ACTU Submission

Fair Work Amendment (Bargaining Processes) Bill 2014

Senate Education and Employment Legislation Committee

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About the ACTU

The ACTU is the peak body for Australian Unions, made up of 46 affiliated unions. We represent almost 2 million working Australians and their families.

Unions are active every day campaigning in workplaces and communities around Australia for better job security, pay and conditions, rights at work, healthier and safer workplaces, and a fairer and more equal society.

Since it was formed in 1927, the ACTU has spearheaded some of the most significant social, economic and industrial achievements in Australia's history, including decades of wage increases, safer workplaces, greater equality for women, improvements in working hours, entitlements to paid holidays and better employment conditions, the establishment of a universal superannuation system, the social security system, Medicare and universal access to education.

Many of the Australian Union movement's achievements for the benefit of all workers have come about through the exercise of collective power, including industrial action.

Introductory remarks

Notwithstanding the impression that might be conveyed by its title, the *Fair Work Amendment (Bargaining Processes) Bill 2014* ("the Bill") is about outcomes, rather than mere process issues.

The outcomes that the Bill seeks to engineer are twofold:

- A reduction in the incidence of lawful industrial action; and
- A reduction in the likelihood that bargaining will result in the approval of a collective agreement.

The pursuit of such outcomes by our national Government is highly objectionable and is a repudiation of the commitments made to the international community through the *Freedom of Association and Protection of the Right to Organise Convention* and the *International Covenant on Economic, Social and Cultural Rights.*

We oppose the Bill. In our view, the Government ought to prioritise compliance with its own commitments to the international community rather than considering imposing additional illegitimate and unwarranted obligations on workers and unions.

We note that on 21 January 2015 the Secretary of the ACTU, Dave Oliver, wrote to the Minister for Employment, the Hon. Senator Eric Abetz, calling on the government to withdraw a number of pieces of legislation relating to workplace relations, including the Bill, that are currently before the Parliament. We reiterate the concerns set out in said correspondence and again call on the government to withdraw the Bill.

Industrial Action

The right to strike

That the Australian Government is obliged, and has accepted that it is obliged, to provide its citizens with a right to strike, is uncontroversial. So much is explicitly evident from the Statement of Compatibility with Human Rights found in the Explanatory Memorandum to the Bill[1], the decision of the High Court in *Victoria v. The Commonwealth*[2], and the terms of Article 8 of the *International Covenant on Economic, Social and Cultural Rights*, which provide as follows:

> 1. The States Parties to the present Covenant undertake to ensure:
>
> > (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right 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;
> >
> > (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
> >
> > (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;
> >
> > (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.
>
> 2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.
>
> 3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

For reasons unknown, the Australian Government has not seen fit to explicitly acknowledge, in the Statement of Compatibility, that the right to strike also independently arises from International Labour Organisations ("the ILO") conventions, notwithstanding the positive statement previously contained in our domestic industrial relations legislation that:

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[1] At page 6.
[2] [1996] HCA 56 at [226]-[229].

> 170PA. (1) The object of this Division is to give effect, in particular situations, to Australia's international obligation to provide for a right to strike. This obligation arises under:
>
> (a) Article 8 of the International Covenant on Economic, Social and Cultural Rights (a copy of the English text of the Preamble, and Parts II and III, of the Covenant is set out in Schedule 8); and
>
> (b) the Freedom of Association and Protection of the Right to Organise Convention, 1948 (a copy of the English text of the Preamble, and Parts I and II, of the Convention is set out in Schedule 15); and
>
> (c) the Right to Organise and Collective Bargaining Convention, 1949 (a copy of the English text of the Preamble, and Articles 1 to 6, of the Convention is set out in Schedule 16); and
>
> (d) the Constitution of the International Labour Organisation; and
>
> (e) customary international law relating to freedom of association and the right to strike.

