

# CHAPTER 2

## Key issues

2.1 The committee received a range of submissions and heard divergent stakeholder views on the Fair Work Amendment (Bargaining Processes) Bill 2014 (the bill).

2.2 Most of the submissions received broadly supported the bill as 'an important piece of legislation which will complement other workplace relations legislation which has been introduced by successive Australian governments.'<sup>1</sup> However, the committee is aware of reservations expressed by some, notably unions.<sup>2</sup>

2.3 This chapter examines key facets of the bill and explores issues raised by submitters.

### Productivity is important

2.4 Productivity is critical to ensuring continued improvement in standards of living, and is a key feature of global economic competitiveness:<sup>3</sup>

Productivity matters because productivity gains allow more jobs to be created, more investment to take place, higher real wage growth to occur, and higher living standards to be achieved. Workplace productivity is the fundamental mechanism by which workers, businesses, families and the economy are all better off.<sup>4</sup>

2.5 As stated by Nobel Prize winning economist Paul Krugman, and quoted by the Department of Education (the department):

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.<sup>5</sup>

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1 Australian Mines and Metals Association, *Submission 21*, p.1. See also Australian Chamber of Commerce and Industry, *Submission 17*, p.12; Australian Mines and Metals Association, *Submission 21*; South Australian Wine Industry Association Incorporated, *Submission 5*, p. 7; Master Builders Australia, *Submission 18*, p. 2.

2 See for example Australian Council of Trade Unions, *Submission 10*; Australian Workers' Union, *Submission 12*; Unions ACT, *Submission 11*.

3 Department of Employment, *Submission 16*, p. 4.

4 *The Coalition's Policy to Improve the Fair Work Laws*, p. 32, available at: <http://lpaweb-static.s3.amazonaws.com/Policies/FairWork.pdf> (accessed 17 March 2015).

5 Quoted in Department of Employment, *Submission 16*, p. 4.

2.6 Australia cannot afford to be complacent about productivity. In fact, the need to lift productivity performance is widely recognised,<sup>6</sup> as are our economic growth targets:

The need for Australia's policy settings to support productivity growth is essential if we are to meet the 1.8% growth target set by the G20 Finance Ministers and improve the competitiveness of the national economy.<sup>7</sup>

### **The Fair Work Act**

2.7 The *Fair Work Act 2009* (the Act) was established to help promote productivity whilst ensuring fairness.<sup>8</sup> A submission made on behalf of Australian Business Industrial and the New South Wales Business Chamber Ltd encapsulated the aim of the Act as follows:

The object of the Act is to provide a balanced framework of cooperative and productive workplace relations that promotes national prosperity and social inclusion for all Australians. It seeks to do this by providing workplace laws which, amongst other things, promote productivity and economic growth and seek to achieve productivity and fairness through an emphasis on enterprise-level collective bargaining.<sup>9</sup>

2.8 Despite this fact, the Act does not explicitly require, or even encourage, employees to consider productivity requirements in their negotiations for new enterprise agreements.<sup>10</sup> Australia's leading national and international business advocate, the Australian Chamber of Commerce and Industry (ACCI), posited that aspects of the framework are in fact 'currently acting as barriers to productivity improvement.'<sup>11</sup>

2.9 The committee notes that the government is committed to putting productivity back on the agenda.<sup>12</sup>

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6 See *Productivity and innovation in enterprise agreement clauses: an overview of literature, data and case studies at the workplace level*, Fair Work Commission, 2014, p. 1.

7 Australian Chamber of Commerce and Industry, *Submission 17*, p. 5.

8 Department of Employment, *Submission 16*, p. 4.

9 Australian Business Industrial and New South Wales Business Chamber Ltd, *Submission 13*, p. 3.

10 Department of Employment, *Submission 16*, p. 4. See also Australian Business Industrial and New South Wales Business Chamber Ltd, *Submission 13*, p. 4; Australian Chamber of Commerce and Industry, *Submission 17*, p. 6.

11 Australian Chamber of Commerce and Industry, *Submission 17*, p. 6.

12 See *The Coalition's Policy to Improve the Fair Work Laws*, available at: <http://paweb-static.s3.amazonaws.com/Policies/FairWork.pdf> (accessed 17 March 2015).

