Fair Work Amendment (Bargaining Processes) Bill 2014

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Date introduced: 27 November 2014
House: House of Representatives
Portfolio: Employment
Commencement: A day to be fixed by Proclamation, or six months after the Act receives Royal Assent, whichever is earlier.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.
When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website.
Purpose of the Bill

The purpose of the Fair Work Amendment (Bargaining Processes) Bill 2014 (the Bill) is to amend the Fair Work Act 2009¹ (the Act):

• to require that the Fair Work Commission (the FWC), before it approves an enterprise agreement, be satisfied that productivity improvements were discussed during bargaining

• to require the FWC to consider some further matters before making an order for a protected action ballot and

• to preclude the making of such an order where the claims are excessive or would have a significant adverse impact on productivity.

Background

The Coalition’s Policy to improve the Fair Work laws included these commitments:

... [A] Coalition Government will ensure that protected industrial action can only happen if the Fair Work Commission is satisfied that there have been genuine and meaningful talks between workers and business at the workplace; and that the claims made by both parties are sensible and realistic. When it is asked to approve an enterprise agreement, the Fair Work Commission will need to be satisfied that the parties have considered and discussed ways to improve productivity ... ²

Protected industrial action in support of a claim for an enterprise agreement should always be considered a last resort option when talks break down—not the first step in bargaining ... ²

This Bill is addressed to these commitments.

The 2012 review of the Act discussed the importance of improving productivity, and recommended ‘that the role of the Fair Work institutions be extended to include the active encouragement of more productive workplaces’. However, it did not consider that amendments to the Act were required, recommending instead the dissemination of information on best practice in improving productivity.³

Committee consideration

The Bill has been referred to the Senate Education and Employment Legislation Committee for consideration and report by 25 March 2015.⁴

Senate Standing Committee for the Scrutiny of Bills

The Senate Standing Committee for the Scrutiny of Bills had no comment on the Bill.⁵

Policy position of non-government parties/independents

The Shadow Minister for Employment and Workplace Relations, Mr Brendan O’Connor, expressed a general suspicion of the Bill in his second reading speech. He said:

Labor cannot support this Bill as it currently stands because it may be ambiguous and may result in no change other than to create additional red tape, increase costs and generate uncertainty for employers, unions and employees; and, at worst, it is an assault on employees’ democratic right to bargain effectively at the workplace.⁶

Mr O’Connor also criticised the haste with which the Bill had been brought on for debate, and the mismatch between the content of the Bill and the Coalition’s election commitment. However, he did leave open the possibility of supporting the Bill after the Senate Education and Employment Legislation Committee had canvassed the views of affected parties.\(^7\)

Mr Adam Bandt, of the Australian Greens, criticised the legislation as ‘a clear attempt to stop people bargaining for fair wage rises when their employers make high profits’. He accused the Government of hypocrisy in saying governments should not tell business what to do, while dictating what should be considered in enterprise bargaining.\(^8\)

**Position of major interest groups**

To date there has not been much public discussion of the Bill. The Australian Chamber of Commerce and Industry welcomed it, describing the measures in the Bill as ‘sensible and warranted’.\(^9\)

The President of the Australian Council of Trade Unions, Ms Ged Kearney, has described the Bill as an attack on workers’ rights. She said that it would make it harder for workers to get pay rises, and that references to productivity are ‘a code for cuts’. She linked the Bill to recent developments in bargaining in the Australian Public Service, where pay rises below inflation have been offered in exchange for cuts in conditions.\(^10\)

**Financial implications**

According to the Explanatory Memorandum, the Bill has no financial implications.\(^11\)

**Statement of Compatibility with Human Rights**

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.\(^12\)

The Parliamentary Joint Committee on Human Rights has not yet considered the Bill.\(^13\)

**Key issues and provisions**

**Schedule 1—Amendments**

**Requirement that productivity improvements be discussed during bargaining**

Part 2-4 of the Act deals with enterprise agreements, including provisions which govern bargaining and representation during bargaining, and the steps that must be taken before the FWC approves an agreement. Sections 186 and 187 set out the requirements for when the FWC must approve an enterprise agreement. In general they deal with whether proper process has been followed, and the inclusion of required terms.

**Item 1** inserts new subsection 187(1A) into the Act with the effect that, before approving an agreement, the FWC must be satisfied that, during bargaining for that agreement, improvements to productivity at the workplace were discussed.

On the face of it, this provision is unexceptionable. The object of the Act is, in part, ‘to provide a … framework for … workplace relations that promotes national economic prosperity … by … providing workplace relations laws that … promote productivity …’.\(^14\)

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7. Ibid.
12. The Statement of Compatibility with Human Rights can be found at page iii of the Explanatory Memorandum to the Bill.
commitments to improving productivity. More generally, economists are agreed that the only way to achieve improvements in living standards in the foreseeable future is through improved productivity.

Productivity appears to be a simple concept. It is defined thus in the *Oxford Dictionary of Economics*: 

**Productivity** The amount of output per unit of input achieved by a firm, industry or country. This may be per unit of a particular factor of production, for example, labour employed, or per unit of land in agriculture, or ‘total factor productivity’ may be measured, which involves aggregating the different factors ...

But it is widely misunderstood. At the level of the whole economy, for example, increasing workforce participation is often mentioned as a way of improving productivity. In fact, it would increase the amount of an input, labour, and presumably the amount of output; but it would not, of itself, increase the amount of output per unit of input.

The Explanatory Memorandum suggests that productivity improvements which might be discussed might include:

- 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.

These would produce productivity improvements.