The failure of the Statement of Compatibility to refer to these internationally binding sources of the right to strike is concerning and fuels speculation that the Australian Government now wishes to depart from the orthodox historical position adopted by the Parliament and instead align itself with the recent views of employer organisations that have chosen to question, (after acceptance for some four decades), both the very existence of the right to strike and the authority of the supervisory mechanisms of the ILO to interpret ILO conventions.

This recent, concerning and, in our view, entirely specious campaign by employer representatives has had a negative impact on the functioning of important ILO decision making bodies and must be resolved.

An opportunity arose for Australia to support bringing this matter to such a resolution at the 322nd session of the ILO Governing Body in November of last year, by supporting efforts to have the question of the existence of the right to strike referred to the International Court of Justice ("the ICJ"). On that occasion, Australia indicated that such a referral was preferable to a continuing impasse between tripartite members.[3] A further opportunity for the Australian Government to take a public position before the international community will arise at the 323rd session, to take place in March of this year. As the impasse has continued, we believe it is essential that Australia supports the referral of this matter to the ICJ and state its strong support of the right to strike.

The right to strike is already inappropriately restricted

Even putting to one side the recent denial in some sectors of the nature of the rights protected by ILO conventions, the High Court has made the following observations concerning the right to strike as contained in the *International Covenant on Economic, Social and Cultural Rights*:

[3] Minutes of the ILO Governing body (322nd Session), 30 October-13 November 2014 at [149].

> "…the right to strike, subject to the possibility of common law remedies, might be reasonably seen as no right all, so too might the existence of the right be doubted where its exercise might lead to the loss of employment or punitive action by the employer against the employee."[4]

> "…the absence of criminal penalties does not equate with the provision of a right to strike. In our view, it was reasonably open to the Parliament to conclude that even the existence of common law remedies against strikers and strike organisers is inconsistent with the provision of the right to strike."[5]

The *Fair Work Act 2009* (Cth) ("the Fair Work Act") currently places a number of restrictions on the right to strike. It does so by making the right to strike an exception to a rule, rather than prescribing a right to strike with restrictions. In so doing, it exposes strikers to both statutory *and* common law remedies in all but a few limited circumstances. This Bill proposes to further reduce the limited circumstances in which strikes are permitted, thus correspondingly increasing the field of strike activity that may be the subject of statutory and common law remedies.

There are several limitations on the right to strike and requirements that must be met before strike action (or other industrial action) may be lawfully organised or engaged in by workers in under the Fair Work Act. These include the following:

1. The bargaining representatives seeking to organise the industrial action must be genuinely trying to reach agreement.[6]
2. Industrial action must be industrial in character, meaning that it must be connected with the area of industrial disputation and bargaining between the employer and the employees.[7]
3. Industrial action must only be engaged in for the purpose of supporting or advancing claims in relation to a proposed enterprise agreement, being claims that are only about, or reasonably believed to be about, "permitted matters".[8] Thus the permissible subject matters of disputation are confined to those that the Parliament has judged as legitimate. This, for example, prohibits industrial action being taken in support of claims to protect workers against arbitrary dismissal in their first 6 months of employment[9] as well as claims to prohibit the jobs of the employees being contracted out.[10]
4. Industrial action may only take the form of a restriction in the performance of work[11] which is implemented by certain employees of an employer in a single enterprise.[12] The employees so authorised are limited to those who fall within the description of a group contained in the pre-requisite protected action ballot order.
5. Sympathy strikes and secondary boycotts are prohibited.[13]

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[4] *Victoria v. The Commonwealth, Op. Cit,* at [232]
[5] *Victoria v. The Commonwealth, Op. Cit,* at [228]
[6] s. 413
[7] [2014] FWCFB 2063
[8] s. 409(1).
[9] s.194 (c)
[10] [2004] FCA 1737
[11] s. 19
[12] Industrial action is not permitted in respect of multi-enterprise agreements: s. 413(2).
[13] *Competition and Consumer Act* 2010, s. 45D-45DC.

