Senate Inquiry into the: Secure Jobs Better Pay Bill 2022 ACTU Submission

AUSTRALIA NEEDS A Pay Rise

Australian Unions
We're for workers

Contents

About the ACTU

The ACTU is the peak body of trade unions in Australia, with 43 ACTU affiliated unions representing nearly 1.8 million members engaged across all industries and occupations in the public and private sector. Since its establishment in 1927, the ACTU has led all major campaigns to win improved workplace rights for Australian workers.

The ACTU welcomes the **Fair Work Legislation Amendment (Secure Jobs Better Pay) Bill 2022**, and the chance to participate in the Senate Education and Employment Committee's inquiry into it.

1. Executive Summary

Australian workers urgently need a pay rise.

Over the past decade, wages in this country have barely grown. This wage stagnation has now turned into a collapse in real wages as inflation has contributed to workers on average, losing $3,000 in real terms in the past 12 months.

This wages crisis is due to one thing only: the collapse of bargaining power for working people. Any other reason put just does not stack up. Afterall, productivity growth is positive, unemployment is historically low, and economic growth is healthy.

Collective bargaining should be the engine of wage growth in this country but has not been working for the past decade. Today less than one in seven employees are covered by a current collective agreement. It is far too easy for an employer to exploit and evade the laws.

Employers have also been turning permanent jobs into insecure ones. Today nearly one in three workers is in a form of insecure work. This puts their wages, job security and lives on hold.

The Secure Jobs, Better Pay Bill 2022 (the Bill) is a critical and welcome measure to get wages urgently moving in this country. It makes modest changes to open up the bargaining system and its benefits to more workers.

It also makes a start in delivering on the new Government's commitments to make jobs more secure, and end wage theft but more needs to be done, especially for workers in casual, gig or labour hire work and to recover underpayments.

It includes key measures to make women safer at work, delivering on the final recommendations of the Respect@Work report, and makes serious inroad into ending the gender pay gap in this country, where progress has stalled, both by strengthening equal pay laws, and by enabling bargaining to make a greater contribution towards equal pay.

The Bill is not perfect. It does little to fix industrial action, which is among the most restrictive systems in the world for employees, but still comparatively easy for employers to take. And the modest changes to the bargaining system in the Bill still leave a restrictive system in place which risks limiting its uptake and effectiveness.

Placing limits on the inclusion of small business in multi-employer bargaining risks shutting out an estimated 4.3 million Australian workers from a key reform to get wages moving, as does the exclusion of the construction industry.

The ACTU also raises in this submission a series of practical recommendations to help the Bill better achieve its stated intentions. Nevertheless, the Bill is still a strong set of measures to get wages moving in this country. The ACTU calls for this Committee to recommend the prompt passing of this Bill.

1.1 Summary of recommendations

The ACTU also recommends that:

1. The need to ensure gender equity should be included in the list of factors the FWC must consider in making a workplace determination as provided for by the FW Act s 275.
2. S302(4) should be amended to provide that reports of the new expert panels must be taken into account when making an equal remuneration order.
3. Consideration be given to the establishment of a Work and Care Expert Panel and 'work, care and family policies' should be added in as areas of knowledge and experience to be considered when appointing panel members in sections s620(1B) and 627(4).
4. Gender pay equity should be added to the areas of knowledge and experience an expert panel should have when constituted for the Annual Wage Review and to review default fund terms by amending s620(1)(b) and s620(1A)(b).
5. Amendments should be made to s617A to provide that an expert panel may inquire into a matter, and that interested parties be given an opportunity to make written submissions in relation to the issues to be inquired into and the manner in which the inquiry will be conducted.
6. Amendments should be made to 617B to allow parties to provide submissions on draft reports of expert panels before they are published and to make submissions during final proceedings.
7. Extend the pay secrecy provisions so that they apply to all workers, and not just employees.
8. The flexible work provisions should narrow the grounds on which a request can be refused, and require an objective test such as whether the request will cause the employer 'unjustifiable hardship'.
9. The flexible work provisions should be extended to also cover requests for extended unpaid parental leave, giving the FWC the ability to review requests for extended unpaid parental leave that have been refused or not responded to.
10. Government amendment 19 would effectively allow terms in enterprise agreements that indirectly discriminate against a group of employees (for example, employees with caring responsibilities) to override the flexible work provisions. This change should be reversed.

11. Remove s65C(1)(a) and insert a Note or subsection after s65B(1)(b)(ii) that where 21 days have passed since the employee made the request, and the employer has not given the employee a written response to the request under section 65A, the employer will be taken to have granted the request.
12. Include "experiencing reproductive health symptoms or concerns" as a circumstance under s65(1A).
13. Give the FWC stronger powers with regard to sexual harassment disputes, allowing it to arbitrate where the worker or their union requests this. Give the FWC the ability when dealing with applications to stop sexual harassment to make orders designed to put the worker back into the financial position they were in prior to the commencement of the harassment.
14. Make it clear that third party conduct is covered by s527D, and extend vicarious liability for employers in S527E to include sexual harassment perpetrated by third parties.
15. Amend sexual harassment provisions so the FWC can have regard to the general risk that a person will continue to be sexually harassed by others in a workplace and make orders that will reduce the risk of future harassment occurring.
16. Extend sexual harassment provisions to cover former workers and include reinstatement as a remedy.
17. Include reproductive health as a protected attribute under the FW Act.
18. Remove s195(6) that provides that a term of an enterprise agreement ceases to be a special measure to achieve equality after substantive equality for the particular employees has been achieved.
19. Remove the 'necessity test' for special measures to achieve substantive equality in section 195(4)(b).
20. The parts of the Bill which dispense with the requirement for a 7-day access period be removed from the Bill. The Committee should further consider whether the access period be increased to a greater period, such as 14 days.
21. Proposed s 173(2A)(d) should be redrafted so as to provide clarity that bargaining can be initiated in the manner provided where parties seek a new agreement that covers the same, or substantially similar, workers as a previous agreement, even if the new agreement would also cover additional workers.
22. Proposed s 227A(1)(c) should be amended to allow for an employee organisation that is entitled to represent the industrial interests of a worker covered by the agreement to make an application for reconsideration of whether an agreement passes the BOOT.
23. The Bill should be amended to increase the minimum bargaining period for intractable bargaining declarations (currently set at 6 months after bargaining commences or 3 months after the first application is made under section 240) to ensure that a declaration may only be made after bargaining has been engaged in for an appropriate period and bargaining is truly intractable.
24. The provisions requiring compulsory conciliation in connection with the seeking of a protected industrial action ballot order should be removed from the Bill.
25. The proposed requirement that there be minimum of 14 days between the issuing of a protected action ballot order and the closing of votes should not be adopted.

26. Part 20 should be strengthened by providing greater priority for supported bargaining, clear rights to compel funding entities to attend and meaningfully contribute to those conferences and the bargaining process in good faith.
27. To better support the intent of Part 20, the objects of the Act should be amended to no longer preference any particular level or form of bargaining as the means through which those objects should be realised.
28. Part 21 requires some amendment to provide the FWC greater freedom in structuring bargaining cohorts in accordance with employees' wishes. Items directed to limiting bargaining cohorts for single interest employer agreements, including by way of the immunity in respect of current bargaining and the small business exemption, should not be proceeded with.
29. To better support the intent of Part 21, the objects of the Act should be amended to no longer preference any particular level or form of bargaining as the means through which those objects should be realised.
30. Proposed section 226(1) should be redrafted to make clear that the circumstances provided for in that sub-section are the only circumstances in relation to which the FWC may terminate an agreement.
31. Proposed section 226(4) should be redrafted such that the FWC cannot terminate an agreement if doing so would have an adverse effect on the bargaining position of employees.
32. Proposed section 226(5) should be removed;
33. Sub-section 226A(4) should be amended to provide that a guarantee of termination of employment entitlements given in relation to the termination of an enterprise agreement should remain in force until a new agreement comes into force. It should remain in force for any worker not covered by a new agreement, until such time as a new agreement covers them.
34. All other terms and conditions should also be guaranteed for a period of at least 6 months.
35. The Government should facilitate further discussions aimed at ensuring that the Bill meets its objective of limiting the use of fixed term contracts.
36. The ACTU encourages the Government to implement its other commitments on job security, by further legislating to ensure labour hire workers get the same pay as directly employed workers doing the same job; protect workers in the "gig economy"; enact a fairer definition of casual employment, and strengthen rules to prevent sham contracting.
37. The need to promote job security should be included in the factors for consideration when making a workplace determination arising under the FW Act s 275.
38. Proposed sub-section 536AA(2) should be amended to refer to outworker entities, as well as employers, to ensure that responsibility is conferred to the correct hiring entity.
39. Proposed sub-section 536AA(3) which allows for employers to escape scrutiny if they have a "reasonable excuse" should be removed from the Bill.

