AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS

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PO Box A147
Sydney South
NSW 1235
DX 585 Sydney

alhr@alhr.org.au
www.alhr.org.au

The Committee Secretary
Senate Education and Employment Committee
PO Box 6100
Parliament House
Canberra
ACT 2600

By email: eec.sen@aph.gov.au

Dear Committee Secretary

Fair Work Amendment (Bargaining Processes) Bill 2014

Australian Lawyers for Human Rights (ALHR) is pleased to provide this submission in relation to the provisions of the Bill which proposes to amend the *Fair Work Act 2009*.

ALHR was established in 1993. ALHR is a network of Australian law students and lawyers active in practising and promoting awareness of international human rights. ALHR has a national membership of over 2,600 people, with active National, State and Territory committees. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.

1. Background

1.1 ALHR's primary concerns are that the Bill (1) should not on its face breach the human rights of persons affected by that legislation; and (2) should not be capable of being applied so as to infringe those persons' rights.

1.2 **Productivity:** The Bill links 'productivity' to wages in two ways:

- the Fair Work Commission (FWC) must be satisfied that, during bargaining for an enterprise agreement, 'improvements to productivity at the workplace' were discussed (new s 187(1A)), and
- 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 would have 'a significant adverse impact on productivity at the workplace' (new s 443(2)). (Presumably this means '*would, if the claim in relation to the enterprise agreement were met in full*' but it is not entirely clear.)

1.3 **Steps to agreement:** The Bill requires the FWC to have regard to all relevant circumstances in considering its approval of a protected action ballot under s 443, including:

(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.

1.4 The Explanatory Memorandum acknowledges (p iii) that the Bill 'engages' the following rights – which, under international law, Australia is bound to respect:

- the right to freedom of association under Article 8(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and Article 22 of the *International Covenant on Civil and Political Rights* (ICCPR);
- the right to strike under Article 8(1) of the ICESCR;
- the right to organise (Article 3, International Labour Organisation (ILO) *Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87));*
- the right of employees to collectively bargain for terms and conditions of employment (Article 4, the *Right to Organise and Collective Bargaining Convention, 1949 (No. 98)).*

It is argued in the *Statement of Compatibility with Human Rights* contained in the Explanatory Memorandum that 'To the extent that requiring bargaining parties to hold a discussion over productivity improvement is said to limit the right to collectively bargain, the requirement is reasonable, necessary and proportionate to achieving the legitimate objectives of the Bill.' (p iv).

3. Main Concerns

Productivity

3.1 The Bill appears to be based on an economic claim that is arguable: that any single increase in wages without productivity growth is bad for a country's economy.[1]

3.2 But even if one accepts this argument:

a. Labour productivity differs enormously between industries, not because some workers work harder than others but because different capital values are taken into account in the calculations ie 'productivity' in the economic sense is not a measure of hard work alone, as the Bill seems to imply;[2]

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1 Angus Hume, Member for Hume, House of Representatives, speaking to the Second Reading of the Bill, 4 December 2014, available at: , http://www.openaustralia.org.au/debates/?id=2014-12-04.24.2.> accessed 22 January 2015.

2 According to Professor Jeff Borland, 'Labour productivity has risen – but it's not exactly a good news story', *The Conversation*, 9 July 2014, available at <http://theconversation.com/labour-productivity-has-risen-but-its-not-exactly-a-good-news-story-28901>, accessed 22 January 2015: 'The huge differences in labour productivity between industries are mainly driven by differences in the capital intensity of production between industries. Workers in mining have their labour combined with much larger amounts of capital equipment than in accommodation and food services, and hence an

b. According to the Governor of the Reserve Bank, labour productivity is generally growing in Australia;[3]

c. The argument does not necessarily hold true on a micro or individual company basis (as the Bill effectively requires);

d. Applications for higher wages are most likely to be driven by cost of living issues – like the excessively high accommodation prices in Sydney – which will remain the same irrespective of productivity within a particular company or industry;

e. How will the Bill apply if the workers in question are already very productive? Because meeting their wage claim will impose an additional cost on the employer, can the employer argue that this will reduce the employer's overall productivity?

3.3 For the Bill to effectively ban protected action ballot orders in relation to a proposed enterprise agreement if the FWC is satisfied that a claim of an applicant would have 'a significant adverse impact on productivity at the workplace' is to impose an unreasonable limit on employees' already very limited collective bargaining rights and to penalise workers for factors over which they have no control.

3.4 It is also inappropriate that productivity must be discussed in order for an enterprise agreement to be approved. It is not clear what will happen if the employer refuses to discuss productivity – or imposes requirements upon the employees to concede other matters first. The employer appears to be effectively given a veto. If this is not the intention, then the wording of the proposed provision should be clarified.

3.5 Article 4 of the ILO's *Right to Organise and Collective Bargaining Convention,* 1949 requires ratifying States to encourage and promote the full development of voluntary collective bargaining between employers, their associations and workers' associations. The essential element of this obligation is the promotion of collective bargaining of a voluntary nature, implying recognition of the autonomy of the bargaining parties.[4] The Bill restricts that autonomy.

Steps to Agreement

3.6 While the proposed subsection 443(1A) might potentially assist in solving the issue noted in the previous paragraph, again it is unclear how this wording will operate in a situation where one party's wishes are substantially different from those of the other, and there is an inequality of economic /bargaining power. Neither party should be forced to try to compromise if the position of the other is unreasonable or excessive. It appears that the wording of the Act and of the Bill imposes more restrictions on employees than employers in this regard.

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hour of their labour produces a larger value of output.' That is, the productivity of a miner might be $320 per hour but of a hotel receptionist might be $32 per hour, and if the receptionist becomes a miner, overall productivity will increase.

3 Glenn Stevens*, Economic Update*, July 2014, available at http://www.rba.gov.au/speeches/2014/sp-gov-030714.html accessed 22 January 2015

4 Terri Butler, Member for Griffith, House of Representatives, speaking to the Second Reading of the Bill, 4 December 2014, available at: http://www.openaustralia.org.au/debates/?id=2014-12-04.24.2.> accessed 22 January 2015, citing Shae McCrystal (2010) "Protected industrial action and voluntary collective bargaining under the Fair Work Act 2009" *Economic and Labour Relations Review*, 21(1), 37-52.

4. Conclusion

ALHR believes that a human rights framework will strengthen employment legislation in Australia by appropriately balancing the various obligations. This Bill does not reflect an appropriate balance. The Bill is not a reasonable, necessary or proportionate response to the economic issue of productivity and unreasonably undermines employees' rights.

If you would like to discuss any aspect of this submission, please email me at: president@alhr.org.au.

Yours faithfully

Nathan Kennedy
President
Australian Lawyers for Human Rights