

LABOR SENATORS' DISSENTING REPORT

1.1 Labor Senators oppose the Fair Work Amendment (Bargaining Processes) Bill 2014 (the bill).

1.2 The bill is unnecessarily ambiguous, and if passed will result in the addition of red tape, expense and inconsistency at the expense of workers' democratic right to take protected industrial action.

1.3 The fifth in a series of Coalition bills proposing changes to federal workplace relations laws, like its predecessors the bill comprises nothing more than a focused attack on trade unions.

The bill relies on incorrect assumptions and hypotheticals

1.4 Whilst the Chair's report for this inquiry states that submitters were largely supportive of the thrust of the amendment, twelve of the twenty three submissions to the inquiry opposed the bill. It was not in any way overwhelmingly supported, and the need to enhance productivity discussions in bargaining processes was not widely acknowledged.

1.5 Claims of 'excessive claims' are simply not supported by evidence, despite being welcomed by employer groups. Evidence submitted by bodies representing workers, who of course far outnumber employers, completely opposed this view.¹ In evidence, the Australian Chamber of Commerce and Industry gave evidence that issues were certainly not widespread, but more the fact that there are "outliers".²

1.6 In evidence given at the hearing, Mr Daniel Mammone, made incorrect reference to the Explanatory Memorandum (EM):

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.³

1.7 The EM does not discuss an industrial dispute in Port Hedland. The EM makes a single reference to a decision of Fair Work Australia, *Total Marine Services Pty Ltd v Maritime Union of Australia*, and the decision only, certainly not a reference to the dispute:

1 Maritime Union of Australia, *Submission 19*, p. 6; Australian Manufacturing Workers' Union, *Submission 15*, p. 10.

2 Mr Dick Grozier, Associate Director, Workplace Relations, Australian Chamber of Commerce and Industry, *Proof Committee Hansard*, 20 March 2015, p. 8.

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

14. This item inserts new subsection 443(1A) to provide that when considering whether an applicant for a protected action ballot order has been, and is, genuinely trying to reach an agreement, the FWC must have regard to all relevant circumstances, including a non-exhaustive list of matters which are 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 368.⁴

1.8 Furthermore, Mr Mammone's mention of lost royalties of '\$7 million a day' is reference not to the EM, or to any industrial action that ever happened. This number is drawn from a hypothetical matter within a keynote address to the Australia Mines and Minerals Association (AMMA), delivered by Mr Nev Power, CEO of Fortescue Metals Group Limited, in 2014.⁵

1.9 Mr Barklamb also refers to this '\$7 million' apparently lost in dispute during the hearing:

There was a dispute last year of tugboat operators in Western Australia. From memory, 54 or 55 of them were discussing a period of industrial action. I make this comment without necessarily saying that the circumstances in that dispute are directly addressed by this bill, but I just make this point to illustrate the impact. That dispute cost \$7 million a day, and it substantially cost the Western Australian state government in terms of royalties. ... These were calculations that were done by a party affected by the dispute. I will send you the speech they were taken from.⁶

1.10 This is completely incorrect. The number is quoting from the same speech, from Mr Power, who was of course not a party to any dispute, as such strike action did not actually occur.

1.11 Mr Mammone and the Chair make no reference to closures of Ports by actions such as cyclonic activity, which is common each and every year in Port Hedland, and in fact far outweighs any closures from actual strike activity (and certainly hypothetical strike activity).

1.12 This hypothetical has been repeatedly recycled by the Government, the Coalition members of the Committee, and the employer groups submitting to the Committee, and misconstrued as an actual case. It is not, and should not have been relied upon as 'evidence' by the Committee.

1.13 Not content to try and mislead productivity increases by not referring to well respected reports, the Chair's draft seeks to imply by combining elements of the Department of Employment's submission and a nameless speech in the House of Representatives that no importance is attached to productivity in the almost 7,000 bargains registered each year. No evidence was led at the inquiry to substantiate this

4 Explanatory memorandum, p. 3.

5 Mr Nev Power, Speech to the Australian Resource People Summit, 30 May 2014, video recording available at: <http://www.amma.org.au/news-media/media-center/fmg-chief-talks-ir-challenges/> (accessed 8 April 2015).

