22 January 2015

UNIONSWA
WA's PEAK UNION BODY

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Dear Madam/Sir

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

UnionsWA is the governing peak body of the trade union movement in Western Australia, and the Western Australian Branch of the Australian Council of Trade Unions (ACTU). As a peak body we are dedicated to strengthening WA unions through co-operation and co-ordination on campaigning and common industrial matters. UnionsWA represents around 30 affiliate unions, who in turn represent approximately 140,000 Western Australian workers.

UnionsWA thanks the Committee for the opportunity to make a submission on the *Fair Work Amendment (Bargaining Processes) Bill 2014*. UnionsWA supports the ACTU's positions on the amendments being proposed for *Fair Work Act*, and we join them in pointing out that the current set of the multiple, overlapping and ongoing inquiries the Government has commissioned, such as the Productivity Commission Review of the Workplace Relations Framework, go directly to the subject matter of this and other Bills. To go ahead with legislation in advance of those inquiries being finalised makes for a deeply flawed public policy process, wasting taxpayer resources and the Senate's time.

Given the impact of the Bill under consideration however, we would like to bring to the Committee's attention the particular issues of significance in WA, and no doubt other parts of Australia.

The *Fair Work Amendment (Bargaining Processes) Bill* is a manifestly unfair attack on the freedom to bargain of Australian workers. Contrary to the claims of the Explanatory Memorandum, it is not in keeping with the object of the *Fair Work Act* to *'provide a balanced framework for cooperative and productive workplace relations'*. Instead it is an unbalanced piece of legislation, which advantages employers over workers. It will not promote cooperative workplace relations, and will in practice work against productivity by allowing employers to game the bargaining process at the expense of workers.

Our detailed concerns with the *Amendment Bill* are as follows.

Requiring that the Fair Work Commission be 'satisfied' that improvements to productivity were discussed during bargaining

The proposed section 187(1A) states that

> *If the agreement is not a greenfields agreement, the FWC must be satisfied that, during bargaining for the agreement, improvements to productivity at the workplace were discussed.*

The Explanatory Memorandum declares that the purpose of this amendment is to *'enhance collective bargaining by promoting discussions about improving productivity at the workplace level'*. It will actually have the opposite effect because it gives employers the power to *refuse* discussion about productivity until all other claims in the bargaining process are resolved to the employer's advantage. Because the employer knows that the FWC will not approve any Agreement without a 'productivity' discussion that involves both sides, he or she now has the power to wilfully delay those discussions until workers agree to the employer's other demands. There is nothing in the proposed Bill that would in any way compel an employer to begin discussions about productivity until *they* decide to do so.

One objection to the above scenario is that employers would undermine the interests of their own organisations by behaving in such a manner. However that presumes employers understand and are genuinely interested in 'productivity' in the first place. Unfortunately survey after of survey of employer views about productivity shows them up, in the words of business commentator Robert Gottliebsen, as 'productivity dunces'. The 2013 Telstra *Productivity Indicator Report* found that 58 per cent of Australian CEOs of both public and private organisations could not measure productivity and had no identifiable target for it. This was despite 78 per cent of CEOs claiming that productivity improvement was a 'key priority'.[1] This result is likely to be higher for smaller enterprises.

The amendment requiring discussion of productivity will give all the power to the employer to decide when and on what terms to have that discussion. In reality there is no reason to trust the judgement of employers on productivity, and the amendment is more likely to detract from rather than improve productivity at the workplace level.

Requiring a higher standard for unions to demonstrate that are 'genuinely trying to reach agreement' before granting a Protected Action Ballot Order

It is proposed that sections 443 (1)-(1A) will now read as follows, after the word 'only' is inserted into the first sentence

> *(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.*

[1] 'Time to halt the productivity slide' *Business Spectator* (22 February 2013) http://www.businessspectator.com.au/article/2013/2/22/time-halt-productivity-slide

(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;