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## Enterprise bargaining

2.10 Statistics provided by the department indicate that, on average, 6696 applications for approval of enterprise agreements are made each year.<sup>13</sup> Enterprise bargaining is clearly an important feature of industrial legislation. However, attaching no importance to productivity during the bargaining process does not pass the common sense test.<sup>14</sup>

2.11 To address this, the proposed legislation would simply ensure that improvements to workplace productivity are discussed during enterprise bargaining. Examples of improvements include, but are not limited to:

- 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.<sup>15</sup>

2.12 This requirement would not apply to negotiations for greenfields agreements,<sup>16</sup> and there would be no obligation for an agreement to be reached during negotiations. Parties would merely have to at least consider how productivity could be improved in their workplace, and the amendment places no extra burden on the FWC:

[It] is not intended to require the FWC to consider the merit of the improvements to productivity that were discussed, the detail of the matters that were discussed, the outcome of those discussions or whether it would be reasonable for certain provisions to be included in an enterprise agreement. Further, the new requirement is not intended to modify or delay the current timeframes for FWC consideration and finalisation of applications for agreement approval.<sup>17</sup>

2.13 Submitters were largely supportive of the thrust of the amendment.<sup>18</sup>

2.14 ACCI described the measure as a modest improvement:

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13 Department of Employment, *Submission 16*, p. 4.

14 House of Representatives, *Hansard*, 27 November 2014.

15 Explanatory Memorandum, Fair Work Amendment (Bargaining Processes) Bill 2014, p. 2.

16 Enterprise agreements made in relation to a new enterprise before any employees are employed. Such enterprises do not have existing arrangements to which productivity improvements can be made. See <http://www.fairwork.gov.au/ArticleDocuments/723/Enterprise-Bargaining.pdf.aspx?Embed=Y> (accessed 16 March 2015).

17 Explanatory Memorandum, Fair Work Amendment (Bargaining Processes) Bill 2014, p. 2.

18 Australian Business Industrial and New South Wales Business Chamber Ltd, *Submission 13*; Master Builders Australia, *Submission 18*; Australian Sugar Milling Council, *Submission 20*.

...while not a guarantee of enhanced productivity arising from bargaining, [the measure] will at least assist in getting the 'issue' of productivity onto the table. The proposed amendment is modest and may deliver some benefit if operating in conjunction with other measures set out in the Bill.<sup>19</sup>

2.15 The Australian Mines and Metals Association (AMMA) also supported the proposed amendment, but suggested adding a requirement that productivity be not only discussed, but genuinely considered.<sup>20</sup>

2.16 The South Australian Wine Industry Association echoed this position, stating that:

Simply mentioning the term productivity or agreeing that it is important to lift productivity rates does not in itself lead to productivity improvements.<sup>21</sup>

2.17 The New South Wales state government, meanwhile, saw definite merit in ensuring that the parties involved in enterprise bargaining turn their minds to the issue of productivity.<sup>22</sup>

2.18 On the other hand, some submitters questioned the fundamental premise linking productivity with wages growth:

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.<sup>23</sup>

2.19 Others, such as Job Watch, described the requirement to discuss productivity improvements as part of the negotiation process as "superfluous":

Whether the employer and employees have had discussions regarding improvements to productivity should not impact on whether an Enterprise Agreement passes the Better Off Overall Test and is approved. Whilst presumably discussions regarding productivity, and thus the improvement of productivity, already occur during the Enterprise Agreement negotiation process, this should be left to the parties to discuss among themselves.<sup>24</sup>

2.20 The Australian Workers' Union expressed concerns about some of the consequences of the proposed amendments, adding that employers may at times be disingenuous in how they present data and information relating to productivity:

...data and documents relating to productivity in a workplace are generally not available to employees or unions, except at the discretion of the

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19 Australian Chamber of Commerce and Industry, *Submission 17*, p. 7.

