Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020

ACTU Submission

ACTU Submission, 5 February 2021

ACTU D. No 01/2021

ACTU
australian council of trade unions

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1 Executive Summary

Since its formation in 1927, the ACTU has been the peak trade union body in Australia. There is no other national confederation representing unions. For over 90 years, the ACTU has played the leading role in advocating for the improvement of employment conditions of employees.

The ACTU consists of affiliated unions and State and regional trades and labour councils. There are currently 39 ACTU affiliates. They have approximately 1.8 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

The ACTU believes that the Fair Work Amendment (Supporting Australia's Economic Recovery) Bill 2020 should be rejected by Parliament unless it can be substantially amended to ensure there are no cuts to workers pay, conditions and rights, and working people's jobs are more secure.

This Bill, if enacted will cut the wages, conditions and rights of Australian workers. Working people have either been the essential workers supporting the country during the pandemic or have already suffered the most from the economic impacts of Covid19. Punishing them with cuts to their rights should not be acceptable to this Parliament.

There are three key arguments that underpin the ACTU's view on this Bill:

1. **The Bill takes rights off Australian workers. Parliament should not be supporting laws that take rights off workers leaving them worse off.**

Key elements of the Bill that are most concerning for the ACTU:

a. Award provisions are cut – not just 12 awards but every award is in scope
b. The casual provisions will allow employers to casualise what are today, permanent jobs. There is no real offer for casual conversion. It removes rights for workers who have been wrongly classified to recover their entitlements.
c. The part time provisions will remove predictable hours and pay from workers making it harder for those with family responsibilities.
d. The changes to the bargaining system fundamentally shift more power to employers at a time of record low wage growth and allow cuts to pay, conditions and rights.
e. New Greenfield Agreements hands power to multinationals to determine the rights of Australian workers, giving workers no say regarding their working conditions and no

means to resolve workplace disputes on projects that are high risk in terms of workplace safety. They will create a new class of workers with fewer rights.

f. New provisions related to wage theft that propose to criminalise this behaviour, actually displace superior state-based laws, and set the bar so high for criminalisation that it is unlikely to ever be applied.

g. The Bill extends JobKeeper IR emergency provisions past the end of JobKeeper payments.

It excludes or removes workers ability to access quick and straightforward access to justice by denying them access to Fair Work Commission arbitration putting an independent umpire and enforcement options out of reach for most working people.

2. This Bill will hurt, not help economic recovery.

- There is no evidence that the provisions set out in the Bill are needed or required to sustain our recovery.
- No evidence that the proposed changes will create one job.
- The key to economic recovery is wages growth and certainty. The measures in this bill are all about keeping downward pressure on wages and keeping jobs insecure.
- Working people in casual jobs have less confidence to spend. Household spending is key to our economic recovery.
- Australia's working people sacrificed the most and have paid the highest price as a result of the pandemic. Over 900,000 are unemployed and 1.1 million are underemployed, many have exhausted their sick leave, annual leave and long service leave. 3.3 million people have raided their superannuation account with thousands of young people reducing their balances to zero. This has happened while corporate profits have continued to grow, and Australia's richest people have become richer.

3. This Bill undermines fairness and delivers ongoing insecurity, not flexibility.

- The 2020 COVID responses proved the current system is extremely flexible – flexible enough to make rapid changes that were necessary as well as fair. Australian workers and their unions worked rapidly with employers to make temporary changes to awards across whole industries to cope with shutdowns, social distancing rules, reduced hours and working from home.
- By weakening protections, the Bill ignores the lessons of the pandemic which demonstrated the risks to everyone when one class of workers was left exposed and vulnerable and lost their jobs overnight.

- The Bill does not address Australia's most pressing labour market problem - the extent to which jobs are casual and insecure. Over half a million casuals lost their jobs at the outset of the pandemic and 60% of new jobs created since May 2020 have been casual. The Government's changes will not help solve this problem – it will make it easier for employers to casualise permanent jobs and pay workers less than the award safety net. The Bill shifts more power to employers which will exacerbate inequality, low wage growth and job insecurity. The current laws have overseen record low wage growth and record high job insecurity. Instead of remedying them to rebalance the system, the Bill will make these three serious issues worse.

The Detail

Casual workers – more jobs will be casualised

- The Bill will result in fewer permanent jobs with rights, increasing the casualisation of the workforce.
- The casual conversion provisions of the Bill are essentially meaningless, an employer is not bound to offer a regular casual a permanent job if they do not think it would be reasonable to do so and the same employer can veto a workers right to have the Fair Work Commission consider if their decision was fair.
- The Bill allows employers to call a worker "casual" even if the job is not casual, stripping them of entitlements such as sick leave.
- The Bill retrospectively strips misclassified "casuals" of their right to leave entitlements

Awards – will be varied to cut the pay, conditions, and rights of working people.

Part time work casualised

- The Bill will cut the rights and take-home pay of part time workers.
- The Bill effectively will turn part time workers into casuals, putting enormous pressure on them to accept extra hours, with little notice and no overtime.
- The Bill will in particular disadvantage workers with family responsibilities who need predictable and secure hours.
- These cuts can be imposed on any part time worker under any award by regulation.

Unreasonable Flexible work directives

- The Bill provides a two-year extension of JobKeeper-style 'flexible work directions' for duties and location of work without JobKeeper payments and without the key protections that came with JobKeeper which the parliament supported in 2020.

- Unlike JobKeeper, the employer will not need to satisfy a turnover test but simply needs to believe it necessary to give a directive to 'assist in the revival of an enterprise'.

A workers right to stop an employer issuing unreasonable directions is removed by the stripping the power of the Fair Work Commission to arbitrate disputes.

Enterprise Bargaining – Agreements can cut pay and employers are given significantly more bargaining power

Flawed enterprise agreements

- The Bill will cut bargaining rights and protections for workers whose pay and conditions are covered by agreements.
- The Bill's provisions will mean that working people can no longer have confidence that an agreement will mean they are better off.
- The Bill will undermine the critical function of the independent umpire, the Fair Work Commission to ensure agreements are fair and leave workers better off. This will have the biggest impact for workers who are not represented and so need this protection the most.
- The Bill allows for the making of agreements that are below the safety net, cutting wages and creating unfair competition.
- The Bill proposes radical changes to enterprise agreement making a fundamental change to the purpose of these agreements from a means to share productivity improvements and increase wages to become a vehicle for employers to escape the safety net and reduce employee rights, pay, and entitlements.

Failing the Better Off Overall Test

- The Bill fundamentally undermines and weakens the Better off Overall Test.
- The reduction and removal of employee protections is at its starkest with a proposal to allow a new, wide exemption (for 2 years) allowing the FWC to approve agreements that do not pass the BOOT if 'appropriate in all the circumstances' and 'not contrary to the public interest'. Once approved, these agreements which have a nominal term of up to two years remain in force until replaced or terminated.

When considered as a package, the proposed amendments to agreement making fundamentally weaken the current (albeit inadequate) protections for workers:

- Workers will be notified bargaining has started and they have a right to be represented a month after bargaining starts, putting workers behind the eight ball from the start.
- Workers are stripped of the right to a comprehensive explanation of an agreement they are asked to vote on.
- Workers from culturally and linguistically diverse backgrounds, young employees or workers who are not represented in bargaining will no longer be guaranteed an appropriate explanation of a proposed agreement.
- The Fair Work Commission will have less time and power to ensure an agreement was genuinely agreed to and leaves workers better off.
- Agreements that exclude or misrepresent the National Employment Standards can be approved.
- Unions will no longer be able to play a role in assisting the Fair Work Commission ensuring an agreement is fair if they were excluded from bargaining.

Greenfields Agreements – Handing power to multinationals over Australian workers

- The Bill creates a new form of agreement making that only applies to major projects where big corporations can impose wages and conditions on their workforce, cutting Australian workers out of any say over their wages and working conditions.
- This provides fewer rights for workers on such projects than any other Australian worker.
- Major construction projects which usually involve a FIFO workforce have been beset with issues bought about by the inability to the workforce to resolve such issues as reasonable rosters and accommodation leading to high rates of suicide amongst the workforce.
- For example, on the Inpex project 13 workers took their own lives because of the working conditions. FIFO workers need a strong voice and deserve the same rights as other workers.
- The threshold for a "major project" is so low it could apply to a CBD office building or a hospital creating widespread, deeply unfair arrangements where the workforce has no right to negotiate their wages and working conditions. This will strip tens of thousands of workers of this fundamental right.

Wage Theft and Complying with the law

- The Bill will over-ride strong wage theft laws in Victoria and Queensland taking rights and protections off workers in these states.
- The Bill makes it harder for unions and individuals to take employers who underpay their workers to court by removing an important avenue to recover the costs involved.
- In conciliation talks the Fair Work Commission is prevented from making a recommendation that could guide people to a fast, effective outcome.

Conclusion

The ACTU submission lays out the elements of the proposed legislation that do the opposite of the Bill's name – it attacks fairness and does not support Australia's economic recovery.

- In its current form the Fair Work Amendment (Supporting Australia's Economic Recovery) Bill represents a failure to respect and protect the interests of the essential workers who have carried Australia through the crisis of the Covid-19 pandemic.
- The Bill does not create new jobs. The Bill will lead to reductions in workers' rights. Cuts in employment rights and pay represents a danger to our fragile recovery. You can't fix the economy by hurting workers.
- The Bill will entrench and worsen casualisation and insecure work. This is the biggest problem faced by working people and this Bill will actually make things worse by swinging the pendulum further towards employers.
- Because the Bill fails these tests it should be fixed or rejected. The Committee is urged to reject it in its current form. The Bill requires substantial changes before it would meet the test of no cuts to workers pay, conditions and rights, and working people's jobs are more secure.

2 Introduction

2.1 The Fair Work Amendment (Supporting Australia's Economic Recovery) Bill 2020

1. The introduction of *the Fair Work Amendment (Supporting Australia's Economic Recovery) Bill 2020* (Amending Act) comes at a time that has seen ordinary working Australians stretched to their limits. Workers have borne the brunt of the pandemic; many have been stood down or have lost work altogether; others have had no option but to exhaust leave balances or withdraw from their Superannuation – risking their retirement security. Those

who continued to be employed faced greater working pressures than ever before and many worked tirelessly to support their communities throughout the COVID-19 pandemic.

2. The pandemic has fundamentally changed what we mean when we say "essential worker" - a term we now know includes retail, hospitality, cleaning, transport and food delivery workers as well as healthcare and aged-care workers.

3. To not only abandon these workers now, but worse yet to reduce their conditions of employment is perverse. Yet, as we detail in this submission, this is exactly what the Amending Act will do.

4. The provisions of the Amending Act, if passed: will make jobs less secure; will allow employers to rush through enterprise agreements that undercut the safety net with lesser scrutiny; will lock some workers out of enterprise bargaining for unacceptably long periods; unilaterally reduces rights for workers in Australia; and will replace more effective criminal sanctions against wage theft with less effective ones.

5. The ACTU makes the following submissions in relation to the Amending Act. For convenience, our submission is divided to address each schedule of *the* Amending Act individually.

6. Notwithstanding the way in which we have divided this submission, we must state from the outset that we recognise these proposed changes as an interlocking set. Both individual components and the sum total of the proposed changes will leave workers worse-off and will in particular have a significantly negative effect on those workers whom we have relied on to deliver us through the COVID-19 pandemic. Women and young people in particular will be adversely affected. This is simply unacceptable.

7. Among the many ways in which workers will be worse of if these proposals become law are:

   - Workers who are mislabelled as casuals despite for all intents and purposes being permanent workers, will lose their rights of redress.

   - Part-time workers will lose overtime payments and will no longer be given predictable working hours (which many rely on for work/life balance).

   - Employers in states where wage theft is already criminalised will be able to get away more easily under this law, which will override those superior state schemes that are already in effect. Reducing the consequences of engaging in wage theft is a severely damaging retrograde step which will see an increase in stolen wages.

   - Workers will see their working conditions eroded – even below the legal safety net – by changes to enterprise bargaining agreement rules.

- Employers will be given significantly more power when enterprise bargaining.
- Some workers on greenfields agreements may be locked out of enterprise bargaining for up to 8 years.

3 Schedule 1 - Casual Employment

8. The COVID-19 pandemic has demonstrated how the pervasiveness of casual and other forms of insecure work affect not just our economy but our community's health and safety. The biggest problem facing working people as exposed by the pandemic, is the unacceptably high number of casual, insecure jobs. Over half a million casuals lost their jobs in the first wave of the pandemic. The vulnerability of casual workers was the weakest link in our battle to stop the spread of the virus.

9. The simplest exposure of this is that so many Australian workers who either contracted the virus or who needed to self-isolate pending test results did not have the right to be absent from the workplace without loss of pay. This access to paid leave of absence proved crucial in halting the spread of COVID-19 in the early stages.

10. The Victorian COVID-19 Hotel Quarantine Inquiry Final Report found that:[1]

> As an industry, casually employed security guards were particularly vulnerable because of their lack of job security, lack of appropriate training and knowledge in safety and workplace rights, and their susceptibility to an imbalance of power resulting from the need to source and maintain work.
>
> A fully salaried, highly structured workforce with a strong industrial focus on workplace safety, such as Victoria Police, would have been a more appropriate cohort, which would have minimised the risk of outbreaks occurring and made contact tracing an easier job in the wake of an outbreak.

11. The Independent Review of the Response to the North-West Tasmania COVID-19 Outbreak found that working across multiple employers and locations, a feature of a casualised workforce, contributed to the North-West Tasmanian COVID-19 outbreak.[2]

[1] *Final Report of The COVID-19 Hotel Quarantine Inquiry*, 6 November 2020,<https://content.royalcommission.vic.gov.au/sites/default/files/2020-12/0387_RC_Covid-19%20Final%20Report_Volume%202_Intro%20Pages_Digital.pdf> 23

[2] Greg Melick, 30 November 2020, *Independent Review: Response to the North-West COVID-19 Outbreak* <http://www.dpac.tas.gov.au/__data/assets/pdf_file/0004/564853/Report_-_North-West_Outbreak.pdf>, 87

12. It is unsurprising, therefore, that significant outbreaks of COVID-19 occurred within industries such as aged care and meat processing – both of which have highly casualised workforces.

13. What is more confronting is that the casualisation and insecurity of work is not accidental, natural or organic – it is the result of deliberate policy decisions which over a sustained period have reduced working conditions for vulnerable workers. Prior to the pandemic Australia had among the highest proportions of insecure work in the OECD.[3] This insecurity has been a driving factor in our low wage growth crisis that has now extended into an eighth year. The combination of high levels of insecure work and low wage growth has been revealed in the falling share of wages in output. It has failed to alleviate the burden of poverty and uncertainty faced by the lower paid. It has put a brake on productivity growth in Australia. It has left the economy with persistently underutilized capacity with high rates of unemployment and underemployment. Economic growth was sluggish even before the pandemic, held back by inadequate spending. Casual employees have less job security, fewer rights at work, usually lower pay than their permanent counterparts, and less predictability and certainty of working hours and income. Converting a permanent job into a casual one robs that worker of time spent with family; it robs them of higher pay, it robs them of the job security that allows workers the bargaining power to pursue better working conditions. Casualising what should be permanent jobs fundamentally swings the pendulum towards employers, further exacerbating the lack of fairness and balance in the system.

14. A recent study by Professor David Peetz found that:[4]

> A majority [of casual employees] have no guaranteed minimum hours. A majority cannot choose the days on which they work. Only around half of them knowingly receive the casual loading. And all of them, by definition, have no annual or sick leave.
>
> ...
>
> The implicit threat of having their hours cut, or being dismissed, enhances the potential power of the employer to exercise discipline. So 'casual' employment

[3] Nassim Khadem, 'Australia has a high rate of casual work and many jobs face automation threats: OECD', *ABC News* (online, 25 April 2019) <https://www.abc.net.au/news/2019-04-25/australia-sees-increase-in-casual-workers-ai-job-threats/11043772>

[4] David Peetz, 'What do the data on casuals really mean?' (27 November 2020), Centre for Work, Organisation and Wellbeing, Griffith University <https://www.griffith.edu.au/__data/assets/pdf_file/0024/1212675/What-do-the-data-on-casuals-really-mean-v5.pdf>, 22-3

reduces employee power and reduces employee entitlements (often without any offsetting 'loading') under the guise of providing necessary flexibility.

15. Prof. Peetz found that rather than being characterised by mutually beneficial flexibility, many of these jobs are not casual, but casualised. He describes them as "permanently insecure".[5]

16. The proposed provisions in the Amending Act Schedule 1 will, if passed, further reduce the rights of casual workers.

17. The proposed provisions will do this by setting a statutory definition of casual employment which overrides years of carefully considered judicial reasoning.[6] This statutory definition will extinguish the rights of workers who have been wrongly labelled as casuals to seek to enforce their true rights. Further reducing the rights of workers are the proposed provisions in relation to set off, which again overturns judicial precedent and extinguishes the rights of workers misclassified as casuals and who have been wrongly denied access to NES enshrined accrued leave. Worse yet, these changes will facilitate the casualisation of jobs that should be permanent and secure.