6. A protected action ballot order cannot be sought (or obtained) from the Fair Work Commission ("the Commission") any earlier than 30 days before the nominal expiry date of an existing agreement.[14]
7. A protected action ballot order cannot be issued by the Commission unless it is satisfied that the bargaining representatives seeking it are genuinely trying to reach agreement.[15] Accordingly, applications for protected action ballot orders may be contested by employers. Such contests generally concern the question of whether the bargaining representative, usually a union, is genuinely trying to reach agreement, or whether the action the union seeks to take would be "protected" in the sense that it would only be taken in support of claims that were only about permitted matters, or reasonably believed to be about permitted matters. Further, a protected action ballot application may be refused where the questions that the bargaining representative proposes to include on the ballot paper are thought to be ambiguous.[16]
8. Industrial action cannot be taken until the results of a protected action ballot duly authorised by a protected action ballot order have been declared. This generally occurs 8-10 days from the hearing of the application, although longer periods are experienced. The results so declared must demonstrate both that 50% of the employees eligible to vote did vote, and that more than 50% of the valid votes approved the industrial action.
9. Industrial action may be criminal, or declared criminal by proclamation, where it impedes trade and commerce between States or between countries.[17]
10. Prior to any industrial action being engaged in, written notice must be given to the employer by the bargaining representative that is organising the industrial action. Generally the notice must be given at least three working days in advance of commencement of the industrial action and must state the nature of the action and the day on which it will start.[18] Further, the notice must describe the nature of the industrial action in a manner sufficient for the employer to take appropriate defensive action so that it is prepared to deal with the effect of the industrial action.[19]
11. The industrial action must be industrial action of the type authorised by the results of the protected action ballot order, and must commence within 30 days of those results being declared.[20]
12. The industrial action must not be protracted action that threatens to imminently cause significant economic harm to the employer and any of the employees proposed to be covered by an agreement.[21]
13. The industrial action must not be action that has threatened, is threatening, or would threaten to cause significant damage to the Australian economy or an important part of

[14] s. 438(1)
[15] s. 443(1)
[16] [2012] FWA 4633
[17] *Crimes Act* 1914, s. 30J-30K.
[18] s. 414
[19] *Davids Distribution v. NUW* [1999] FCA 1108.
[20] S. 459
[21] s. 423

it, or endanger the life, personal safety, health or welfare of the population or of part of it.[22]

14. The industrial action must not be action that the Commission is satisfied should be suspended, by reference to discretionary criteria including whether the Commission is of the view that a suspension would be "beneficial to the bargaining representatives".[23]
15. The industrial action must not be threatening to cause significant harm to a third party (such as another business in a supply chain) at the same time as *adversely affecting* either the employer or any of the employees proposed to be covered by an agreement.[24]

The restrictions on the right to strike are clearly substantial. They have drawn pointed commentary from the ILO supervisory structure on a number of occasions, including describing the protected action ballot process as "excessive"[25] and observing that many of the consequences of "legitimate strikes"[26] that our legal system uses as trigger points to cancel lawful industrial action "...do not justify restrictions on the right to strike".[27]

The "need" for further restrictions

The Explanatory Memorandum rightly makes no claim that the incidence of industrial action is such as to require regulatory intervention. Indeed, it may be observed that the number of work days lost to industrial action in recent years is at trace levels, and, interestingly, is dwarfed by the numbers observed during periods where all strikes were unquestionably breaches of the common law:

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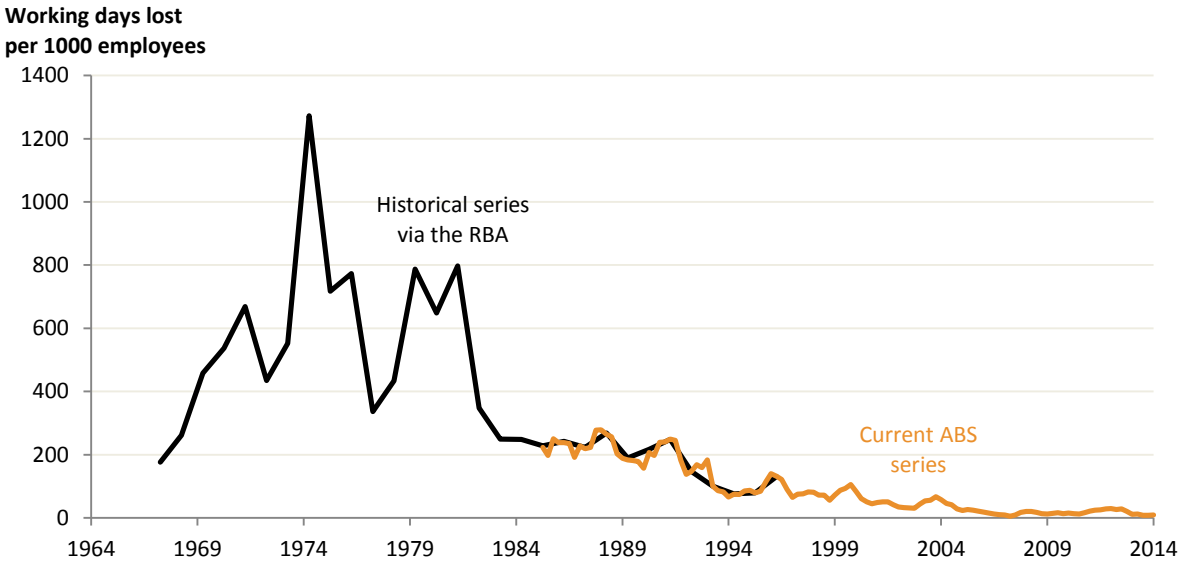
[22] s.424, 431
[23] s. 425
[24] s. 426. Note the obvious point that all industrial action organised by workers in support of claims in enterprise bargaining is designed to adversely affect an employer.
[25] *Freedom of Association – Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* 5th (revised) edition, 2006, at [556]-[559].
[26] Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labor Conference, 101st Session, 2012, Report III (Part IA), pp.59-60.
[27] *Ibid.*

Figure 1: Working days lost to industrial disputes



Sources: Historical series from Foster, R.A. 1996, 'Australian Economic Statistics 1949–50 to 1994–95', RBA Occasional Paper No. 8, Reserve Bank of Australia, Sydney. Data available from: http://www.rba.gov.au/statistics/frequency/occ-paper-8.html#section_4. Current ABS series from ABS 2014, *Industrial Disputes, Australia, Sep 2014,* Catalogue number 6321.0.55.001. Available from: http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6321.0.55.001Sep%202014?OpenDocument

Rather, the need for intervention is asserted in the Explanatory Memorandum to be based on the need for greater "transparency" and "certainty" as well as in terms of the purported desirability (from this Government's and the business lobby's point of view) of having an institutional check on the merits of the claims pursued by workers in enterprise bargaining.

How the Bill further restricts the right to strike

The further restrictions imposed by the Bill operate at the point at which a workers' bargaining representative, which as previously set out is usually a union, makes an application for a protected action ballot order. However, they function so as to impact on the conduct of bargaining from its inception.

The question of whether there should be some form of a strike ballot in Australian labour law is a far less controversial one than the question of what form the strike ballot provisions should take.

Pursuant to Article 10 of its Constitution, the ILO has published *Labour Legislation Guidelines* to assist those involved in formulating and reviewing labour legislation to reflect ILO conventions. These explicitly deal with the issue of strike ballots, as follows:

> "The requirement to hold a strike ballot before calling a strike is intended: to ensure that labour relations, including industrial action, are carried out in an orderly fashion; to reduce the likelihood