40. The Committee support the passage of the Bill Part 27 and welcomes the recent commitment of the Minister for Employment and Workplace Relations to continue working with the relevant parties, including the union to ensure that the intent of these changes are fairly and effectively met.

2. Introduction: Australia needs a pay rise

Australian workers urgently need a pay rise. Our industrial relations system is not delivering the wage increases that working people deserve and the economy and businesses can afford. The *Secure Jobs Better Pay Bill 2022* (Bill) is urgently needed to help turn around the wage's crisis in this country.

Over the past decade wages in this country have barely grown. But this wage stagnation has now turned into a collapse in real wages over the past 12 months, with inflation now running at 7.3% and expected to hit 8% by the end of the year.

Taking these figures, the average worker on about $70,000 per year has faced a pay cut in real terms of about $3,000 in the last 12 months.[1] But the real picture is likely far worse for working people: prices for those items that people can't do without – so called "non-discretionary items" - are rising even faster than CPI at 8.4%.[2] And it is workers on lower incomes who spend a greater amount of their income on these items.[3]

As a result, one in four people are finding it "difficult" or very difficult" to get by on their current income, up from 17.4% in November 2020, despite people working more hours, according to a recent survey of 3,500 respondents by the ANU's Centre for Social Research and Methods.[4] The survey also found a steep drop in average weekly household income from almost $1,800 in February 2020 to $1,629 in October 2022 when adjusted for inflation. A record number of Australians – more than one in five - have experienced severe food insecurity in the past 12 months.[5]

This emergency has been brewing throughout a decade of lost wage growth. Nominal wages have grown on average 2.2% over this period, compared to 3.8% in the ten years before that.

Figure 1: Annual nominal wage growth (per cent) at each quarter, September 2002 to June 2022

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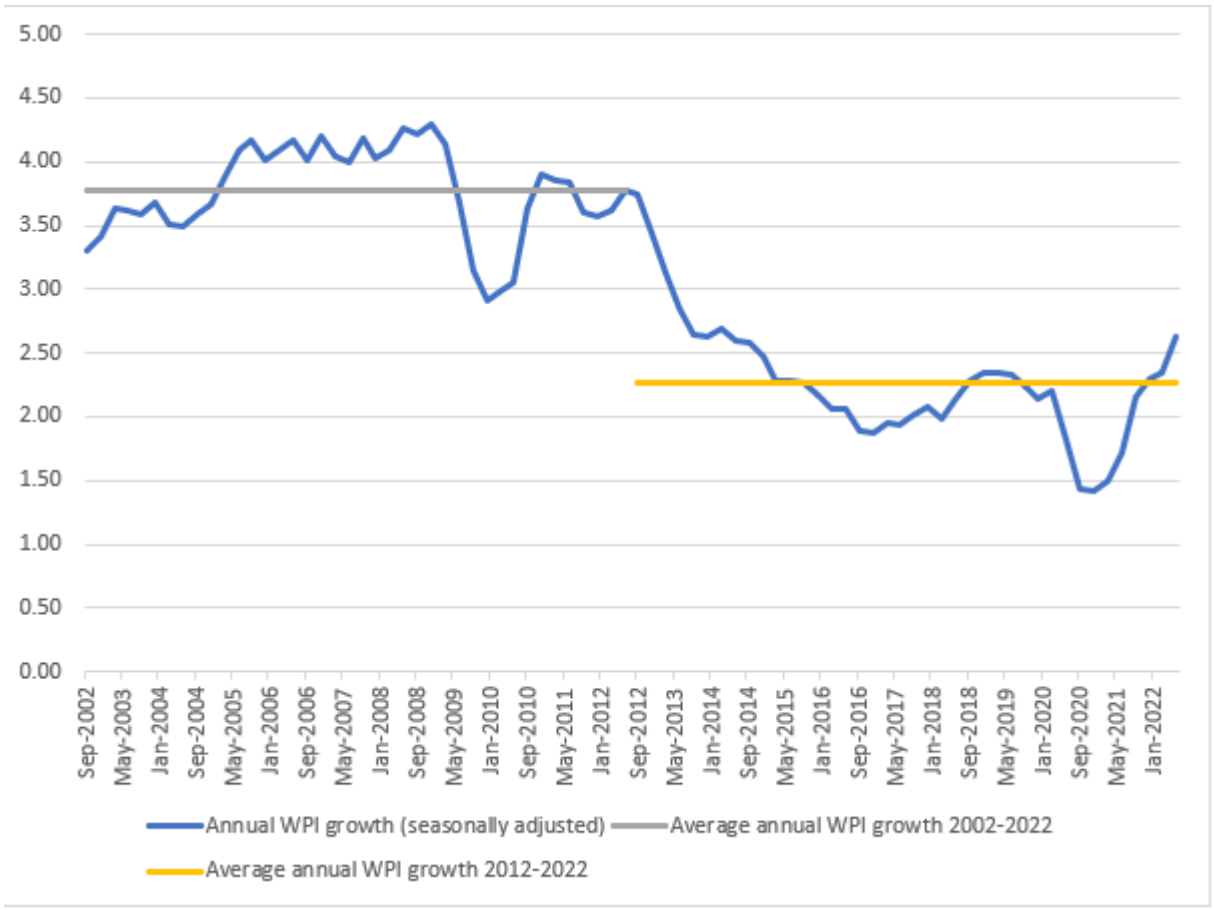
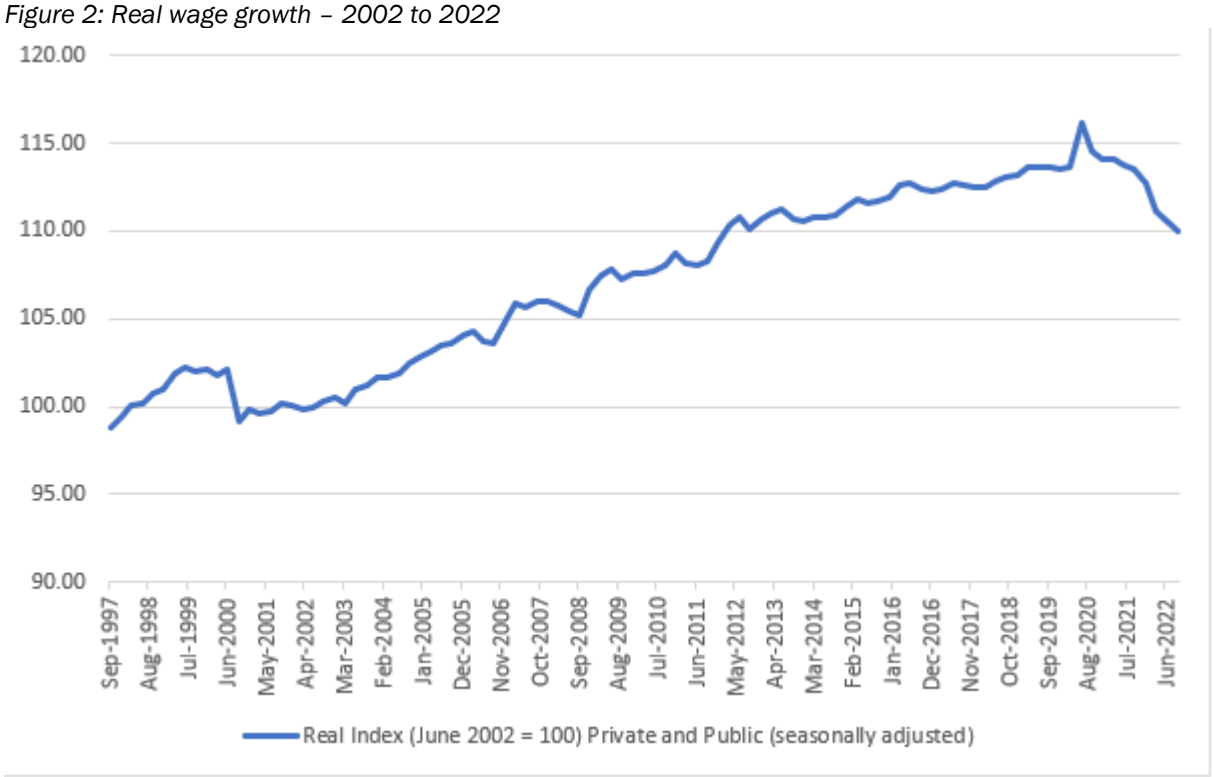
[1] ABS CPI (September 2022), ABS Average Weekly Earnings (May 2022) and assuming 3% WPI for September 2022 up from 2.6% in June 2022.
[2] ABS CPI (September 2022)
[3] See for example, Yuen K and Rozenbes, D (2022) *Experimental estimates for a Consumer Price Index for low-paid employee household* Fair Work Commission.
[4] Guardian, 3 November 2022, "One in four Australians struggling to make ends meet as inflation strains incomes, study shows", https://www.theguardian.com/australia-news/2022/nov/03/one-in-four-australians-struggling-to-make-ends-meet-as-inflation-strains-incomes-study-shows
[5] The Guardian, 17 October 2022, "Inflation and inadequate welfare fuelling Australia's food insecurity crisis, Foodbank find", https://www.theguardian.com/australia-news/2022/oct/17/inflation-and-inadequate-welfare-fuelling-australias-food-insecurity-crisis-foodbank-finds



