Australian Government
Department of Employment

Senate Education and Employment Legislation Committee

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

Submission of the

Department of Employment

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Introduction

1.1 The Department of Employment welcomes the opportunity to make a written submission to the Senate Education and Employment Legislation Committee inquiry into the Fair Work Amendment (Bargaining Processes) Bill 2014 (the Bill).

1.2 The *Fair Work Act 2009* (Fair Work Act) and the Fair Work Regulations 2009 provide the legislative framework underpinning the national workplace relations system, which covers the majority of Australian workplaces.

1.3 *The Coalition's Policy to Improve the Fair Work Laws* (the Policy), released in May 2013, includes the commitment to amend the Fair Work Act to promote sensible, harmonious and productive bargaining. This Bill gives effect to some of these commitments. Other commitments in the Policy in relation to the Fair Work Act are contained in the Fair Work Amendment Bill 2014.

1.4 The Bill was introduced into the House of Representatives on 27 November 2014 and implements the Government's remaining bargaining commitments outlined in the Policy. The Bill amends the Fair Work Act to provide:

- a new requirement that productivity improvements at the workplace were discussed during bargaining before an enterprise agreement can be approved by the Fair Work Commission
- that before an applicant can obtain a protected action ballot order from the Fair Work Commission, they have at least attempted to have genuine and meaningful discussions with the employer, and
- that the Fair Work Commission cannot make a protected action ballot order where it is satisfied that an applicant's bargaining claim or claims are manifestly excessive or, if acceded to, would have a significant adverse impact on productivity.

Consultation

1.5 On 24 October 2014, Senator the Hon. Eric Abetz, Minister for Employment, chaired a meeting of state and territory ministers for workplace relations and work health and safety. At this meeting Minister Abetz consulted ministers on the Australian Government's intention to introduce the remaining bargaining amendments in the Policy in the spring sittings of Parliament.

1.6 A meeting of the National Workplace Relations Consultative Council (NWRCC), which comprises representatives from the Australian Council of Trade Unions and peak employer associations, was held on 31 October 2014 and also chaired by Minister Abetz. At this meeting the Minister consulted members on the proposed changes to the bargaining provisions and advised that the Committee on Industrial Legislation (a subcommittee of

NWRCC) would be convened to examine the draft legislative amendments prior to introduction.

1.7 On 11 November 2014, the Committee on Industrial Legislation was consulted on an exposure draft of the Bill during confidential sessions facilitated by the Department of Employment. State and territory government officials were also consulted and provided feedback on the draft legislation at a Senior Officials' meeting via teleconference on 11 November 2014. Changes to the draft legislation were made following these processes.

Changes to the *Fair Work Act 2009*

Part 2-4 – Enterprise agreements

Existing framework

2.1 There are currently no explicit provisions in the Fair Work Act to require or encourage employees to consider productivity improvements as part of negotiations for a new enterprise agreement. However, achieving productivity through an emphasis on enterprise-level collective bargaining is part of the Object of the Fair Work Act (section 3) and the Object of Part 2-4 of the Act (section 171), which deals with enterprise agreements.

2.2 Productivity is critical to maintaining Australia's competitiveness globally and improving all Australians' standard of living. As noted in the Government's Policy, productivity improvements lead to increased investment creating jobs and increased wages and higher standards of living. The importance of productivity growth is acknowledged universally by economists and leaders from business, institutions and both sides of the political spectrum.

2.3 As noted by the Nobel Prize winning economist Paul Krugman, 'Productivity isn't everything, but in the long run it is almost everything. A country's ability to improve its standard of living over time depends almost entirely on its ability to raise its output per worker'.[1]

2.4 Fair Work Commission statistics show that over the period July 2010-11 to June 2013-2014 there were between 6005 and 7860 single enterprise and multi-enterprise applications for approval of an enterprise agreement made each year, with an average of 6696 applications per year. While the number of applications varies from year to year depending on the bargaining cycle, this average is expected to remain relatively constant.

2.5 Data collected from the Department of Employment's Workplace Agreements Database showed that as at September 2014 approximately 50 per cent of all enterprise agreements

[1] Paul Krugman (1994), The Age of Diminishing Expectations, MIT Press.

approved under the Fair Work Act contain a clause about workplace productivity. While productivity is mentioned in at least one clause, it is not clear whether the issue was actively discussed in the negotiations, or if a clause that has been introduced in an earlier bargaining round is revisited by the parties. It is also unclear if productivity was discussed during negotiations for the 50 per cent of agreements that do not have a specific productivity clause. This amendment will ensure that discussions on improved workplace productivity are held between employers and employees.