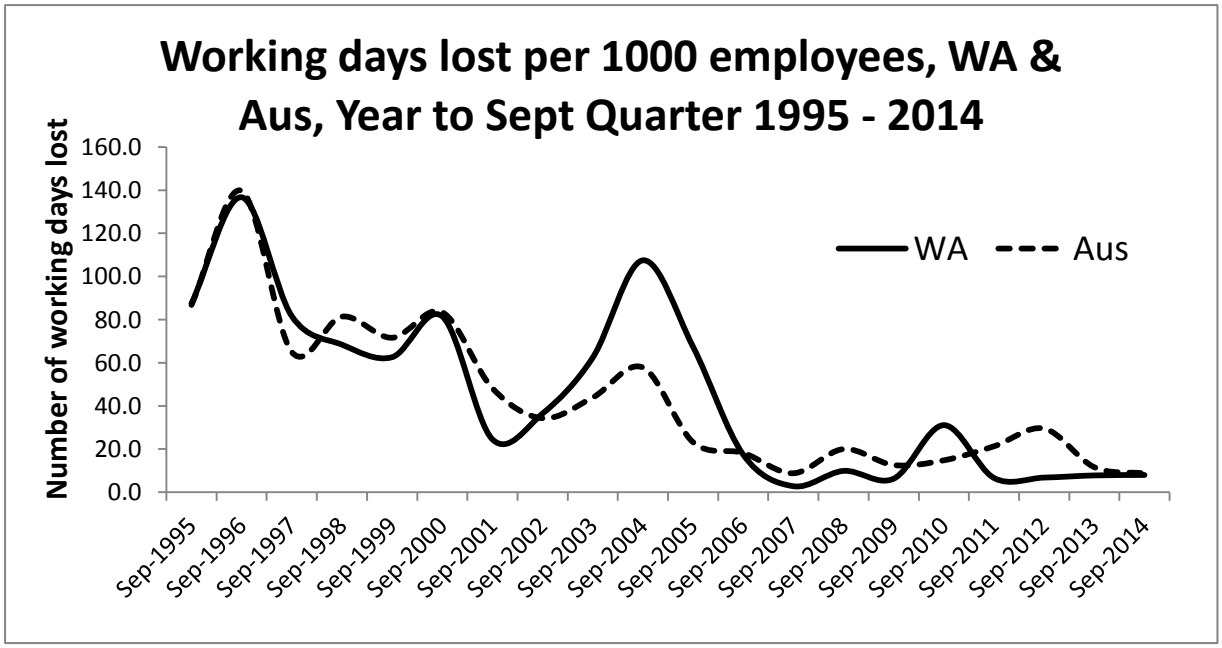
(c) whether each applicant has provided a considered response to proposals made by the employer;

(d) the extent to which bargaining for the agreement has progressed.

The Explanatory Memorandum says that

To the extent that the amendments limit the right to strike, they are reasonable, necessary and proportionate to achieving the legitimate objectives of encouraging genuine and meaningful discussions between bargaining representatives before protected industrial action is engaged.

This is not true. The insertion of the word 'only' turns this section into a rigid merit test for bargaining that will fall disproportionately on the shoulders of workers. The FWC will have no flexibility to consider the *overall* merits of the application for a Protected Action Ballot Order, because the Act is now more prescriptive for all of the matters outlined in section 443. The balloting requirements for union members to take industrial action already limit their ability to pursue such a course in the bargaining process. Given that levels of industrial disputation are at historically low levels in both WA and Australia (see chart below), this amendment is not reasonable, necessary or proportionate.



Source: ABS *6321.0.55.001 - Industrial Disputes, Australia, Sep 2014*

Limiting the FWC's making a protected action ballot order if a union's claim is judged to be 'manifestly excessive'

It is proposed that the current section 443(2) of the *Fair Work Act* be replaced by the following

> *(2) 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.*

This amendment compounds and extends the problems we have outlined with the previous amendments. The Explanatory Memorandum says that

> *When considering whether the bargaining claims of an applicant are manifestly excessive, the FWC will retain discretion about the matters it takes into consideration. The phrase 'manifestly excessive' is intended to be directed at claims that are evidently or obviously out of range or above and beyond what is necessary, reasonable, proper or capable of being met by the employer, when compared to the conditions at the workplace and the industry in which the employer operates. The requirement for the FWC to assess the claims of an applicant having regard to the conditions at the workplace is intended to be interpreted broadly and encompasses both the terms and conditions of employment at the workplace, and other matters, such as the financial situation of the workplace or the relevant industry, or matters of logistics or operational capacity.*

The amendment will give the FWC an extremely broad scope upon which to decide whether a claim is manifestly excessive. The use of words such as 'evidently' and 'obviously' would make the quality of 'excessiveness' in a claim a highly subjective judgement. In particular the proposed amendments include no provision for considering whether *other* claims being made might moderate the perceived 'excessiveness' of a particular claim.