18. The provisions of the Amending Act Schedule 1, particularly those relating to the definition of casual employment and set off, fail the test set by working people. The provisions will not lead to a reduction of insecure work but will instead enable it. The provisions will strip the rights of misclassified casual employees to seek redress according to the current and well-established common law principles.

19. It is a massive disservice to those workers who got us through 2020 that there is even contemplation of further reducing the rights that they have.

3.1 Defining Casual Employment

20. The ACTU supports a statutory definition of casual employment which is reflective of the common law. This means there should be a definition that looks to the objective circumstances of the employment relationship to determine its nature.

21. The current common law position does not arise suddenly in respect of a couple of recent cases but has instead been affirmed over time.

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[5] David Peetz, 'What do the data on casuals really mean?' (27 November 2020), Centre for Work, Organisation and Wellbeing, Griffith University <https://www.griffith.edu.au/__data/assets/pdf_file/0024/1212675/What-do-the-data-on-casuals-really-mean-v5.pdf>, p 23

[6] See, for example, *Hamzy v Tricon International Restaurants trading as KFC* [2001] FCA 1589 at [38], *MacMahon Mining Services Pty Ltd v Williams* [2010] FCA 1321, *WorkPac Pty Ltd v Skene* [2018] FCAFC 131, *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84.

22. In *Hamzy v Tricon*, a 2001 case, the Federal Court held that:[7]

> The essence of casualness is the absence of a firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work.

23. In *Rossato,* Bromberg J observed:[8]

> It was accepted that in *Skene*, a Full Court of this Court (Tracey, Bromberg and Rangiah JJ) correctly determined that a casual employee is an employee who has no firm advance commitment from her or his employer to continuing and indefinite work according to an agreed pattern of work ("firm advance commitment")

24. By the time of Rossato, Bromberg J was able to observe (in relation to that case) that:[9]

> At the level of principle, and although the meaning of "casual employee" was not in contest, how the existence or absence of a firm advance commitment is to be assessed was at the heart of the contest between WorkPac and Mr Rossato.

25. Employer associations have mounted a misleading scare campaign about the potential cost of rectifying employment relationships which have been mislabelled as casual.

26. The estimates are alarmist. They simplistically and incorrectly rely on ABS data about employees without paid leave entitlements who have been with the same employer for more than one year and seek to extrapolate that number to represent the number of mislabelled casuals. In truth, the vast majority of casual employment relationships are undisturbed by recent legal cases.

27. To the extent that uncertainty remains despite decades of consistent court decisions on the question of casual employment, a statutory remedy must be both clear and simple and grounded in the established law. The definition proposed by the Bill fails to do this in every aspect. Rather, it involves layers of complexity and swings the pendulum too far towards employers by giving them the power to casualise what are in effect permanent jobs.

28. The Amending Act Schedule 1 will insert section 15A into the *Fair Work Act 2009* (Cth) (**FW Act**), which will define casual employment as follows:

> 1) A person is a casual employee of an employer if:

[7] *Hamzy v Tricon International Restaurants trading as KFC* [2001] FCA 1589 at [38]
[8] *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 at [31]
[9] *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 at [37]

a) an offer of employment made by the employer to the person is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person; and

b) the person accepts the offer on that basis; and

c) the person is an employee as a result of that acceptance.

29. This definition (and its retrospective application) will strip the rights of redress of workers who are currently mislabelled as casual employees. By locating the examination of whether or not there is a firm advance commitment within the prism of contractual offer and acceptance, the legislation will assist those employers who draw down on the benefits of a permanent workforce but instead label their employees as casual.

30. An assumption that insecure workers and enterprises are equal contractual negotiating partners is misplaced and does not provide a sound basis for a statutory provision in this area. The reality is that most employment contracts for insecure work are offered on a take-it-or-leave-it-basis in a market which heavily favours the seller. Employers have overwhelmingly greater bargaining power than unemployed workers. This is exacerbated by the alarming rises we have seen in unemployment in the wake of the COVID-19 pandemic.

31. Of further concern are the temporally and substantively limited indicia by which the existence of a firm advance commitment may be ascertained under the proposed legislation. Under this proposed legislation, the well-established considerations that have guided courts in the past (detailed in the following paragraphs) will no longer be features of their decision making, replaced instead by a highly constrained list of the only matters able to be taken into account.

32. The constraints placed on judicial enquiry by this legislation will only serve to further the unfair outcomes that result from unequal bargaining power between employers and insecure workers. This legislation will allow employers to escape having to provide fair entitlements to workers whom they deliberately label as casuals in employment contracts, but then use as permanent employees.

33. It is well-accepted that in interpreting employment contracts, regard may be had to surrounding circumstances, including post-contractual conduct.

34. In the 2001 case of *Hollis v Vabu*, the High Court observed:[10]

> It should be added that the relationship between the parties, for the purposes of this litigation, is to be found not merely from these contractual terms. The system which was operated thereunder, and the work practices imposed by Vabu go to establishing 'the totality of the relationship' between the parties; it is this which is to be considered.

35. In the 2013 case of *Ace Insurance Ltd v Trifunovksi*, Buchanan J observed:[11]

> …it now seems established in Australian law that all the circumstances should be taken into account.

36. In *Williams v MacMahon Mining Services*, Barker J upheld a finding that a contractual definition of a worker was not determinative of the issue, and that regard should be had to other factors indicative of the true nature of the employment.[12] Citing *Tricord*, Barker J held:[13]

> To the extent that the parties by the Contract described their relationship as employer and "casual employee" it is well understood that the descriptions supplied by such an instrument will not override the true legal relationship that arises from a full consideration of the circumstances

37. The proposed definition, and the way in which it limits the enquiry as to whether a firm advance commitment exists not only strips away the rights of workers who are historically and currently mislabelled as casual employees; it also allows for employers, through careful drafting of employment contracts – which they may offer on a "take-it-or-leave-it" basis – to engage workers in the future as casuals even though they might otherwise have been required to recognise the existence of a permanent employment relationship at the outset. The proposed definition does this in a number of ways.

38. By limiting the enquiry as to whether there is a firm advance commitment so as to exclude post-contractual conduct, a court would now be obliged to entirely ignore how the parties have conducted themselves during the employment relationship. This feature of the proposed definition goes entirely against the grain of the developed common law.

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[10] *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at [24]

[11] ACE Insurance Ltd v Trifunovski (2013) 209 FCR 146 at [107]

[12] *Williams v MacMahon Mining Services Pty Ltd* [2010] FCA 1321

[13] *Williams v MacMahon Mining Services Pty Ltd* [2010] FCA 1321 at [38] citing *Personnel Contracting Pty Ltd t/as Tricord Personnel v The Construction, Forestry, Mining and Energy Union of Workers* [2004] WASCA 312 at [24]-[25]

39. In determining the nature of an employment relationship, courts have typically looked to the factual surroundings and conduct of the employment relationship to ascertain whether they shed light on what was agreed to, or whether they disclose a change in the relationship over time. It makes reasonable sense to examine conduct with a view to ascertaining what was really agreed to. The proposed definition would entirely exclude this line of enquiry.

40. The proposed definition also appears to give an unwarranted level of primacy to the description of the relationship in the employment contract. This again runs contrary to the principles within the common law. For example, when interpreting whether-or-not an employment relationship (as opposed to a contract for service) exists, courts have looked beyond the description of the relationship within the express terms of the contract and into its reality.[14]

41. That the proposed definition explicitly rules out the sufficiency of a regular pattern of hours as showing a permanent employment relationship is a further erosion of the rights of workers.[15] While this factor alone may not at all times be enough to show that a worker is permanent, it should be open to a court to consider that on some occasions it is.

42. As it stands under the proposed definition, an employer could: engage a worker; label them as a casual; have them work a regular pattern of hours; and not actually pay a casual loading; but still mount a defence against a claim that the worker was in fact a permanent employee.

Case Study: Skene and Rossato

Paul Skene was a mine worker. He was employed by Workpac, a labour-hire company, who labelled him as a casual.

Skene worked first at Anglo Dawson mine and then for a longer period as a FIFO Haul Truck Operator at the Clermont Mine. His total period of employment with Workpac was in the order of 2.5 years.

Whilst employed as a FIFO Operator, Skene was subject to the mine operator's supervision and rosters which were set 12 months in advance. He worked 12.5 hour shifts - 7 days on, 7 days off - on a continual basis, lived in the company camp and was flown to and from the mine at the employer's expense. He was paid weekly and filled in a weekly time sheet.

[14] *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* [2011] FCA 366; *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (1997) 37 ATR 528 [(1997) 97 ATC 5070]

[15] s 15A (3)

Everything about Mr Skene's employment, including the fact that he didn't receive a separately identifiable casual loading, suggested that he was a permanent employee, and the Full Federal Court appropriately found that to be the case.

Having challenged Mr Skene all the way to the Full Federal Court, Workpac decided not to appeal the decision further. Instead, a separate claim was subsequently lodged in the courts involving a Mr Rossato.

A number of interesting features defined the litigation process in *Rossato*, including:

1. The proceedings were commenced by Workpac (as opposed to the worker) after Mr Rossato made a claim for entitlements as a full-time employee relying on the Skene decision.
2. Workpac paid Mr Rossato's legal costs.
3. The factual scenario, whilst not identical, was remarkably similar to that arising in *Skene.*
4. The proceedings were referred directly to the Full Federal Court for hearing.

Mr Rossato worked for Workpac from 2014 to 2018, with Workpac supplying his labour to Glencore companies at two Queensland coal mine sites. Mr Rossato was employed under six consecutive contracts during this period. He worked as directed by Glencore alongside full-time Glencore employees who did the same work and on the same regular shift roster as those employees. His work was pre-programmed well in advance. An enterprise agreement applied to his employment. Mr Rossato was paid a flat hourly rate of pay under the six contracts. The Full Federal Court found that Mr Rossato, despite being labelled as a casual, was in fact a permanent employee. Workpac have now appealed to the High Court to overturn the decision.

From the nature of the industry they work in, to their specific circumstances, it is clear that Mr Skene and Mr Rossato are far from being archetypical of workers employed under casual employment contracts. As the facts in these examples show, Mr Skene and Mr Rossato worked rosters that were – consistent with the practice in their particular industry - programmed well in advance. Their situation doesn't compare to someone working in, for example, hospitality or retail who picks up shifts on an *ad hoc* basis.

The Skene and Rossato cases show that legislating a pro-employer definition of casuals at this time is unjustified for two reasons:

1. The *Rossato* case is currently before the High Court, who should be allowed to consider and ultimately determine the matter based on the existing and well-developed body of law that already exists.
2. The policy justification cited in support of legislating a pro-employer definition of casual employment – that there is an impending wave of casuals who will make claims against their employers following the *Rossato* decision – simply falls away on a proper understanding of what made Mr Skene and Mr Rossato permanent workers, and how those characteristics will not be found in genuine casual employees.

3.2 Set off

43. A distinction was made in *Rossato*, and cases before it, between (on the one hand) compensation in lieu of an entitlement such as leave and (on the other hand) the actual provision of rest and recreation or the ability to care for family that flows from the rightful acknowledgement of a permanent employment relationship.[16]

44. The principle that statutory minima cannot be contracted out of has been well established since at least the early 20th century:[17]

> ...although the employer and the employee have gone on for a long time the one paying and the other receiving what each honestly believes to be the proper rate of wages, nevertheless if it is afterwards found that the wages paid are less than those fixed by the award, the right of the employee to receive the wages so fixed has accrued.

45. The common law position on set off has developed over an extensive period, in light of the above principle. In the 1967 case of *Ray v Radano,* Sheldon J held:[18]

> The employer cannot allocate to one subject matter what he has already paid in pursuance of a promise related to another subject matter. That would be approbating and reprobating.

46. In *Pelotti v Ecob*, a 1989 case, the Federal Court identified two principles relevant to set off.[19] The first, taken from contract law, was that amounts paid for a specific purpose may not retrospectively be claimed as being allocable to a different purpose.[20] The second, taken from the common law relating to debtors and creditors was that a debtor may, either prior to or when making a payment, specify the obligation it is to go towards; and, that if they fail to do so, it is open to the creditor to apply the payment to an obligation of their choosing.[21]

47. In the 2002 *Givoni* case, Goldberg J held that:[22]

> These authorities make it clear that where a payment is made to an employee in discharge of an award obligation, which payment is in fact in excess of the amount

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[16] See *Rossato* at [227 - 231]
[17] *Josephson v Walker* (1914) 18 CLR 691
[18] *Ray v Radano* [1967] AR (NSW) 471 cited in *Rossato* at [827]
[19] [1989] FCA 492 at [42]
[20] 1989] FCA 492 at [42]
[21] 1989] FCA 492 at [42]
[22] *Textile, Clothing and Footwear Union of Australia v Givoni Pty Ltd* [2002] FCA 1406

of the obligation, the amount of the excess cannot be set-off against a claim in respect of a different award obligation unless **at the time of the payment** of the excess the employer designates that the excess is payable in respect of a purpose or an obligation different from the purpose for which the initial payment is made.

48. In *Rossato*, regard was had to whether or not a "separately identifiable" casual loading was paid to Mr Rossato whereas the Amending Act Schedule 1 makes reference only to the amounts paid which are "identifiable".[23] This would allow an employer to make, and a court to accept, arguments which identify amounts paid at the time of a claim being made, even if for other purposes or if there was no such identification or separation at the time of the payment.[24] Removing the requirement that an amount be "separately" identifiable will steer courts into a practical difficulty of identifying the true character of payments that may have been made in excess of statutory minimum obligations (for instance, to reflect "market rates" and attract employees).

49. A study by Melbourne University's Joshua Healy found that while a lot of the time casuals were paid less than their permanent counterparts; where they were paid a premium, it was usually modest (in the vicinity of 4-5%) and did not compensate for the loss of entitlements.[25]

50. A recent study found that about half of all casual employees receive no loading whatsoever, and of the subset that do receive a casual loading, a significant number nevertheless receive less pay than they otherwise would if they were not casual employees.[26]

51. This suggests that any amount which is paid to casuals in addition to the award minimum for a permanent employee is more likely to be paid for recruitment and retention purposes (i.e., to reflect a competitive market rate) than to represent a genuine casual loading (noting that despite receipt of a rate more closely aligned with a market rate, many casuals nevertheless are paid lower than their permanent counterparts).

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[23] i.e. not "separately", proposed s 545A (1)(b)
[24] See above, identification of a payment against an obligation having been considered a necessity in the 1989 case of *Poletti v Ecob*.
[25] Joshua Healy and Daniel Nicholson, 'The costs of a casual job are now outweighing any pay benefits', *The Conversation* (online, 4 September 2017) <https://theconversation.com/the-costs-of-a-casual-job-are-now-outweighing-any-pay-benefits-82207>
[26] David Peetz, 'What do the data on casuals really mean?' (27 November 2020), Centre for Work, Organisation and Wellbeing, Griffith University <https://www.griffith.edu.au/__data/assets/pdf_file/0024/1212675/What-do-the-data-on-casuals-really-mean-v5.pdf>, 23

3.3 Conversion

52. The ACTU supports the introduction of robust and effective provisions which allow for the conversion of casual employees to permanent employment. However, the scheme proposed in the Bill is neither robust nor effective. The purpose of a casual conversion scheme should not be to correct the mis-categorisation of an employment relationship as casual when in fact it is not. The failure to provide a good definition of what is *really* casual employment, and what is not, is not overcome by the introduction of a conversion scheme for individuals. The proposed definition would open the floodgates to having permanent work casualised while a conversion scheme would only operate at the periphery for a relatively small group of employees.

53. When viewed as a whole, the proposed legislation's entire conception of casual employment from definition to conversion is fundamentally misplaced. What is needed is an objective definition (which would provide certainty for all parties) of what is casual employment, coupled with robust conversion scheme. A better system would more closely align with the common law position (which looks to objective factors) on the distinction between casual and permanent employment and only then when a worker is found to genuinely be casual offer up a pathway to *convert* to permanent employment.

54. The problem of insecure labour is one which can be resolved. Fundamental to solving the problem is legislative change. Studies have confirmed that casual employees receive a wage penalty – that is, they are less well remunerated than permanent employees, despite their potentially receiving a casual loading.[27] It is undeniable that the lessened negotiating and bargaining power that casual (and other insecure) workers have as a result of their insecure working arrangements is a significant contributor to this. ABS data identifies that 45.3% of casuals are Award reliant for setting pay rates. This is double the number of permanent part-timers (21.3%) and over three times the number of permanent full-time employees (13.2%)[28]. In addition to this, casual workers are more likely to have their wages stolen, and less likely to be able to seek redress where this occurs.