Source: ABS 6345.0, Table 1, derived.

Taking into account inflation, wages have actually declined by 0.2% in real terms over the past ten years.

Figure 2: Real wage growth – 2002 to 2022

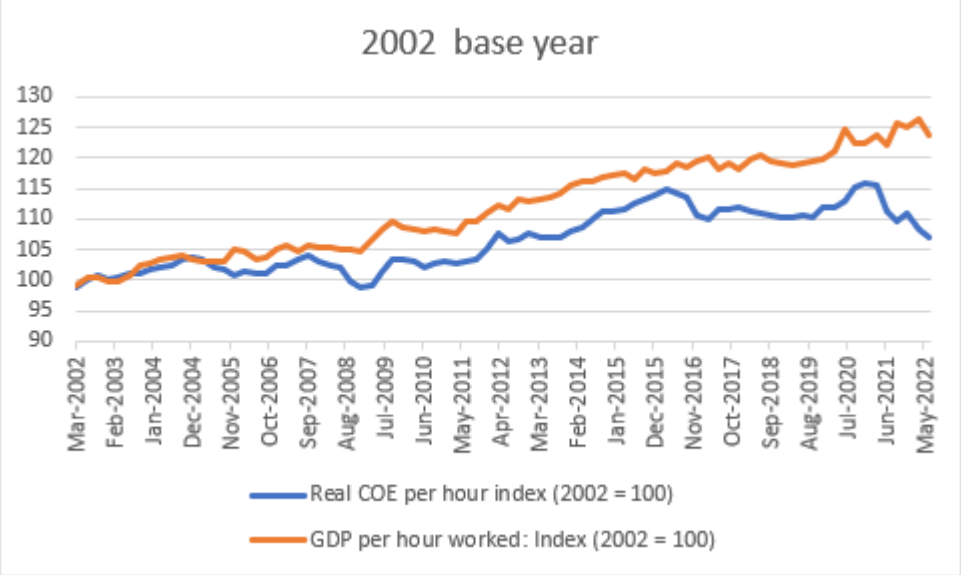


Source: ABS 6345.0, 6401.0, derived.

Low wage growth is mostly an Australia problem and not an international one. Average wage growth across OECD countries from 2011 to 2021 has been on average two and a half times higher than Australia's.[6]

Why are wages growing so slowly? Employer groups and some commentators have put forward a range of arguments. Firstly, employer groups have repeatedly argued that to get wages moving, productivity has to get moving first. But productivity has been moving while wages haven't. The ACTU calculated earlier this year that if wages had kept up with productivity improvements since 2013, the average worker would be about $10,000 better off today.[7]

Figure 3: Productivity vs wages growth since 2002.



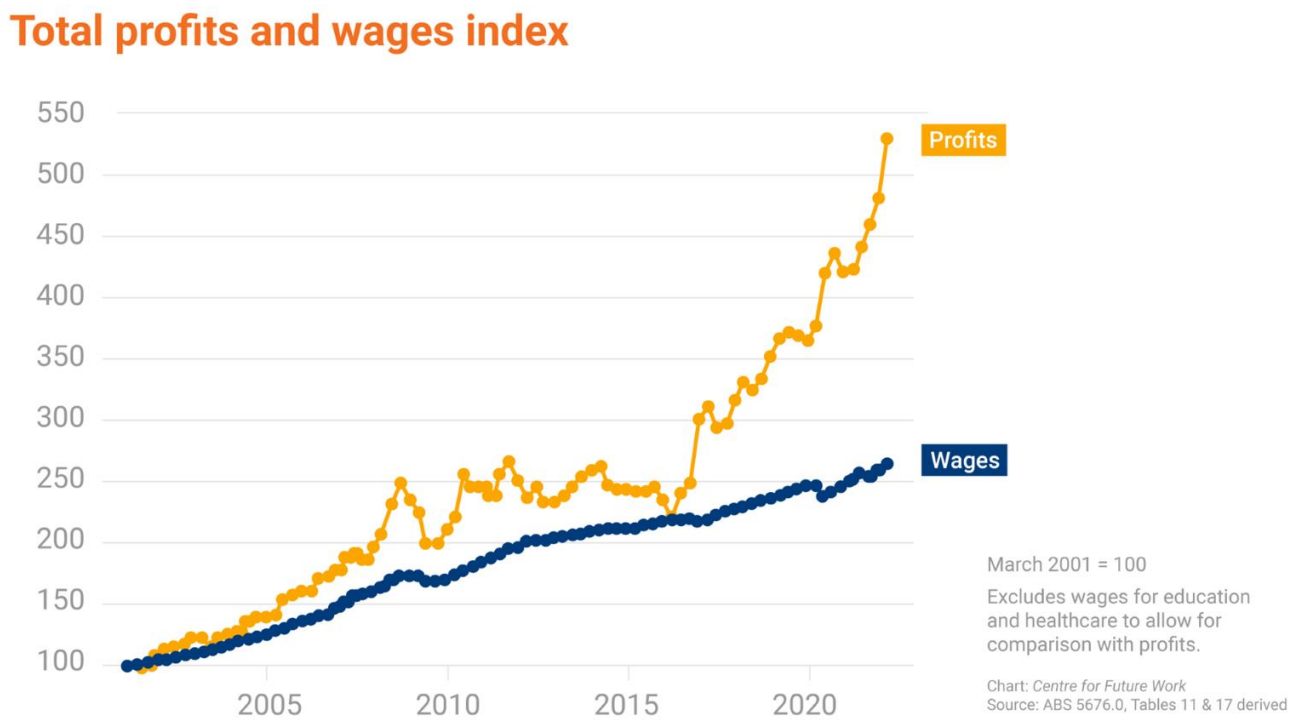
Source: ABS 5206.0, derived.

