

# **Senate Education and Employment Legislation Committee**

## **FAIR WORK AMENDMENT (BARGAINING PROCESSES) BILL 2014**

Australian Mines & Metals Association (AMMA)

*January 2015*

AMMA is Australia's national resource industry employer group, a unified voice driving effective workforce outcomes. Having actively served resource employers for more than 96 years, AMMA's membership covers employers in every allied sector of this diverse and rapidly evolving industry.

Our members include companies directly and indirectly employing more than half a million working Australians in mining, hydrocarbons, maritime, exploration, energy, transport, construction, smelting and refining, as well as suppliers to these industries.

AMMA works with its strong network of likeminded companies and resource industry experts to achieve significant workforce outcomes for the entire resource industry.

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GPO Box 2933

Brisbane, QLD, 4001

Contact: Scott Barklamb – Executive Director – Policy and Public Affairs

Email: [policy@amma.org.au](mailto:policy@amma.org.au)

Phone: 07 3210 0313

Website: [www.amma.org.au](http://www.amma.org.au)

ABN: 32 004 078 237

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1. INTRODUCTION.....	1
2. PRODUCTIVITY REQUIREMENT FOR AGREEMENT APPROVAL.....	8
3. PROTECTED ACTION BALLOT ORDERS .....	9

## 1. INTRODUCTION

1. The Australian Mines and Metals Association (AMMA) welcomes the opportunity to provide a submission to the Senate Education and Employment Legislation Committee inquiry on the Fair Work Amendment (Bargaining Processes) Bill 2014 (the Bill).
2. The Bill was introduced into the House of Representatives on 27 November 2014 by the Australian Government, further to its pre-election Policy to Improve the Fair Work Laws.<sup>1</sup> The Bill would amend the *Fair Work Act 2009* (the Act).
3. AMMA strongly supports the Bill and the policy principles underpinning the Bill. AMMA considers it is an important piece of legislation which will complement other workplace relations legislation which has been introduced by successive Australian Governments.
4. AMMA is Australia's national employer group representing our resource industry that employs 1.1 million people (either directly or indirectly) and accounts for 18% of economic activity in Australia.<sup>2</sup> Australia's earnings from resources and energy commodities has been projected to increase at an average of 7% per annum from 2013-14 to total \$274 billion in 2018-19.<sup>3</sup> This projection will be challenged by global commodity prices and as noted by the Bureau of Resources and Energy Economics in its most recent Quarterly update, "*investment in Australia's resource and energy sector has been declining in response to a general decline in commodity prices.*"<sup>4</sup>
5. AMMA members throughout the resource industry strongly supports passage of the Bill, which will be a step towards addressing Australia's declining productivity and growing challenges from competing resource exporting countries.
6. The Bill will start to refocus our enterprise bargaining system on productivity and competitiveness, and re-encourage employers and employees to use enterprise bargaining to make operations more viable and competitive, and make jobs more secure and rewarding.
7. The proposed amendments to the Act are proportionate and balanced, and are consistent with the evolution of our system under both Coalition and Labor governments. Whilst the Bill will create some minor regulatory compliance burdens on employees, employers and bargaining representatives when bargaining for an enterprise agreement, this is warranted.
8. These changes, whilst not fundamental or structural, will start to refocus our workplace relations system on productivity, and will, for example, better direct legal protection of industrial action to realistic claims being genuinely pursued. They would

<sup>1</sup> Coalition's Policy to Improve the Fair Work Laws, May 2013.

<sup>2</sup> Reserve Bank of Australia research discussion paper, '*Industry dimensions of the resources boom*', February 2013.

<sup>3</sup> Bureau of Resources and Energy Economics, '*Resources and Energy Quarterly—September Quarter 2014*'.

<sup>4</sup> *Ibid*, p.5.

deliver positive adjustments to the system, which are becoming increasingly urgent in the current economic and labour market climate.

