



Submission to Inquiry into the Fair Work Amendment (Bargaining Processes) Bill 2014

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The Australian Nursing and Midwifery Federation (ANMF) thanks the Senate Education and Employment Legislation Committee (the Committee) for providing this opportunity to comment on the provisions of the Fair Work Amendment (Bargaining Processes) Bill 2014 (the Bargaining Amendment Bill).

The ANMF

The Australian Nursing and Midwifery Federation (ANMF) is the national union for nurses, midwives and assistants in nursing with branches in each state and territory of Australia. The ANMF is also the largest professional nursing and midwifery organisation in Australia. The ANMF's core business is the industrial, professional and political representation of its members.

As members of the union, the ANMF represents over 240,000 registered nurses, midwives and assistants in nursing nationally. They are employed in a wide range of enterprises in urban, rural and remote locations, in the public, private and aged care sectors including nursing homes, hospitals, health services, schools, universities, the armed forces, statutory authorities, local government, and off-shore territories and industries.

General comments on the Fair Work Amendment (Bargaining Processes) Bill 2014

- The Bargaining Amendment Bill is the fourth Bill proposing significant changes to the Fair Work Act 2009 (FWA) introduced by the Coalition since coming to office a little over two years ago. The other Bills have been rejected or remain in limbo before the Senate, primarily because the industrial regulation changes are seen as unbalanced, unfair or simply not needed.
- The ANMF respectfully believe the changes proposed by the Bargaining Amendment Bill are simply not needed, reduce the rights of employees, employers and their representatives and reflect poor policy.
- The ANMF notes the FWC functions under the Act include “promoting cooperative and productive workplace relations.”[(s.576(2)(aa))].

- Further, in performing its functions, the FWC is required to promote the objects of the Act, including:
 - “provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians”, including through “achieving productivity and fairness through an emphasis on enterprise-level collective bargaining”[s.3(1)& 3(1)(a)] ; and
 - “collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits” [s.171(a)].
- The Bargaining Amendment Bill appears to be inconsistent with International Labor Organisation (ILO) conventions to which Australia is a signatory. This includes the *Right to Organise and Collective Bargaining Convention, 1949* (No. 98).
- Despite the benign industrial climate and that enterprise bargaining under the FWA is increasingly preferred by a growing number of employers and employees, the government now appears to be responding to calls from narrow sectional interests to reduce the rights of employees and their representatives in the agreement making process, in the absence of any real justification.
- We respectfully submit the parliament should not legislate in response to sectional interests making unsubstantiated demands on alleged shortcomings in the bargaining processes.
- While the ANMF supports clear and effective regulation, the Bill appears to be little more than a vehicle for more prescription, regulation and procedural and legal complexity, which is ironic given the current government’s supposedly slavish commitment to a reduction in unnecessary regulation.
- For the most part those able to engage in the current bargaining system, the rights and obligations under the FWA, provide an ability for the industrial parties to secure agreed

outcomes to apply at a particular establishment for a set period and which are enforceable at law.

- The failure of the FWA to provide for industry bargaining, the prohibition of particular matters in agreements, the decreasing relevance of modern awards and relative ease by which employers can choose not to engage in bargaining, (thereby forcing their employees to remain on minimum conditions) are the real deficiencies in the legislative regime in which bargaining is conducted in Australia.

Boosting labour productivity

The Government claims the Bargaining Amendment Bill will promote labour productivity by requiring the industrial parties to make discussions about improving workplace productivity a feature of their enterprise bargaining negotiations.

Nearly everyone in the community accepts that productivity growth is important, it's one way we get rising living standards and sustainable prosperity and, if the benefits of productivity growth are shared, all receive a benefit.

For most mainstream observers however industrial relations laws are not the cause of productivity problems and they are not the solution. The changes introduced during the "Work Choices" era didn't improve productivity levels, and the FWA has not made productivity levels worse.

Despite this analysis, the government, backed by a small number of vocal commentators, view the current industrial relations laws as a key barrier to productivity growth. Of course when pressed these groups fail to provide any practical or tangible evidence that the industrial relations laws are a hand brake on productivity growth.

The targeting of workers, unions and industrial laws by this Bill is of significant concern. It suggests that the federal government remains fixated on these issues and continues to have an industrial relations axe to grind. If so this is disappointing and lazy policy making.

Finally, on this general point, the ANMF notes that should the Bill become law, the fact is the industrial parties will not be required to come to any agreement about productivity, nor be required to include any term or reference in the enterprise agreement to productivity discussions, measures or improvements. This is, with respect, just a bit illogical and ridiculous and would not pass the “woman on the Melbourne tram” test.

It is reminiscent of a recent report claiming in Pret a Manger food outlets in London, the staff not only have to serve all day for a wage just over the legal minimum, but they have to touch each other regularly, as this conveys a joyfulness that apparently boosts sales. It is based on that well established human resource theory, that when you see two employees put their arm around one another, you can’t help but buy a grilled peach salad with jalapeno vinaigrette!

Measuring and improving productivity in a health, community or aged care setting.

In many industries it is acknowledged that labour productivity is very difficult to quantify both as unit measure and across the enterprise or organisation.

This is notoriously the case in health, community and aged care sectors where nurses and midwives are employed.

While a measure of productivity in this type of setting may simply be the cost of a procedure, the number of in-patient days per admission or the frequency of readmissions, in particular settings it may also be the nursing care, technology and medication used to prolong a life in an acute or palliative setting.

Further while productivity and efficiency changes in these settings may be measured by the number of admissions to a facility over a period, as admissions rise this may coincide with increased labour and structural costs.