20 Australian Mines and Metals Association, *Submission 21*, p. 8.

21 South Australian Wine Industry Association Incorporated, *Submission 5*, p. 4.

22 New South Wales Government, *Submission 3*, pp 1–2.

23 Australian Lawyers for Human Rights, *Submission 11*, p. 2.

24 JobWatch Inc, *Submission 14*, p. 4.

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employer. This means that employers may pick and choose which data and information to present as evidence to the FWC, and in what form to present it, so as to exaggerate the actual impact of the proposed claim.<sup>25</sup>

2.21 The committee notes the above concerns but is, however, aware that employees are able to request that employers provide the relevant data and information. This request may be followed by an order from the FWC if employers are not forthcoming.<sup>26</sup>

#### *Committee view*

2.22 The need to enhance productivity performance is widely acknowledged. In the committee's view, it therefore follows that productivity improvements should feature in conversations about work.

2.23 The committee notes submitter concerns about employers not always being forthcoming with employees on issues pertaining to productivity, but is confident that adequate protections exist to ensure that employees have access to relevant information.

### **Protected action ballots**

2.24 The Act provides that the FWC must make a protected action ballot order if satisfied that an application has been made under section 437, and that the applicant has been, and is, genuinely trying to reach an agreement with the employer.<sup>27</sup>

2.25 An application for a protected action ballot does not automatically trigger protected industrial action—rather, it is an application for a determination of whether such action will occur and how.<sup>28</sup> The bill seeks to provide clarity on the circumstances in which the FWC may make a protection action ballot order.

2.26 In making its determination, the FWC would have to look at *how* the applicant has been trying to reach an agreement with the employer, with regard to all relevant circumstances, including the following non-exhaustive list of matters:

- 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

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25 The Australian Workers' Union, *Submission 12*, p. 12.

26 *Fair Work Act 2009*, s. 590(2)(c).

27 *Fair Work Act 2009*, ss. 443(1).

28 JobWatch Inc, *Submission 14*, p. 5.

- the extent to which bargaining for the agreement has progressed.<sup>29</sup>

2.27 Views on the amendment were varied. A number of unions argued that the proposed measures would in effect curtail employees' right to strike:<sup>30</sup>

The right to strike equalises the position of the employer and employees so that they can bargain as equals with approximately equal bargaining power. Without an ability to bargain as an equal with an employer, employees will not be able to effectively seek and obtain their fair share of the growth of the business, which they have played a critical role in supporting.<sup>31</sup>

2.28 Evidence suggests that these fears are unfounded. Careful analysis of the bill shows that the proposed amendments are consistent with current practice in that the 'genuinely trying to reach an agreement test does not require bargaining to have been exhausted or to have reached an impasse before a protected action ballot order can be made.'<sup>32</sup>

2.29 Submitters such as ACCI pointed out that the Act already requires the FWC to be satisfied that applicants have been and are 'genuinely trying to reach agreement,' the only difference is that there is currently no clarity on matters to be considered in making this determination.<sup>33</sup>

2.30 Master Builders Australia went further, suggesting that the requirement for applicants to merely be 'genuinely trying' is insufficient, pointing out that the Act does not contain any meaningful requirement that parties be acting in good faith and offering an example of the consequences of this omission:

One of the adverse effects...is seen in the prevailing culture in the building and construction industry. This culture is reflective of the fact that unions force parties to sign up to pattern or template agreements or they will suffer the consequences of industrial disruption, both lawful and unlawful ie the 'sign up or else' culture that has been identified by the Cole Royal Commission.<sup>34</sup>

2.31 ACCI was similarly of the view that the 'genuinely trying to reach agreement' requirement, as it currently stands, is ineffective:

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29 Drawn from principles of a Full Bench of Fair Work Australia decision in *Total Marine Services Pty Ltd v Maritime Union of Australia* [2009] FWAFB 368. See Explanatory Memorandum, Fair Work Amendment (Bargaining Processes) Bill 2014, p. 3.

30 Australian Manufacturing Workers' Union, *Submission 15*, p. 7; the Australian Council of Trade Unions, *Submission 9*, p. 4.