The ACTU agrees that productivity improvements – our capacity to produce more with a given set of resources – is critically important to improving our national wealth and standards of living. We continually put forward ideas to improve productivity – from rebuilding our national skills system to investing in the industries of the future. Yet workers have been denied their fair share of productivity gains over the past decade. Productivity growth could double, but on current trends, workers are unlikely likely to share in any of the benefits of it. So when employer organisations talk of improving productivity to get wages moving, it is often a distraction from the real issue.

[6] OECD Data – Average Wages 2011 to 2021 from: https://data.oecd.org/earnwage/average-wages.htm
[7] ACTU (April 2022), *Morrison Missing in Action on Wages,* page 9. https://www.australianunions.org.au/wp-content/uploads/2022/05/Morrison-Missing-in-Action-on-Wages.pdf

So where have the gains from productivity growth gone? They've gone onto company balance sheets. Since 2010 profits have easily outpaced wages, growing at 3 times the rate.

Figure 4: Total profit and wages index.



Source: Centre for Future Work, ABS 5676.0 Tables 11 & 17 derived.

Key employer groups have rebutted this evidence by arguing that this divergence is due to the stellar performance of the mining industry. Leaving aside the merits of excluding the mining sector from this discussion, these trends are still present even without mining. For example, as Table 1 below shows, non-mining profits have grown by an annual average of 6.9% for the past five years, compared to nominal wage growth of just 2.1%.

Looking across the economy, the share of national GDP going to workers is now at its lowest level since this record was first kept back in 1959.

Figure 5: Share of GDP going to workers as compensation of employees (per cent)

Source: ABS 5206.0, Table 7, derived.

Secondly, key commentators, especially the Reserve Bank, have said that wages will move once the unemployment rate goes down and labour markets tighten. Workers were told to wait until unemployment had a "4" in front of it. Now it has a "3" in front of it, but the wage growth still has a "2" in front of it. A tight labour market is no longer driving the wage growth that it did in the past.

A third contribution employer groups make to this debate, is that even if wages aren't moving, now is not the time for pay increases because it would contribute to inflation. Yet wage growth has had absolutely nothing to do with the current episode of inflation. In fact, low wage growth has arguably held back inflation. Further, holding back the wages of a worker is also a deeply unfair, blunt and ineffective way of tackling the underlying drivers of inflation and it ignores the key role that profits, already at record levels, have played in driving inflation.[8]

Table 1: Average annual growth in key economic variables over five-year periods 2002 to 2022 (%).

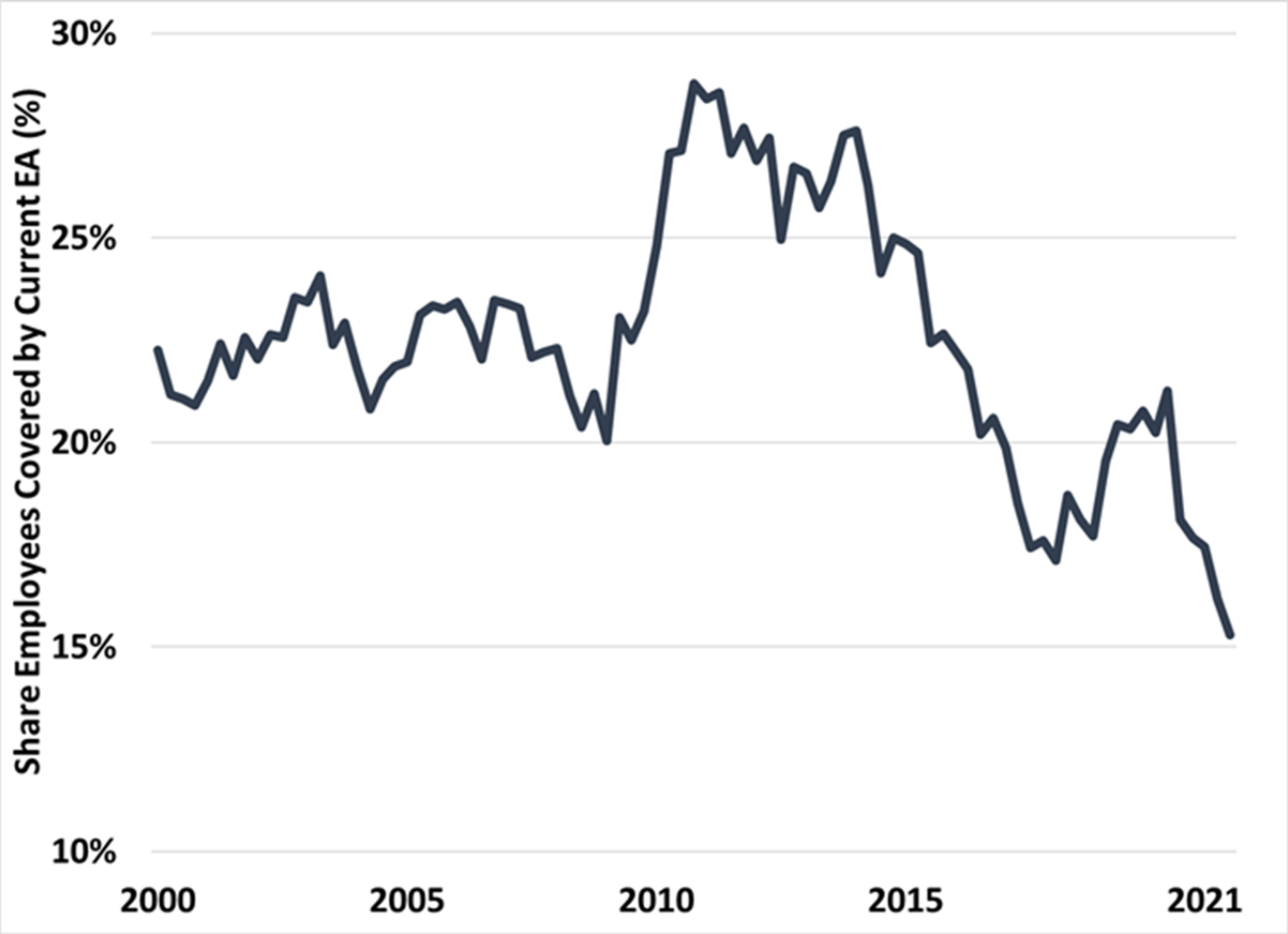
	2003-2007	2008-2012	2013-2017	2018-2022
Nominal wages	3.9	3.7	2.3	2.1
Real wages	1.1	1.0	0.4	-0.5
Real GDP	3.4	2.8	2.5	2.1
Productivity	1.1	1.2	1.4	1.0
Company profits	11.1	6	4.1	14.4
Non-mining company profits	9.5	3.4	3.7	6.9

Sources: ABS WPI, CPI, and National Accounts

[8] Richardson D, Saunders M & Denniss R (July 2022), *Are wages or profits driving Australia's inflation?* The Australia Institute discussion paper.

The real reason that wage growth has slowed so badly in the past decade is the sharp decline in the bargaining power of Australian workers – an issue that has been heavily debated since wages first started to slow down around a decade ago.[9] The clearest example of this has been the decline in the number of workers covered by a collective agreement. A decade ago 27% of employees were covered by a collective agreement. Today that figure is just 14%.

Figure 6: Share of employees covered by a current Enterprise Agreement.

