WORKERS’ RIGHTS

3. A FAIR BARGAINING SYSTEM

BETTER BARGAINING

1. Congress believes Australian workers deserve a unified national industrial relations system in which they all have equal access to collective organisation and collective bargaining about matters that are important to them in their working lives.

2. All workers deserve access to an independent umpire that can resolve disputes in accordance with equity, good conscience and the substantial merits of the case.

3. Congress rejects the notion that workers should be subject to any prejudice in bargaining merely because of the industry in which they work, the level at which they choose to bargain or the economic power of their employer. Congress calls for the abolition of the Fair Work Building Commission, and any regulatory body or procurement guidelines which limit the rights workers have under the Fair Work Act.

4. Congress will lobby Federal and State governments to work together to amend the Fair Work Act and State referral legislation to expressly permit the federal system, including the Fair Work Commission, to deal with all public sector employment matters that State governments have argued are subject to constitutional limitations, such as job security and staffing levels.

5. Congress believes that all agreements must meet a genuine ‘better off overall test’.

CHOICE OF PARTIES TO AGREEMENTS

6. Consistent with the principle that parties should be free to determine the level at which they bargain, bargaining for multiple employer agreements and multi-agency public sector agreements should involve the same rights, processes and facilitation from the Fair Work Commission as applied to single employer agreements in all cases where:

   a) there is agreement to bargain by the employers or government concerned; or
b) there is majority support from their collective workforce; subject only to a simple ‘public interest’ test.

FAIR FLEXIBILITY

7. Whilst bargaining can deliver agreed flexibilities to workers and employers, this must not undermine the collective nature of any agreement reached or undercut basic safety net provisions.

8. Congress calls for the Fair Work Act to be maintained and improved to ensure that:

a) it continues to contain clear prohibitions on individual employers or employees opting out of a collective agreement;

b) collective agreements continue not to be permitted to cover only one employee; and

c) enterprise agreements are not able to be made with a small number of employees prior to the engagement of the rest of the workforce.

9. Congress regards the use of Individual Flexibility Clauses as inappropriate and affirms the 2009 Congress Policy on Individual Flexibility Clauses.

BETTER SUPPORT, CERTAINTY AND PARTICIPATION

10. Congress notes that workers must be free to appoint their bargaining representatives. Affiliates are committed to working co-operatively in single bargaining units that represent the collective interests of employees.

11. To ensure equal access to collective bargaining for all workers, Congress calls for amendments to competition and consumer legislation to permit unrestricted union representation for independent contractors.

12. Congress affirms that in any bargaining process, workers have a right to be informed and represented and advocates that:

a) The requirement for genuine agreement creates a practical obligation to provide all relevant information related to bargaining and the agreement in a format which will be accessible and understood by all workers, including the NES;

b) Where the workforce to be covered by the agreement comprises of one third or more of short or long term visa holders, the employer must facilitate for the workers to meet and confer with a representative from the relevant union within 14 days of the notification time for the agreement;

c) Where the number or identity of the workforce changes significantly within one year of a non-greenfields agreement being approved, the workers, upon demonstrating
majority support, should be able to bring forward the nominal expiry date of the agreement.

GOOD FAITH BARGAINING

13. Congress believes that the statutory good faith bargaining obligations should be seen as constituting substantive and not merely procedural obligations. The legislation should make clear that a party is not acting consistently with good faith bargaining obligations if the intention is to simply avoid the making of a collective agreement, regardless of its terms.

14. Congress believes that clear rules of conduct are essential to the proper operation of a good faith bargaining system and calls for a more detailed statement of desirable bargaining conduct which reflects the substantive obligations of parties.