55. Even greater work insecurity is created where casual employment occurs in conjunction with the provision of labour hire, the result of which is often that workers are engaged casually by the labour hire provider to perform the same work as directly employed permanent workers for less take-home pay and fewer workplace entitlements.

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[27] See Mooi-Reci I, Wooden M. Casual employment and long-term wage outcomes. *Human Relations*. 2017;70(9):1064-1090

[28] ABS Employee Earnings and Hours, May 2018 (Cat No. 6306.0)

56. In Award-reliant industries and enterprises it is open to employers to engage casual employees and pay them the award minimum, despite contracting to pay their permanent workforce a higher market rate. In this scenario, a casual worker could receive lower remuneration than their permanent counterparts even when a casual loading is included *and* face a further reduction in take-home pay if they elect to become permanent.

57. Because casuals are more likely to be award wage reliant and because conversion involves the loss of the 25% casual loading, there are vast numbers of employees who will not seek or accept offers of casual conversion simply because they can't afford the pay cut.

58. No casual conversion scheme will be effective in the way that it should until the detriments to workers' right to decent secure wages and stable working conditions are addressed.

59. The qualifying period which employees must serve under the proposed legislation, before they become eligible for casual conversion, is too long. The twofold qualifying test requires a worker to have been employed for 12 months as well as to have worked regularly and systematically in at least the last 6 months of their employment. Making casual employees wait so long to be eligible for conversion to permanent employment is arbitrary, unnecessary –and unfair. The 12-month waiting period under the proposed legislation is longer than the current qualifying period under some Modern Awards.

60. The ability for an employer to avoid making an offer of conversion to permanent employment is unnecessarily broad and will in practice greatly diminish the number of offers which are made pursuant to the proposed scheme. The current proposal's formulation of potentially unlimited "reasonable grounds" (to not make an offer) allows an employer to avoid making an offer of permanent employment not only on known facts, but also on those which are reasonably foreseeable.

61. In practice, these limitations will allow employers to use forecasts of reductions in working hours to avoid their obligations to make offers of permanent employment, even where these forecasts never come to pass.

62. A further limitation of the proposed conversion scheme is that the FWC can only exercise its arbitral powers subject to the agreement of the parties.[29] The practical effect of this failure to allow for compulsory arbitration of disputes relating to casual conversion will be

[29] s 66M(5)

that employers may simply avoid their compliance obligations by declining to allow the independent umpire to make a binding determination.

Case Study – Casual employment and Labour hire - Ms Jaylene Kool v Adecco Industrial Pty Ltd T/A Adecco (U2015/4381) [2016] FWC 925

Jaylene Kool was employed by the labour hire firm Adecco and worked at the Nestle Chalet Patisserie in Sumner Park Queensland. After working there for about 2.5 years, for at least 38 hours per week, Ms Kool was terminated for misconduct (the FWC later found that there was no valid reason for the dismissal). The dismissal was carried out by Nestle and not by Adecco.

Ms Kool filed an application with the FWC for an unfair dismissal remedy.

Adecco challenged Ms Kool's application, arguing that as a casual labour hire employee, Ms Kool had not in fact been dismissed. The FWC instead found that Ms Kool had been dismissed, and that neither Adecco nor Nestle had afforded her procedural fairness.

This example shows that the situation of casual employees is even less secure when they work for labour hire companies. In this example, Adecco, a sizeable employment provider, considered that it was acceptable that their casual labour hire employee lost their job without fully being told why or having a chance to respond.

The proposed casual conversion provisions - had they applied during Ms Kool's employment with Adecco/Nestle - would have been unlikely to assist Ms Kool. This is because of the wide range of exceptions in the proposed conversion scheme and the way in which they could be applied to the labour hire context. Despite Ms Kool working at Nestle for about 2.5 years, working at least 38 hours weeks, and being directed by Nestle managers; Nestle did not consider her an employee because she was hired through Adecco. In terms of the proposed casual conversion clause, Adecco would have been able to hide behind any one of the exceptions in the proposed legislation, for example, Adecco would have been able to say that it was "reasonably foreseeable" that Ms Kool's hours might change or reduce, or that her employment might end over the following 12 months. Ms Kool's would have had no means to have the questions of whether or not she should be converted to permanent employment determined by the FWC.

63. In total, this proposal makes for a casual conversion scheme which:

- Is based on arbitrary and unfairly long qualifying periods;
- does not factor in the impact of the lower wages received by casual employees;

- is far too easily avoided by employers, and,
- fails to properly empower the FWC to resolve disputes fairly.

4 Schedule 2 – Modern Awards

64. The changes proposed in Schedule 2 can be described in two parts. The first relates to the introduction of 'simplified additional hours agreements' (SAHAs), which are agreements between employers and certain part-time employees that permit the working of hours which are additional to the usual scheduled working hours for those employees, without the payment of overtime.

65. The second is the extension of a version of the 'JobKeeper enabling directions' – measures that were introduced as a temporary response to the pandemic - which allow employers to issue unilateral directions to employees in relation to the duties they perform and the location of their work. In the Bill, these are now called 'flexible work directions.'

66. In both cases, the new provisions are taken to be incorporated as terms of twelve 'identified modern awards.' However, the reach of these new measures can extend well beyond these listed awards since the bill allows the Minister to prescribe any modern award as an identified modern award by regulation.[30] It is possible then that ultimately, workers in every industry and under every modern award could be subjected to these new provisions.

67. Flexible work directions have a limited lifespan of two years from the time they become law.[31] However, these kinds of directions, which were first introduced as part of the JobKeeper package, were always meant to be a strictly temporary measure for the purpose of responding to the immediate effects of the pandemic. They were originally to sunset in September 2020 but were extended. This Bill would further extend their operation until well into 2023.

68. SAHAs are a permanent change and effectively a reduction to the award safety net, not a temporary COVID-related measure.

[30] Section 168M(3)(m) and see also s 168M(4).
[31] Schedule 2, Part 3.

4.1 Simplified Additional Hours Agreements

69. The Bill seeks to impose a one size fits all approach to the variation of permanent part time employees' hours of work across 12 identified modern awards through the introduction of simplified additional hours agreements. The list of awards can be extended or reduced by regulation.

70. Simplified additional hours agreements will create enormous pressure on part-time employees to accept additional hours, on little to no notice, without being paid overtime.[32]

71. In circumstances where Modern Awards already contain provisions to vary ordinary hours; there is no pressing policy need for these changes, but there is significant scope for them to reduce the rights, entitlements and security of part time employees.

72. The formalities for creating a binding SAHA are minimal. SAHAs must simply identify additional agreed hours to be worked on one or more days and be entered into before the start of the first period of additional hours.[33] Then an employer simply has to inform the employee that they are proposing a SAHA, ask them to accept it and retain some unspecified form of 'record' of the agreement[34] for it to be binding and to override other contrary award provisions.[35] There is no requirement that the worker even be provided with a written copy of the agreement when it is made.

73. An agreement can apply as a one-off alteration of working hours or a standing and indefinite means by which an employer can schedule additional hours at ordinary time rates. The reference to the additional hours being *part of* a continuous period of three hours[36] means that very short periods of additional hours can be added on to existing part-time hours. For example, a part-time worker could be asked to work for as little as an additional 15 minutes, or, up to multiple hours, at the end of their ordinary hours. These sorts of arrangements will be entirely unpredictable and will impact on family responsibilities.

74. The industrial reality of these changes is that part-time employees will be pressured into accepting agreements that make their working arrangements less certain and less secure. Employers will simply move part-time workers to standard minimum 16-hour contracts and adopt SAHAs to allow them to allocate additional hours at ordinary time rates as they see

[32] Section 168Q(2)
[33] Section 168N(1).
[34] Section 168N(2)
[35] Section 168M(6). See also s 168P(3).
[36] Section 168P(1)(b)

fit. This might result in some additional hours for some part-time workers, but it will not create new jobs. Any jobs that do arise through ordinary and customary turnover are likely to also be offered on the basis of a standard minimum 16-hour contract, with SAHAs then being used to allocate further hours. This will have the effect of turning jobs which already exist into less stable and secure ones.

Case Study: The casualisation of part time work

BankSA is a regional bank based in South Australia. It is a subsidiary of the Westpac Group. For years, the bank has used a mode of employment called "flexi-part time" in its branch network. Flexi-part time workers are engaged on a minimum number of hours over a roster cycle and are then asked to work additional hours on a needs basis.

Sarah* (not her real name) has worked in the BankSA network in country South Australia for over 10 years as a flexi-part time employee. Most of Sarah's co-workers wanted full time work but BankSA wouldn't offer it preferring a minimum hours flexi who could be called in as needed.

Sarah says that most flexis have low hours guarantees and then feel pressured into accepting irregular extra hours at short notice. This can include being required to come in to work on a day off, or when someone else calls in sick. These flexis are left to feel that they are "letting the team down" if they refuse extra hours even when it interferes with their caring and family responsibilities.

Sarah says that this casualises part time work. She says that casual employment should be for when casual work fits people's life choices whereas permanent part time workers are much more likely to have inflexible demands on their time outside of work. They should be different types of employment.

Because of the irregular hours that Sarah and the other flexis work, BankSA regularly seems to get their accrued entitlements to paid leave wrong.

75. It has long been recognised that part-time employment is not - and should not - be the same as casual employment, and protections must be put in place to ensure that part-time employment remains secure, stable, fairly remunerated and 'akin' to full-time employment.[37] In recognition of the fact that workers with family responsibilities 'require some certainty as to the days upon which they work and the times they start and finish

[37] Re Clerks (State) Award [1953] AR (NSW) 199 at p 224

work', one of the key protections that has been put in place in relation to part-time employment is the requirement to obtain written consent to change hours of work.[38]

76. It is essential that the security and stability of part-time employment is protected in the minimum employment safety net. Too many working parents and carers – most of them women – are already forced to drop out of the workforce altogether or accept lower paid or less secure work in order to manage their unpaid caring and parenting commitments.[39] Only 15% of Australians, regardless of gender, feel they are able to balance their work and family responsibilities.[40] A reduction in the security and stability of the safety net entitlement to part-time employment will have a discriminatory impact on women and further widen Australia's gender pay gap.

77. Many part-time employees structure their other family and/or working commitments around the certainty and predictability of the part-time hours that are agreed on at the commencement of their employment. These changes will take away that certainty. It will, in effect, introduce all the uncertainty of casual work, without the casual loading. The removal of penalty rates for additional hours from some awards would also be a significant reduction in employee rights and protections in those modern awards.

78. The protections against illegitimate pressure being placed on employees to accept these arrangements are insufficient. Reliance on the general protections provisions is of limited value given the approach the courts have taken to the application of these sections. In any case, part-time employees who want to maintain their employment are unlikely to resist requests to accept SAHAs and even less likely to challenge them in the courts.

79. Disputes about the operation of the SAHA provisions and their interaction with other award clauses are dealt with under modern award dispute settlement procedures. This means there is no access to arbitration processes in the FWC to resolve disputes unless an employer agrees. Accordingly, an employer could prevent a meritorious claim from being

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[38] *Appeal by Leading Age Services Australia NSW - ACT* [2014] FWCFB 12 at [19]; *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at [97].

[39] See for example Dr Siobhan Austen, *The Effects of Parenthood and other Care Roles on Men's and Women's Labour Force Participation and Experiences of Paid Work*, May 2017 at [5]; Argyrous, G., Craig, L. and Rahman, S. 2017. 'The Effect of a First-Born Child on Work and Childcare Time Allocation: Pre–Post Analysis of Australian Couples'. Social Indicators Research, 131(2): 831–851; Charlesworth, S., Strazdins, L., O'Brien, L. and Sims, S. 2011. 'Parents' Jobs in Australia: Work Hours Polarisation and the Consequences for Job Quality and Gender Equality'. Australian Journal of Labour Economics, 14(1): 35-57.

[40] Hill E, Baird M, Vromen A, Cooper R, Meers Z, Probyn E. Young women and men: Imagined futures of work and family formation in Australia. *Journal of Sociology*. 2019;55(4):778-798.

determined against them by the FWC simply by not consenting to have the matter arbitrated.

80. Another option available to employers to structure rostering arrangements in their workplaces is to negotiate an enterprise agreement. The provisions for SAHAs will reduce the incentive for employers to collectively bargain, thereby undermining a fundamental pillar of the Australian industrial relations landscape and a primary feature of the FW Act.

81. Simplified Additional Hours Agreements will not reduce casualisation, they will exacerbate it. They will undermine the regularity and certainty that is essential to enable part-time workers – most of them women – to manage their family responsibilities. They will promote and facilitate poor and unsafe workforce management practices (such as those already rife in the health sector) which cause harm to workers, customers, businesses and the wider Australian community and economy. The introduction of these provisions is contrary to the national interest.

4.2 Flexible Work Directions

82. The proposed Part 6-4D allows employers to whom identified modern awards apply to give written unilateral directions to their award dependent employees about the duties those employees are to perform or the location of their workplace (including working from home arrangements). The terms of this Part prevail over the terms of any modern award to the extent of any inconsistency.[41] As we note above, the Minister may expand the current list of 12 identified modern awards, thereby exposing even greater numbers of workers to these provisions.

83. These directions are available to any employer who has information that leads them to believe that the direction is part of a reasonable strategy to assist in the revival of the employer's enterprise.[42]

84. That revival of an enterprise is contingent upon a generally allowed strategy of restricting particular working conditions or wages is highly contested. It is evident that higher income countries also have a greater degree of regulation for better working conditions and wages. To regulate in order to worsen any aspect of these is not a means to ensure that individual firms will prosper, let alone firms generally. Rather, it is characteristic of less developed countries in which workers face exploitation by employers.

[41] Section 789GZF
[42] Section 789GZK

85. Unlike the JobKeeper directions, the enterprise does not have to meet a strict 'decline in turnover' test to be able to issue these directions. The use of the word 'revival' is likely to open up access to these directions to a wide range of employers at vastly different levels of economic difficulty. Whilst it would no doubt apply to genuine cases of economic hardship caused by declining business activity resulting from the impacts of COVID-19, it could also readily apply to a successful business that had suffered only a minor and temporary economic 'dip' from previous record high levels and which was seeking to 'revive' itself from that 'dip' towards new record highs.

86. There is a limited requirement to 'consult' employees about the directions.[43] However, if an employer has previously consulted about an earlier flexible work direction, then there is no further obligation to consult about subsequent directions, even if the direction is of an entirely different nature.[44]

87. There is an overarching requirement that flexible work directions be 'reasonable'.[45] There will inevitably be different views about whether a particular direction is 'reasonable' in the circumstances. That is why it is important that there be a quick, free and informal process to resolve those issues.

88. However, disputes about the operation of these provisions are to be dealt with in accordance with the dispute settlement clause in the relevant modern award. This means that there is no right to have access to arbitration in the Far Work Commission where these disputes arise. It is extremely unlikely that an employee would challenge the 'reasonableness' of a direction by bringing court proceedings alleging the breach of an award term. This completely undermines the value of the reasonableness criterion.

89. This means that the proposed provisions go beyond the comparable provisions introduced in conjunction with the JobKeeper scheme in two fundamental ways. Firstly, whereas under the JobKeeper provisions an employer was required to be participating in the JobKeeper scheme (having met the reduction in turnover requirements), the proposed provisions are much more broadly available, and may even be used by employers whose businesses have been minimally impacted or even improved by the COVID-19 pandemic. The second is that whereas under the JobKeeper provisions workers had the right to have disputes decided by the industrial umpire, under the proposed provisions, they do not have that right.

[43] Section 789GZL
[44] Section 789GZL(2).
[45] Section 789GZJ

90. Part 6-4D also lowers the safety net by making these new award terms relevant for the purposes of the application of the BOOT.[46] This means that future enterprise agreement terms will be assessed against an award that gives an employer a unilateral right to change work duties and locations. This makes it more likely that those agreements will themselves include similar terms since employers would want to retain that right and including such a term would not jeopardise approval on BOOT grounds. Once included in enterprise agreements, such provisions would remain in force long after their intended operational period in Modern Awards.

91. The existing terms of awards can also be varied to make them 'operate effectively' with the new provisions. Variations of this kind can even operate from a date prior to the date the determination is made.[47] These provisions are questionable, insofar as the terms of the new Part 6-4D already prevail over award terms.

Case Study: Transport Workers' Union of Australia v Prosegur Australia Pty Limited [2020] FWCFB 3655

Prosegur, a security company, issued a set of JobKeeper enabling directions which had the effect of decreasing hours for some workers, and increasing hours for others.

The TWU filed an application for the FWC to hear a JobKeeper enabling dispute. The FWC Full Bench, on appeal, found *inter alia* that the direction to increase hours was unreasonable. Without the ability to have a dispute arbitrated by the FWC, Prosegur workers would have been stuck abiding by unreasonable workplace directions. The capacity to misuse such vast directions powers is the exact reason why it is so fundamentally important that the FWC has the full power (including arbitration, where necessary) to scrutinise their use.