Productivity may also be affected by the geographical location or specialist services offered by the facility. For example a hospital may specialise in procedures such as hip replacements. While such a service may be inconsistent with achieving optimal labour productivity or maximizing returns, it may well be consistent with the provider policy to offer services that meet the characteristics and the demands of the population the health facility services.

The provision of health, community and aged care services in Australia is considered world class, both in terms of the standard of the service and its cost.

The employees in these sectors, many of who are on low wages and poor conditions, undertake stressful, unsociable and difficult work. This should be acknowledged and government should look to ways to improve the working lives of health and aged care workers rather than trying to squeeze them further.

Productivity and bargaining

The ANMF submits that there is no evidence or even claims by nursing and midwifery employers that productivity is not squarely on the table during enterprise bargaining negotiations.

For nurses, midwives, employers groups, state and territory governments and agencies, productivity improvements in its many forms is at front of mind in agreement negotiations. Examples of matters that may be discussed in agreements negotiations include:

- How can health and aged care services (usually publically funded) provide better and lasting care at a time of increasing demand and limited available resources?
- What are the most recent developments in pharmaceuticals, health technologies, clinical procedures and work and hygiene practices and how can they be best used at the enterprise?
- How can the enterprise attract and retain better skilled staff?

A cursory examination of nursing and midwifery agreements clearly demonstrate commitments by both employees and their employers to improve and increase service delivery within reasonable limits. The ways this may be achieved are diverse and many.

In addition to the foregoing it is important to note that the majority of health, community and aged care facilities are subject to legislated quality and accreditation standards. These standards invariably require continuous improvement processes resulting in documented and measurable productivity improvements at the facility.

Proposed changes to conditions applying to a Protected Action Ballot Order application

Currently under the provisions of the FWA, a bargaining representative for an enterprise agreement may make an application to the Fair Work Commission (FWC) seeking an order for the conduct of a protected action ballot.

The objective of protected action ballots is to establish a transparent process that allows employees directly concerned to choose, by means of a secret ballot, whether to support the taking of industrial action.

The FWC considers an application made pursuant to Division 8 of the FWA, and if a protected action ballot order (PABO) is issued, the FWC will determine the group(s) of employees to be balloted, the question(s) to be asked and the date by which voting is to be completed.

The Bargaining Amendment Bill seeks to add additional conditions before the FWC can be satisfied that s443 (1) (b) has been met. While these conditions have been described in the parliamentary papers as “non-exhaustive” they appear to be partly based on the following conditions established in *Total Marine Services Pty Ltd v MUA* (2009) FWA 368:

- 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.

In addition, the Bill specifically proposes amendments to s443 providing the FWC must not make a PABO if it is satisfied the claims are “manifestly excessive.”

There are currently various statutory pre-conditions for the issuing of an Order by the FWC facilitating a secret ballot of employees on protected industrial action in support of bargaining claims.

The statutory preconditions in the main are to ensure that a democratic and orderly process is undertaken where protected industrial action is sought by a bargaining party.

In 2013/14 the FWC dealt with in excess of 600 applications pursuant to s443 of the Act (FWC Annual Report 2013/14) . In each case the bargaining parties had an opportunity to put their views before the FWC. For its part the tribunal ensured that the appropriate processes, timetables and certainty were established and ultimately determined whether an order was issued. Importantly, to issue such an order, FWA must also be satisfied that there have been genuine attempts by the applicant to reach an agreement.

A small number of commentators are critical of the existing framework arguing that the FWA allows unions/employees to embark on protected industrial action as a first step when an employer refuses to commence bargaining.

In *JJ Richards & Sons Pty Ltd v Transport Workers Union of Australia* [2011] FWA 3377, a full bench of FWC hearing an appeal found that a union could seek a ballot order for protected industrial action despite the fact that bargaining for an enterprise agreement had not commenced with the employer.

In this case, the employer argued that it was not open for the tribunal to issue a ballot order because bargaining had not commenced and so FWC could not be satisfied that the union had genuinely tried to reach agreement.

The full bench in rejecting this argument held it was possible for a bargaining representative to show that is genuinely trying to reach agreement even though bargaining had not commenced.

Furthermore, FWC did not accept that it could not issue a ballot order in circumstances where the employer is unwilling to bargain. At paragraph 31 of the decision, the full bench stated: “there is nothing in the legislative provisions to suggest that a bargaining representative

should not be permitted to organise protected industrial action to persuade an employer to agree to bargain. Nor is there anything to suggest that a union which is genuinely trying to reach an agreement for its members, but cannot get the employer to agree to bargain, should not be able to organise protected action unless it has the support of the majority of employees”.

Despite the almost hysterical response from some employers to this ruling the ANMF is of the strong view that the approach by the FWC was sound and logical. The alternative would be that an employer who simply chose not to bargain with their employees would be immune from protected industrial action.

Such an outcome would be grossly unfair and inconsistent with the Objects of the FWA relating to the encouragement of enterprise bargaining.

The ANMF does not support the proposals in the Bill relating to establishing more onerous conditions for an applicant to meet the “genuinely trying to reach an agreement” test, particularly where there is little evidence the current regime is not working appropriately.

Finally, the ANMF does not support the proposal in the Bill intended to allow the tribunal to judge whether bargaining claims are “manifestly excessive”. This proposal really is a red herring and once again appears to be an attempt to appease a small number of loud voices. Claims, counterclaims, offers and rejections are sorted at the bargaining table as they should be.

Recommendation

The ANMF recommends the Senate rejects the Fair Work Amendment (Bargaining Processes) Bill 2014.