31 Australian Manufacturing Workers' Union, *Submission 15*, p. 7.

32 Explanatory Memorandum, Fair Work Amendment (Bargaining Processes) Bill 2014, p. 3.

33 Australian Chamber of Commerce and Industry, *Submission 17*, p. 7.

34 Master Builders Australia, *Submission 18*, p. 8.

The decision in *JJ Richards & Sons Pty Ltd v Transport Workers Union of Australia* opened the door for unions to pursue industrial action in relation to a proposed enterprise agreement, even before bargaining has commenced, resulting in a number of significant and negative implications for the bargaining system. It is hard to imagine this was the intended outcome when the Act was being drafted. The threat of industrial action pursuant to such tactics not only undermines the voluntary nature of agreement making through ‘practical compulsion’ but has potential productivity stifling and damaging consequences from the outset. Critically, as things currently stand, the prerequisite that the applicant for a protected action ballot order is “genuinely trying to reach agreement” does not present as a significant hurdle.<sup>35</sup>

2.32 Evidence provided by employer groups clearly articulated the view that unions engage in disruptive industrial action as a bargaining strategy. Master Builders Australia further explained that there is no requirement for the FWC to be satisfied that a party is not engaging in pattern bargaining:<sup>36</sup>

This omission, combined with the absence of any constraints relating to good faith bargaining, has contributed to the culture of ‘sign up or else’ agreement making.<sup>37</sup>

### **Excessive claims**

2.33 Under the Act, protected industrial action can be taken even in pursuit of claims that are excessive or unrealistic.<sup>38</sup> To address this, the bill would also provide that the FWC must not grant a protected action ballot order if satisfied that:

- the applicant's claims are manifestly excessive; or
- the claims would have a significant adverse effect on workplace productivity.<sup>39</sup>

2.34 In making its determination, the FWC would need to have regard to the specific conditions at the relevant workplace and industry within which the employer sits. The department informed the committee that the phrase 'conditions in the workplace' is intended to be interpreted broadly, and that the FWC would retain discretion on the matters it takes into consideration in deciding whether claims are manifestly excessive.<sup>40</sup>

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35 Australian Chamber of Commerce and Industry, *Submission 17*, p. 8.

36 Pattern bargaining is a process by which an employee group gains a new entitlement from one employer and then uses that as a precedent to demand equal or better entitlements from other employers.

37 Master Builders Australia, *Submission 18*, p. 9.

38 Department of Employment, *Submission 16*, p. 6.

39 Explanatory Memorandum, Fair Work Amendment (Bargaining Processes) Bill 2014, p. 4.

40 Department of Employment, *Submission 16*, p. 8.

2.35 Employer groups welcomed the amendment.<sup>41</sup>

2.36 ACCI suggested that the measure would actively work to discourage ambit claims—which can frustrate the bargaining process—and 'inject reasonableness into claims ultimately advanced.'<sup>42</sup>

2.37 Similarly, Master Builders Australia welcomed the effect the bill would have in discouraging ambit claims, but reminded the committee that 'some level of ambit claim may, however, be maintained because of the express limitation in the language of the phrase "manifestly excessive".'<sup>43</sup>

2.38 Not all submitters shared this view. The Maritime Union of Australia pointed out that the content of claims often changes over the course of a negotiation:

[T]his requirement [to reject manifestly excessive claims] would have the Commission make an assessment of a claim in circumstances where the final form of the proposed agreement is far from settled. It is often the case that claims which may initially seem to contain ambit may at a later stage, when "hard bargaining" has seen other claims by the applicant fall away, no longer be characterised as "manifestly excessive".<sup>44</sup>

2.39 The Australian Manufacturing Workers' Union further suggested that views on what is reasonable or excessive would be inherently subjective:

What may be considered manifestly excessive as a final outcome could be considered a reasonable outcome early in the bargaining process by one party, particularly where an employer has refused to engage in discussions and to provide their perspective about why they do not support certain claims. Conversely, what may be manifestly excessive from an employee's perspective may seem reasonable to an employer before they have had the opportunity to hear from union representatives about why certain entitlements are important to employees.<sup>45</sup>

2.40 The Australian Sugar Milling Council agreed that the terms 'manifestly excessive' and 'significant adverse effect' were subjective. The Council, however, pointed out that the FWC will require and rely on significant detail before making a

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41 Australian Chamber of Commerce and Industry, *Submission 17*, p. 10; Australian Public Transport Industrial Association, *Submission 8*, p. 3.

