THE UNION FOR QNU NURSES AND MIDWIVES

QUEENSLAND NURSES' UNION

Submission to The Senate Education and Employment Legislation Committee

Fair Work Amendment (Bargaining Processes) Bill 2014

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Introduction

The Queensland Nurses' Union (QNU) thanks the Senate Education and Employment Legislation Committee (the Committee) for the opportunity to make a submission on the *Fair Work Amendment (Bargaining Processes) Bill 2014* (the Bill).

Nurses[1] are the largest occupational group in Queensland Health and one of the largest across the Queensland government. The QNU is the principal health union in Queensland covering all categories of workers that make up the nursing workforce including registered nurses (RN), registered midwives, enrolled nurses (EN) and assistants in nursing (AIN) who are employed in the public, private and not-for-profit health sectors including aged care.

Our more than 50,000 members work across a variety of settings from single person operations to large health and non-health institutions, and in a full range of classifications from entry level trainees to senior management. The vast majority of nurses in Queensland are members of the QNU.

Productivity, *Fairness* and Enterprise Bargaining

Although most will agree that Australians are better off in an economy with high productivity, high employment and low inflation, the debate on whether industrial relations policy can deliver these outcomes continues. Reflections on enterprise bargaining as the mechanism for productivity improvements increasingly indicate there is little empirical evidence to support this argument (Hancock, 2012; Peetz, 2012). The QNU therefore questions why, in light of this evidence and the Productivity Commission's announcement of a full review of the industrial relations framework, the Abbott government would introduce the Bill at this time to amend the *Fair Work Act 2009* (the Act).

In April, 1991, the (then) Australian Industrial Relations Commission[2] declined to introduce a principle for enterprise bargaining as it was sceptical of claims this would be an effective mechanism for raising both the level and rate of growth in productivity.[3] Although the National Wage Case[4] later that year gave conditional acceptance and established the basis for the legislative changes in 1993, there is still conjecture around enterprise bargaining as a vehicle for productivity improvements.

[1] Throughout this submission the terms 'nurse' and 'nursing' are taken to include 'midwife' and 'midwifery' and refer to all levels of nursing and midwifery including RNs, Midwives, ENs and AINs.
[2] Now known as the Fair Work Commission.
[3] See *National Wage Case April 1991,* Print J7400.
[4] See *National Wage Case October, 1991*, Print K0300.

In an examination of productivity data for the years 1964-65 and 2009-2010 Hancock (2012) concludes there is little evidence of any boost to productivity that could be attributed to enterprise bargaining. Further, Hancock (2012) contends that there are good grounds for doubting enterprise bargaining has contributed anything to productivity and still less to ongoing productivity growth. These include:

- At most, there was four year boost in productivity whose timing does conceivably match the introduction and spread of enterprise bargaining but this has not endured;
- If the four year boost was policy-induced, there were other changes of policy in the late 1980s and early 1990s that may have been more important than the shift to enterprise bargaining;
- When the productivity data are dissected to the industry level, it is hard to identify any large movements in productivity that could reasonably be ascribed to enterprise bargaining with wholesale trade the possible exception. The records of some major industries, notably mining and electricity, gas and water suggest that much stronger influence have been at work (Hancock, 2012, p.301)

Eslake and Walsh (2011), writing for the Grattan Institute, an independent think-tank focused on Australian public policy, maintain that reversing the decline in Australia's productivity growth lies in 'a re-invigorated economic reform effort, improvements to education and training, improved governance of infrastructure investment, and a heightened innovation effort'. They acknowledge that regulatory reform extends well beyond the workplace relations framework and reconfiguring the taxation system could also improve Australia's productivity growth performance (Eslake & Walsh, 2011, p. 29).

The Fair Work Commission (FWC) has also recently conducted independent research into the link between productivity and enterprise bargaining (Preston, Katic, Farmakis-Gambone & Yuen, 2014). The following summary of findings from this study indicates there is limited evidence at this time to make a connection between the two: -

> Turning to the relationship between enterprise bargaining and productivity in particular, the review noted mixed research findings. While some research has found that firms that engage in bargaining are more productive than those that don't, other research has contended that enterprise bargaining has not contributed much, if at all, to productivity. The literature also highlighted the difficulty in finding a causal relationship. The focus of the literature in this area is on enterprise bargaining and enterprise agreements, rather than on particular clauses within agreements.