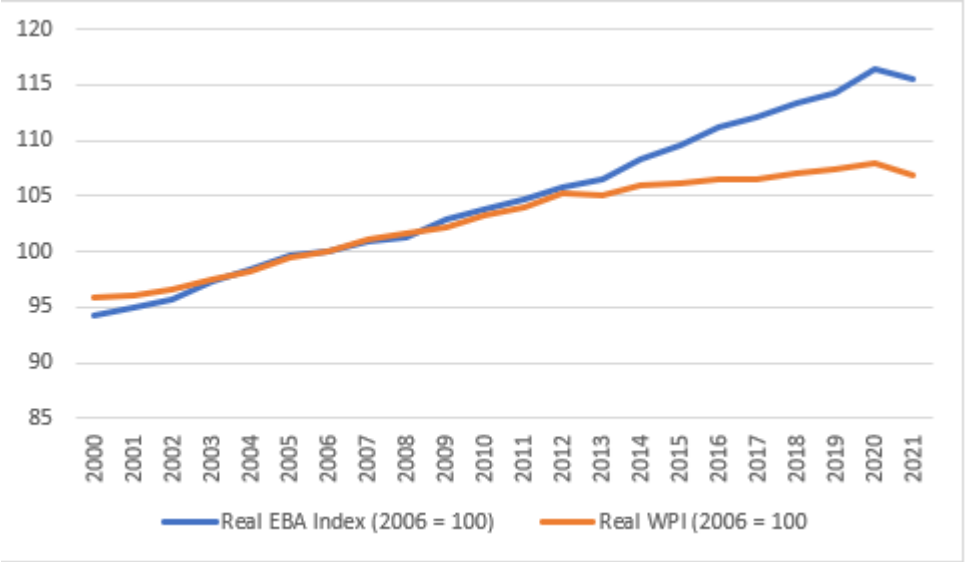


Source: DEWR, Trends in Enterprise Bargaining.

This has had a significant impact on the ability of workers to negotiate and win fair pay increases. For workers still on collective agreements, their wages have outpaced the growth in the national Wage Price Index – the only good news story for wage growth. Since 2012 real EBA wages have grown by 9.1% whereas real wages across the economy up until 2021 had only grown by 1.4% (before then going backwards).

[9] See for example, Stewart A, Stanford J, & Hardy T, (Eds) (2018), The wage crisis in Australia: What it is and what to do about it, University of Adelaide Press

Figure 7: Index of real wages under approved EBAs versus index of real wages overall (WPI)



Source: ABS 6345.0, Department of the Attorney-General WAD, derived.

The bargaining power of workers has dramatically weakened because Australia's industrial relations system has not kept up with changes in the world of work and is no longer fit for modern workplaces. The move from larger workplaces to fragmented workplaces coordinated across supply chains, the continued march of technology, and the rise of the services sector, especially in care, have all eroded the traditional model of enterprise based industrial relations. But it is the wide range of corporate strategies to evade responsibilities to their employees under labour law, from outsourcing and moving permanent workers onto insecure work arrangements, to frustrating employee attempts to organise and bargain under the Fair Work Act, among others, that bears the most responsibility.

2.1 How this Bill will get wages moving again

The Secure Jobs Better Pay Bill 2022 presents a broad package of sensible reforms that will update Australia's Industrial Relations system to make a substantial contribution to getting wages moving. As this submission makes clear, in many cases they are modest changes to the existing system. In many cases, especially with regards to bargaining, they do not go far enough. Below is a summary of exactly how the Bill will do this.

Closing the Gender Pay Gap

Each week a woman on average earns $472 less than a man. The Gender Pay Gap in Australia has refused to close and has recently gotten worse. This Bill is a comprehensive package to help close the gap. Workplaces with collective bargaining are able to deliver higher wages for women. The Bill will make it easier to bargain,

including by allowing bargaining over measures to reduce the pay gap for the first time, and allowing women to bargain across workplaces - particularly in industries where their work has been undervalued.

The Bill will also strengthen the equal pay laws in the Fair Work Act. There has only been one successful equal pay case under these laws since they were introduced in 1993. The Bill will fix this by making gender equity an object of the act, strengthening how equal pay cases are assessed, establishing expert panels on pay equity and care and community, and outlawing pay secrecy clauses in employment contracts that hide pay discrimination against women. These changes are all vital to get wages moving for women.

Strengthening the right to request flexible working

Jugging work and care is a burden that falls heaviest on women, limiting the hours they can take on, the money they can earn and their career progression. It also increases the stress in their lives. The proposals in this Bill to strengthening the right to request flexible working, would enable women to better balance care and work, and improve their workforce participation and income.

Getting bargaining moving again

Enterprise agreements now only cover one in seven workers because the system is outdated, overly restrictive and too easy for unscrupulous employers to exploit or evade. Even with its limitations, workers who can bargain are getting better pay increases than other workers. The Bill introduces a series of changes to get bargaining moving again. Firstly, it will make it easier for employees on expired agreements, – which now make up the majority of all collective agreements – to re-initiate bargaining to bring their pay and conditions up to date. It also streamlines the agreement approval process and adopts a common-sense approach to fixing errors in agreements.

Enabling bargaining across workplaces.

While the Fair Work Act already has multi-employer bargaining streams, they have proven to be almost unusable in practice. The Bill seeks to fix this. Firstly, it reforms the former “low paid” bargaining stream by broadening the test that the FWC applies and removing other key restrictions under a renamed “supported bargaining” stream. This should enable, in particular, low paid and award-reliant workers the chance to fairly bargain across employers – a vital reform especially in female-dominated sectors. Secondly, the Bill broadens out the very narrow criteria that has made the other key multi-employer bargaining stream – single interest – largely unworkable. It also makes a range of other common-sense changes.

Unfortunately, the Bill also introduces significant limitations for employees working in a workplace with 15 or less to access multi-employer bargaining. This could have the effect of shutting out up to 4.3 million employees, or more than one in three workers from a key reform to get their wages moving.

Closing agreement loopholes that employers exploit

Employers can currently undermine workers' bargaining positions by threatening to terminate their current enterprise agreements. This has seen workers threatened with significant pay cuts, often forcing them to settle for lower wages. The Bill will close this harmful loophole to ensure that fair bargaining can take place.

Further, an estimated 450,000 workers are trapped on so called "Zombie agreements" - industrial instruments from the WorkChoices era that formally ended in 2009. Sunsetting these agreements will finally enable workers trapped on them to bargain again for better conditions.

Tackling insecure work by limiting the use of fixed term contracts

Over 4.1 million workers in Australia – nearly one in three - are on insecure work arrangements which limit their ability to bargain for better wages and security in their lives.[10] Some 550,000 workers are on fixed term contracts – many of them frequently rolled over to deny workers job security. The Bill will limit the use of the fixed term contracts, allowing Australia to join the nearly 100 other countries that already do this. More work needs to be done however to give job security to workers on casual, labour hire, gig and sham contracting arrangements.

Making it easier to combat wage theft

Each year billions are stolen from workers by unscrupulous employers, particularly in retail, hospitality and construction. The legal barriers to combatting wage theft are significant. This Bill will provide easier access to the small claims processes for workers to recover their stolen wages. It will also outlaw ads for jobs with illegal rates of pay. This is a good start to address wage theft, but more will need to be done.

Providing Respect@Work for Women and other anti-discrimination law changes.

The Bill introduces into the FW Act a prohibition on sexual harassment and improves the process to raise a complaint – one of the final legislative recommendations of the Respect@Work report into workplace sexual harassment which is welcome and overdue.

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[10] ACTU (March 2022), *Morrison's record of failure on Secure Jobs,* page 7

The Bill also brings the FW Act into alignment with other anti-discrimination legislation by including protection against discrimination on the basis of the protected attributes of breastfeeding, gender identity or intersex status.

Finally, while the Bill will make an important contribution to getting wages moving again, it is far from perfect.