Key measure in the Bill

2.6 In *The Coalition's Policy to Improve the Fair Work Laws*, the Government committed to putting productivity back on the agenda by making sure it is actively and genuinely considered by employers and employees during enterprise bargaining negotiations.

2.7 The amendment to Part 2-4 of the Fair Work Act will ensure improvements to productivity at the workplace are discussed during enterprise bargaining. It will not apply to negotiations for greenfields agreements, as these are for genuine new enterprises, which therefore do not have existing arrangements to which productivity improvements could be made.

2.8 The amendment will insert new subsection 187(1A) to provide for the new requirement that the Fair Work Commission must be satisfied that productivity improvements at the workplace were discussed in the course of bargaining before an enterprise agreement can be approved. Section 187 sets out a range of requirements that must already be met before the Fair Work Commission approves an enterprise agreement.

2.9 The approval requirement will not mean that the parties have to reach agreement about improving productivity, or include specific productivity clauses in their agreements. Instead improvements to productivity at the workplace must simply have been discussed. The Fair Work Commission will not be required to consider how improvements to productivity were discussed, the detail of the matters that were discussed or the outcome of those discussions. It will simply need to be satisfied that a discussion about improvements to productivity at the workplace has taken place.

2.10 The Bill does not define the term productivity, as in the context of this amendment it is intended to take on its ordinary and broadest meaning. The Fair Work Commission can decide what constitutes productivity within the circumstances of the particular workplace or enterprise before it. The Explanatory Memorandum cites the following examples of productivity improvements:

- elimination of restrictive or inefficient work practices
- initiatives to provide employees with greater responsibilities or additional skills directly translating to improved outcomes; and
- improvements to the design, efficiency and effectiveness of workplace procedures and practices.

2.11 The amendment recognises the role of workplace arrangements in increasing workplace productivity and that a timely way to ensure productivity is considered is during the course of negotiations for a new enterprise agreement.

Part 3-3 – Protected Industrial Action

Existing framework

3.1 Part 3-3 of the Fair Work Act provides the legislative framework governing industrial action. Under these provisions, a bargaining representative must apply for and obtain a protected action ballot order before protected industrial action can be taken. These orders enable a ballot to be conducted to determine whether eligible employees wish to take protected industrial action. The Fair Work Commission must be satisfied of a number of matters before it can grant a protected action ballot order, including that the applicant bargaining representative has been and is genuinely trying to reach an agreement.

3.2 There is currently no guidance in the Fair Work Act on what the Fair Work Commission should consider in applying this 'genuinely trying to reach an agreement' test and the Fair Work Commission is not required to consider an applicant's bargaining claims when it assesses a protected action ballot order application.

3.3 Data on protected action ballot order applications under section 437 of the Fair Work Act is collected and reported by the Fair Work Commission. Between 2010-11 and 2013-2014 there have been between 627 and 1011 applications for a protected action ballot order each year with an average of 828 applications per year. These numbers fluctuate depending on the bargaining cycle, however are expected to remain relatively constant.

Key measures in the Bill

3.4 The Bill includes amendments to the protected action ballot order provisions in the Fair Work Act to provide guidance and ensure greater transparency for the 'genuinely trying to reach agreement' test. The Bill will mean that industrial action cannot be taken in support of bargaining claims that are manifestly excessive or, if acceded to, would have a significant adverse impact on productivity in the workplace.

3.5 The changes in the Bill give effect to the Government's Policy that protected industrial action should not be able to be taken at an early stage in negotiations, before proper and meaningful discussions have occurred or have had an opportunity to occur.

3.6 Under the Fair Work Act, protected industrial action can be taken in pursuit of claims that are excessive and unrealistic. Examples of such bargaining claims are included in the Government's Policy.

3.7 The proposed amendments are consistent with the statement of the then Leader of the Opposition, the Hon. Kevin Rudd, in his speech to the National Press Club on 17 April 2007, that under the Fair Work Act employees 'will not be able to take strike action unless there has been genuine good faith bargaining'.

Genuinely trying to reach an agreement

3.8 The Bill implements the Government's policy commitment to encourage more cooperative bargaining, so that industrial action is not taken before some bargaining has occurred or an applicant has made a reasonable attempt to engage in bargaining. The amendment is intended to respond to concerns that protected industrial action under the Fair Work Act can be taken at an early stage of bargaining, before genuine and meaningful discussions have occurred.