9. The changes will direct workplace parties to better address productivity, within a framework in which mutual fairness remains protected, including new fair protections from manifestly excessive or damaging claims.
10. The measures within the Bill are an important progression of the existing framework to ensure that the focus of enterprise bargaining within the Act meets its current statutory objectives outlined in s.3 of the Act, specifically sub-paragraphs (a) and (f) outlined below:

*“Object of this Act*

*The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:*

*(a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and*

*...*

*(f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and”*

11. It is relevant to note that this Senate inquiry occurs against the backdrop of a recently announced Productivity Commission (PC) inquiry into the workplace relations framework.<sup>5</sup>
12. Former Chair of the Productivity Commission, Gary Banks, commented on the importance of industrial relations policy settings, remarking:<sup>6</sup>

*“Industrial relations regulation is arguably the most crucial [area of regulation] to get right. Whether productivity growth comes from working harder or working ‘smarter’, people in workplaces are central to it”.*

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<sup>5</sup> Joint Media release of 19 December 2014. Information about the inquiry can be found on the Productivity Commission website here: <http://www.pc.gov.au/news-and-media/latest/workplace-relations-framework>.

<sup>6</sup> Gary Banks, ‘Successful Reform: Past Lessons, Future Challenges’, Keynote address to the Annual Forecasting Conference of the Australian Business Economists, Sydney, 8 December 2010.

13. Mr Banks also aptly reminded policy makers and the wider community how important productivity growth is and why it will remain the main driver of ensuring Australia's future prosperity and standards of living:<sup>7</sup>

*"There are essentially only two ways of increasing the per capita income of a society over time — by producing more per person or by getting higher world prices for what is produced. Over the past decade, Australia's failure to do the former has been more than made up for by the latter. Indeed, the decline in our productivity performance and the rise in our terms of trade have been almost equally unprecedented. But no country (not even a Lucky Country) can expect its terms of trade to rise forever. Their recent decline puts the spotlight back on productivity growth as the main conduit for higher incomes into the future. While the labour force participation rate is important, it is to productivity growth that we must primarily look if we are to meet the ongoing challenges of an ageing society (PC 2005). And it is to productivity growth that we must look if we are to succeed in making necessary fiscal repairs in the wake of the Global Financial Crisis, while addressing important social needs. As has been said, a government cannot redistribute what its economy does not produce. Productivity growth is fundamental to this."*

14. Australia's productivity growth is important "because growth in it can generate the higher incomes and government revenues needed to raise living standards and rectify disadvantage."<sup>8</sup>
15. As indicated in the most recent RMIT University research report commissioned for AMMA on the impacts of the Fair Work Act:<sup>9</sup>

*"The issue of labour productivity is of vital importance for the resource industry. For individual businesses and the economy as a whole, it is essential that productivity be as high as possible, particularly in an industry as important to the economy as this one. Improvements in productivity are also the key to non-inflationary growth and securing major project investments in Australia."*

16. Whilst the proposed changes in the Bill may appear modest, given the challenges ahead for the resource industry and Australia, they are a step in the right direction and will ensure, at a minimum, that productivity is at least put on the bargaining table and considered during bargaining negotiations.

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<sup>7</sup> Banks G, Productivity policies: the 'to do' list, p.4 (Speech to the Economic and Social Outlook Conference, 'Securing the Future', Melbourne, 1 November 2012), available here:

[http://www.pc.gov.au/\\_data/assets/pdf\\_file/0009/120312/productivity-policies.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0009/120312/productivity-policies.pdf)

<sup>8</sup> Ibid.

<sup>9</sup> The AMMA Workplace Relations Research Project – A Survey Based Analysis Report 6, A research report prepared by Dr Steven Kates School of Economics, Finance and Marketing RMIT University, August 2013, p.20.

17. The PC has relevantly indicated that the available data suggests a very mixed picture in terms of productivity measures in enterprise agreements:<sup>10</sup>

*"While enterprise agreements can contain clauses that specify commitments to productivity improvement in exchange for improvements in wages and conditions, these are not mandatory. Data provided to the Commission suggest around one third of agreements include some specific productivity measures and around half make general commitments."*
18. According to research conducted by Deakin University for the Australian Human Resources Institute (AHRI) of over 600 AHRI members on the impact of the Fair Work system, the findings on productivity bargaining across a variety of industry and occupational sector has been generally negative.<sup>11</sup> For example, 58.3% of respondents disagreed or strongly disagreed with the statement that "*operating under the Fair Work Act will improve productivity within the organisation over the next three years*", whilst only 10.3% of respondents agreed or strongly agreed with this statement.
19. According to the research, 46.9% of respondents had engaged in bargaining under the *Fair Work Act 2009*. Of those, it appears that only 33% of respondents had indicated that they had "*specific productivity initiatives included in the enterprise agreement*".
20. This research reflects the similar findings by RMIT University on the impact of the Fair Work Act on resource industry employers.
21. AMMA's commissioned research by RMIT University, relevantly found that:<sup>12</sup>
  - a. Three quarters of respondents (75.6%) believed their productivity levels had reduced because of the introduction of the Fair Work system in 2009;
  - b. The vast majority of respondents (87.5%) had not negotiated any productivity offsets as part of their agreements under the Fair Work Act.
22. A number of respondents to that survey-based analysis indicated that the Fair Work Act had a number of negative implications for the ability for productivity improvements to be achieved, with the following comments received from respondents and detailed in the report:<sup>13</sup>