Another unwarranted presumption within the Bill is that sufficient information has been provided by the employer to both the union and the FWC about conditions in the workplace and the industry that would determine whether a claim is 'manifestly excessive' or not. Without such information, it is often only the bargaining process itself that can determine the 'excessiveness' or otherwise of a claim. It is also the case that employers only provide such information *after* steps have begun to obtain a protected action ballot order. Without any requirement in legislation for employers to produce timely, complete and accurate information about 'conditions at the workplace and the industry in which the employer operates', the judgement of what is manifestly excessive will be biased against workers.

By way of example, in 2008 one of our affiliates was bargaining with a large non-profit employer. While this affiliate's standard practice is to research an employer's financials in order to assess the

feasibility of a wage claim, the situation of non -profits in Western Australia is more difficult because they do not have the same legal requirements to release their financial information as do public or private employers. The WA *Associations Incorporation Act 1987* (Section 25) only requires a non-profit to

> *(a) keep such accounting records as correctly record and explain the financial transactions and financial position of the association; and*
>
> *(b) keep its accounting records in such manner as will enable true and fair accounts of the association to be prepared from time to time; and*
>
> *(c) keep its accounting records in such manner as will enable true and fair accounts of the association to be conveniently and properly audited.*

Aside from Annual General Meetings, there is no serious requirement to maintain or publically release detailed records of financial information. The practical result of this was that the employer could decline to reveal the state of their finances, thus leaving the union with very little information upon which to judge the 'manifest excessiveness' or otherwise of its claim.

It was only after the affiliate took steps to initiate industrial action that the employer agreed to hand over their financial information for examination by union representatives. Once that examination was concluded the union accepted that their wages claim was too high and could result in redundancies, so it was revised and agreement was reached.

The *Amendment Bill* has nothing whatsoever to say about whether an employer will be required to produce financial information about their situation in order to judge whether a union claim is excessive. Indeed an employer would appear to have every incentive to *refuse* to provide that information, knowing that without it almost any union claim is likely to appear 'manifestly excessive' when applying for a protected action ballot order.

It is also worth noting that the full object of the *Fair Work Act* (Section 3) is to

> *provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians*

'National economic prosperity and social inclusion for all Australians' means that bargaining claims made by workers are not intended to merely 'keep pace' with a narrow living costs. Workers are also entitled to *advance* their living standards in real terms. In practice this means that claims to improve the conditions of the workforce are often going to appear 'manifestly excessive' when they are first made. However prosperity and social inclusion have never been advanced only ever making modest claims in workplace bargaining. The point of bargaining is ideally to find common ground over what constitutes a reasonable and real advancement in living standards for workers, and productive workplace arrangements for employers. The *Amendment Bill*, however, will tip the balance in favour of one side, the employers, to decide on the excessiveness of a bargaining claim.

In conclusion, UnionsWA recommends that the *Fair Work Amendment (Bargaining Processes) Bill 2014* be withdrawn on the grounds that it represents a one-sided attack on the rights of workers.

- It places the power to decide on productivity discussions in the hands of employers

- It creates a rigid merit test for bargaining and applying for a protected action ballot order
- It creates the highly subjective category of the 'manifestly excessive' claim which delegitimises the right of workers to advance their living standards
- It is premature and opportunistic to legislate on industrial relations issues while major inquiries are still looking into this area

UnionsWA and its affiliates would like the opportunity to speak to and give evidence directly to the Senate Committee. Please contact me on to discuss matters further.

Yours sincerely

Meredith Hammat
Secretary