> Further, an analysis of the available data on enterprise agreements that contain clauses to improve productivity, at an industry level, suggests that there is no directly observable association between enterprise agreements and ABS measures of productivity.
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> In light of these findings, it is clear that an analysis of Australian data provides limited insight into the use of enterprise agreement clauses to improve productivity at the workplace and the effect particular clauses have in regards to raising productivity (Preston, Katic, Farmakis-Gambone & Yuen, 2014, p.22).

If the Abbott government must now require the FWC to intervene in the bargaining process to ensure the parties have discussed productivity arrangements, it should also require the FWC to ensure the parties have discussed fairness and equity. In effect, the Bill is introducing a vetting process for employers to gain performance indicators in agreements. Measures such as this are taking enterprise agreements into a new realm, one that delivers even more power for employers to exercise managerial prerogative and deny requests for increased wages and conditions. The idea that less fettered managerial prerogative will enhance both profitability and productivity lies at the heart of these continual moves to reposition enterprise bargaining as the instrument for change.

An enduring feature of enterprise bargaining has been the permissible subject matter of agreements. Internationally, these matters are left to the parties to determine, however Australian law has never allowed this. Indeed, as Creighton (2012, p. 277) suggests, 'the permissible scope of collective regulation has bedevilled both federal and state systems of industrial regulation since their inception – most notoriously as reflected in the long line of cases which insisted that industrial awards and agreements could not trespass upon the sacred turf of managerial prerogative, or upon other matters that did not 'pertain' to the employer/employee relationship in the relevant sense'.[5]

Productivity provisions link performance to wages and conditions of employment and are thus concessions that employees must make in order to reach an agreement. There are no drawbacks for employers, only the possibility of future gains. That is not the case for employees who will be asked to do more with less. Enterprise bargaining is not a performance tool. Certified agreements represent the outcome of discussions around wages and entitlements. Agreements can effectively contain provisions that may enhance work practices, but they are not tools for gauging performance. The FWC's (and its predecessors') decisions around matters pertaining, decisions of the High Court and the legislation have historically determined the content of agreements.

[5] See for example *Clancy v Butchers' Shop Employees Union* (1904) 1 CLR 181; *R v Kelly; Ex parte Victoria* (1950) 81 CLR 64; *R v Commonwealth Conciliation and Arbitration Commission: Ex parte Melbourne and Metropolitan Tramways Board* (1966) 115 CLR 443.

Although there are still matters such as dispute resolution that have to be included in agreements, we question whether meeting a requirement to have discussed productivity will be relegated to ticking a box on the F17 form or if other evidence will be necessary to indicate it has taken place. In any case, we expect an inevitable legislative follow on from an obligation to discuss productivity will be a requirement that all agreements include productivity clauses. This federal government has already indicated its predisposition towards amending the Act to accommodate its 'productivity agenda'.

Whilst the Bill only requires discussions to have taken place at the workplace, we believe that including productivity in such broad terms on a bargaining agenda will add time to the process and reorient the purpose of negotiations. This may indeed be the Bill's intention, but the reality of bargaining is that interventions such as this will empower employers at the expense of employees. We note that the *Explanatory Memorandum* (Schedule 1 Amendments, p. 2) sets out examples of improvements to productivity that may include elimination of restrictive or inefficient work practices and initiatives to *provide employees with greater responsibilities* or additional skills directly translating to improved outcomes.

In our view, any discussion on productivity should also occur within a context of fairness. Despite Minister Abetz's warning of a 'wages explosion' (Abetz cited in Woodley, 2014), wages have failed to keep up with inflation. To the June, 2014 quarter, the Wage Price Index grew by 2.6% while the Consumer Price Index (CPI) rose by 3% over the same period (ABS Cat No. 6345.0) The fall in wages growth has slowed in every industry including mining.[6] The most recent ABS data (Cat no. 5260.0.55.002) indicates that on a quality adjusted hours worked basis, labour productivity grew 1.3% in 2013-14. Labour productivity on this basis reflects a positive contribution from changes to labour composition, due to educational attainment and work experience. There is no mention that this is attributed to enterprise bargaining outcomes.

According to Senator Abetz (cited in Woodley, 2014), in recent years unions in some sectors have gone too far in their demands for wage rises and conditions and it is not only the role of government to act. Senator Abetz stated that 'instead of agitating for reform to outlaw certain tactics, why can't employers just say no'? He claims if unions and employers do not act responsibly in future negotiating agreements, it could have a significant impact on the broader economy.