*"Australia is now a high-cost and high IR risk environment. Other countries will now overtake us due to our restrictive and high-cost IR systems. We should benchmark Australia against other countries in terms of cost of productivity and industrial risk/threat to investors."*

<sup>10</sup> PC Issues Paper 3 (January 2015), Workplace Relations Framework: The Bargaining Framework, p.5.

<sup>11</sup> AHRI, Research Report, The Fair Work Act: Its Impact Within Australian Workplaces, January 2012.

<sup>12</sup> The AMMA Workplace Relations Research Project – A Survey Based Analysis Report 6, A research report prepared by Dr Steven Kates School of Economics, Finance and Marketing RMIT University, August 2013.

<sup>13</sup> Ibid.

*"As a nation we have lost our credibility around wages and certainty of productivity. We cannot provide the market with either ..."*

*"Reduce the power of unions to dictate terms to employers. Focus on genuine pay for productivity reforms."*

*"Our low productivity and high labour costs need to be looked at."*

*"[There is an] inability to provide certainty around wages. [There are] major [wage] increases without productivity gains."*

*"Wage escalation, a combative labour environment and declining productivity."*

*"[It is] currently a bit subdued due to the recent quietening down in resources. Generally though [it is] characterised by little appetite for productivity improvements, but an expectation of 5% year-over-year pay increases."*

*"Union willingness to take significant action to obtain well above CPI outcomes for employees already paid well above workers of similar skills in other companies. Union demands for EBA clauses which significantly increase their power and reduce productivity, such as subcontractor and labour hire clauses, union delegates' rights clauses, etc."*

23. The second major concern amongst employers which this Bill attempts to address, are the claims which are made during bargaining and for which protected industrial action can be used as a tool of leverage against companies to accede or capitulate to union logs of claims. The second reading speech to the Bill refers to examples of excessive claims made during bargaining in the resource industry as follows:<sup>14</sup>

*"For example, we've recently seen reports of protected action ballot orders made and protected industrial action threatened in pursuit of claims that would increase the salary package of marine engineers in Port Hedland by around 38 per cent over four years. The reports indicated the claim, which includes an additional month of annual leave, is on top of existing salary packages of between \$280,000 and \$390,000, where employees work 6 months of the year.*

*Similar irresponsible conduct was on show in the case of the MUA's negotiations with marine operators in the offshore oil and gas sector in Western Australia in 2010. These negotiations resulted in 30 per cent wage increases in just under four years with no productivity benefits, following industrial action being taken. Just months following this case, the MUA brought Australian ports to a halt in pursuit of a \$46,000 wage increase for workers already earning over \$100,000 for 185 days work per year."*

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<sup>14</sup> House of Representatives, Second Reading Speech to the Fair Work Amendment (Bargaining Processes) Bill 2014.

24. Below is a case study referred to in AMMA's submission to the Senate Inquiry into the Fair Work Amendment Bill 2014 which demonstrates the types of claims that are being made within the greenfield agreement making context.

**Case study – offshore construction agreement**

A greenfields agreement covering an offshore construction project in the oil and gas industry, which has since been renewed in nearly identical form, would significantly discourage other similar projects going ahead if its provisions were forced to be adopted in other agreements.

The agreement includes the following clauses for workers on a particular offshore vessel:

**Job termination payment** – On completion of work on the project, employees are entitled to a "job termination payment" simply for finishing the job, calculated at 15% of gross earnings for all hours worked, including allowances and training and money paid whilst on approved workers' compensation or income protection leave (but not paid on redundancy or termination pay).