3.9 The Bill amends s 443 (1) to make clear that the Fair Work Commission must only make a protected action ballot order in prescribed circumstances, which includes that it must be satisfied that the applicant has been and is genuinely trying to reach an agreement with the employer. Section 443 will be amended to include a new subsection (s 443(1A) that will provide guidance and greater transparency as to the factors the Fair Work Commission must consider in determining whether an applicant for a protected action ballot order is genuinely trying to reach an agreement.

3.10 The amendment draws on principles from a decision of a Full Bench of (the then) Fair Work Australia (*Total Marine Services v Maritime Union Australia* [2009] FWAFB 368). It will require the Fair Work Commission to have regard to all relevant circumstances including a non-exhaustive list of relevant factors when considering whether an applicant is genuinely trying to reach an agreement. They are:

- 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.

3.11 As is currently the case, the Fair Work Commission must take into account all relevant circumstances of the bargaining parties when considering an application for a protected action ballot order. As noted in the Explanatory Memorandum, these new matters are not intended to require the Commission to establish fixed thresholds that must be met in relation to all applications for a protected action ballot order. Rather, the Commission will take account of all relevant factors in relation to the bargaining to determine whether the applicant is genuinely trying to reach an agreement, such as the number of bargaining meetings that have been held, the extent to which the applicant has communicated their major claims and the length of the negotiations. The conduct of any other bargaining

representatives, including that of the employer, will not be a relevant for the Fair Work Commission, as it is not within the applicant's control if, for example, the employer refuses to engage in the negotiations.

3.12 The amendment to clarify the genuinely trying to reach an agreement test complements the amendment in Part 7 of Schedule 1 to the Fair Work Amendment Bill 2014 that seeks to ensure that protected industrial action can only be taken if bargaining for a proposed agreement has commenced. That amendment responds to recommendation 31 of the Fair Work Act Review 2012, which in turn was in response to the decision of the Full Federal Court in *JJ Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53.

3.13 The amendment will provide greater transparency as to what is needed to meet the genuinely trying to reach agreement test and is intended to help to ensure that negotiations have progressed before the Fair Work Commission is able to make a protected action ballot order.

Bargaining claims

3.14 The Bill will amend subsection 443(2) to provide that the Fair Work Commission must not make a protected action ballot order if it is satisfied that a bargaining claim or claims of the applicant:

- are manifestly excessive, having regard to the conditions in the workplace and the industry in which the employer operates, or
- would have a significant impact on productivity at the workplace.

3.15 The phrase 'conditions in the workplace' is intended to be interpreted broadly and the Fair Work Commission will retain discretion about the matters it takes into consideration when deciding whether an applicant's bargaining claims are manifestly excessive.

3.16 This change to subsection 443 (2) will ensure that protected industrial action is not taken to advance unreasonable or excessive bargaining claims.

3.17 When deciding whether an applicant's bargaining claims would have a significant adverse impact on productivity, the Fair Work Commission also retains a broad discretion about the matters that it takes into consideration. For example, it may have regard to whether the claims would have a substantial effect on the output of the workplace relative to its time or cost inputs, if those claims were implemented in an enterprise agreement covering that workplace. Whether a claim or claims will have a significant adverse impact on productivity would depend on the characteristics and capabilities of the workplace, established on the facts and circumstances of the application. Bargaining claims initially advanced by an applicant but no longer being pursued would not be relevant to the Fair Work Commission's considerations.

3.18 The Fair Work Act provides the Fair Work Commission with broad powers to inform itself in relation to any matter before it. These powers are sufficient for it to deal with any uncertainty about whether these new standards have been met. For example, the Fair Work Commission may choose to seek further advice from the bargaining parties as to the potential impact of the bargaining claims.

3.19 These amendments are not intended to deter employees from taking protected industrial action in support of legitimate bargaining claims which involve fair improvements to terms and conditions of employment. They do however seek to ensure that bargaining claims are reasonable and would not have a significant adverse impact on workplace productivity if they were acceded to.

3.20 The intention of this amendment, as outlined in the Policy, is to ensure the Fair Work Laws are balanced and effective, encouraging workplaces to resolve issues and reach agreement through negotiations in the first instance, rather than through costly industrial action – where the costs are borne not only by the companies affected and the employees taking the action, but the broader Australian economy.