> of wildcat strikes; and to ensure democratic control over an important decision for the workers concerned. Often, whether or not the legislation sets out this requirement, provision is made in trade union rules for the holding of strike ballots.
>
> In countries where the right to strike is a collective right, and therefore subordinate to a trade union decision, there is often a legal obligation for a union to hold a strike ballot before a strike is called and for a specific majority of the workers concerned to approve the strike. Provisions of this type are in accordance with the principles of freedom of association *where they are not such as to make the exercise of the right to strike very difficult or even impossible in practice*. In particular, legislative provisions on this subject should ensure that:
>
> - the quorum and the majority required are reasonable and not such as to make the exercise of the right to strike very difficult or even impossible in practice;
> - account is only taken of the votes actually cast in determining whether there is a majority in favour of a strike." [28] (emphasis added)

The current law goes beyond the requirements of industrial democracy (that in any event are independently met by the requirement and practical necessity that Registered Organisations function democratically). It relevantly provides as follows:

> Section 443
>
> (1) The FWC must 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.
>
> (2) 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).

The requirement that a participant in bargaining be "genuinely trying to reach agreement" is one of the few restrictions on the right to strike that has not been a moveable feast in the political cycle over the last two decades. It appears not only in section 443, but also in section 413 which is concerned with the mutual requirements upon *employers and unions* before industrial action may be considered to be "protected" and thus attract the limited immunity from suit contained in section 415. This mutual function of the concept of "genuinely trying to reach agreement" has been consistent since the inception of protected industrial action during the term of the *Industrial Relations Act 1988* (Cth).

The Bill proposes to break with history and principle by relevantly amending the above provision as indicated by the mark ups below:

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[28] Labour Legislation Guidelines, Social Dialogue, Labour Law and Labour Administration Department, International Labour Organisation, Geneva, 2001 at Ch. 5.

Section 443

(1) 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.

(1A) 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.

(2) ~~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).~~ 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.

No amendment is proposed to be made to the mutual requirement in section 413 concerning "genuinely trying to reach agreement". The result is that "genuinely try to reach agreement" will become a different and higher standard for unions seeking a protected action ballot than it will be for an employer seeking to lock out its workforce. It is difficult to reconcile this result with the Coalition's pre-election Industrial Relations policy position that:

> *"Workers and business must be genuine in their attempts to bargain so that realistic improvements in employment conditions can occur for everyone".*[29] *(emphasis added)*

The content of this new higher standard upon unions seems, among other things, to approximate a de-facto way of achieving what was sought by Item 56 of Schedule 51 of the *Fair Work Amendment Bill 2014* (reversing the *JJ Richards* decisions) without the necessity of securing its passage, noting that the former Bill has been stagnant in the Senate for a considerable period.

[29] The Coalition's Policy to Improve the Fair Work Laws, Liberal Party, May 2013, at p 34

The individual "matters" referred to in the proposed section 443(1A) are said in the explanatory memorandum to be "drawn from the principles in" the decision of a Full Bench of Fair Work Australia in *TMS v. MUA*.[30] This is a contestable statement and contestable basis for reform, when the following matters are considered:

(1) The Full Bench in *TMS* (Watson VP, Hamberger SDP and Roberts C) made important statements of principle before descending into what matters it considered, on the facts before it, were relevant to the determination of the appeal it was considering. Those statements included:

> *"…the concept of genuinely trying to reach agreement involves a finding of fact applied by reference to the circumstances of particular negotiations."*
>
> *"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."*
>
> *"We agree that it is not appropriate or possible to establish rigid rules for the required point of negotiations that must be reached."*

The amendment proposed demonstrates a deliberate ignorance of these principles.

(2) To the extent that the decision in *TMS* did descend into detail about what could be "normally expected" of bargaining representatives applying for a protected action ballot, it has not been followed by subsequent Full Bench decisions: *JJ Richards & Sons v. TWU* [2010] FWAFB 9963, *John Holland v. AMWU* [2010] FWAFB 526, *Farstad Shipping (Indian Pacific) v. MUA* [2011] FWAFB 1686).

