



SUMMARY: *FAIR WORK AMENDMENT (BARGAINING PROCESSES) BILL 2014 (CTH)*

Proposed change	Summary of change	Implications for employers
Requests to discuss productivity	<p>Prior to approving a non-greenfields enterprise agreement, the Fair Work Commission will need to be satisfied that productivity improvements at the workplace have been discussed during bargaining for the agreement.</p> <p>Such improvements may include eliminating inefficient work practices, implementing new skills and improvements to the design and efficiency of workplace practices.</p>	<p>The intention of this amendment is to bring productivity to the forefront of enterprise bargaining negotiations, and give employers the opportunity to make bargaining representatives substantiate their claims.</p> <p>Whether this amendment will achieve these aims remains to be seen. However, it is unlikely that this requirement will impose any significant changes to the bargaining process, and it may be that this new requirement is merely an additional step that employers need to address in their Fair Work Commission lodgement documentation.</p>
Raising the threshold for 'genuinely trying to reach agreement'	<p>Before making a protected action ballot order (a precondition being that the applicant has been, and is, 'genuinely trying to reach an agreement'), the Fair Work Commission will need to have regard to all relevant circumstances.</p> <p>As a minimum, the Fair Work Commission will be required to consider the steps taken by the applicant to reach an agreement, the extent to which the applicant has communicated its claims, whether the applicant has given a considered response to proposals by the employer, and the extent to which bargaining has progressed.</p>	<p>Since the commencement of the <i>Fair Work Act 2009</i> (Cth), it has been difficult for employers to oppose applications for a protected action ballot order on the grounds that the applicant has not been, or is not, 'genuinely trying to reach an agreement'.</p> <p>The amendments make it more difficult for applicants to obtain protected action ballot orders, and will provide greater opportunities for employers to challenge these orders. In particular, the changes elevate the importance of a bargaining representative properly articulating claims, considering employers' claims, and giving the negotiation process some time before proceeding down the path of protected industrial action.</p> <p>Preventing the Fair Work Commission from making an order to permit protected industrial action where the claims are 'manifestly excessive' or will have an adverse impact on productivity at the workplace may deter ambit claims, or any other claims which may have a detrimental effect on workplace productivity. This may have the effect of protecting the employer from any premature protected industrial action.</p>
No protected industrial action for 'manifestly excessive' or unproductive claims	<p>The Fair Work Commission will be prevented from making a protected action ballot order if it is satisfied that the applicant's bargaining claims are:</p> <ul style="list-style-type: none">• 'manifestly excessive' having regard to the conditions at the workplace and industry; or• would have a significant adverse impact on productivity at the workplace.	<p>Imposing the 'manifestly excessive' requirement may shift the onus on employers to evaluate claims to determine whether they consider the claims meet this test, and whether it is worth objecting to a protected action ballot order being made. Employers will also need to have regard to prevailing workplace industry standards and accordingly, should be up to date on what other industry participants and employers are doing.</p> <p>If the <i>Fair Work Amendment (Bargaining Processes) Bill 2014</i> (Cth), passes into law, employers will have a greater opportunity to hold employee bargaining representatives to account in relation to their conduct and claims made during bargaining. However, to take advantage of this, employers will need to ensure that it is factored into any bargaining strategy.</p>