**Termination payment** – This was in addition to the above "job termination payment" and equated to 84 hours' pay.

**Termination bonus** – This was in addition to the above termination payments and equated to 168 hours' pay.

**Redundancy pay** – Upon the completion of the contracted scope of work, employees are paid "redundancy" pay of 268 hours at their appropriate ordinary hourly rate (on top of the termination payments above). This is more than 20 days' pay (assuming a 12-hour working day) simply for completing the designated work for the duration of the contract.

**Flexibility clause** – The agreement allows flexibility around just one part of the agreement - the taking of annual leave – which in an offshore environment in particular is of very limited value to the employer.

**Dispute resolution** – The types of disputes able to be referred to the FWC under this clause are not limited to disputes over the application of the agreement. They also include "individual(s) grievances over management decisions not just limited to clauses of this agreement". The FWC is able to arbitrate on such grievances in the event conciliation fails, meaning the agreement is open-ended to additional costs and imposts. This appears, for example, as the opposite of the closed agreements and no extra claims clauses being contested in relation to workplace arrangements at Toyota.

**Sick leave** – The agreement gives workers 120 hours of sick leave which, if unused during their employment, is paid out upon termination as an "attendance incentive bonus".

**Annual leave** – The agreement provides for six weeks' annual leave.

**Ordinary pay rates** – Ordinary hourly rates for workers on the project, not including other allowances and benefits, range from \$40.25 an hour for a janitor to \$48.20 an hour for a barge welder.

**Travel allowance** – Each employee is paid a travel allowance of \$455.25 each way for all travel to mobilise to and from the work location. Where travel time by another mode of transport is deemed unreasonable compared to flight time, the employee is paid an allowance of \$911.60 each way.

**Shift allowance** – A flat shift allowance applies to all hours worked, calculated at 17.5% of the ordinary rate of pay for the applicable classification.

**Common-use ablutions allowance** – Employees sharing common-use ablutions or accommodation aboard the facility are paid a flat allowance of \$90 a day (this allowance was retained in the subsequent rollover of the agreement despite each bedroom by that stage having its own en suite on a new accommodation facility). The culmination of such terms means that the above-mentioned janitor earns not less than several hundred thousand dollars per year, which is double or triple the average weekly earnings in the resource industry, and exponentially higher than comparable onshore rates for such work in, for example, a CBD office building.

For workers who had been on the project for one year and had not taken any sick leave, the termination payments alone totalled 640 hours' pay (including termination payments, termination bonuses, redundancy pay and untaken sick leave) in addition to the "job termination payment" of 15% on gross earnings. The more time worked, the more such payments would accumulate.

These termination payments were also received by some short-term casual workers who, because they worked on the project beyond one cycle, were deemed to be "permanent". This equated to around an extra \$28,000 each for those workers for a two-week stint on the project, in addition to their ordinary pay and other allowances.

25. Within some parts of the commercial construction industry, the PC relevantly found in its final Public Infrastructure report the following:<sup>15</sup>

<sup>15</sup> Productivity Commission 2014, Public Infrastructure, Inquiry Report No. 71, Canberra, Volume 1, p.31.

- a. There is evidence of potentially excessive powers for some union officials and constraints on workplace flexibility likely to be inimical to productivity;
  - b. Analysis of enterprise bargaining agreements (EBAs) suggest large and inexplicable variations in terms and conditions for employees. For example, there were large wage premiums associated with the construction of desalination plants throughout Australia. This might reflect the urgency with which these projects proceeded (and the resulting bargaining power bestowed on the relevant unions);
  - c. The nature of construction projects provides unions with significant leverage, which they sometimes abuse. Businesses are exposed to large delay penalties, and high costs if construction work is interrupted (such as a concrete pour).
26. Claims made during bargaining that are manifestly excessive or which are inimical to productivity in the enterprise are issues of genuine concern which should be addressed by the Parliament in parallel to the PC Fair Work system inquiry.
27. This is to ensure that during enterprise bargaining negotiations, the taking of protected industrial action by employees, which by definition, is designed to be damaging to the company and innocent third parties, is confined to claims which are a) realistic and open for consideration and b) not contrary to the longer term viability of the enterprises concerned and its workforce.
28. Companies in the resource sector, when faced with the prospect of protected industrial action and little recourse from the Fair Work system, do find themselves in extremely challenging environments.
29. The Bill is a genuine attempt by the Australian Government to ensure that trade unions, who are provided with significant statutory rights and protections, pursue claims on behalf of their members during bargaining which are realistic and sensible. Moreover, bargaining representatives will need to justify those claims to the employer, employees and before the Fair Work Commission, prior to embarking on potentially damaging and crippling industrial action. As the Parliament is granting such significant statutory rights, it is entirely legitimate for the Parliament to impose limitations and conditions on such significant rights. Such policy measures, as contained in the Bill, are supported by the resource industry and should be supported by the Parliament.
30. AMMA has recommended a number of technical amendments to the Bill in the following chapters of this submission.

