel:

> *What all of this means is that rather than pursuing the more democratic mechanisms under the Fair Work Act that are available to force an employer to bargain, unions can and will immediately employ the far less democratic approach of obtaining majority support from union members.*[11]

The amendments proposed by the Bill to address this are not only consistent with aspects of the Government's pre-election policy aimed at "promoting harmonious, sensible and productive enterprise bargaining"[12] but is also consistent with the policy intent underpinning the recommendations of the Independent Panel commissioned by the former Government to review the *Fair Work Act 2009*, with recommendation 31 stating:

> *The Panel recommends that Division 8 of Part 3-3 be amended to provide that an application for a protected action ballot order may only be made when bargaining for a proposed agreement has commenced, either voluntarily or because a majority support determination has been obtained. The Panel further recommends that the FW Act expressly provide that bargaining has commenced for this purpose despite any disagreement over the scope of the agreement.*[13]

ACCI also supports the further proposed amendments to section 443 to provide that the FWC must not grant a protected ballot order if satisfied that the applicant's claims 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.

Such amendments will make some progress in addressing concerns raised by ACCI during the Inquiry into the *Fair Work Act 2009*. The following extracts from that submission remain relevant as the committee considers this Bill:

> *The system needs changes because we simply cannot afford to see unnecessary disruption because of third party interferences, such as wild cat unprotected strikes*[14]*, protected industrial action over claims which pertain to union rights, and which resulted in an entire national airline grounding its*

[11] Australian Mines and Minerals Association, *'Submission to the Fair Work Act Review Panel On the post-implementation review of the Fair Work Act 2009',* page 106.
[12] *The Coalition's Policy to Improve the Fair Work Laws.*
[13] *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation,* page 177.
[14] Guest, D., *"Building watchdog demands fines for Woodside's wildcat strikers"*, *The Australian*, 14 December 2011.

> *fleet in order to bring about an end to the unions' industrial action over a series of restrictive claims[15], or industrial action that does not have the support of a majority of the workforce and has resulted in unions who wish to "strike first, talk later" being able to bypass the majority support determination provisions rendering these redundant.[16] Since the Fair Work Australia (FWA) Full Bench decision in JJ Richards, there has been only 16 applications made during July – September 2011 for a majority support determinations.[17] However, a total of 294 protected action ballot orders were made during that same period.[18] Similarly 10 applications for a majority support determination were made during October – December 2011[19]. A total of 293 protected action ballot orders were made during that same period.[20] It is a concern that unions are possibly by-passing the majority support determinations and threatening to take industrial action to force the employer to the bargaining table.*

These amendments will help to discourage ambit claims which can frustrate bargaining and may help to inject reasonableness into claims ultimately advanced. The focus of enterprise bargaining should be on the challenges, needs, aspirations relevant to the employer and employees at a particular workplace. These amendments warrant support because they would steer discussions away from other matters which would undermine these interests.

4. CONCLUDING COMMENTS

The 'Forward with Fairness' policy giving rise to the Act expressed a desire for enterprise bargaining to be the heart of the workplace relations system, stating:

> *Collective enterprise agreement making and democracy will be at the heart of Labor's industrial relations system. Collective bargaining allows balanced, cooperative arrangements that foster improved productivity across a business and provide the flexibility employers and employees want.[21]*

However, the employer experience is that the rules under the Act have don't adequately balance their interests against those of unions. It is the experience of many employers in bargaining that such imbalance sees them having to try and resist claims that damage productivity rather than negotiating constructively for outcomes

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[15] The *Australian Industry Group v ADJ Contracting Pty Ltd* [2011] FWA 6684; [2011] FWAFB 6684 (13 October 2011); *Minister for Tertiary Education, Skills, Jobs and Workplace Relations* [2011] FWA 7444; [2011] FWAFB 7444 (31 October 2011).

[16] *J.J. Richards & Sons Pty Ltd v Transport Workers' Union of Australia* [2010] FWA 9963; [2010] FWAFB 9963 (23 December 2010); *J.J. Richards & Sons Pty Ltd and another v Transport Workers' Union of Australia* [2011] FWA 3377; [2011] FWAFB 3377 (1 June 2011)

[17] FWA Quarterly Report, under s.654 of the Fair Work Act 2009, p.4. Published on 28 October 2011. http://www.fwa.gov.au/documents/quarterlyreports/DEEWR_1Q_11-12.pdf

[18] Ibid, at p.7.

[19] FWA Quarterly Report, under s.654 of the Fair Work Act 2009, p.4. Published on 30 January 2012. http://www.fwa.gov.au/documents/quarterlyreports/DEEWR_2Q_11-12.pdf

[20] Ibid, at p.7.

[21] *Forward with Fairness*, p 3.

of mutual benefit. A 'strike before you talk' position contradicts the intention of enacting 'clear tough rules' about industrial action and undermines the notion of a bargaining regime underpinned by good faith principles

Immediate legislative change is needed to improve genuine workplace level bargaining if we are to achieve the productivity improvement we need. While broader reform is required, in the immediate term, these modest steps proposed in the Bill can be taken.

Although more holistic reform of the bargaining system is required, the Bill proposes modest and sensible steps that would address some of the issues highlighted in this submission. ACCI urges the timely passage of the Bill.

5. ABOUT ACCI

5.1 Who We Are

The Australian Chamber of Commerce and Industry (ACCI) speaks on behalf of Australian business at a national and international level.

Australia's largest and most representative business advocate, ACCI develops and advocates policies that are in the best interests of Australian business, economy and community.

We achieve this through the collaborative action of our national member network which comprises:

- All eight state and territory chambers of commerce
- 29 national industry associations
- Bilateral and multilateral business organisations.

In this way, ACCI provides leadership for more than 300,000 businesses which:

- Operate in all industry sectors
- Includes small, medium and large businesses
- Are located throughout metropolitan and regional Australia.

5.2 What We Do

ACCI takes a leading role in advocating the views of Australian business to public policy decision makers and influencers including:

- Federal Government Ministers & Shadow Ministers
- Federal Parliamentarians
- Policy Advisors
- Commonwealth Public Servants

- Regulatory Authorities
- Federal Government Agencies.

Our objective is to ensure that the voice of Australian businesses is heard, whether they are one of the top 100 Australian companies or a small sole trader.

Our specific activities include:

- Representation and advocacy to Governments, parliaments, tribunals and policy makers both domestically and internationally;
- Business representation on a range of statutory and business boards and committees;
- Representing business in national forums including the Fair Work Commission, Safe Work Australia and many other bodies associated with economics, taxation, sustainability, small business, superannuation, employment, education and training, migration, trade, workplace relations and occupational health and safety;
- Representing business in international and global forums including the International Labour Organisation, International Organisation of Employers, International Chamber of Commerce, Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development, Confederation of Asia-Pacific Chambers of Commerce and Industry and Confederation of Asia-Pacific Employers;
- Research and policy development on issues concerning Australian business;
- The publication of leading business surveys and other information products; and
- Providing forums for collective discussion amongst businesses on matters of law and policy.

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