- It does nothing to fix industrial action, which is among the most restrictive systems in the world for employees, but still comparatively easy for employers to take.
- The modest changes to the bargaining system in the Bill still leave a very restrictive system in place which risks limiting its uptake and effectiveness.
- Placing limits on the inclusion of small business in multi-employer bargaining risks shutting out some 4.3 million Australian workers from a key reform to get wages moving, as does the exclusion of the construction industry.
- The ACTU understands that further key reforms to improve job security and tackle wage theft will be introduced into the Parliament next year but are sorely needed now.

3. Gender Equity and Equal Pay

The Australian workforce has always been, and remains, highly gender segregated by international standards. Industries and occupations dominated by women are characterised by high levels of award dependency, lower wages and fewer protections. Female-dominated sectors have been historically under-valued due to discriminatory and gendered assumptions about the skill-level and value of the work. In its current form, the FW Act does not effectively ensure gender equality.

Manifestations of gender inequality in the workplace, such as the gender pay gap, occupational and industrial segregation and the underrepresentation of women in leadership roles are also major causes of sexual harassment.

Australia's high rate of insecure work is a heavily gendered phenomenon and a significant contributor to the gender pay gap and gender inequity at work. Sectors characterised by a high prevalence of low paid and insecure work include those which have carried our community through the pandemic, including Healthcare, Retail and Hospitality. Australia has dropped in the global gender gap index (the World Economic Forum Gender Gap Report) from 15 in 2006 to 43 in 2022 - well below most other OECD countries. Each week, a woman takes home $472 less on average in pay than a man[11] – a pay gap that has been stagnant for the past five years and has recently gotten worse.

There are three broad and overlapping reasons why women get paid less than men. Firstly, there is the historic undervaluation of work done in female-dominated industries and occupations, and the persistently high levels of occupational and industry segregation along gender lines. Secondly, women face a lack of access to secure, quality and flexible work, particularly due to a lack of support for caring responsibilities. Expensive and inaccessible early childhood education and care (ECEC), inadequate paid parental leave, unequal parenting for children, and no meaningful right to request family friendly work arrangements all contribute to this barrier. Thirdly, gender discrimination continues to play a large role, including in treating women less favourably when it comes to hiring, access to training, and pay and promotion decisions.

These factors continue to undermine women's workforce participation and drive the gender pay and retirement income gaps. The impact of women's care burden and the resulting work/care collision has been thoroughly examined over many years, with evidence demonstrating that for women, the effect is 'curtailed

[11] When the gender pay gap is measured across all hours worked and pay received, rather than by full-time ordinary hours. See ABS Average Weekly Earnings (May 2022)

career aspirations, reduced life-time earnings, and inadequate superannuation.'[12] The propensity of women with care responsibilities to end up in 'poorly remunerated and insecure work without training and promotion opportunities, and with continuing clashes between work and care responsibilities' has also been well documented over many years.[13]The result of these structural inequities are felt over a lifetime and see women, on average, retire with superannuation balances 47% lower than men.[14]

Given the complex and multivariate causes of the gender pay gap, solutions to it also need to be broad. The Bill addresses the gender pay gap on multiple fronts, including by making it easier to collectively bargain, especially across employers, which is critical in female-dominated sectors, – a proven solution to reducing the pay gap. It will also:

a. Enable employees and employers to bargain about measures to reduce the gender pay gap;
b. Place gender equity at the heart of the FW Act;
c. Strengthen equal pay laws;
d. Ban the employer practice of pay secrecy;
e. Strengthen rights to flexible work; and,
f. Establish expert panels, better suited to addressing cases on equal pay and in the care and community sectors where women's work has been undervalued.

a. Objects (Part 4)

Section 3 of the FW Act provides a number of overarching objects for the legislation to achieve. In accordance with established principles of statutory interpretation, the FW Act is required to be interpreted in a way that best achieves the objects.[15] The Fair Work Commission must also take the objects into account when performing its functions and exercising its powers under the FW Act,[16] for example in dispute resolution and arbitration, when setting terms and conditions in modern awards, and in approving enterprise agreements. This means the FW Act's stated objects are critical to the way in which that legislation is interpreted, how the FWC exercises its functions and powers, and the decisions it makes. There are also specific objectives in the FW Act that deal with modern awards and minimum wages.

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[12] Chapman.A, Industrial Law, Working Hours and Work, Care and Family, Monash University Law Review (Vol 36, No 3) 190-216
[13] Ibid at 201 and 202 and references
[14] David Hetherington and Warwick Smith, Not so Super, for Women: Superannuation and Women's Retirement Outcomes (Melbourne: Per Capita and the Australian Services Union, 2017), at p6
[15] *Acts Interpretation Act 1901(Cth)* s 15AA; See also *Tickner v Bropho* (1993) 114 ALR 409 at 434 (1993) 114 ALR 409
[16] S578(a) *Fair Work Act 2009* (Cth).

Currently, gender equality is only recognised indirectly as an objective of the FW Act, through the requirement in s3(a) to consider Australia's international labour obligations, and it is only the concept of 'equal pay for work of equal or comparable value' (just one aspect of gender inequality, and also a concept that has been narrowly interpreted by courts and tribunals) which is to be merely 'taken into account' by the FWC when performing its functions in relation to modern awards and minimum wage setting. This means that when dealing with decisions that affect large groups of award reliant and low paid workers, the FWC has not been required to properly consider the impact of those decisions specifically on women, how structural gender inequality has affected those workers, or how any decision it makes may be able to address that.

These limitations of the current industrial framework when it comes to gender equality are demonstrated by the 2018 Full Bench decision in relation to the union movement's claim for paid family and domestic violence leave. In that case, the Full Bench said:

> "*We accept that family and domestic violence is a gendered phenomenon, in that it predominately affects women. But s.134(1)(e) is concerned with the provision of equal remuneration in particular, not the impact of an award term on women generally. The consideration in s.134(1)(e) is not relevant in the present context*."[17]

This was a missed opportunity. Had the FWC been required to consider the positive impact that an entitlement such as paid family and domestic violence leave would have on gender equality in the workplace more broadly, it may not have taken over a decade for Australian workers to have access to paid family and domestic violence leave.

The Bill addresses these issues by amending the FW Act so that gender equity is included within the objects of the FW Act, as well as the Modern Awards Objective and the Minimum Wages Objective. Section 3 will now state that the FW Act is intended to achieve gender equity. The Modern Awards Objective in section 134 will now provide that the FWC must ensure that modern awards provide a fair and relevant minimum safety net, taking into account the need to achieve gender equity in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work, and providing workplace conditions that facilitate women's full economic participation. Section 284 will now provide that the FWC must establish and maintain a safety net of fair minimum wages, taking into account the need to achieve gender equity, including by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work, and addressing gender pay gaps.

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[17] *4 yearly review of modern awards – Family and Domestic Violence Leave* [2018] FWCFB 1691 at [297]

Enshrining gender equity as one of the objects of the FW Act means that the FWC has to consider the need to achieve gender equity in the performance of all of its functions and exercise of its powers, along with other objects such as achieving productivity, fairness and flexibility. The inclusion of gender equity in the Modern Awards Objective and the Minimum Wages Objective will mean that the FWC has to consider gender equity when setting terms and conditions in modern awards, and when setting and reviewing minimum wages. These changes will mean that gender equity considerations are placed at the heart of the Fair Work system, and will lead to fairer outcomes for women, help to eliminate gender-based undervaluation of work, and address the gender pay gap.

ii. How the Bill can be strengthened

A further associated change which would assist in delivering on the intention behind these changes would be to include the need to ensure gender equity in the factors the FWC must consider in making a workplace determination provided for by the FW Act s 275. This would ensure that when making a workplace determination, the FWC must give consideration to gender equity, as it would when exercising its modern award powers.

ii. Recommendations

1. **The need to ensure gender equity should be included in the list of factors the FWC must consider in making a workplace determination as provided for by the FW Act s 275.**

b. Equal Remuneration (Part 5)

Some of the most undervalued work in Australia is performed largely by women, including many of those who carried us through the pandemic – workers in early childhood education and care, aged care, healthcare, disability support, retail and hospitality. These female-dominated sectors have been historically undervalued due to gendered assumptions about the skill level and value of the work, and this remains a significant driver of the gender pay gap.