5 Schedule 3 - Enterprise Agreements

92. The Amending Act makes a number of significant changes to the Enterprise Bargaining framework in Part-2-4 of the FW Act. The changes will make it easier for employers to undercut or exclude the minimum safety net of employment conditions and undermine workers' fundamental rights to have a union represent their interests in bargaining. These changes are strongly opposed by the ACTU and its affiliates.

[46] Section 789GZO(1)
[47] Section 789GPZ

93. When considered as a package, the proposed amendments (which are discussed in further detail below):

- extend the time an employer has to provide the Notice of Employee Representative Rights (NERR), which will undermine workers' rights to receive essential information about bargaining in a timely manner, including that they have the right to be represented by their Union.
- removes the mandatory requirement for an employee to be provided with a copy of a proposed enterprise agreement (and any material incorporated by reference) and have its terms explained, meaning that employees may be asked to approve agreements they do not fully understand.
- provides a 'public interest' mechanism to completely circumvent the Better Off Overall Test (BOOT) (which tests proposed agreements against the safety net), with no need for exceptional circumstances to be proved.
- direct the FWC when applying the BOOT to give 'substantial weight' to the opinions of employers and employees, even in circumstances where the agreement leaves employees worse off compared with the relevant award, and/or the employees are unrepresented.
- change the objects of Part 2-4 and the provisions governing the FWC's functions to elevate the opinions of employers and employees over an objective assessment of the fairness of the agreement.
- facilitates the inclusion of clauses in enterprise agreements that could be wrong and misleading in their description and representation of an employee's National Employment Standards rights through the introduction of an NES interaction provision.
- removes the right of a union who was not directly involved in bargaining to make submissions about an agreement before it is approved.
- The combined effect of these reforms will be to fatally undermine the BOOT's protective function by removing several of the planks which underpin its foundations.
- These changes to the way that enterprise agreements are made will leave workers worse off overall.

5.1 Changes to FW Act Objects (Part 1) and FWC functions (Part 11)

94. Currently, s 578 of the FW Act requires the FWC to take into account the objects of the FW Act, as well as 'equity, good conscience and the merits of the matter' and the need to prevent and eliminate discrimination when performing its functions. Section 3 sets out the

objects of the FW Act, including to provide a 'balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians' by (inter alia) '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' (s 3(f)). Each Part of the FW Act then has standalone objects, including Part 2-4. Part 1 of the Amending Act would amend the objects of Part 2-4 at s 171 of the FW Act as follows:

> *(a) to provide a simple, flexible and fair and balanced framework for employers and employees to agree to terms and conditions of employment ~~that enables collective bargaining in good faith~~, particularly at the enterprise level, ~~for enterprise agreements that deliver productivity benefits;~~ and*
>
> *(b) to enable collective bargaining in good faith for enterprise agreements that:*
>
> *(i) deliver productivity benefits; and*
>
> *(ii) enable business and employment growth; and*
>
> *(iii) reflect the needs and priorities of employers and employees; and*
>
> *~~(b)~~(c) to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements, including through:*
>
> *(i) making bargaining orders; and*
>
> *(ii) dealing with disputes where the bargaining representatives request assistance; and*
>
> *(iii) ensuring that applications to the FWC for approval of enterprise agreements are dealt with ~~without delay~~ in a timely, practical and transparent manner.*

95. New (b)(iii) aims to direct the FWC to elevate the outcome of bargaining over requirements such as the BOOT. A new criterion of 'enabling business and employment growth' has been added to the objectives of enterprise agreements, at (b)(ii). While we generally support both business and employment growth, we note that there is not a proposed object for increasing wages despite the fact that Australia is now in the eighth year of a low wage growth crisis that the Reserve Bank Governor has previously highlighted as a serious contributor to lower economic growth. Changes to (c)(iii) reflect an intention to change the FWC's approach to the application of the BOOT test to make it less rigorous. Part 11 of the Amending Act would also dictate a new and special approach to bargaining decisions over and above the general requirements in s 578. The Part would require the FWC to perform

its functions and exercise its powers under Part 2-4 'in a manner that recognises the outcome of bargaining at the enterprise level.'

96. It is of considerable concern how these new requirements will interact with provisions of the FW Act, in particular the BOOT, which requires the FWC to objectively scrutinise the actual effect of new agreements, rather than simply considering the opinions of employers and workers. It is likely to discourage the application of a rigorous, evidence-based process and encourage or require the FWC to approve sub-standard agreements that do not meet the community and industry standards set out in the FW Act and awards.

5.2 Changes to the Notice of Employee Representational Rights (NERR)

97. The purpose of the NERR is to protect workers' rights to representation during bargaining under an agreement-making framework which allows 'non-union' agreements to be made. There is no requirement under the FW Act to issue a formal notice commencing bargaining, so without the NERR process an employer could simply prepare an agreement without consulting with workers and put it to them for a vote with no capacity for workers to access representation. The NERR advises workers that they may appoint a bargaining representative to represent them in bargaining for a proposed enterprise agreement, and that union members will by default be represented by their union unless they nominate a different representative.

98. Importantly, an employer cannot put an agreement to a vote until at least 21 days after the last NERR has been validly provided. The FWC has observed that the NERR process is 'integral' to the operation of the bargaining framework.[48] Timely notification of the right to be represented is a crucial step in ensuring that workers can make a fully informed decision about whether or not to agree to a new enterprise agreement.

99. Currently under ss 173–174 of the FW Act, an employer that will be covered by a proposed enterprise agreement (other than a greenfields agreement) must take 'all reasonable steps' to give notice of the right to be represented by a bargaining representative to each worker employed at the notification time and who will be covered by the agreement. What constitutes reasonable steps depends on the circumstances.[49] Employers do not have to undertake every single reasonable step to provide the NERR – one or more reasonable steps is sufficient.[50] The notification time is the date the employer first agrees to or initiates

[48] [2014] FWCFB 2042 at [22]
[49] Re University of New South Wales [2010] FWAA 9588 (Lawler VP, 16 December 2010) at [24].
[50] National Tertiary *Education Industry Union v University of New South Wales* [2011] FWAFB 5163 (Harrison SDP, Sams DP, Deegan C, 10 August 2011) at para. 13, [(2011) 210 IR 244].

bargaining (or the date a majority support determination, a scope order, or a low-paid authorisation comes into effect). As there is no requirement under the FW Act for a formal notice initiating bargaining, identification of the notification time can be difficult.[51]

100. The NERR must contain only the content prescribed by the *Fair Work Regulations* (reg 2.04 and 2.05) and be in the form prescribed in Schedule 2.1. The NERR must not be varied and must be given to the relevant workers as soon as practicable - and no later than 14 days - after the notification time. A NERR issued after the 14-day period may be invalid.[52]

101. Under s.188(1), the FWC cannot approve an agreement unless it is satisfied that an employer did not request workers to approve an enterprise agreement until 21 days after the last NERR was validly issued.

102. Part 2 of the Amending Act will extend the time for an employer to issue the NERR from 14 days to **28 days** after bargaining commences. This amendment is unnecessary and will disadvantage employees by undermining their right to be represented during negotiations for a new enterprise agreement. This significant extension to the timeline will make it easier for employers to finalise the content of agreements before employees have even been notified of their right to representation.

5.3 Pre-Approval Requirements

103. Part 3 of the Amending Act substantially weakens the pre-approval protections for workers. The current procedural requirements are appropriate, fair, not unduly onerous and do not require amendment. Many of the pre-approval requirements in the FW Act exist in order to facilitate Australia's almost unique concept of non-union collective agreement making. Where international collective bargaining systems acknowledge that workers' interests in an uneven bargaining situation are protected by the involvement of unions, the FW Act effectively transfers that obligation to protect un-represented employees' interests to the FWC through the pre-approval requirements. Removal of the mandated procedural requirements simply transfers the burden directly onto employees, who will have varying capacities to find and understand the information they need in order to give informed consent to an agreement. This will have an adverse impact on all unrepresented employees, but particularly young workers, workers who do not speak English as a first language, workers with disability, and workers absent on sick leave or parental leave.

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[51] *Transport Workers' Union of Australia v Hunter Operations Pty Ltd* [2014] FWC 7469 (Hatcher VP, 30 October 2014) at paras 69–79;
[52] [2013] FWC 4168

104. Currently, s 180(1) requires an employer to comply with certain requirements before asking employees to vote on a proposed agreement. In particular an employer must take 'all reasonable steps' to ensure that during the access period (7 days before the vote) employees are provided with a copy of, or access to, the written text of the proposed agreement, as well as any other material incorporated by reference in the agreement (s 180(2)). An employer must also take 'all reasonable steps' to ensure that the terms of the agreement and the effect of those terms are explained to the relevant employees, taking into account their particular circumstances and needs, including employees from culturally and linguistically diverse backgrounds, young employees, and employees who did not have a bargaining representative for the Agreement (ss 180(5) and (6)). The FWC cannot approve an agreement unless these requirements have been complied with (ss 186(2)(a) and 188(a)(i)).

105. The purpose of these requirements is self-evident – to ensure that all employees have at least the minimum required amount of information to make an informed decision about any agreement they are asked to vote on. As has been noted by the Federal Court in relation to a failure to meet the obligation to explain the terms of an agreement, the *'requirement imposed by s.180(5) is an important obligation imposed upon an employer to ensure that employees are as fully informed as practicable. The requirement is not a mere formality. Whatever steps may be necessary will depend upon the facts and circumstances of each particular case: but those steps are not satisfied by a person reading – without explanation – the terms of an agreement to an employee'.*[53]

106. These procedural steps are mandated by the FW Act because it is simply unfair and unreasonable to expect employees to genuinely agree to something that they do not fully understand. Informed consent requires at a minimum that all reasonable efforts are made by an employer to notify employees of the time, place and method of voting, provide a copy of all relevant written material, and explain the effect of the proposed agreement. In a bargaining dynamic that is inherently unequal, these procedural requirements are among the few protections in the enterprise bargaining system for unrepresented workers.

107. Section 180(5) qualifies the employer obligation by requiring only 'reasonable' steps to be taken, which reflects the fact that the nature of the steps may change in a particular circumstance.[54] For example a workforce experienced in bargaining and receiving regular

[53] *One Key Workforce Pty Ltd v CFMEU* [2017] FCA 1266, 270 IR 410 at [103].
[54] MUA v Northern Stevedoring Services Pty Ltd *Maritime Union of Australia, The v Northern Stevedoring Services (NSS) [2016] FWCFB 1926 (5 April 2016)*

briefings from their union on the effect of the agreement may not require as much explanation on the impact of the agreement as a young, unrepresented group of workers. The phrase 'all reasonable steps' has been the subject of detailed judicial consideration. In *MUA v Northern Stevedoring Services Pty Ltd*, the Full Bench set out the following propositions:

a. *reasonable steps are what a reasonable man or woman would regard as being reasonable steps in the circumstances which apply;*
b. *the obligation to take "reasonable steps" depends on the particular circumstances existing at the time the obligation arises; and*
c. *a requirement to take all reasonable steps does not extend to all steps that are reasonably open in some narrow or theoretical sense (such as, for example, matters not directly within the particular knowledge or experience of a relevant party).*

108. The current provision is sufficiently flexible and does not require amendment. For example, it was held by the FWC recently (in spite of union concerns that reasonable efforts had not been made in this case to explain the effect of the proposed agreement) that the requirements of s 180(2)(b) had been met by emailing copies of the current and proposed agreements, along with links to the incorporated awards.[55] The FWC considered that there was no evidence in the particular circumstances that the employees would have difficulty accessing the awards in this way, had a disability or came from non-English speaking backgrounds, and so found that the employer had met the requirements of the section. The FWC has also exercised its discretion to overlook minor procedural or technical errors in relation to a failure to provide incorporated material. The FWC has found that despite non-compliance with s.180(2) of the Act, the agreement was 'genuinely agreed' within the meaning of s.188(2), as the error was of a minor procedural nature only and employees were not likely to have been disadvantaged.[56]

109. The Amending Act will fundamentally change the operation of these provisions by removing the mandatory procedural steps set out in ss 180(2), (3) and (5) of the FW Act and replacing them with a broad and general requirement to 'take reasonable steps to ensure that the relevant employees are given a fair and reasonable opportunity to decide whether or not to approve the agreement' (**the general requirement**). A new section 180(3) provides that 'without limiting' the general requirement, the employer is 'taken to have complied' with the general requirement if the employer 'takes reasonable steps' to ensure the relevant

[55] *Civil Sydney Pty Limited Enterprise Agreement 2019 - 2023* [2020] FWCA 1033
[56] [2019] FWCA 1954

employees have access to the agreement and an appropriate explanation of its terms and details of the voting process. The requirement to take 'all' reasonable steps' has been removed. Section 188 of the FW Act is amended to remove the obligation on FWC to ensure compliance with the procedural requirements, and simply requires the FWC to be satisfied that the relevant employees have been given 'a fair and reasonable opportunity to decide whether or not to approve an enterprise agreement'.

110. The content of the general obligation is unclear. While an employer will be taken to have met the obligation if the procedural requirements are met, an employer does not *have* to meet the procedural requirements in order to comply with the general requirement. This means that an employer could fail to provide proper access to the terms of an agreement and/or fail to properly explain its terms and/or fail to give proper notice of the time, place and method of voting, and yet still meet the pre-approval requirements if the FWC was satisfied that employees had overall been given 'a fair and reasonable opportunity' to decide whether or not to approve the agreement. This is a substantial weakening of the current protections which will in practice lead to employees being asked to vote on terms and conditions that they do not fully understand.

Case Study: Rigforce

Rigforce applied to have an enterprise agreement approved by the Commission. The agreement was made with three employees despite Rigforce (by the use of a related entity) having a workforce of almost 200 at the time. No union was involved in negotiating the agreement.

The agreement was approved, and the Australian Workers' Union successfully appealed the approval decision on the grounds that the employer had explained the agreement as providing higher rates of pay than the previous agreement, despite in fact providing lower rates of pay for casuals in 2 out of 3 classifications. The application for approval was subsequently dismissed.

The pre-approval steps matter. Sometimes they are the only way of ensuring that workers know exactly what they're voting on and agreeing to. Any weakening of the protections offered by requiring employers to follow these steps could lead to workers not being provided the information they need to freely agree, or not agree, to the terms and conditions which regulate their employment.

This example also shows how important it is for workers and their unions to be heard by the FWC in enterprise agreement approvals (discussed further below). Under the proposed changes to the laws, the AWU would not have been able to intervene in this case, and the FWC would not have been assisted by their submissions. The effect of this would have been that those casual workers would have been worse off under their new agreement.

Case Study: *One Key* (see also "Small Voting Cohorts" below)

If the Amending Act comes into law, it will more readily allow employers to pursue strategies involving striking agreements with small cohorts of workers, before then hiring many times as many employees, to whom that agreement would apply. In effect, a circumventing of the current greenfields agreement making process.

This strategy was pursued by One Key who made an enterprise agreement with 3 employees before then hiring over a thousand workers. The One Key Agreement was intended for employees who would have been covered by any of 11 named awards. The agreement provided for a 0.1% allowance on the award rate of pay.

Subsequently, the enterprise agreement approval was quashed by the Federal Court on the basis that the small voting cohort did not fairly represent the workers to be covered by the agreement. [57]

Under the proposed legislation, which reduces the approval requirements for enterprise agreements to a more general nature, unfair strategies such as One Key's may be used by employers seeking to impose conditions without bargaining with their workforce or adequately explaining the terms of an agreement.

A further feature of the proposed legislation is that it would prevent unions from making submissions to the Fair Work Commission in similar circumstances to the One Key case, where they had not been involved as a bargaining representative initially. This would see agreements being approved without workers' interests being represented.