The bargaining framework for the Australian Public Service may offer an example of how this principle might operate. It requires that pay rises be offset by genuine productivity gains. Genuine productivity gains are ‘demonstrable, permanent improvements in the efficiency, effectiveness and/or output of employees, based on reform of work practices or conditions, resulting in measurable savings’. However, it appears that, in recent bargaining in the Australian Public Service, savings have been confused with productivity. For example, a proposal by the Employment Department for an enterprise agreement reportedly offered a pay rise of 1.7 per cent over three years, offset by the removal of a half-day pre-Christmas close-down and a ‘health allowance’, slower incremental pay progression and tighter rules on higher duties allowances. These changes may offset the pay rise, but they are not increases in outputs per unit of input: they are increases in working hours (inputs) and reductions in benefits (the cost of the inputs).

The link between discussion of productivity and pay rises is not spelt out in the Explanatory Memorandum. The implicit reason for the measure in the Bill appears to be that pay rises should be at least partly offset by productivity gains. This assumes that the wage structure prevailing in the enterprise is the right one. However, if an enterprise is particularly profitable, there is no reason why workers should not share in that profitability, as the media release by Mr Bandt suggests. Similarly, if the owners of a company improve productivity by investing in new machinery, it is not obvious that this should result in an increase in workers’ pay.

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23. A Bandt, op. cit.

Improvements in productivity are most likely to come from innovation and improved processes.\textsuperscript{25} It might be argued that these are important issues for management and workplace culture, and that they are not best addressed in the climate of negotiating an enterprise bargain.\textsuperscript{26} Indeed, a recent research report by the Fair Work Commission quotes evidence that productivity improvements should be pursued outside formal bargaining processes.\textsuperscript{27} The requirement in this Bill creates a danger that productivity will become just a box to be ticked rather than an important element of continuing business strategy.

This is a danger especially because the FWC is given no guidance in the Bill or the Explanatory Memorandum as to when it should be ‘satisfied’ that improvements to productivity were discussed. It explicitly is not required to consider the merits of the discussion or the content of the discussion.\textsuperscript{28}

**When a protected action ballot order can be made**

If workers strike or take other industrial action, they are protected from civil claims against them when the strike is a part of negotiations for an enterprise agreement and has been authorised by a ballot of workers who would be covered by the agreement. Such a ballot can take place only when the FWC has issued an order for a protected action ballot.

Section 443 of the Act sets out when the FWC must make a protected action ballot order. Subsection 443(1) says that the FWC must be satisfied that ‘each applicant has been, and is, genuinely trying to reach an agreement with the employer’. In the past, employee organisations have been able to use industrial action, or the threat of it, to force employers to bargain. In particular, protected action ballot orders have been issued in cases where bargaining has not begun.\textsuperscript{29}

The Review of the Fair Work Act in 2012 considered this inconsistent with the ‘good faith bargaining’ framework in the Act.\textsuperscript{30} Moreover sections 236 and 237 of the present Act provide for ‘majority support determinations’, by which, if a majority of the employees to be covered wish to bargain, the employer is required to bargain. The Review recommended that the Act:

...be amended to provide that an application for a protected action ballot order may only be made when bargaining for a proposed agreement has commenced, either voluntarily or because a majority support determination has been obtained.\textsuperscript{31}

**Item 3** inserts new subsection 443(1A) and provides a non-exhaustive list of matters to which the FWC must have regard in determining whether employees are genuinely trying to reach an agreement. While they include the extent to which bargaining has progressed, they do not explicitly preclude the granting of an order before bargaining has commenced.

**Item 2** inserts the word ‘only’, into subsection 443(1) with the effect that the FWC cannot make an order unless the conditions in subsection 443(1) are met. This was the effect of existing subsection 443(2) (which is to be repealed and replaced by **item 4**) so it is not a new requirement.

**Item 4** repeals subsection 443(2) and replaces it with a requirement that the FWC must not make a protected action ballot order if an employee claim is, or the claims taken as a whole are ‘manifestly excessive’ or ‘would have a significant adverse impact on productivity’.

This could be problematic in practice, first because it requires the FWC to pre-judge the employee claims before there is an agreement. It seems likely that this could influence the course of bargaining.

Second, it is not clear what might be ‘manifestly excessive’. The Explanatory Memorandum gives this guidance:

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31. Ibid.
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 employ operates ... 32

In his second reading speech, the Minister for Education gave two actual examples. One was a claim, which he described as ‘fanciful’, that would increase the salary package of a work group by 38 per cent over four years, for which a protected action ballot order had been made. The other was an actual agreement for 30 per cent wage increases in just over four years with no productivity benefits. This was a claim which was in fact agreed to by the employer (after industrial action had been taken) and approved by the FWC. 33 Given these two examples it seems that it may be difficult to tell at first sight what might be excessive. Is it that 30 per cent is reasonable and 38 per cent is excessive? Or is it that both are excessive, and the employer and the FWC were somehow wrong to endorse the 30 per cent deal?

Third, the framing of the provision suggests that the application could be rejected on the basis of one element of a proposed agreement, even when it was offset by other elements. For example, even if a claim for 38 per cent pay rises over four years is judged excessive, if the pay rises were offset by abolition of penalty rates and sacrifice of a fortnight’s leave, in context they might not be excessive.

Finally, assessing the productivity impacts of a claim could be a time consuming and difficult process and would depend crucially on information which employers might not be ready to supply at this stage. It would also involve devoting resources to analysis of provisions which might be negotiated away in the bargaining process.

Schedule 2—Application and transitional provisions

These amendments are technical application provisions. Item 2 provides that the amendment relating to approval of enterprise agreements applies to agreements made after the commencement of this item. Item 3 provides that the amendments relating to protected action ballots apply to applications made after the commencement of those items.

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32. Explanatory Memorandum, op. cit., p. 4.