(3) To make access to protected industrial action beholden to some externally derived notion of the extent to which bargaining has "progressed" is to reward employers for frustrating the progress of bargaining, which is contrary to the stated objects in the Fair Work Act to "enable" and "facilitate" bargaining.[31]

The practical effect of the proposed new subsection (1A) is not to be understated. For unions, it creates a sizeable burden to document every single interaction that occurs in bargaining so as to be in a position to leave open the option to pursue a protected action ballot at some future point in time. For employers, it creates a corresponding regulatory burden should they wish to leave open the option of opposing a union's application, should one be sought at some future stage in bargaining. These burdens arise because section 443 is concerned not only with whether a union *is* genuinely trying to reach agreement, but whether it *has been*.

The point of difference between unions and employers is that unions will *always* face this burden, should they wish to leave the option of a protected action ballot open, even where they are confident or assured that an employer will not oppose such an application. This is because

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[30] [2009] FWAFB 368. This was an appeal decision which considered, among other matters, whether a union was "genuinely trying to reach agreement".
[31] s. 171

section 443 requires the Commission to reach a *positive state of satisfaction* as to whether the union "has been, and is, genuinely trying to reach agreement". This means the union is, in all cases, cast with the burden of establishing a jurisdictional fact, and ensuring there is sufficient evidentiary material put before the Commission, as is necessary to reasonably satisfy the Commission, that this requirement is being and has been met.[32] The amended content of this requirement is such that this process will now necessarily include an examination in *all* cases of matters that, on the current law, need not be so examined.

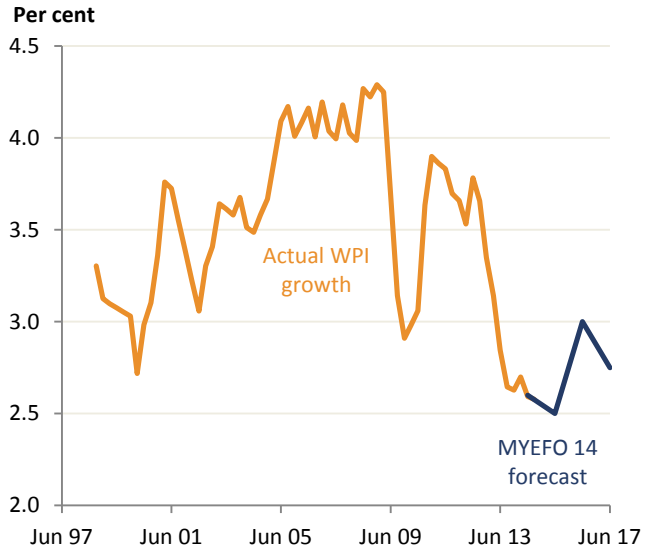
The amendments to section 443(2) introduce a merit test which will be applied to the claims made in bargaining by unions (but not employers). We strongly contest this on the basis that it is flagrantly inconsistent with the principle of free functioning unions and the right to strike, as embodied in the *Freedom of Association and Protection of the Right to Organise Convention* and the *International Covenant on Economic, Social and Cultural Rights,* both of which are binding on the Australian Government.

It is important to appreciate that this merit test is cast such that it will be applied *both* on a stand alone basis *and* on an "all in basis". The former could effectively defeat the latter: if the Commission is satisfied that *a* claim of the applicant is manifestly excessive or would significantly reduce productivity, the ballot application fails – notwithstanding the fact that other claims made, or concessions given, would moderate the impact of the individual "problematic" claim that had been identified.

Further, it is to be noted that judgment of "excessiveness" involves a comparison between what is *claimed* and the status quo in the workplace *and* the industry. Claims which therefore seek to advance living standards in real terms, or which have an element of ambit in them, create a risk that the protected action ballot order will not be granted. It not only encourages perhaps overly cautious claims, but in so doing, threatens to further entrench already historically low levels of wage growth as measured by the Wage Price Index. Wages growth is also forecast to remain around record lows for the next several years.

[32] See for example the discussion in *Corporation of the City of Enfield v. Development Assessment Commission* [2000] HCA 5 and *NAAV v. Minister for Immigration* [2002] FCAFC 228.