42 Australian Chamber of Commerce and Industry, *Submission 17*, p. 11. An ambit claim is an extravagant demand issued in expectation of a counter-offer and eventual compromise.

43 Master Builders Australia, *Submission 18*, p. 14.

44 Maritime Union of Australia, *Submission 19*, p. 6.

45 Australian Manufacturing Workers' Union, *Submission 15*, p. 10.



determination.<sup>46</sup> AMMA added that the 'threshold for an employer to prove that a claim or claims have a "significant" adverse impact may be too high a bar.'<sup>47</sup>

2.41 The Maritime Union of Australia, however, rejected the premise behind the requirement prohibiting claims that would have a significant adverse impact on productivity:

[T]he implicit assumption in the Bill appears to be that employee claims are adverse to productivity. This ignores the significant contribution that employees make to productivity improvements, often without receiving any corresponding benefit, as borne out by ACTU research.<sup>48</sup>

2.42 The department emphasised the discretion the FWC would have in determining whether claims would have an significant adverse impact on productivity:

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.<sup>49</sup>

### **The real cost of industrial action**

2.43 Industry representatives explained that industrial action affects more than the particular employer in question, illustrating why such action is better prevented through good faith negotiation. Mr Daniel Mammone, AMMA, said he did not see why simply ensuring that claims are not excessive and that they include a focus on productivity should be of concern to anyone:

The bill is seeking to address the real problems that are occurring. They are not made-up problems. The explanatory memorandum talks about an industrial dispute in Port Hedland. The threat of that one particular dispute had the capacity to affect not only that company but other companies and their workforces. By and large, it had the capacity of \$7 million a day. That includes royalties lost—foregone—to the Western Australian government. These are not insignificant matters. Yes, we agree that, by nature, these laws will affect bargaining across the economy where bargaining occurs. But it will only affect bargaining in the context of protective industrial action where it is taken. By and large, the requirement that productivity be discussed—and there is no formal mechanism other

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46 Australian Sugar Milling Council, *Submission 20*, p. 3.

47 Australian Mines and Metals Association, *Submission 21*, p. 9.

48 Maritime Union of Australia, *Submission 19*, p. 7.

49 Department of Employment, *Submission 16*, p. 8.

than the commission being satisfied that productivity was discussed—should not be a problem across the board.<sup>50</sup>

2.44 Mr Scott Barklamb, also representing AMMA, added that the cost of the dispute to the Western Australian state government in terms of royalty income equated 'in very short order to the entire amount it spends on homelessness in any year.'<sup>51</sup> Mr Barklamb concluded:

The point of this is to say, though, that apparently localised disputation—what you might describe as sectional or someone might choose to characterise as sectional or limited to an industry—does affect the wider community.<sup>52</sup>

2.45 The committee also heard that the impact of industrial action can start before any action is even undertaken. As posited by the Australian Business Industrial and the New South Wales Business Chamber Ltd:

[T]he true impact of protected industrial action is not confined to its actual incidence, protected industrial action also impacts the bargaining process when it is raised as a credible threat.<sup>53</sup>

2.46 AMMA offered a concrete example of an employer left with no choice but to agree to excessive claims in order to stave off industrial action:

In our submissions, we refer to a project which was an offshore construction project. It was actually a \$4.5 billion project...Halfway through the project, when they needed to renew the agreement to cover the project, was where we saw extortionate pressure from the unions because the client had millions of dollars worth of equipment on site under lease, certainly over a million dollars a day just for the accommodation vessel. Of course, the unions were able to use that and the protected action that was on threat in that project to extract further extortionate claims from the company that was building this offshore facility, including one example where the vessel common-use ablutions allowance was paid at \$90 a day, which was for the fact that people had to walk from their room about 30 metres to go to showers and toilets. On the new accommodation vessel, which was there at the time when the new agreement was being negotiated, each room had its own ensuite, but they still insisted on not just the \$90 a day; that was escalated up to \$110 a day. I think the pressure in those circumstances was absolute. There was no discussion of productivity. They had the client and

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50 Mr Daniel Mammone, Director Government Relations, Australian Mines and Minerals Association, *Proof Committee Hansard*, 20 March 2015, p. 26.