5.4 Material incorporated by reference.

111. Currently, s 257 of the FW Act permits an agreement to incorporate material as it was in force at a particular time, or as it is in force from time to time. Commonly this will include provisions of an earlier agreement, an award, a State or Territory law, or a workplace policy. The effect of such material on terms and conditions of employment can be very significant, hence the need for the access and explanation requirements to extend to it. Section 180(2)(b)(ii) provides that if an agreement incorporates material contained in another instrument, the employer must take 'all reasonable steps' to ensure that relevant employees are given, or have access to, a copy of that material for the seven-day access period. The explanatory memorandum indicates that reasonable steps could include, 'providing electronic copies of the material, or making copies of the material available for

[57] See *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77

inspection by employees. In cases where an employee is not at the workplace, for example, because the employee is on maternity leave, it may include providing a copy of the agreement and other materials by post.'[58] After considering the impact of a failure to provide copies of industry codes and company policies incorporated by reference into an Agreement, the Full-Bench explained the purpose of the provisions as follows:

> The statutory purpose of s.180(2) is clear: where a proposed enterprise agreement contains, as material incorporated by reference in the agreement, entitlements or obligations derived from an external document, that document is to be provided to employees to be covered by the agreement before they vote upon it so that they know what the content of those entitlements or obligations are when they consider whether to approve the agreement. That is why compliance with s.180(2) is an element of the requirement for an enterprise agreement to have been "genuinely agreed" by the employees who voted upon it. A failure to provide any such external documents is not answered or addressed by providing employees with the documents after they have voted and after the agreement has already taken effect." [59]

112. The Amending Act removes the obligation to provide material incorporated in an agreement by reference if it is 'publicly available'. This is very problematic because while awards, agreements and laws will technically be 'publicly available', in reality it may be very difficult for employees to readily locate them. Material that is no longer in force can be particularly difficult to locate. The need for strict and clear requirements for access to the written terms of an agreement, as well as any documents incorporated by reference, are evident. Employees cannot be expected to properly understand the effect of an agreement and make an informed decision about whether or not to vote for it unless the terms are made available to them in writing and in full. This is particularly the case for employees who did not have access to a bargaining representative during negotiations; and is compounded for employees who do not have English as a first language, are young, or have a disability which makes accessing information, even when it is freely available in the public domain, difficult or impossible. It also disadvantages workers who are absent on sick leave or parental leave and who are unable to spend time searching online for material incorporated into a proposed agreement.

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[58] Fair Work Bill 2008 Explanatory Memorandum at [739]
[59] *CFMEU v Sparta* [2016] FWCFB 7057 at [15]

113. For example, in *Bachy Soletanche Australia Pty Ltd [2019] FWCA 3962*, employees were asked to approve an agreement expressly incorporating the terms of the *Building and Construction General On-site Award 2010*. The employer failed to provide a copy of the incorporated Award to employees because no employee had specifically asked for it. The Commission held that it is not enough for an employer to simply be prepared to provide a copy of the document on request, 'particularly where the employees are not advised of the award's relevance or availability by that means'.[60] The Commission held that the employees suffered disadvantage by not being provided with, or being given access to, the Award because in its absence, 'they cannot be seen to have had effective access to materials to make an informed decision.'

114. In circumstances where an employer has obtained, read and understood the material which they are proposing be incorporated in an enterprise agreement, there is no defensible reason for that employer to not pass on the information which they hold to their employees when asking them to agree to an enterprise agreement.

5.5 Voting requirements

Part 4 of the Amending Act stipulates that the group of employees that can vote on an agreement is employees employed 'at the time the request is made'; excluding all casuals, except those who actually performed work between the start of the access period and the date employees are asked to vote on the agreement (replacing s 181(1)). This new definition informs the meaning of 'relevant employees' for the purposes of the pre-approval obligations. Amendments to s 207 extend the new definition to the process for making joint applications for variations of agreements, with the effect that only casuals who actually work during the relevant period can vote.

115. Enshrining this blanket approach may lead to acceptable outcomes in some sectors but could disenfranchise workers in other sectors where work is performed seasonally. Moreover, this approach could leave open employer strategies to secure positive enterprise agreement ballots with small cohorts of their workforce, by deliberately not rostering casual employees during voting periods.

[60] *Bachy Soletanche Australia Pty Ltd* [2019] FWCA 3962 (12 June 2019). The relevant term of the agreement read: **(d)** The terms and conditions of the Building and Construction General On-site Award 2010, are hereby expressly incorporated as terms of this agreement as if the same were set out in full herein and shall be binding upon the parties during the currency of the agreement, by operation of this agreement. A copy of the Award was not provided to employees and they were not notified that they would be provided with a copy on request.

Case Study – Small Voting Cohorts

In *The Trustee for Celotti Australia Discretionary Trust T/A Celotti Workforce [2020] FWCA 2696* the employer, Celotti, applied to the FWC for the approval of an enterprise agreement which was expressed to cover workers in a wide range of industries, to which 12 different Modern Awards applied.

The FWC initially approved the enterprise agreement, however this was overturned by a Full Bench of the FWC ([2020] FWCFB 5011) for reasons which included that the employer could not demonstrate that at the time of the vote it employed workers covered by those awards. Accordingly, the FWC could not be satisfied that workers had "genuinely agreed" to the agreement.

This example demonstrates a strategy which has been pursued by employers that involves asking a small cohort of workers to approve an agreement which then covers many times more workers in the future.

The proposed changes to casual voting would enable employers to adopt this strategy and deliberately restrict who works during the voting period.

5.6 Better Off Overall Test

Case Study: The Level Playing Field

Having a level playing field isn't just good for workers, it's also good for employers, and protects small businesses in particular.

The value of the 'level playing field' afforded by the Modern Award and the BOOT for Enterprise Agreements was addressed in the Wilson Security – Western Australian Collective Agreement 2009 [2017] FWCA 1595 (Wilson Case). It is illustrated through the following extracts:

> [57]: In fact, it is in the public interest, and consistent with the objects of the FW Act, to ensure that compliance by Wilson Security's competitors with the minimum terms and conditions in the Security Award does not commercially disadvantage those competitors as against Wilson Security because Wilson Security are operating under an Agreement containing terms well below the minimum set by the Security Award.
>
> [58] In fact, the commercial advantage Wilson Security currently obtains from not being obliged to meet the minimum entitlements contained in the Security Award, unlike its competitors, is a positive disincentive to Wilson Security negotiating a new enterprise agreement.

The FW Act provides a safety net of minimum workplace entitlements to every individual every employee who are subject to its terms. Modern Awards form part of that safety net. Requiring that enterprise agreements pass the BOOT having regard to every employee is consistent with the application of the safety net to individuals.

If Agreements were allowed to fall below this standard by not taking into account every employee, not only would some employees be worse off, but some employers may obtain a competitive advantage over others by negotiating terms inferior to the Award through the enterprise bargaining process.

116. Enterprise agreements are statutory instruments, not private contracts.[61] Agreements that are approved under the FW Act displace the award safety net which would otherwise apply to an employee's employment,[62] and as such, the FWC exercises external regulatory oversight of these instruments to ensure that they meet minimum community and industrial standards as set out in the FW Act and modern awards.

117. This submission has previously referred to the uneven power dynamic between workers and employers. The BOOT is one part of the Australian industrial system which prevents employers from using their power advantage to force agreements which undercut basic statutory minima onto their workforces.

118. One of the objects of the FW Act is 'ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards (**NES**), modern awards and national minimum wage orders' (s 3(b)). This 'safety net' is by its nature protective, intended to 'underpin' bargaining and ensure that no employee falls below minimum standards.[63] Section 193(1) of the FW Act provides that the FWC must be 'satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.'[64] This is known as the Better Off Overall Test or 'BOOT'.

[61] *Toyota v Marmara* (2014) 222 FCR 152 at [88], [90]; *Byrne and Frew v Australian Airlines Ltd* (1995) 185 CLR 410 at 425
[62] Section 57(1)
[63] *4 Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001 at [121]–[126].
[64] See also *Hart v Coles* [2018] FWCFB 3610

119. The BOOT assessment conducted by the FWC is for many employees the only means by which their right to a minimum safety net of terms and conditions is assured. The BOOT should be applied in a rigorous and consistent manner which identifies flaws in agreements, protects the integrity of the employment safety net, and encourages employers to negotiate in good faith for terms and conditions which improve upon, rather than undermine, the minimum employment safety net.

120. The fundamental purpose of collective bargaining should be to improve working conditions for ordinary Australians, whereas this legislation will lead to cuts to those conditions.

121. Part 5 of the Amending Act makes a number of changes which would expose vulnerable workers to the excessive market power of their employers and fundamentally undermine the purpose of the BOOT. These changes will allow agreements which undercut the safety net to be approved and expose vulnerable workers to excessive employer market power.

Case Study: National Patient Transport Pty Ltd T/A National Patient Transport [2019] FWCA 5918 (28 August 2019

In 2019 a private ambulance provider in Victoria (National Patient Transport) proposed an agreement that would have significantly changed the shift penalty system for paramedics.

When the system was analysed against employee rosters, it showed that while some workers may have been better off under the new system, a significant group of paramedics working after 6PM would have been worse off.

The employer argued that as a majority of employees would be better off overall, the agreement should be approved.

Due to the current protections provided by the Act, the employer was not successful in this argument and was required to provide a reconciliation undertaking that ensured each individual employee was better off overall.

Had the employer proposal applied, a significant cohort of emergency services professionals could have had their pay cut by this agreement.

Under the proposed law, the employer would have had two additional avenues available to them to secure the cuts to conditions that they were seeking. The first is the new 'public interest' exemption; and the second is the new issues (including the views of the parties) that the FWC is required to consider during the approval process. Any changes which would expand the current exceptional circumstances exemption and see agreements approved even though they leave workers worse off than under their award, should be rejected.

5.6.1 New time limited public interest exemption

122. Currently s 189 of the FW Act allows for the approval of enterprise agreements that do not pass the BOOT if, because of 'exceptional circumstances', approval of the agreement would 'not be contrary' to the public interest. The FWC may only approve an agreement under this section if failure to pass the BOOT is the only reason the Commission is not required to approve the agreement. Section 189(3) provides that an example of a case in which the FWC may be satisfied that exceptional circumstances exist is where 'the agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the enterprise of an employer covered by the agreement'. Section 189(4) provides that agreements made under the section have a maximum nominal expiry date of 2 years after approval. Examples of agreements approved under this section include agreements covering seasonal workers with 'voluntary hours' provisions, which allow an employee to agree to forgo penalty rates in exchange for extra hours of work.[65] The FWC has held that the 'not contrary to the public interest' test is a lower standard than requiring satisfaction that the agreement is 'in the public interest'.

123. The Amending Act adds a new public interest exemption to s 189 of the FW Act, which will allow the FWC to approve agreements that do not meet the BOOT as long as it is 'appropriate to do so taking into account all the circumstances' (including the views and circumstances of the employers, employees and bargaining representatives, the impact of COVID-19, and the result of the vote) and 'because of those circumstances' approval is 'not contrary to the public interest'. This is an extremely low bar for employers to overcome. (See discussion below regarding the application of the public interest test by the FWC)

124. This new limb is not needed and would be a retrograde step if adopted. Approving enterprise agreements that fail to pass BOOT should be extremely rare and should be in response to short term exceptional circumstances only. The current 'exceptional circumstances' exemption is sufficient to allow businesses genuinely trying to recover from COVID-19 impacts to make agreements which fall below the BOOT. Under s 189(3), any agreement that is 'part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the enterprise of an employer covered by the agreement' will meet the test.

125. There is no requirement under the new public interest limb for 'exceptional circumstances' to exist before the FWC can approve an agreement that fails the BOOT. A much lower

[65] See for example [2010] FWAA 5060 and [2010] FWA 6442

standard of satisfaction is required; namely that it is "appropriate [to approve the agreement] taking into account all of the circumstances". The test under the new public interest limb is far too broad and easy to meet. It will allow employers who do not genuinely need to offer below minimum employment conditions to recover from COVID-19 to make opportunistic agreements that undercut the safety net on the basis of any kind of 'impact' of COVID-19 on the business. The proposed new test includes consideration of the opinions of the parties as to the impact on themselves in determining whether approval of an enterprise agreement is not contrary to the public interest. This is a conflation of public and private interests, by adopting consideration of private interests to reach a finding as to public interests.

126. While the new public interest test sunsets after two years, agreements made under the section continue until terminated or replaced, which could mean that agreements made under this section remain in place for many years to come, permanently undermining the safety net and disadvantaging employees.

Example: Changes to Enterprise Agreements remaining after 2 years

XYZ Products uses the new provisions to secure an enterprise agreement that contains provisions that are less favourable than the award.

Four years pass, the agreement has passed its nominal expiry date but is still in effect because it hasn't been replaced. The workers at XYZ products have been stuck on the agreement for 4 years, which is two years after the original provisions which enabled it to have ceased to be in force. XYZ products knows that it cannot maintain the same provisions that fall below the award in a new agreement, so it decides that it doesn't want to bargain for a new agreement. The law already prevents workers from organising and taking industrial action in order to bring management to the bargaining table. Workers and their union have no real other option but to secure a Majority Support Determination, which could involve a long and drawn-out process (with the below standard agreement applying all the while). But a Majority Support Determination does not guarantee that a new agreement will be entered into. Even if workers are successful in getting XYZ Products to negotiate, management could frustrate the process by refusing to agree to terms. As long as bargaining continues without resolution, workers would be stuck on their sub-standard agreement. The final option for the workers would be an application to the FWC to terminate the agreement and revert to the award.

5.6.2 Permanent new BOOT considerations

127. The Amending Act adds a new section to s 193, which:

- Limits the FWC's consideration of patterns of work for employees and prospective employees to those which are 'reasonably foreseeable' by the employer at the test time.
- Directs the FWC to consider the 'overall benefits' (including non-monetary benefits) that the employee would receive under the agreement compared with the award.
- Directs the FWC to give 'substantial weight' to the views of agreement-covered employers, award-covered employees, and any bargaining reps; with a note providing that an example of the views of employees is 'the outcome of the vote'.

These provisions would also apply to agreement variations.

128. While the consideration of overall benefits is broadly consistent with what the FWC is already required to do[66] , the other two elements significantly change the current approach. The limitation on the consideration of work patterns introduces an unfair subjective element to the test – arrangements need to be reasonably foreseeable 'by the employer'; rather than being reasonably foreseeable on an objective test, which is the current approach. Dot point (c) would fundamentally change the approach the FWC takes to the BOOT. It is unclear how the directive to place 'substantial weight' on the views of employers and employees will interact with the requirements in the FW Act to be satisfied that agreements do not undercut the safety net. For example, in *The Andrew Crawford Group Pty Ltd T/A Crawford Security & Investigations* the FWC considered an agreement which paid an hourly rate on Sundays of $7.31 lower than the Award rate, and, on public holidays of $14.64 lower than the Award rate. Employees were not represented at the BOOT hearing and so the only views before the FWC were the views of the employer, who wanted the agreement approved. Applying the current provisions, the FWC decided that the agreement did not pass the BOOT and did not meet the public interest exemption in s 189, and therefore did not approve the agreement. This case illustrates how difficult it will be for the FWC to both place 'substantial weight' on the views of the employers and also properly apply the BOOT.[67] Even if the FWC managed to somehow reconcile these conflicting

[66] See *Loaded rates in agreements case* [2018] FWCFB 3610 at [103], [105], [106], [112] and [115]
[67] [2013] FWC 5858 at [2], [10]

functions and still find that the agreement failed the BOOT, the broad new public interest test could operate to ensure the agreement would be approved anyway, resulting in a significant undercutting of award rates of pay in the industry.

5.7 New model NES interaction term

129. No award, employment contract or enterprise agreement can exclude or provide conditions that are less than the National Employment Standards (**NES**). Under s 186(2)(c), the FWC must be satisfied that the terms of an agreement to be approved do not contravene s 55, which prevents agreements from excluding the NES. Part 6 of the Amending Act repeals this section, along with the note at 186(2) that clarifies that an agreement may supplement the NES, and the note in s 55(7), which clarifies that terms of modern awards and agreements which exclude the NES are of no effect. The effect of these amendments would be to remove the FWC's capacity to scrutinise agreements at approval stage to ensure that they do not exclude or undercut the National Employment Standards. Instead, there will be a new requirement for all enterprise agreements to include a 'model NES interaction term', to be set out in the Fair Work Regulations.

130. In the absence of scrutiny from the FWC at the time of approval, it will be open to employers to include terms in enterprise agreements which misrepresent employees' rights and entitlements under the NES, or otherwise purport to exclude them. That these terms might ultimately be unenforceable is not an adequate protection where employees are not aware of the intricacies of the FW Act and accept what is written in their enterprise agreement at face value.

131. These changes shift the onus onto employees (from the FWC) to monitor the compliance of agreements with the safety net; requiring them to incur the cost and risk of bringing a dispute where the NES is breached. The NES are minimum conditions representing important community and industrial standards that should not be bargained away or excluded under any circumstances. The proposed mandatory interaction term not only shifts the onus from the FWC to the individual employee, but it actually makes permissible misleading provisions that are not compliant with the NES.

132. The capacity for the FWC to proactively scrutinise agreements to ensure the NES are not uncut or excluded is an essential part of ensuring that the minimum employment safety net is guaranteed and enforceable. This proposed departure from the current provisions will leave workers worse-off, by allowing employers to include terms in enterprise agreements which fall below the NES, having avoided the scrutiny of the industrial umpire.

Case Study: Excluding the NES

Currently, the FWC examines whether an enterprise agreement excludes the NES. Under the Amending Act, this role will be taken away. In *CFMMEU v CSRP* [2017] FWCFB 2101, the FWC Full Bench held:

> Section 56 of the FW Act relevantly provides that a term of an enterprise agreement has no effect to the extent that it contravenes s.55. It would be open to us to do nothing and allow s.56 to have operational effect on the provisions affected by the challenge mounted in ground two of the notice of appeal. However, we do not think it is desirable, when there is an opportunity to take rectification action, to allow an agreement to continue operating with provisions of doubtful legal efficacy. Moreover, employees covered by the Agreement and those who in the future will be covered by the Agreement deserve to understand their rights and obligations under the Agreement without recourse to a lawyer or the legal niceties of s.56.