15. Congress will lobby to strengthen the bargaining provisions of the Fair Work Act, including:
   a) requiring employers to facilitate meetings of workers and union representatives nominated by the relevant union in paid time within 14 days of the notification time for the agreement;
   b) requiring employers to disclose relevant and material information, including internal accounts, budgets and forecasts, to bargaining parties in a timely manner, while ensuring genuinely confidential information is treated appropriately;
   c) requiring the principal decision maker of the employer or a direct delegated representative to participate in the bargaining process;
   d) prohibiting employers from submitting an agreement to a vote until the bargaining representatives are agreed on a course or bargaining is at an impasse;
   e) promotion of the expectation that bargaining parties should reach an agreement unless there are genuine reasons based on reasonable grounds not to do so;
   f) the need for restorative and effective legal remedies against bad faith conduct, including non-compliance as a basis for objection to the approval of an agreement and good faith bargaining orders;
   g) orders should be available to ensure that unions are able to contact and communicate with workers on sites;
   h) orders should be available to ensure that unions can hold paid meetings with workers during work time over the course of the bargain.

16. Congress notes in particular the systemic failure in the operation and proper application of the good faith bargaining framework and the inadequacy of existing mechanisms to provide for arbitration when employers refuse to enter into a collective agreement.
17. The current legislation allows large employers who are able to create significant damage to the Australian economy or an important part of it to access arbitration to resolve a dispute about bargaining, at the significant disadvantage of workers in smaller enterprises or with little bargaining power.

18. Congress advocates that the Fair Work Commission should be empowered to adopt an expansive approach to pro-actively facilitate bargaining parties in reaching agreement.

19. Where appropriate, the Fair Work Commission should initiate a form of supervised negotiation process and arbitration should be available where parties are assessed to be on a trajectory towards an intractable dispute, particularly where a party surface bargains or refuses to negotiate a collective agreement. Where parties are seeking their first agreement there should be more liberal access to arbitration conducted by the Fair Work Commission.

20. Congress recognises that public and government employees may require specific solutions to deal with intransigent employers and calls for the FW Act to be amended to provide access to arbitration in public sector bargaining.

**PROTECTING ENTERPRISE AGREEMENTS**

21. Congress notes the decision in *Aurizon Operations Limited; Aurizon Network Pty Ltd; Australian Eastern Railroad Pty Ltd* [2015] RWCFB 540 terminating 12 enterprise agreements covering over 6,000 QLD workers.

22. Congress is concerned by the Full Bench’s interpretation of s226 of the *Fair Work Act* which allows enterprise agreements to be terminated where to do so is not contrary to the public interest”.

23. Congress condemns the interpretation of s226 by the Full Bench, including its reasoning that (a) collective bargaining is not a central object of the Act and (b) that it will be in the interest of employees and the employer if the business can enhance its competitive position...and compete more effectively for market opportunities” regardless of the employer’s existing profits, market share and competitiveness during the life of the agreements.

24. Congress notes that the employer involved in this decision earned $300 million in the 2013/14 financial year and held 70-75% market share while the agreements were in force.

25. Enterprise agreements allow employees and employers the freedom to make a judgement on the matters they seek to advance with reference to the needs and circumstances of an enterprise at the time. The sanctity of such agreements, nominally expired or otherwise must be protected in all but the most limited of circumstances.

26. Congress believes that this interpretation of s226 will provide a disincentive for employers to negotiate in good faith – by providing a mechanism for employers to drag out
negotiations, apply to terminate nominally expired agreements, force workers down to the relevant award, and renegotiating terms up from award rates and conditions.

27. Congress commits to pursue changes to the Fair Work Act to ensure that s226 can only be applied in very limited circumstances and not in any circumstances where bargaining is underway or is sought.

28. Congress affirms the need for good faith bargaining processes to apply equally to ‘greenfields’ agreements. Congress rejects assertions that there is a need for unique provisions for Greenfield sites, which are not supported by evidence. Rather, Congress supports parties to Greenfield bargaining having access to the range of dispute resolution facilities provided by the Fair Work Commission. Arbitration on the merits of the case should be available in the case of an intractable Greenfields dispute, with determinations having regard to conditions on applicable projects of similar scale and nature.