51 Mr Scott Barklamb, Executive Director, Policy and Public Affairs, Australian Mines and Minerals Association, *Proof Committee Hansard*, 20 March 2015, p. 31.

52 Mr Scott Barklamb, Executive Director, Policy and Public Affairs, Australian Mines and Minerals Association, *Proof Committee Hansard*, 20 March 2015, p. 31.

53 Australian Business Industrial and New South Wales Business Chamber Ltd, *Submission 13*, p. 7.

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the actual employer and all of the subcontractors in a position where they could not afford to say no.<sup>54</sup>

2.47 The Australian Chamber of Commerce and Industry described this approach to industrial action as 'strike first, talk later tactics [which] undermine the economy and a stable industrial relations system.'<sup>55</sup>

2.48 The department explained that the bill would address this concern by encouraging discussion rather than costly industrial action:

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.<sup>56</sup>

### *Committee view*

2.49 The committee is persuaded that amendments pertaining to protected action ballot orders would provide much needed clarity on how and when the FWC may issue such orders. The amendments are also a reasonable and fair way of ensuring that industrial action is not used as a first resort in enterprise agreement negotiations.

2.50 The committee recognises that both employee and employer groups considered terms such as "manifestly excessive" and "significant adverse effect" to be subjective. Given how complicated it would be for employers to demonstrate, for example, significant adverse impact, the committee is confident that this would serve as a protection for employees and is comfortable with the onus being on employers in this instance.

### **Conclusion**

2.51 The committee is concerned that much of the opposition to this bill appears to be ideologically driven. It does not share the view that requiring employees to consider productivity improvements in any way impinges on their rights. In fact, given that the route to improving living standards is through improved productivity, it is demonstrably in both employers' and employees' interests to work together to enhance productivity.

2.52 It can unfortunately be tempting to fall into the trap of viewing enterprise bargaining as an 'us-and-them' proposition. As is clear from the submissions received, unions are of the view that the proposed measures give employers the upper hand,

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54 Mr Tony Bradford, Principal Consultant, Australian Mines and Minerals Association, *Proof Committee Hansard*, 20 March 2015, pp 29–30.

55 Australian Chamber of Commerce and Industry, *Submission 17*, p. 8

56 Department of Employment, *Submission16*, p. 6.

while in employers' experience the Act doesn't adequately balance their interests against those of unions.<sup>57</sup>

2.53 It is worthwhile remembering that the modern workplace has moved beyond that clichéd, adversarial model. Today only a small percentage of employees feel that unions represent them, as evidenced by dwindling union membership.<sup>58</sup> The vast swathe of Australian employees work in non-unionised sectors. The committee is very much of the view that the outdated us-and-them way of viewing enterprise bargaining helps no one, and supports the bill's initiative in fostering workplace dialogue founded on the concept of mutual responsibility for mutual gain.

2.54 Evidence before the committee confirms that the bill is consistent with the spirit of the Act in promoting both fairness and economic prosperity. It is the committee's view that the proposed measures would enhance the Act by providing clarity where it is desperately needed and promoting flexibility in enterprise bargaining. The rewards are obvious—the bill would empower employees to play an active role in the future of their workplace and help build prosperity for future generations—while the drawbacks are non-existent. The committee has not heard convincing reasons to impede the progress of these reforms.

### **Recommendation 1**

**2.55 The committee recommends that the Senate pass the bill.**

**Senator Bridget McKenzie**

**Chair**

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57 Australian Chamber of Commerce and Industry, *Submission 17*, p. 11.

58 In 2013, only 17 per cent of employees overall and 12 per cent of private sector employees were union members. See Australian Bureau of Statistics data supplied by South Australian Wine Industry Association Incorporated, *Submission 5*, p. 4.