The role that the FWC plays in making sure enterprise agreements do not cut below the legal minimum safety net is an important one, and it's a role that the FWC should play. The Amending Act would prevent the FWC from exercising a function that it has recognised it should fulfill.

5.8 Terminating agreements after nominal expiry date

133. Part 8 of the Amending Act will prevent an application for termination of an agreement being made until 3 months after the Nominal Expiry Date has passed.

134. While this amendment is an improvement on the current position, it does not adequately address the serious concerns that the ACTU and its affiliates have raised regarding the operation of these provisions.

135. In *Tahmoor Coal,* the FWC held that terminating an enterprise agreement on application by the employer would be inappropriate, where the effect would be a fundamental alteration of the *status quo* in bargaining to improve the position of the employer at the disadvantage of the workers.[68] It was further considered that awarding the employer all that they sought to achieve in bargaining by way of terminating an enterprise agreement was not conducive to further bargaining.

[68] *Tahmoor Coal Pty Ltd* [2010] FWA 6468

136. *On* 22 April 2015, a Full-Bench of the FWC significantly changed the approach to the termination of expired agreements.[69] Since that decision, the threat of unilateral termination of expired enterprise agreements has been used by employers as a tactic to force employees onto inferior wages and conditions.

137. In 2019-20 employers made 84% of applications under s.215 with a 72% success rate while employees and unions only had 39% success in their 16% of applications.

138. It is clear that the termination of agreement provisions of the FW Act are operating to drive down hard won wages and conditions and deliver employers an unfair advantage in negotiations for new agreements.

139. It should not be open to an employer to compel their workforce to accept cuts to their working conditions by terminating an enterprise agreement in order to place workers in a situation where they are even worse off.

140. These amendments do not address the real issue with respect to the termination of enterprise agreements, as outlined above and illustrated by the following case studies.

Case Study: Streets Ice Cream

In 2017 Unilever, the transnational corporation which owns popular brands such as Streets Ice Cream, applied to terminate the enterprise agreement applying to its production workers in Sydney after workers, concerned about their job security, rejected management's first offer.[70] Despite global sales of €53.7 billion in 2017, Unilever sought to reduce working conditions in its Sydney production facility by threatened termination of the nominally expired agreement, rather than agree to a plan with the AMWU.[71] The union estimated that workers would face a 46% pay cut if the agreement was terminated.[72]

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[69] *Aurizon Operations Limited; Aurizon Network Pty Ltd; Australia Eastern Railroad Pty Ltd (AG2014/6009)* (**Aurizon**) significantly altered the approach to the termination of expired agreements set down in *Tahmoor Coal* and earlier decisions. Aurizon was upheld on appeal by the Federal Court on 3 September 2015.

[70] 'Union launches Streets ice-cream boycott for Australian summer', *the Guardian* (online, 30 October 2017) <https://www.theguardian.com/australia-news/2017/oct/30/union-launches-streets-ice-cream-boycott-for-australian-summer>

[71] Unilever, (7 June 2018) *'Sustainability fuels growth and transparency builds trust'* https://www.unilever.com.au/news/press-releases/2018/sustainability-fuels-growth-and-transparency-builds-trust.html; Anna Patty, *Sydney Morning Herald* (online, 6 November 2017) https://www.smh.com.au/business/workplace/streets-factory-workers-offer-to-save-the-company-millions-of-dollars-20171106-gzfta1.html#:~:text=Unilever%2C%20the%20multinational%20company%20that,wages%20and%20conditions%20or%20jobs

[72] 'Union launches Streets ice-cream boycott for Australian summer', *the Guardian* (online, 30 October 2017) <https://www.theguardian.com/australia-news/2017/oct/30/union-launches-streets-ice-cream-boycott-for-australian-summer>

The Australian public reacted strongly to Unilever's attempts to drive down working conditions and many people stopped buying Streets products. This prompted Unilever Australia to return to the bargaining table and negotiate a fair replacement agreement which contained no loss of pay, shifts or conditions.[73]

Unilever is a major transnational corporation, and the Australian public rightly responded to their attempts to reduce employment conditions with condemnation. But for this public support, Unilever may have proceeded with their application to terminate their enterprise agreement and been successful in delivering wage cuts to their workforce. This strategy should never have been available to them in a round of bargaining. The proposed amendments make no material difference to addressing the circumstances illustrated by this example, other than to potentially put up a minor delay to an employer's strategy to cut conditions.

Case Study: Seven Network

In late 2018, the Seven Network, owned by major media conglomerate Seven West Media, applied to terminate its enterprise agreement in the middle of a round of enterprise bargaining. The AFR reported at the time:[74]

> The network's termination application is the highest profile use of an industrial tactic that has been dubbed the "nuclear option".
>
> The tactic only emerged in recent years in the resources industry as employers sought to reduce generous benefits delivered during the boom.
>
> However, it has now started to spread beyond mining and manufacturing, with Murdoch University successfully terminating its union agreement last year in a landmark ruling.

Two of the key matters in dispute during the bargaining round were the quantum of redundancy pay, and access to arbitration of disputes by the independent umpire. These, and many other conditions which had been negotiated and agreed over many years, would have been stripped away from workers if the Seven Network were successful with its application.

[73] Christopher Knaus, 'Boycott of Streets ice-creams ends as unions hail 'huge victory'', *the Guardian* (online, 23 November 2017) <https://www.theguardian.com/australia-news/2017/nov/23/streets-factory-workers-vote-to-end-boycott-of-companys-ice-creams>

[74] David Marin-Guzman, *'Seven Network applies to axe union agreement, scrap redundancy entitlements'*, AFR (online, 20 December 2018) <https://www.afr.com/policy/economy/seven-network-applies-to-axe-union-agreement-scrap-redundancy-entitlements-20181220-h19b9c>

Seven Network's strategy of attempting to force a bargaining outcome by threatening the removal of conditions which it had freely agreed to previously should never have been available.

Through further negotiation, the parties were able to seek agreement as to a replacement enterprise agreement, and the Seven Network withdrew its termination application.

5.9 How the FWC may inform itself

141. Part 9 of the Amending Act would significantly confine the discretion of the FWC in ss 589 and 590 of the FW Act to consider any information it sees fit in approval applications for new agreements and variations. It will prevent workers covered by the agreement from being represented by a union which was not a bargaining representative unless 'exceptional circumstances' exist.

142. This amendment is directed at addressing the perceived problem of 'third party interference' in bargaining. However, it is not accurate to talk about 'third parties' interfering in agreement approval processes. Agreements do not have any parties under the FW Act; rather agreements 'cover' or 'apply' to employees and employers. Employees who are covered by an agreement should have a right to be represented by their union in all matters before the FWC involving that agreement, without limitation or exception.

- The Part limits the FWC to consider specific identified information. The practical effect of this provision is that the FWC would be permitted to consider publicly available information, submissions from the federal and/or state Minister for workplace relations and submissions from volunteer bodies, but not a union, if that union was not a bargaining representative for the agreement, even where that union covers one or more workers whose terms and conditions of employment will be set by the agreement. The capacity for unions who were not bargaining representatives to make submissions to the FWC about the impact of an agreement is a significant safeguard which should be retained.[75]

143. The submissions that unions make, which these changes would prevent, represent the interests of workers across industries by seeking to protect industry standards such as those contained in Modern Awards. Preventing submissions being made by workers'

[75] For example in [2012] FWA 7336, the wages offered were so low they fell below the base rate. The AWU intervened to oppose approval and was successful.

representatives is another of the ways in which the Amending Act claws away at the safety net. This undermining of the safety net will leave whole sets of workers with less than the industry standard legal minima and will also expose good employers to unfair competition from those employers' savvy enough to take advantage of the weakened safety net.

Genuine agreement – who can be heard in respect of genuine agreement.

Removing the capacity of the FWC to hear from parties other than those directly involved in the making of an agreement would, in our view, result in a significant increase in errors, and appeals, of those decisions.

An example is matter AG2019/4616, which related to an application for approval of the C & H Blaco Enterprise Agreement 2020. In this matter the applicant protested furiously to the CFMMEU being heard in relation to the application. The CFMMEU claimed that it had members who would be covered by the Agreement or, in the alternative, that the FWC should exercise its discretion to hear from the CFMMEU. Both parties provided confidential lists to the FWC, with the CFMMEU's list identifying its members who would be covered by the agreement if approved, and the company's list identifying its employees who would be covered by the Agreement. There was no commonality between the two lists.

A mention was convened by the FWC during which the CFMMEU identified the site at which its members were located. Despite being included in the coverage of the Agreement, the applicant had failed to include the relevant site in both its employees list, and in the process of agreement making. Had the CFMMEU been blocked from making submissions in this matter the applicants would have controlled the information available to the FWC, and the Agreement would have been considered without the FWC having been made aware of this oversight.

Case Study: *Bis Enterprise Agreement 2018*.

The CFMMEU sought to be heard in relation to this agreement on three different bases, as a bargaining representative due to the correct interpretation of the coverage of the agreement, as a matter of procedural fairness given it had members engaged by the company who would, in the alternative, be excluded from the Agreement's coverage, or alternatively that it could assist the FWC and that the FWC should exercise its discretion under s 590 to hear from the CFMMEU. At first instance, in *Bis Industries* [2019] FWC 4184, Deputy President Beaumont rejected each of the grounds under which the CFMMEU sought to be heard.

This preliminary decision was subsequently overturned on appeal (*CFMMEU v Bis Industries* [2019] FWCFB 8591), on the basis that the correct interpretation of the coverage of the Agreement included the CFMMEU's members, that it was therefore a bargaining representative to the Agreement, and it had a right to be heard (without needing to consider the other grounds).

If this case study occurred under the current law, the CFMMEU, despite being properly held to be a bargaining representative, may have been unable to be heard in the first place in order to establish itself as a party to the proceedings.

Case Study: Drilling Industries Australia

Drilling Industries Australia applied to have an enterprise agreement approved by the Commission. There was no union involvement in bargaining. The AWU sought to be heard on the basis of the agreement covering an industry in which the AWU is the primary union. This request was granted by Commissioner Johns.

The AWU made submissions on genuine agreement (specifically s.180(5)) and the BOOT. In relation to genuine agreement, the employer provided a two-page table to employees, which it relied on to discharge its obligations regarding the provision of an explanation of the terms of an enterprise agreement and the effect of the terms. There were few face-to-face meetings or explanations throughout the 'bargaining' process. The table provided referred to seven terms of the enterprise agreement, despite there being 32 clauses in the agreement. The 'explanation' provided by the table was non-sensical and confusing on many counts.

In relation to the BOOT, the AWU drafted and filed two analyses of an employee working a typical roster in the hydrocarbons industry. Both found that the agreement did not pass the BOOT. This is despite the FWC's agreement approvals team initially finding that the rates of pay in the agreement were between 47% and 156% above the award. The FWC's analysis was ultimately wrong due to the rolled-up rates and the removal of the living away from home allowance in the agreement.

The Commissioner found that the agreement was not genuinely agreed to by the employees and that the agreement also did not pass the BOOT.

In this matter, had the AWU not been permitted to intervene, it is possible that the agreement would have been approved after being assessed by the FWC as being more beneficial than the comparator award despite this not being the case. Had the AWU not been permitted to make submissions in relation to genuine agreement, again the agreement may have been approved despite the employer providing a wholly inadequate explanation of the agreement's terms and their effect, most notably not informing employees (who were not represented throughout the process) that the agreement contained a number of conditions that were worse off than the award. Had the AWU not been permitted to provide an analysis of a roster worked by an employee covered the agreement to demonstrate that the agreement was inferior to the award, the Commission may not have come to the conclusion that the agreement didn't pass the BOOT. Had the AWU been restricted to a certain roster in drafting an analysis, the same applies.

5.10 Time limits for determining certain applications.

144. This Part requires the FWC to determine an application for approval of a new agreement or a variation within 21 business days, otherwise given written notice as soon as practicable to relevant employers and employee organisations (and place a copy on the website) explaining why the application hasn't been determined, including any exceptional circumstances.

145. This proposal is flawed as it could lead to agreements being rushed through without proper scrutiny and/or the FWC being forced into rejecting applications rather than working with the parties to make the agreement compliant with the regulatory framework.

146. Any staffing requirements associated with an increased service standard should also be considered.

5.11 Transfer of business (Part 12)

147. This Part excludes employees who seek on their own initiative to become employed by a new employer from the transfer of business provisions.

148. The FW Act's transfer of business provisions were designed to broaden the circumstances in which a transfer occurs and make it easier to determine where a transfer has happened. This followed a number of cases under the previous legislation where employees were doing the same work for a new employer but had lost the protection of their industrial instrument.

149. The scheme of the legislation is that once a transfer of business occurs, the agreement transfers with the employees. Employers are already able to apply to the FWC for an order exempting them from having to apply the transferring agreement. The FWC can also make orders varying the operation of any transferring agreement.

150. Employees who transfer from one company to another within the same corporate group are protected under the current Act because the Act deems there to be the necessary

connection between the two companies which justifies the transfer of wages and conditions. Without this protection, large corporate businesses could simply transfer employees to companies within the group with less favourable conditions and employees would lose the protection of their old agreement even where, as in many cases, they continue to do the same work.

151. The amendment in the bill 'switches off' this protection in the case of corporate groups. In any case where the employee sought to become employed by the new employer 'at the employee's initiative' the transfer of business provisions would not apply. However, that test is very wide and potentially open to abuse because it is unclear how far 'at the employee's initiative' actually extends. Although the Explanatory Memorandum says this 'switching off' would not apply in the case of an 'organisational restructure', the wording of the amendment does not guarantee that is the case. For example, an employee could be given indications that their current position is at risk and their best option would be to apply for another position in the corporate group at reduced rates. The new employer would then rely on an application 'at the employee's initiative' to not apply the transfer of business rules. Current employees would be unlikely to challenge this 'switch off' at least while they remain employed.

152. The change would allow major corporations to manipulate or manufacture 'employee initiated' transfers to the detriment of their workforce.

Example scenario – transfer of business, spill and fill situation.

XYZ Products hires 1000 staff. 800 staff are involved in production, with the remainder being involved in the operation of the business. The XYZ Enterprise Agreement covers and applies to XYZ Products and its staff. XYZ also operates a small production facility under a subsidiary company – UVW Products, which has 100 staff who are all engaged in production. The UVW Products Enterprise Agreement covers and applies to UVW Products and its workers, and generally provides less favourable conditions overall, and lower wages, than the XYZ Enterprise Agreement. XYZ Products wants to "streamline" its operation. It proposes to do this by moving all of its production staff to UVW Products, so that UVW products is responsible for all production and XYW products is responsible for the remainder of the business operation, such as sales and distribution.

XYZ products calls a meeting of its production staff. It outlines the proposal to them and advises that anyone who wants to transfer to UVW Products can fill in an "expression of interest to transfer at own initiative" form, and that anyone who doesn't transfer will be made redundant.

The majority of workers at XYZ products don't want to lose their job. They don't want to take a pay cut and lose other conditions, but they're caught between a rock and a hard place.

Under the current law, employees of XYZ would carry over their current conditions with them to UVW Products (unless the FWC ordered otherwise). This is an important feature of the safety net and ensures that business restructures are not used to avoid obligations to workers. Under the proposed law, the employees could be considered to be transferring on their own initiative, even though their choice is not a completely free one. This would mean that the workers who did transfer would lose wages and other employment conditions, simply because they wanted to keep their jobs.

5.12 'Zombie Agreements' (Part 13)

153. This part automatically sunsets all 'agreement-based transitional instruments' and all 'Division 2B State employment agreements' on 1 July 2022. There is no reason for the delay in application of this provision. By July 2022 some of these "zombie agreements" will be up to 16 years old.

154. The Part also sunsets any enterprise agreement made during the bridging period on the same date, with rights and liabilities preserved.

155. While many of these agreements fall below the employment safety net and termination will leave workers better off, the Part fails to protect workers who might be left worse off by the termination of a zombie agreement.

5.13 Enterprise Agreements - Conclusion

156. When considered as a package, the proposed amendments fundamentally weaken the current (albeit inadequate) protections for workers – particularly those who are unrepresented – who vote for agreements with their employers within a grossly uneven power dynamic. Under these proposed changes:

- Workers will receive later notice of their representational rights, which may even come when bargaining has advanced to a point where an agreement is approaching finalisation. Workers will also receive less explanation of the terms of enterprise agreements and may not receive materials incorporated by reference.
- Employers will more easily be able to completely circumvent the BOOT, even where there are no exceptional circumstances for doing so.