Figure 2: Wage Price Index is at record lows and is expected to stay low



Source: ABS 6345 and MYEFO 2014-15.

The judgement of "excessiveness" by reference to the status quo also exacerbates the difficulties faced by low paid workers in industries where there have been longstanding and significant impediments to achieving collective agreements. For those workers, the status quo against which their claims will be assessed as "excessive" is the Minimum Wage and the National Employment Standards. These are workers that the Fair Work Act in other respects asserts itself to be particularly concerned with assisting in bargaining.[33] The façade of this assistance is further compromised by the prospect of removing from those workers the only economic leverage available to them to assist them in achieving their objectives. This introduces an element of incongruity (if not black comedy) into the bargaining framework of the Fair Work Act: "The lowest paid workers should be better off overall, but only a little bit".

[33] See generally Division 9 of Part 2-4.

The final observation we make concerning the proposed amendments to section 443 relates to the Transitional Provisions, found in Schedule 2 of the Bill. Both the existing requirement in section 443 to be "genuinely trying to reach agreement" as well as the proposed new subsection (1A) and amended subsection (2) direct that an enquiry be made as to the conduct of bargaining throughout its duration, rather than at a single point in time. Because the Transitional Provisions for these amendments (Schedule 2 of the Bill) propose that the amendments apply to protected action ballot order *applications* made the day after Proclamation, a union could be "caught short" if it failed to now conduct itself in contemplation that the Bill might become law. This is retrospectivity for all practical purposes, and is highly objectionable. No changes to the bargaining framework should be introduced other than prospectively. The most suitable "trigger date" by reference to which transitional provisions concerning bargaining rules may operate is the "notification time" as defined in section 173(2) of the Fair Work Act.

Approval of agreements

The Bill proposes a new requirement that must be met before the Commission may approve non-greenfields agreements. The requirement is that "*FWC must be satisfied that, during bargaining for the agreement, improvements to productivity at the workplace were discussed*." This new requirement is to be located at section 187(1A).

There is some risk that the amendment creates incentives for an employer to refuse to "discuss" productivity improvements at all, or unless or until, all other claims are resolved in a manner acceptable to it. As such, it could function as a veto right which could be exercised strategically during bargaining to prevent the future approval of any enterprise agreement. This sets it apart from all of the other requirements associated with agreement approvals, which are (and always have been) concerned with technical compliance and fairness rather than bargaining conduct.

The functioning of the requirement as a veto right stands at odds with the Coalition's pre-election policy, which contained the following statements:

> *"Before an enterprise agreement is approved, the Fair Work Commission will have to be satisfied that the parties have at least discussed productivity as part of their negotiation process… The key is to make sure that workers and managers have at least considered how to improve productivity to help their workplace work effectively."*[34](emphasis added)

If the true desire was, as expressed in the extract above, to impact on the conduct of *all* parties in bargaining, the only logical step would have been to add the requirement to discuss productivity to the Good Faith Bargaining Requirements set out in section 228 of the Fair Work Act. The clear and deliberate choice to do otherwise is consistent with the true intent being to place additional requirements on unions while providing employers with avoidance strategies as a reward for their intransigence. The best that can be said of the absence of mutuality in the new obligation is that it is consistent with the destruction of mutuality in the concept of "genuinely trying to reach agreement" which is achieved by the amendments discussed in the preceding section.

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[34] The Coalition's Policy to Improve the Fair Work Laws, Op. Cit, at p.33

Further, as with the amendments discussed in the previous section, this new provision will not commence until Proclamation (which may be up to 6 months after Royal Assent) however the Transitional Provisions create retrospectivity in practice. This arises because the new provisions will have effect in relation to enterprise agreements *made* after the day of Proclamation. A non-greenfields agreement is *made* (per s. 182) when it is voted up. This means that the amendment effectively reaches back in time to preclude the approval of agreements where productivity was not discussed during bargaining that had commenced *before* the commencement of the relevant provisions of the amending Act. We oppose such an outcome for the reasons stated in the previous section.

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