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

assertion. It cobbles together two unrelated pieces of information, one based on fact and one on fiction.

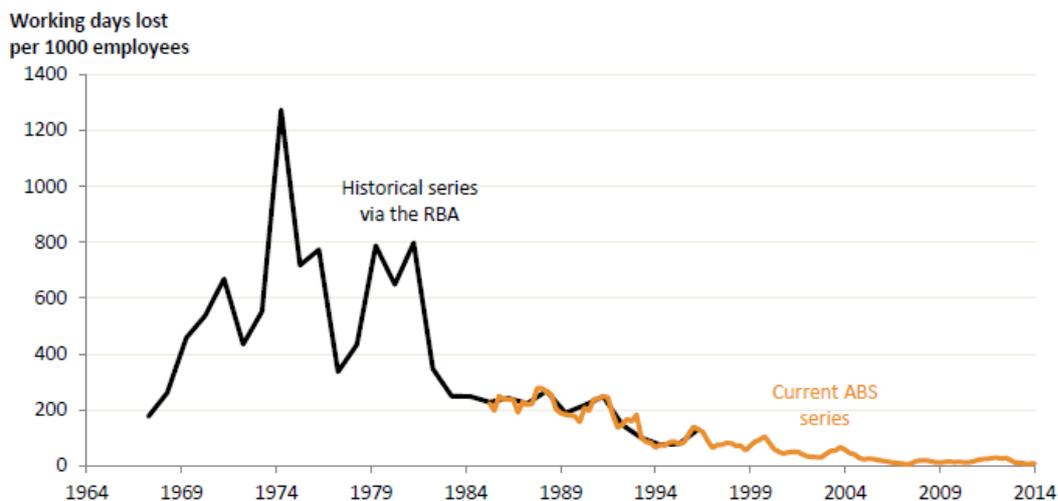
1.14 Evidence provided by the Australian Nursing & Midwifery Federation (ANMF), the Australian Workers' Union (AWU) and the Maritime Union of Australia (MUA) is ignored. All unions appearing before the Committee gave evidence that productivity improvements were part of their bargaining agreements⁷ and the ANMF tabled a further document at the hearing which went directly to the issue of productivity.

The bill seeks to curtail a productivity issue that is not apparent in the workplace

1.15 Statistics from the Australian Bureau of Statistics, referred to in submissions by Unions WA and the Australian Council of Trade Unions (ACTU) among others, clearly demonstrate that working days lost per 1000 employees in the last decade have rapidly declined and remain historically low,⁸ and, interestingly, are dwarfed by the numbers observed during periods where all strikes were unquestionably breaches of the common law.⁹

*Figure 1: working days lost to industrial disputes*¹⁰

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>

7 Maritime Union of Australia, *Proof Committee Hansard*, 20 March 2015, p. 20; Australian Workers' Union, *Proof Committee Hansard*, 20 March 2015, p. 21; Australian Nursing and Midwifery Federation, *Submission 6*, p. 6.

8 Australian Bureau of Statistics, 6321.0.55.001 - Industrial Disputes, Australia, December 2014.

9 Australian Council of Trade Unions, *Submission 9*, p. 10.

10 Australian Council of Trade Unions, *Submission 9*, p. 10.

1.16 We also refer the committee to the 2013 Telstra Productivity Indicator Report, which found that 58 per cent of Australian CEOs in 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’.¹¹

1.17 Yet, the amendments to the *Fair Work Act 2009* (the Fair Work Act) suggested in this bill focus on productivity as a key element.