## 2. PRODUCTIVITY REQUIREMENT FOR AGREEMENT APPROVAL

31. Item 1 of Schedule 1 of the Bill would insert a new s.187(1A) which will require evidence that during bargaining for an agreement, improvements to productivity at the workplace were discussed. According to the explanatory memorandum, the “new approval requirement does not require bargaining parties to agree to productivity terms or to include terms in an agreement about improving productivity”, nor does it modify or delay the current timeframes for agreement approval.<sup>16</sup>
32. Whilst terms such as “workplace” and “productivity” are not defined and therefore take their ordinary meaning, the explanatory memorandum provides for three types of improvements to productivity (in an illustrative and non-exhaustive manner) as follows:<sup>17</sup>
  - a. Elimination of restrictive or inefficient work practices;
  - b. Initiatives to provide employees with greater responsibilities or additional skills directly translating to improved outcomes; and
  - c. Improvements to the design, efficiency and effectiveness of workplace procedures and practices.
33. Whilst AMMA supports this new requirement, AMMA recommends that a minor technical amendment be made which would also require the Fair Work Commission to be satisfied that improvements to productivity were discussed and “genuinely considered.” This would reflect existing good faith bargaining requirements, such as s.228(1)(d) of the Act, such as “giving genuine consideration to the proposals of other bargaining representatives for the agreement ...”.
34. AMMA therefore suggests the following technical amendment be made to item 1, sub-paragraph (1A) as follows:

*Requirement that productivity improvements be discussed during bargaining*

(1A) 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 and **genuinely considered**.

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<sup>16</sup> House of Representatives, Explanatory Memorandum to the Fair Work Amendment (Bargaining Processes) Bill 2014, p.2

<sup>17</sup> Ibid.

### 3. PROTECTED ACTION BALLOT ORDERS

35. The combined effect of items 2 and 3 of Schedule 1 of the Bill would create mandatory and additional factors for the FWC to consider prior to making a protected action ballot order.
36. The explanatory memorandum to the Bill indicates that the factors are derived from principles of a Full bench Fair Work Commission decision of *Total Marine Services Pty Ltd v Maritime Union of Australia* [2009] FWAFB 368.<sup>18</sup> The explanatory memorandum to the Bill indicates that these are a non-exhaustive list of matters for the purposes of considering whether each applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted under existing s.443(1)(b).<sup>19</sup>
37. AMMA supports these amendments and will monitor its implementation.
38. Item 4 of Schedule 1 of the Bill would repeal existing s.443(2) and replace this with a new section which will mandate that the FWC must not make a protected action ballot order in relation to a proposed enterprise agreement if the FWC is satisfied that the bargaining claims of an applicant as follows:
  - (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.
39. AMMA notes that under proposed sub-paragraph (2)(a) (ie. claim or claims are manifestly excessive) appears to be a very high bar to meet. AMMA would be concerned if claims which are objectively assessed as being excessive fall short of meeting the “manifestly excessive” threshold. This should be monitored once implemented to ensure that excessive claims are being captured by these changes.
40. Whilst AMMA supports the balance of the amendments in item 4, AMMA recommends two minor technical amendments be made to item 4. The threshold for an employer to prove that a claim or claims have a “significant” adverse impact may be too high a bar. It should be enough to prove the claims are likely to have a significant or substantive adverse impact on productivity at the workplace. It should also be sufficient to argue before the Fair Work Commission that the claims are likely to have a significant adverse impact, rather than demonstrate that they would have a significant impact.

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<sup>18</sup> House of Representatives, Explanatory Memorandum to the Fair Work Amendment (Bargaining Processes) Bill 2014, p.3.

<sup>19</sup> Ibid.

41. AMMA therefore suggests the following technical amendments be made to Item 5, sub-paragraph 2(b) as follows:

(b) would have **or is likely to have** a significant **or substantive** adverse impact on productivity at the workplace.