[6] Wages in mining rose by only 2.5% over the year to June, 2014 compared to an average of 4% over the past 10 years (ABS Cat no 6345.0).

Senator Abetz has apparently now satisfied himself that this federal government must intervene in the bargaining process and force the parties to adopt his demands. We note the irony here of a coalition government that promotes a small role for government and the reduction of red-tape, yet now seeks to legislate to intervene directly in the enterprise bargaining process to force its agenda on to the parties without any regard to the additional time and effort this may involve for them.

Productivity and Efficiency in Health Care

Broadly speaking, productivity is the measure of organisational inputs and outputs. Health care inputs usually include items such as labour, consumables products and services while outputs are often calculated using activity and unit cost data. The process of measuring productivity in health care is complex because variables such as costs weights and quality adjustments influence service outputs (National Audit Office, 2010). Comparative analysis and benchmarking of health care service productivity can prove difficult due to the variability of calculation methods used within organisations.

Productivity examples include:

- Organisational - dividing the volume of operations and treatments (adjusted for quality) by the resources used to carry out the care;
- Labour – ratio of outputs to the number of staff/hours used.

The term productivity is often confused with efficiency which is the degree to which a production process reflects 'best practice' either in a technical or allocative sense (Organisation for Economic Co-operation and Development, 2001).

- Technical efficiency – maximum output is achieved by a fixed set of inputs using a certain technology.
- Allocative efficiency – occurs when the input-output combination is cost-minimising and/or profit maximising.

Understanding the distinction between health care productivity and efficiency is essential when determining the best measures of service performance.

The QNU is not unfamiliar with the concept of productivity in nursing and midwifery. We are a party to the *Nurses and Midwives (Queensland Health) Certified Agreement (EB8) 2012* that contains a number of clauses related to reform and productivity enhancements. The QNU and Queensland Health negotiated this agreement within an Interest Based Bargaining Framework that recognises mutual interests and gains. The agreement also contains several clauses related to fairness in the employment relationship. However, on

its election in 2012 the LNP government in Queensland set about withdrawing these entitlements including consultation, union encouragement, contracting out and job security.

In the process the LNP government also cut over 1800 nursing and midwifery jobs. These matters, negotiated in good faith with unions were rendered unenforceable, yet other matters where the employer stood to gain from the additional efforts of nurses and midwives – erstwhile 'productivity' measures - remained. If nursing employers seek to introduce productivity measures, then they must also be prepared to discuss excessive workloads and skill mix, two issues that not only require proper resourcing of the nursing workforce, but are also critical to patient safety.

We are therefore unwilling to support federal legislation that may adversely affect private sector and aged care nurses without protections around fairness.

Protected Action Ballot

Whilst we understand that a significant ideological divide separates us from those with a conservative disposition, governments of both persuasions must conform to International Labor Organisation (ILO) conventions to which Australia is a signatory. This includes the *Right to Organise and Collective Bargaining Convention, 1949* (No. 98).

According to the Bill, when the FWC considers an application for a protected action ballot (bearing in mind here that the applicant will nearly always be unions) the FWC must have regard to all relevant circumstances including a non-exhaustive list of matters drawn from principles of a decision of a full bench of Fair Work Australia[7] in *Total Marine Service Pty Ltd v Maritime Union of Australia.* On the strength of one ruling, this government now decides to amend legislation affecting all other parties in the federal jurisdiction. It is an attempt to make it even more difficult for unions to take industrial action when employers are unwilling to bargain in good faith.

The objective of protected action ballots is to establish a transparent process that allows employees directly concerned to choose, by means of a fair and democratic secret ballot, whether to support the taking of industrial action by organisations of employees or by employees (Australian Electoral Commission, 2014). Introducing a set of principles based on the outcome of one full bench case puts in place further obstacles for workers to exercise their international right.

[7] Now known as the Fair Work Commission.

Case study

An employer in the private health sector introduced into the bargaining discussions a clause on productivity. When the matter was taken back to the nurses, they rejected the clause because it was unclear how this would impact on workloads and staffing. The employer eventually agreed to withdraw the clause, however this episode delayed the bargaining process for no result. It demonstrates how vague notions of productivity may yield unproductive outcomes.

Recommendation

The QNU recommends the Senate rejects the Bill.

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