- The opinions of employers and employees will be elevated over an objective assessment of the fairness of the agreement and must be given substantial weight by the FWC even in circumstances where the agreement leaves employees worse off compared with the relevant award.
- The FWC will no longer be able to consider whether agreements exclude the National Employment Standards.
- Unions will no longer be able to make submissions about an agreement if they were excluded from bargaining.

6 Schedule 4 – Greenfields Agreement

157. For 'major projects', the bill allows greenfield construction agreements to extend for up to 8 years from the date specified in the agreement. These projects can have a value as low as $250m (if declared by the relevant Minister to be a "Major Project", otherwise $500m), including amounts spent even before construction work commences. The Explanatory Memorandum makes it clear that the thresholds (whether $250m or $500m) include 'expenditure for assets such as land, equipment and technology or construction of structures.'[76] Thus access to these agreements will extend to projects where the value of the construction work itself is much less than the thresholds.

158. The extremely low financial threshold for the application of these proposed provisions would be met not just by what are ordinarily considered to be major projects (such as the construction of a mine, which may cost 10s of billions of dollars) but would also be met by comparatively much smaller projects, even the construction of a CBD building in Sydney or Melbourne.[77]

159. The extension of the nominal expiry dates of these agreements is significant for a number of reasons. Firstly, unlike the other streams of agreement-making, in the case of greenfield agreements, where the parties are unable to reach an agreement, an "agreement" can be taken to be made on application to the FWC after the expiry of a six-month notified negotiation period.[78] This effectively allows employers to break a bargaining deadlock and

[76] Paragraph 309.
[77] See, for example: 505 George Street, Sydney, $1 billion (https://www.smh.com.au/business/companies/mirvac-coombes-property-get-go-ahead-for-sydney-s-new-1b-residential-tower-20200515-p54t9y.html); 600 Lonsdale Street, Melbourne, $500 million, https://www.smh.com.au/business/companies/lonsdale-court-to-be-replaced-by-40-level-skyscraper-amid-building-blitz-20200504-p54ppo.html
[78] Section 182(4)

have the FWC approve an agreement where the unions do not agree to its terms. No other form of agreement is imposed on bargaining parties in this way under the FW Act. The effect of this is that terms can be imposed on construction workers for up to eight years without either their representative unions or themselves ever agreeing to those terms.

160. Further, an employer who imposes a greenfields agreement on their workforce in the above fashion could include in that agreement a dispute resolution procedure which does not automatically provide for the resolution of disputes by arbitration.

161. This would mean that for the entire duration of projects to which greenfields agreements apply, workers would be deprived of any capacity to renegotiate wages and conditions of employment and would not have access to arbitration to enforce what rights they did have.

162. Having workers 'locked in' to eight-year agreements on major construction sites, including remote FIFO projects, with the threat of fines where action is taken in response to the myriad of issues that can arise on these jobs, such as poor safety standards, sub-standard food or accommodation or lack of decent communication or recreation facilities, is likely to compound mental health issues (in a cohort of workers with increased incidence of suicide) and the family and social dislocation that these jobs are already notorious for.

163. The consequences of taking industrial action during the nominal term of an agreement are more serious for construction workers than for other employees. For most workers, having an in-term agreement means that you cannot take protected industrial action.[79] If action is taken during the nominal term, an order can be made to stop the action[80] and contravening that order can attract a maximum civil penalty of 60 penalty units ($13,320). Under the *Building and Construction Industry (Improving Productivity) Act* 2016 (BCIIP Act) any action taken within the nominal term of an agreement is regarded as 'unlawful industrial action'.[81] There is no requirement that an order be made, and further action taken to contravene that order before liability arises. The action *automatically* attracts a maximum civil penalty for individual workers of $44,400.

164. 'Industrial action' is broadly defined in the BCIIP Act and includes '*the performance of building work by an employee in a manner different from that in which it is customarily performed.'* Thus, even a small departure from ordinary work patterns can attract a penalty

[79] Section 417.
[80] Section 418.
[81] Section 46.

for these workers. Construction workers already have fewer rights than workers in other industries.

Case Study: 8 years

XYZ Exploration is planning to construct a mine in a remote part of the country using a fly-in-fly-out (FIFO) workforce. The project spend is above the $500 million threshold for an 8-year agreement. They approach the union to negotiate a greenfields agreement. The union looks over the proposed greenfields agreement and sees that its terms and conditions are well below the industry norm. The agreement allows for rosters that are not in line with recommendations relating to work/life balance and mental health, and there are no health and safety provisions in the enterprise agreement itself. The agreement also provides for minimal wage increases of less than 1% per annum, over the 8-year life of the agreement. The union tries to negotiate more favourable conditions, but the company refuses to agree. After 6 months, the company applies to the FWC under s 182(4) to approve the greenfields agreement, even though agreement hasn't been reached, and is successful.

Four years later, the union receives a number of complaints about poor working conditions from its members who are working on the project. The union investigates and finds that there are numerous issues, including unsafe working conditions. Many of the workers are experiencing mental health issues, which are being contributed to by the working conditions and rostering patterns. A number of members are in financial distress because their wages have not kept pace with their cost of living. An ordinary greenfields agreement would have expired by now.

Without health and safety clauses in the enterprise agreement that compliments workplace health and safety laws, the union and its members are denied a simple and effective way of addressing the various safety issues in the workplace. Because of the extended eight-year term of the agreement they also cannot bargain for fairer wages and conditions, or more equitable rosters. If workers refuse to perform unsafe work, pursuant to health and safety legislation, they know that there is a risk that a court will subsequently find that the action was unprotected industrial action, and that they may be fined.

Eight years is far too long for workers to be stuck on poor working conditions that they have no power to change, especially when those conditions could impact their health and safety and mental wellbeing.

7 Schedule 5 – Compliance and enforcement

7.1 Consequences for breaching civil penalty provisions

165. Items 1-5 of Schedule 5 significantly increase the maximum penalties in respect of the non-payment, late payment or underpayment of wages and entitlements (defined as "remuneration-related contraventions"). The net effect is that for contraventions of this character, maximum penalties will be increased by 50%. Based on the value of penalty units at the time of writing[82], maximum penalties for remuneration related contraventions will rise from $13,320 to $19,980 for an individual and from $66,600 to $99,900 for a body corporate. Penalties may be increased further for body corporates if the contravention is also a serious contravention and, where the body corporate is not a small business employer, the value of the benefit obtained by the contravention may lift the maximum penalty to double the value of that benefit or three times its value where the contravention is also a serious contravention.

166. Providing for penalties to be set and assessed on the basis of the value of the benefit obtained by a contravention is provided in other Commonwealth laws, including the *Competition and Consumer Act 2010* and the *Proceeds of Crime Act 2002*. Under those regimes, it is only the regulator that has standing to recover a penalty (as opposed to compensation). Under the FW Act, regulators, individuals and their unions are entitled to initiate a single proceeding seeking both a penalty and compensation. It appears that the drafters of the Bill have attempted to rationalise the differences in the enforcement settings by providing in proposed subsection 546(3A) that where a penalty is awarded on the basis of the value of the benefit obtained, the penalty must only be paid to the Commonwealth. This is contrary to the current law where the penalty may be paid to the Commonwealth or other person or organisation and the usual order is that the person or organisation that brings the proceedings recovers the penalty, in recognition of "..the trouble, risk and expense of bringing proceedings which are in the public interest which advance the objects of the legislation and which benefit the wider community".[83] The Commonwealth has a very poor record of prosecution and enforcement through the

[82] The definition of penalty unit in section 12 of the Act is that it "…has the meaning given by section 4AA of the *Crimes Act 1914"*. Amendments to section 4AA of the *Crimes Act 1914* have permitted automatic indexation of the amount set out since 1 July 2020. However, subsection (8) of section 4AA (and the associated notice by the Attorney General) specify that any indexed amount "..applies only to **offences** committed on or after the indexation day". It is assumed in our calculations that the indexed amount applies. However, because contraventions of these provisions are not offences, we suggest it would be prudent to either amend the language used in subsection 4AA(8) of the *Crimes Act 1914* or in the definitional provision in section 12 of the *Fair Work Act 2009*.

[83] *United Voice v. MDBR123 Pty Ltd (No 2)* [2015] FCA 76 at [24]

responsible authority, the Fair Work Ombudsman, with annual reports suggesting that less than 1% of complaints of underpayment have led to prosecutions[84] and only approximately $123 million of the estimated at least $1.3 billion and as much as 12 billion in underpaid wages and superannuation is recovered by the FWO.[85] The effect of this new provision excluding payment of the penalty to other person or organisation further limits the capacity of anyone other than the Commonwealth to properly resource compliance efforts.

167. Permitting the person or organisation who brings the proceedings to retain the penalty allows for the expense of the legal proceedings to be recovered from the amount awarded by way of penalty rather than intruding into the compensation provided for the underpayment itself. The sound policy rationale for such an approach does not evaporate by reason of there being a new method of calculating maximum penalties. The current position should be retained.

168. The value of the benefit as defined in proposed section 546A essentially equates to the value of the underpayment and will be readily ascertainable. The Court is required to ascertain the maximum available penalty as part of its reasoning in every case, irrespective of whether the applicant seeks it to be determined on the value basis or otherwise. The effect of proposed 546(3A) will accordingly be to create disincentives for individuals and unions to initiate proceedings at the more serious end of the spectrum where the value of the underpayment exceeds the maximum value of penalty as determined in the usual way. This is a perverse effect of amendments which are touted as improvements that will drive compliance.

7.2 Small claims procedure

169. The significance of a proceeding being designated as "small claim" is essentially that the applicant forgoes legal representation as of right and the right to recover penalties in return for a less formalistic and usually quicker determination of their claim in which the respondent will also not have legal representation as of right. Nonetheless, it remains a Court process and as such many people, particularly workers, find it unfamiliar and intimidating.

170. The basic elements of the proposed amendments to the small claims procedure are lifting the ceiling on the amounts that may be claimed as "small claims" from $20,000 to

84 The Fair Work Ombudsman's 2019-20 report indicated that it received "more than 25,000" requests for assistance and commenced 54 litigations in that year.
85 See FWO Annual Report 2019-20 for FWO recovery figures; for estimate of wage theft see ACTU submission to the Senate inquiry into the unlawful underpayment of employee remuneration.

$50,000, providing a role for the FWC in resolving small claims and permitting filing fees to be recovered. Taken at face value, such initiatives have promise to allow more workers and unions to quickly recover underpayments. However, there a several flaws in the detail of the model proposed in the Bill, which could lead to the small claims jurisdiction becoming more technical and complex than it already is.

171. The difficulties arise because of the interplay between the role of the Court and the role of the FWC, particularly the restrictions on the latter. Whilst it might be assumed that the practical effect of proposed section 548B will be that most small claims are referred to the FWC to conciliate[86], pre-trial procedures in the Court proceedings can continue while the matter is subject to conciliation[87], which may distract from genuine efforts to resolve the matter. Furthermore, the following features of the proposed model for the FWC's involvement deprive it of its potential effectiveness as a forum for prompt and efficient dispute resolution:

172. One party may obtain an order from the Court to cease the conciliation process, irrespective of the wishes of the other party or the views of the Commission as to the prospects of a resolution.[88]

173. The Commission is deprived of its power to give an opinion or recommendation to the parties[89], which is particularly significant given that the parties will likely be unrepresented and inexperienced.

174. The Commission is effectively required to satisfy itself that any resolution that it facilitates in conciliation is accurate to the precise dollar value of what would be awarded by a Court in the same circumstances.[90] This is a heavy burden on an issue where reasonable minds could differ as to the quality and persuasiveness of evidence, for example as to hours worked over a particular period. It accordingly leaves any agreement reached through conciliation open to collateral attack in the Court. This restriction is notably not a feature of mediation by the Court's own Registrars.

175. By comparison, elements of the dispute resolution functions set out in the amended (but not yet commenced) sections 507C-507I and 547C-547I of the *Industrial Relations Act 2016* (QLD) or Part 4.2A of the *Magistrates Court Act 1930* (ACT) provide a more

[86] The allocation of powers to Court Registrars in Item 18 and 22 of Schedule 5 suggest that referrals to conciliation will become routine.
[87] Proposed section 548B(6)(b)
[88] Proposed section 548(6)
[89] Proposed section 548C(4)
[90] Proposed section 548C(9)

constructive path to alternative dispute resolution. Such provisions aim to bring about a timely, cost effective and agreed resolution of claims while permitting the conciliator or mediator to take an active role in the dispute resolution process. We should note however that, like the model currently proposed in the Bill, those models operate on the basis that claims have commenced in the Court and are continuing until otherwise ordered. The more conventional situation in the FWC (for example for General Protections and Unlawful Termination matters), and indeed in anti-discrimination jurisdictions generally, is that a conciliation process precedes the initiation of proceedings in the Court. There is no indication in the Explanatory Memorandum or Regulatory Impact Statements that such an option has been considered as an alternative in the small claims context.

176. Regrettably, the arbitration stream set out in the Bill also suffers from its sensitivity to collateral attack through Court action where a Court may reach a different view on the available evidence.[91] In our view, whilst we support the right to appeal an order made in arbitration, the process of electing to refer a matter to arbitration should sensibly be accompanied by a waiver of the right to further pursue the same matter in a Court and the arbitration order should be enforceable in its own right by way of civil penalty proceedings. These are currently features of the model for arbitration of general protections and unlawful termination matters in the FWC.[92]

7.3 Advertising restrictions

177. The introduction of a civil penalty for advertising positions at below minimum wages set by the National Minimum Wage Order, enforceable by compliance notice or civil penalty proceedings, is a welcome development. Regrettably, the potential impact of the initiative is constrained by the inexplicable requirement that only the regulator may bring enforcement proceedings. The practical effect of this limitation is that it will reduce the likelihood of employers who do contravene the provision ever being detected and facing sanction.

[91] Proposed section 548D(7).
[92] See Subdivision B of Part 6-1 of the Act (note sections 727(1A)(d) and 730(1A)(d)); sections 369(3) and 777(3).

Case Study: Unions detecting advertisement with below legal wages. Unions NSW reports of ads in Chinese Korean and Spanish websites

An audit of Chinese, Korean and Spanish language job advertisements conducted by Unions NSW found that 70% were for below the relevant Award minimum wage.[93] Addressing exploitation on this scale requires every policy, legal and investigative resource that is available. No government regulator will have the resources to detect and prosecute all of the foreign-language job advertisements that offer below the legal minimum wage when these form over two-thirds of foreign-language advertisements. Without the presence of a regulator with the investigative capacity and resources, job advertisements will continue to represent a dark economy, no matter what the legislative position.

Unions are made up of members of the community and our members speak the vast array of languages present in modern Australian society. No proposal to address advertising jobs below the applicable legal minimum can be effective if it does not allow unions to initiate proceedings.

7.4 Compliance tools

178. The 50% increase in penalties for non-compliance with a compliance notice, as provided by items 33 and 34 of Schedule 5, are welcome and uncontroversial. The 50% increase in penalties for sham contracting and related practices are also welcome, however we maintain that the "not reckless" defence should be abolished, consistent with the recommendation of the Productivity Commission 5 years ago[94] as well as the *Sham Contracting Inquiry Report* by the Australian Building and Construction Commission (2011), the *Towards more productive and equitable workplaces post-implementation review of the FW Act* (2012) and, most recently, in the final report of the Black Economy Taskforce (2017).

179. The amendments proposed by Items 28-32 of Schedule 5 of the Bill provide for enforceable undertakings to be entered into between the Australian Building and Construction Commissioner and building industry participants, with the alleged contraveners to benefit from the usual immunity associated with such undertakings. We are unable to discern why the additional guidance proposed in Item 35 in relation to the accepting of enforceable

[93] Unions NSW, *'Wage Thieves: Enforcing the minimum wage'* <https://www.unionsnsw.org.au/wp-content/uploads/2019/06/UNSW-wage-thieves-PRINT-2018.pdf>
[94] Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra, Recommendation 25.1.

undertakings by the Fair Work Ombudsman has not been replicated in the proposed amendments to the *Building and Construction Industry (Improving Productivity) Act 2016.* Whilst we continue to object to the separate industrial relations regime given effect to by and under the *Building and Construction Industry (Improving Productivity) Act 2016*, the amendments proposed by the Bill to that regime are themselves otherwise uncontroversial.

7.5 Criminalising Underpayments

180. We have previously outlined a sensible and workable regime of strict liability offences, modelled on the liability regime in the *Australian Consumer Law*, that would permit State and Territory criminal laws to operate simultaneously in a variety of circumstances.[95] Whilst we are not averse to a higher level offence in Commonwealth law for conduct that is intentional, reckless or dishonest, we are of the view that reform efforts should be co-operative across the Commonwealth, States and Territories and that there remains a role for a lower level offence on the basis that the stigma of criminality of any kind will encourage the otherwise careless to engage in due diligence.