Unfortunately, workplace laws aimed at directly addressing this historical undervaluation of work in female-dominated sectors have largely failed.

The FWC currently has the capacity to make equal renumeration orders on application by employees, unions or the Sex Discrimination Commissioner. This has been the primary mechanism by which female workers can claim equal pay. However, in the 30 years since the Equal Remuneration Order provisions were introduced in

1993, there has only been one successful case. This is because the requirements have been too strict and technical – for example, female workers can only succeed in an equal pay case if they can identify a specific cohort of male workers who are paid more than them.[18] This is next to impossible in female-dominated industries, and the requirement to identify a male "comparator group" in order to prove undervaluation has been a large barrier to achieving gender pay equity. This has made the pursuit of Equal Remuneration Orders an extremely costly, time consuming, highly adversarial and, overwhelmingly fruitless process.

This is demonstrated by the FWC's decision in 2018 to dismiss an application by the Australian Education Union and United Voice for an Equal Remuneration Order for the children's services and early childhood education industry. The then Coalition Commonwealth government and employer groups argued that unions needed to identify 'male comparators,' despite the fact that there was no such requirement in the FW Act. The case ran for five years, resulting in the FWC agreeing with these arguments and finding that the unions did not present enough evidence that educators were underpaid due to the sector being overwhelmingly female. The Independent Education Union brought a similar application for early childhood teachers. Because of the need for a male comparator, the early childhood teachers were compared first to male primary school teachers and then to engineers. In 2021, The FWC rejected the equal pay claim, saying the evidence did not meet the strict requirements of the FW Act. These decisions failed to recognise and take into account the systemic undervaluing of women's work. Moreover, they demonstrate the need for both new equal remuneration principles, and for equal remuneration decisions to be made by people with specialised knowledge and experience.

The Bill will address these issues by providing revised equal remuneration principles, and new guidance for equal remuneration and work value cases. The new principles, based on those applying in the Queensland state jurisdiction, will mean that equal pay cases will no longer require comparison with 'similar work' or a 'male comparator'. The FWC will be able to take into account comparisons within and between occupations and industries to establish whether the work has been undervalued on the basis of gender, but it is not limited to consideration of similar work and does need to compare the work with a historically male dominated industry. The FWC will now be able to consider whether the work has been undervalued based on gender, and there is no longer a requirement to find that there has been gender discrimination to establish that work has been undervalued or to grant an equal remuneration order. The FWC will also be able to make an equal remuneration order on its own initiative, as well as on application, meaning it does not have to wait for an application to act. Equal remuneration decisions will also need to be heard by an Expert Panel (see section c below).

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[18] See *Application by United Voice & Australian Education Union* [2015] FWCFB 8200 at [290]

The Bill also provides new guidance for work value cases. Applications to vary awards for 'work value' reasons can be made where the employees covered by an award believe that the classification descriptors and remuneration paid to them no longer reflects the work being performed and the value of that work. When considering whether amending an award is justified for work value reasons, consideration of work value reasons must be free of assumptions based on gender, and include consideration of whether the work has been historically undervalued due to gender-based assumptions.

These changes will mean that the Equal Remuneration Principles may finally be able to achieve what they were intended to - addressing the historical undervaluation of work in female dominated industries and closing the gender pay gap. The changes will also strengthen the work value provisions, meaning it will now be possible for women to win equal pay claims through multiple avenues.

i. How the Bill can be strengthened

If the making of equal remuneration orders is to be informed by investigations or inquiries of the new expert panels, the reports of the expert panels should be referred to in s302(4) of the FW Act as a matter that the FWC must take into account when making an equal remuneration order. S302(4) currently requires the FWC to take into account orders and determinations made in annual wage reviews, and the reasons for those orders and determinations. The inclusion of reports of the new expert panels in s302(4) is important to ensure that reports of the expert panels serve a purpose and are taken into account in decisions the FWC makes.

ii. Recommendations

2. **S302(4) should be amended to provide that reports of the new expert panels must be taken into account when making an equal remuneration order.**

c. Expert Panels (Part 6)

Currently, issues relating to pay equity and the care and community sector (such as applications for equal remuneration, work value cases and award variations) are dealt with by the FWC as part of its ordinary case load. Currently the FWC only has to convene an expert panel in relation to certain superannuation matters and for the Annual Wage Review, which decides the increase in the minimum wage and minimum rates in modern awards. In order to be appointed to the FWC, members need to have knowledge or experience in workplace relations, law and/or business, industry or commence. However, experience and expertise in gender pay equity, anti-discrimination and the care and community sector are not currently considered when making

appointments to the FWC. The Bill will allow members who have expertise and experience in these areas to be appointed to the FWC.

Further, the Bill will establish two new expert panels – a Pay Equity Panel and a Care and Community Sector Panel. The Pay Equity Panel will consider any applications for equal remuneration orders, and any matters related to determinations to vary modern award minimum wages if there are substantive gender pay equity matters justifying the determination. The Panel will have at least two experts with knowledge or experience relating to gender pay equity and/or anti-discrimination.

The Care and Community Sector Panel will deal with any matters that arise in the Care and Community Sector and which otherwise would have been considered by the Pay Equity Panel, as well as decisions about Care and Community Sector Awards. The Panel will have at least two experts with knowledge of or experience in the care and community sector, and when dealing with pay equity in the care and community sector, will need one expert in the sector and one expert in gender pay equity/anti-discrimination.

This will mean that instead of issues relating to pay equity and the care and community sector being dealt with as part of the Fair Work Commission's ordinary case load, they will be decided by the two new Expert Panels, who will have the expertise and specialist knowledge needed to assess pay and conditions for women and for workers in feminised industries. This will lead to better and fairer outcomes for women, promote the right to fair wages and equal remuneration, and help to address the gender pay gap.

ii. How the Bill can be strengthened

Additional Work and Care Expert Panel

In addition to the two new expert panels established by the Bill, consideration should be given to the establishment of another expert panel that would be constituted to consider work and care matters. Unions are concerned that these issues are not currently understood well in matters before the FWC, leading to poor outcomes for women. This panel would give the FWC the ability to address issues that are not only about pay equity, or about the care and community sector, and deal with systemic issues in relation to how workers balance work and care, an issue that disproportionately affects women. This would also be consistent with the inclusion of gender equity in the objects of the FW Act, as well as the new considerations in the Modern Award and Minimum Wage objectives regarding workplace conditions that facilitate women's full economic participation and addressing the gender pay gap.

"Work, care and family policies" should also be added to the areas of knowledge and experience for the pay equity panel and for any future expert panel for Work and Care. This is in recognition of the fact that a lack of workplace accommodation for caring responsibilities, and women's disproportionate share of unpaid labour

are significant causes of the gender pay gap. There is a clear need for understanding of the impact of regulation on work, care and families. This area of knowledge should be added to s620(1B) and 627(4).

Minimum Wage Expert Panel

Consistent with the Minimum Wage objective being amended to include the need to consider gender equity, the expert panel that is constituted for the Annual Wage Review should also include panel members with expertise relating to gender pay equity. This could be done by amending s620(1)(b) to include gender pay equity as an area of knowledge and experience. Given the substantial income retirement gap, s620(1A)(b) could also be amended to include gender pay equity as an area of knowledge and experience for expert panels considering default fund terms.