1.18 The EM notes that the purpose of the amendment regarding productivity is to ‘enhance collective bargaining by promoting discussions about improving productivity at the workplace level’, and indicates that examples of improvements to productivity may include the elimination of restrictive or inefficient work practices.¹² Regardless of the justification of this amendment, the EM rightly makes no claim that the incidence of industrial action is such as to require regulatory intervention, and as such Labor Senators assert that any legislative amendments for the sake of increased workplace productivity would not prove to be reasonable, necessary or proportionate.

1.19 Whilst the Chair’s report makes reference to the importance of productivity, it makes no attempt to report on published productivity reports. One interpretation of the Chair’s report could conclude that whilst productivity improvements are necessary, improvements have not been achieved. This conclusion is not correct, and evidence from the speech by the Deputy Governor of the Reserve Bank of Australia *Demographics, Productivity and Innovation*,¹³ discussed in the hearing,¹⁴ and the MUA in giving evidence at the hearing demonstrated this:

From page 37 through to page 39 of our submission you will see that we have relied on the ACCC’s observations and surveys on productivity. You will see also that there has been a continual improvement in productivity across the five-port measure. ... I also draw your attention to page 39, where it draws some conclusions on Melbourne and Sydney container rates, which are all on the increase.¹⁵

1.20 The MUA, AWU and ANMF presented evidence to the committee that whilst productivity was difficult to quantify, it was usually, if not always, discussed as part of the bargaining process at present:

Senator LINES: Yes. Mr Doleman, the point you made at the beginning was that, rather than just talking about productivity at the bargaining table, it is included in your enterprise agreements?

11 ‘Time to halt the productivity slide’, *Business Spectator*, 22 February 2013, <http://www.businessspectator.com.au/article/2013/2/22/time-halt-productivity-slide> (accessed 25 March 2015).

12 Explanatory memorandum, p. iv.

13 Philip Lowe, ‘Demographics, Productivity and Innovation’, speech to the Sydney Institute, 12 March 2014, <http://www.rba.gov.au/speeches/2014/sp-dg-120314.html> (accessed 8 April 2015).

14 See, e.g. *Proof Committee Hansard*, 20 March 2015, p. 3.

15 Mr Michael Doleman, Deputy National Secretary, Maritime Union of Australia, *Proof Committee Hansard*, 20 March 2015, p. 19.

Mr Doleman: It is indeed.

...

Mr Crawford: In relation to rostering arrangements or whatever, pretty much all of our enterprise agreements contain productivity benefits for employers.¹⁶

1.21 The ANMF submits that there is no evidence or even claims by nursing and midwifery employers that productivity is not squarely on the table during enterprise bargaining negotiations. For nurses, midwives, employers groups, state and territory governments and agencies, productivity improvements in its many forms is at front of mind in agreement negotiations.¹⁷

1.22 Aside from arguments from union bodies discussing productivity measures, the Australian Lawyers for Human Rights submitted evidence similarly questioning the definition and measurability of ‘productivity’:

Labour productivity differs enormously between industries, not because some workers work harder than others but because different capital values are taken into account in the calculations ie ‘productivity’ in the economic sense is not a measure of hard work alone, as the Bill seems to imply.¹⁸

1.23 Professor David Peetz, an expert in the subject of workplace productivity and employment relations, submitted evidence completely discounting the purpose of the bill:

It is unclear what problem the Bill is seeking to solve.

A couple of anecdotal examples are used to demonstrate allegedly excessive wage claims made by particular unions in particular disputes, and thereby demonstrate the need for wage restraint and productivity improvements by using the offices of the [Fair Work Commission].¹⁹

1.24 Unions WA submitted evidence to the committee that this amendment may indeed see the opposite effect due to employers being given the power to refuse discussion about productivity until all other claims in the bargaining process are resolved, undermining the interests of their own organisations:

Because the employer knows that the [Fair Work Commission] 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.²⁰

16 *Proof Committee Hansard*, 20 March 2015, pp 20–21.