181. Contrary to expectations of the community which have been promised - a tough regime of sanctions against wage theft - the criminal liability provisions in the Bill flex the Commonwealth's muscle to exclude the operation of State and Territory laws which criminalise underpayments and certain record keeping transgressions[96], while offering very little in return in terms of criminal liability for employers who underpay their workers. Instead, while knocking out effective state laws, the offence which is proposed in this Bill erects a very high bar to conviction both in terms of its elements and its complexity.

182. The Committee would be aware that legislation in Queensland and Victoria has been passed to criminalise certain underpayments. The legislation in Queensland[97] operates as a deeming provision allowing the non-payment of employees to be treated as "stealing" at the point at which an amount that is payable to the employee is not paid[98]. The fault element of this character of "stealing" as defined is intent, including intent to permanently deprive the employee of the unpaid amount or intent to use the unpaid amount at will with an intent to later repay it. It is a rather straightforward modification of the offence theft

[95] See the 2019 ACTU submission in response to the Attorney General's discussion paper on Improving protections for employees wages and entitlements.
[96] Item 42 of Schedule 5 provides a "covering the field inconsistency". See *NSW v. the Commonwealth* [2006] HCA 52 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ at [346]-[377] and, more generally, *Wenn v. Attorney General Victoria* [1948] HCA 13 and *R v. Credit Tribunal; Ex parte General Motors Acceptances Corporation* [1977] HCA 34 (per Mason J).
[97] Criminal Code and Other Legislation (Wage Theft) Amendment Act 2020 (QLD).
[98] See section 391(6A) of Schedule 1 to the *Criminal Code Act 1899* (QLD).

and the tort of conversion. The legislation in Victoria[99] targets the dishonest withholding of entitlements owed to an employee, where dishonesty is assessed objectively according to the standards of a reasonable person. A due diligence defence is available. Whilst these are different approaches, what they share is the capacity to secure a conviction on the basis of a single underpayment.

183. The offence set out at Item 46 of the Bill conversely requires a "systematic pattern of underpaying employees", which is defined in such broad terms so as to amount to an open discretion.[100] This level of uncertainty in connection with a requirement to prove beyond reasonable doubt is likely to discourage prosecution to the point that the offence is destined to become a dead letter. This is compounded by the fact that the standard test for dishonesty in Commonwealth offences is used, which involves satisfying both an objective test (the conduct is dishonest according to the standards of ordinary people) and a subjective test (the accused knew the conduct was dishonest according to the standards of ordinary people).

184. There are high penalties proposed for conviction of this serious offence. However, because each charged particular of underpayment must be proved beyond reasonable doubt and meet both elements of the test of dishonesty to be considered as a feature of the alleged systematic pattern of conduct necessary to secure a conviction, we seriously doubt that any penalty will be awarded.

185. That the bar to securing a conviction is set so high is more consistent with this proposal to criminalise wage theft being more of a device to override state and territory wage theft criminalisation provisions than it is with it being a serious attempt to combat wage theft by holding non-compliant employers to account.

[99] Wage Theft Act 2020 (VIC).
[100] Proposed sub-sections 342B(5) and 342B(5) provide a list of matters that a Court "may" have regard to in determining whether there was a systematic patter of underpaying employees, but those matters are not a limitation on what the Court may have regard to.

Case Study: Wage Theft

In their submission to the Senate's inquiry into the unlawful underpayment of employees' remuneration, the Young Workers' Centre detailed the story of Mina, a cafe worker.[101] Mina was engaged as a casual but worked full-time hours for about 2 years. On many occasions, Mina worked from opening until closing by herself and didn't receive breaks. Mina was paid a flat rate of $15.45.

If Mina's experience occurred while Victoria's wage theft criminalisation laws were in effect, it would present a strong case for securing a conviction. This would be less so under the proposed Commonwealth laws.

If a prosecution were initiated for this type of conduct under the Commonwealth law, an employer would be likely to mount a defence based on the assertion that they didn't know the conduct was "dishonest according to the standards of ordinary people". A further way in which Mina's former employer would be more likely to escape justice under the proposed Commonwealth Laws (as compared to the Victorian laws which would otherwise apply) is that under the Victorian law it would be an offence to withhold breaks, whereas under the Commonwealth law, it would not.

If passed, the Commonwealth laws would allow employers like Mina's who deny their employees breaks and other entitlements, and pay well below the legal minimum wage, to escape justice – which they might otherwise face under state laws.

8 Schedule 6 – FWC Procedural Powers

8.1 New powers to deny the right to a fair hearing

186. The proposed amendments to section 587, of their own, are of little significance. Whilst the form of the amendment suggests that the section will provide the FWC with new powers to dismiss applications where they constitute an abuse of process or are misconceived or lacking in substance, it is not clear that there is any practical difference between the powers as they presently exist and as they would exist under the proposed amendments.

187. Section 587 as presently drafted already permits the dismissal of applications which have no reasonable prospects of success. That being the case, the additional grounds to

[101] Submission 96, p9

dismiss where an application is "misconceived or lacking in substance" has no utility unless there presently exists a class of applications that are misconceived or lacking in substance which nevertheless cannot be said to have no reasonable prospects of success. In our view, it is highly improbable that such a class does exist. This perhaps distinguishes the FWC from the review jurisdiction of the Administrative Appeals Tribunal, where the amended provisions already apply and were drawn from[102], because "success" is difficult to define in a context where the process is one of merits review and the right of the applicant is to require a fresh decision to be made.

188. In addition, the present formulation of section 587 is expressed as without limitation and has been applied such that it does permit summary dismissal on the grounds of an abuse of process.[103] Indeed in the public discourse leading up to the introduction of the Bill, there was no discussion about these specific proposals and there has been no suitable explanation as to why the Parliament is asked to consider them now. It is therefore unclear what, substantively, the proposed amendments to section 587 would achieve.

189. The same cannot be said of proposed section 587A. This section creates a new power in the FWC, not subject to appeal, to prohibit persons or organisations from accessing their rights in the FWC on the same terms as others. Persons or organisations subject to the new powers will be prohibited from bringing proceedings without first being given permission to do so by a Presidential member. There is no outer limit on the period for which such a requirement may operate.

190. The only threshold that needs to be crossed in order for a person or organisation to be subject to such a barrier is that they have *once* had an application dismissed on the basis set out the proposed revised section 587(2). That notably includes a person or organisation who has once had a proceeding dismissed on the basis that it has no reasonable prospects of success. This is an alarming and unjustified intrusion on access to justice, particularly considering that the FWC is and is intended to be a forum where the absence of legal representation is the rule rather than the exception.[104] This concern is amplified by the fact that there is no formal requirement for there to be a nexus between the type or circumstances of the application which was initially dismissed and the types or circumstances of applications which will be subject to the new requirement to seek permission. The terms of the proposed law would permit, for example, an employer who

[102] Section 42B of *the Administrative Appeals Tribunal Act 1975.*
[103] [2011] FWA 1300; at [2016] FWC 8710 at [28]
[104] See section 596

had made one dismissed application to stop or prevent industrial action from ever doing so again, a union who had made one dismissed application for a protected action ballot order from applying for a good faith bargaining order in future bargaining (for any employer) or a worker who had made one failed unfair dismissal application from bringing a future application in respect of any future employment.

191. The practical effect on persons or organisation to whom such orders are directed is that they will need to participate in some form of pre-emptive show cause or strike out proceeding prior to making any of the types of applications which may be prescribed by the order applying to them. This is a real and substantive impairment to their right to a fair hearing, particularly when one considers both the formal time limits which apply to some FWC proceedings as well as the strategic imperatives to act promptly in particular employment and industrial relations matters (particularly those involving in bargaining and industrial action). Because neither the decision to make the order which imposes the requirement to seek permission nor the decision to refuse permission may be appealed[105], the only remedy is to seek judicial review. This for most provides no remedy at all because judicial review will generally not interfere in discretionary decisions save where they are so manifestly unreasonable as to amount to an abuse of power.[106] It is also notoriously expensive, inaccessible without legal representation and far from prompt.

192. Whist vexatious litigation provisions are not unheard of in other Courts and Tribunals in order to balance access to justice with efficient use of resources, it is critical to identify with precision the problem which is sought to be addressed, conduct a thorough assessment of the appropriateness of the proposed response (including the potential for misuse) and confine the response as narrowly as possible having regard to those matters. By way of example, if the problem related to natural persons making successive applications in relation to employment which had been terminated, a more appropriate and confined provision applying only to natural persons in those circumstances could be devised, perhaps including a reasonable threshold requirement relating to the person having had two or more matters relating to their former employment dismissed under a relevant ground under section 587.

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[105] The initial decision to impose the requirement to seek permission is not subject appeal by reason of it having been made by a Full Bench, per section 604(1)(a) and proposed section 616(4)(4A). The decision to refuse permission to make an application is not subject to appeal by reason of proposed section 587A(7).

[106] See generally *Minister for Immigration v. Eshetu* [1999] HCA 21; *Minister for Immigration and Citizenship v. Li* [2013] HCA 18.

8.2 Disenfranchisement and a second bite at the cherry for substandard agreements

193. The proposed amendments to section 603 appear intended to permit FWC to vary or revoke decisions that currently would require permission to appeal and a successful appeal to overturn. That the decisions identified are those which relate to enterprise agreements and workplace determinations suggest, having regard to the amendments set out in Part 5 of Schedule 3 and elsewhere, that the effect of revised section 603 may be (and may be intended to be) to disenfranchise workers in relation to the terms and conditions of their employment.

194. As is set out elsewhere in this submission, the Bill evinces an intention to engineer the following outcomes:

- workers who are not represented by a union in bargaining being deprived of an opportunity to oppose the approval of an agreement if they seek the advice of a union only after an agreement has been circulated for a vote;
- unions being unable to act as an *amicus curiae* or intervener in applications to approve an enterprise agreement; and
- agreements that do not pass the better off overall test being approved in a broader range of circumstances.

195. It is consistent with that intention to also engineer an outcome whereby an agreement that fails the BOOT and is not approved (notwithstanding any undertakings) is permitted to be re-submitted without the necessity for a further vote of workers. The re-submitted application could seek that the agreement be approved notwithstanding its BOOT defects, in reliance on the new provisions proposed for section 189. The current position would be that application for approval, having been dismissed, would in the absence of an appeal need to be made again, inclusive of an employee vote. That second vote would occur in circumstances where the employees had since learned that the agreement would leave some or all of them worse off than the safety net award, a fact which may alter their voting intentions. Bringing about outcomes of this nature which bypass the informed consent of workers is wholly inconsistent with intention of the legislation more broadly.

196. In relation the workplace determinations, the ordinary course is that a party dissatisfied with the terms of a workplace determination would be bound by it (subject to judicial review) until it was replaced or was terminated after its nominal expiry date.[107] The

[107] See sections 279, 604(1)(a), 616(4)

proposed amendments to section 603 would effectively permit workplace determinations to be varied – perhaps years into their period of operation - but only on the basis of submissions by interested parties. If the desire was to permit greater flexibility in the terms of workplace determinations during their operation, a fairer means of doing so would be to permit them to be varied in the same way that enterprise agreements may be varied.

8.3 A day in court as a privilege, rather than a right

197. The Act currently requires that the FWC conduct hearings for appeals, save for where both the FWC considers the appeal can be "adequately determined" without a hearing *and* the participants consent. The proposed amendment to section 607 would remove the requirement for that consent and instead merely require the FWC to "take into account" the views of such persons. This is a significant diminution of rights. The proposed formulation effectively compels a person to convey in writing *why* an appeal in which they are involved should be heard in the usual way. Fundamental rights such as the right to be heard lose that character if those reliant on them are routinely called upon to justify them. The rules of natural justice should remain rules, not discretions.

198. The proposed amendment could serve in practice to exclude the participation of persons who are not as effective in communicating in written English as they are in spoken English. Moreover, where the FWC does act in reliance on the amendment to choose for itself who has a right to be heard, public confidence in the institution is likely to suffer.

9 Schedule 7 – Application, Saving and transitional provisions

199. The ACTU's submissions in relation to this schedule are incorporated into our submissions on the relevant subject areas above.

Conclusion

Working people have set three tests that we should use in considering the Government's proposed changes to the Fair Work Act.

a) We must respect the heroes of the pandemic, those essential workers in supermarkets, transport, warehousing, schools, and health that have got us through over the last twelve months.
b) There can be no cuts to workers' rights, pay, and conditions. You can't heal the economy by hurting workers.
c) We must act now to make jobs more secure. This is the biggest problem that working people face today. We have to stop corporate Australia from casualising jobs and making work more insecure by transferring economic risk from capital onto labour.

This Bill fails each of these tests and in some cases fails multiple tests at the same time.

- More jobs will be casualised.
- Awards will be varied to cut pay, conditions, and rights of working people.
- Enterprise agreements can cut pay and employers are given significantly more bargaining power.
- Greenfields agreement will hand power to multinationals over Australian workers.
- Wage theft laws overrise stronger state-based laws while introducing an impossibly high bar that will prevent successful prosecutions.

As we apply the tests set by working people there are three key arguments that underpin the ACTU's view on this Bill:

1. **The Bill takes rights off Australian workers. Parliament should not be supporting laws that take rights off workers leaving them worse off.**

Key elements of the Bill that are most concerning for the ACTU:

Key elements of the Bill that are most concerning for the ACTU:

a. Award provisions are cut – not just 12 awards but every award is in scope.
b. The casual provisions will allow employers to casualise what are today, permanent jobs. There is no real offer for casual conversion. It removes rights for workers who have been wrongly classified to recover their entitlements.
c. The part time provisions will remove predictable hours and pay from workers making it harder for those with family responsibilities.
d. The changes to the bargaining system fundamentally shift more power to employers at a time of record low wage growth and allow cuts to pay, conditions and rights.
e. New Greenfield Agreements hands power to multinationals to determine the rights of Australian workers, giving workers no say regarding their working conditions and no means to resolve workplace disputes on projects that are high risk in terms of workplace safety. They will create a new class of workers with less rights.
f. New provisions related to wage theft that propose to criminalise this behaviour, actually displace superior state-based laws, and set the bar so high for criminalisation that it is unlikely to ever be applied.
g. The Bill extends JobKeeper IR emergency provisions past the end of JobKeeper payments.

2. **This Bill will hurt, not help economic recovery.**

- There is no evidence that the provisions set out in the Bill are needed or required to sustain our recovery.
- No evidence that the proposed changes will create one job.
- The key to economic recovery is wages growth. The measures in this bill are all about keeping downward pressure on wages and keeping jobs insecure.
- Working people in casual jobs have less confidence to spend. Household spending and domestic demand is key to our economic recovery.
- Australia's working people sacrificed the most and have paid the highest price in the Covid induced recession. While working people are facing extraordinarily high levels of unemployment and under-employment, exhausting their sick leave, annual leave and long service leave, or raiding their superannuation - corporate profits have continued to grow, and Australia's richest people have become richer.

3. **This Bill undermines fairness and delivers ongoing insecurity, not flexibility.**

- The 2020 COVID responses proved the current system is extremely flexible – flexible enough to make rapid changes that were necessary as well as fair. Australian workers and their unions worked rapidly with employers to make temporary changes to awards across whole industries to cope with shutdowns, social distancing rules, reduced hours and working from home.
- By weakening protections, the Bill ignores the lessons of the pandemic which demonstrated the risks to everyone when one class of workers was left exposed and vulnerable.
- The Bill does not address Australia's most pressing labour market problem - the extent to which jobs are casual and insecure. Over half a million casuals lost their jobs at the outset of the pandemic and 60% of new jobs created since May 2020 have been casualised. The Government's changes will not help solve this problem – it will make it easier for employers to casualise permanent jobs and pay workers less than the award safety net.
- The Bill shifts more power to employers which will exacerbate inequality, low wage growth and job insecurity. The current laws have overseen record low wage growth and record high job insecurity. Instead of remedying them to rebalance the system, the Bill will make these three serious issues worse.

The ACTU submission has laid out the elements of the proposed legislation that do the opposite of the Bill's name – it attacks fairness and does not support Australia's economic recovery.

- In its current form the Fair Work Amendment (Supporting Australia's Economic Recovery) Bill represents a failure to respect and protect the interests of the essential workers who have carried Australia through the crisis of the Covid-19 pandemic.
- The Bill does not create new jobs. The Bill will lead to reductions in workers' rights. Cuts in employment rights and pay represents a danger to our fragile recovery. You can't fix the economy by hurting workers.
- The Bill will not reverse casualisation and insecure work. This is the biggest problem faced by working people and this Bill will actually make things worse by swinging the pendulum further towards employers.

Fair Work Amendment (Supporting Australia's Economic Recovery) Bill 2020 swings the pendulum further away from working people and towards big business. The ACTU believes that it should be rejected by Parliament in its current form. It should not be supported unless it can be substantially amended to the point where it passes each of the tests that will allow us to build a stronger, fairer economy with secure jobs and fair pay for working people.

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