17 Australian Nursing and Midwifery Federation, *Submission 6*, p. 6.

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

19 Professor David Peetz, *Submission 23*, p. 2.

20 Unions WA, *Submission 7*, p. 2.

1.25 Amendment to section 443 would provide that the Fair Work Commission (FWC) must not make a Protected Action Ballot Order (PABO) where it is satisfied that the claims of an applicant are manifestly excessive, having regard to the conditions at the workplace and the industry in which the employer operates or would have a significant adverse impact on productivity at the workplace.

1.26 According to the EM, these proposed restrictions on access to protected industrial action are aimed at encouraging sensible bargaining claims, by ensuring that bargaining representatives cannot obtain a PABO in pursuit of claims that are “out of range” or “beyond what is necessary, reasonable, proper or capable of being met by the employer” in light of workplace and industry conditions.

1.27 Labor Senators assert that the terms “manifestly excessive”, “significant” and “beyond what is necessary, reasonable, proper or capable”, are open to interpretation by the government and the FWC, and are not adequately defined in the bill or the EM.

1.28 Additionally, when considering whether an applicant for protected industrial action has been, and is, genuinely trying to reach an agreement the FWC does not disregard the matters the government has inserted in section 443(1A). By amending section 443 in this manner, the bill imposes a different and higher standard test on unions to take protected industrial action over and above the test of section 413. Labor Senators can only assume that the government is introducing the additional requirements set out in section 443(1A) in such a way because they are applicable only to those making an application for protection action – unions – as there are no corresponding additional elements placed on the employers.

The bill infringes on human rights

1.29 Labor Senators note the 19th report of the current Parliamentary Joint Committee on Human Rights (PJCHR), that states:

1.30 The committee considers that this measure engages and potentially limits the right to freedom of association and the right to form trade unions (specifically the right to strike).²¹

1.30 The PJCHR in fact raised a number of concerns with regard to the bill, including limitations of the right to freedom of association,²² placing further limits on when approval to undertake protected industrial action may be granted,²³ the statement of compatibility failing to demonstrate that the objectives of the bill are legitimate and justifiable for the purpose of international rights law.²⁴

21 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: Nineteenth report of the 44th Parliament*, March 2015, p. 7.

22 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: Nineteenth report of the 44th Parliament*, March 2015, p. 11.

23 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: Nineteenth report of the 44th Parliament*, March 2015, p. 8.

24 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: Nineteenth report of the 44th Parliament*, March 2015, p. 10.

1.31 The PJCHR also made note that that Australia already has in place substantial regulation of industrial action.²⁵

1.32 The failure of the Statement of Compatibility to refer to internationally binding sources of the right to strike is concerning, and genuinely unnecessary considering that 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.

1.33 Even more concerning was the manner in which the Chair and other Coalition Senators attempted to lean upon unrelated Senate Standing Orders to shut down the line of questioning from the Deputy Chair on the matter:

[Senator Lines]: We have a report from the Parliamentary Joint Committee on Human Rights which clearly raises some concerns. Mr Cully has said he was aware of it. Then there was some mad whispering and suddenly Mr Cully does not really what is in it. Forgive me for being a little suspicious.²⁶

Concerns with transitional elements

1.34 Whilst the new provisions will not commence until Proclamation (which may be up to 6 months after Royal Assent), it will have effect in relation to enterprise agreements made after the day of Proclamation. A non-greenfields agreement is made when it is voted upon, meaning the amendment effectively reaches back in time to preclude the approval of agreements where productivity was not discussed during bargaining and that had commenced before the commencement of the relevant provisions of the amending Act.

1.35 Labor Senators express concerns that this created a situation where those entering into the bargaining process must follow a process that is not yet law.

Recommendation 1

1.36 Labor Senators recommend that the Senate reject the bill in its entirety.

Senator Sue Lines

Deputy Chair

25 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: Nineteenth report of the 44th Parliament*, March 2015, p. 9.

26 Senator Sue Lines, Deputy Chair, *Proof Committee Hansard*, 20 March 2015, p. 39.