Investigations of Expert Panels

Section 617A of the Bill provides that the President may give a direction requiring that a matter relevant to the function of an expert panel be investigated, and that a report about the matter be prepared. The word investigation should be replaced with the word inquiry. An investigation implies that findings of fact will be made, something only the FWC can do when deciding whether to make a particular order. Furthermore, the language of 'investigation' risks being too formal and legalistic. There could also be issues if the investigation made findings which were overturned during the substantive proceedings. The expert panel should instead be informed by an inquiry, which will allow it to consider relevant research. This amendment would be consistent with s590(2)(f) of the FW Act which allows the FWC to conduct inquiries in order to inform itself in relation to any matter before it in such manner as it considers appropriate (s590 does not refer to investigations). The inquiry could also be informed by interested parties about the topic or matters it proposes to inquire into and how the inquiry will be conducted. For example, the inquiry should not necessarily be limited to submissions and research, but could also include informal proceedings, conferences, worksite visits and conversations with workers.

An amendment should be made to s617A along the lines of:

s617A

(1) *The President may give a direction under section 582 identifying a matter relevant to the function of an Expert Panel constituted under subsection 620(1B), (1C) or (1D) that the FWC proposes to inquire into, and that a report about the matter be prepared.*

Note: Matters that may be relevant include gender pay equity, equal remuneration, the work-care conflict, and the Care and Community Sector, in Australia.

(2) Prior to giving a direction, the President must consult with interested parties and allow interested parties a reasonable opportunity to make written submissions to the FWC for its consideration in relation to identifying the issues for inquiry and the manner in which the inquiry will be conducted.

(3) The direction may be given to:

(a) an Expert Panel; or

(b) one or more Expert Panel Members; or

(c) a Commissioner; or

(d) a Full Bench that includes one or more Expert Panel Members.

Reports of expert panels

S617B of the Bill provides that any report that has been prepared should be published so that submissions can be made addressing issues covered by the report. Parties should have an opportunity to comment on the draft report's recommendations to ensure accuracy before it is published. Any submissions on the final report would be best done in formal proceedings, so that these submissions could be considered by the FWC in making a decision. Otherwise, the submissions on the report do not serve a clear purpose and cannot be considered by FWC outside of proceedings.

An amendment should be made to s617B along the lines of:

1. *If the President gives a direction under section 617A, the FWC must prepare and consult on a draft report.*
2. *The FWC must ensure that interested parties have a reasonable opportunity to make comments and/or submissions to the FWC on the draft report published for its consideration prior to finalising the report.*
3. *The publishing of material under subsections (1) and (2) must be on the FWC's website and by any other means that the FWC considers appropriate.*

(The underlined and in (3) allows the FWC to communicate more widely. The 'or' is restrictive.

ii. Recommendations

3. **Consideration be given to the establishment of a Work and Care Expert Panel and 'work, care and family policies' should be added in as areas of knowledge and experience to be considered when appointing panel members in sections s620(1B) and 627(4).**
4. **Gender pay equity should be added to the areas of knowledge and experience an expert panel should have when constituted for the Annual Wage Review and to review default fund terms by amending s620(1)(b) and s620(1A)(b).**

5. **Amendments should be made to s617A to provide that an expert panel may inquire into a matter, and that interested parties be given an opportunity to make written submissions in relation to the issues to be inquired into and the manner in which the inquiry will be conducted.**
6. **Amendments should be made to 617B to allow parties to provide submissions on draft reports of expert panels before they are published and to make submissions during final proceedings.**

d. Prohibiting Pay Secrecy (Part 7)

An IR system not working

"In 2019 there was a pay discussion amongst team members where it was discovered that the new recruits were paid significantly more than staff members with lengthy tenure. This was raised with team leaders and then to senior management. It was shut down immediately. They asked for the names of those who were involved in these conversations and we were all told not to discuss our pay with anyone. It was implied that we may lose our jobs if we continued to discuss our pay. I then moved into another position where I came to find that 2 male colleagues starting in the same position at the same time as me were paid $5000 and $10,000 more than me even though I had been with the bank for 10 years and they had 1 year experience. I raised this with my team leader and was told I should not know what anyone else is paid and that it cannot be discussed. Although I've raised it a number of times along with taking on many additional duties above and beyond my role, my pay has still not been aligned to that of my male colleagues." Kylie, VIC

Employers preventing staff from discussing their pay is a driver of the gender pay gap. This is because many women don't know they're being paid less than men to do the same job. Pay secrecy clauses in employment contracts which prohibit workers from disclosing what they get paid are commonplace and are designed to give employers the upper hand in pay negotiations. They also hide widespread pay discrimination against women and allow employers to get away with paying women less. The lack of transparency means that women have no way of knowing whether they are being paid the same as men, whether their pay is keeping up with market rates, and whether there is a gender pay gap in their workplace. For example, a 2022 report by the Finance Sector Union (FSU) established that the internal gender pay gap at the Commonwealth Bank was up to $800 million per annum, in part due to pay secrecy clauses and the inability of workers to challenge inequities.[19]

[19] Finance Sector Union, 'The Price of Silence – A Worker Perspective on Pay Secrecy at CBA', March 2022.

The Bill fixes this problem by prohibiting pay secrecy clauses in employment contracts and other instruments in new provisions in Part 2-9 of the FW Act. Employees will have the right to disclose (or not disclose) their remuneration and any terms and conditions of employment that are reasonably necessary to determine their remuneration – for example, the number of hours they work. Employees also have the right to ask other employees about their remuneration (whether or not they work for the same employer). Both of these rights are considered to be 'workplace rights' for the purpose of the general protections provisions – meaning that adverse action, including termination of employment, cannot be taken against a worker for exercising them.

The new provisions are a civil penalty provisions. Any pay secrecy terms in contracts or industrial instruments will have no effect to the extent that they are inconsistent with the new provisions.

The changes will apply to new contracts, including variations to existing contracts, after the Bill receives Royal Assent. Restrictions in existing contracts will remain until the contract is varied or a new contract is entered into.

These changes will mean that employees will be able to talk about their wages with fellow employees if they want to, and employees will have a right to ask other employees about their wages, without having to worry about negative consequences from their employer. This will enable female employees to find out if they're being paid less than male employees, create transparency and accountability for employers, and address the gender pay gap. Nobody would be required to tell anyone what they are paid – employees have the right to disclose or not disclose their remuneration.

i. How the Bill can be strengthened

The provisions regarding pay secrecy only apply to employees, and do not apply to other types of workers such as independent contractors. This means that other kinds of workers will not have the same workplace rights to ask others about their remuneration, and to disclose their remuneration, and employees who ask non-employees about remuneration will not be protected. For example, an employee who asks about the remuneration of another person in the workplace, not realising that they are not an employee, would not have any protection from adverse action including termination of their employment. It also means that the prohibition on pay secrecy terms in contracts and written agreements only apply to employees, and pay secrecy terms in agreements with other kinds of workers will still be allowed. These are significant gaps which will hamper the ability of these provisions to achieve their aim. The provisions should be extended to apply to all workers, including independent contractors, which would also provide consistency with s342 of the FW Act.

ii. Recommendations

7. **Extend the pay secrecy provisions so that they apply to all workers, and not just employees.**

e. Flexible Work (Part 11)

An IR system not working

A 55 year old full-time female Assistant Store Manager employed by a medium sized retailer for several years made a request in writing for a flexible working arrangement to reduce her hours by one shift and drop her rostered Wednesday shift to care for her grandchildren. Her employer denied the request on what they argued were 'reasonable business grounds', however, failed to provide details of the particular grounds that prevented them from agreeing to the request. The employer did not discuss the request with her before making a decision or make any attempt to accommodate her caring needs.

Following the refusal, the employee sought union assistance. After ongoing discussions, the employer offered an alternative arrangement which was still inconsistent with her caring needs, which they were aware of, so was not a genuine attempt to reach agreement. The reasons given by the employer were that it would be too hard to replace her on Wednesdays (which may be a concern or inconvenience, but is unlikely to be a reasonable business ground.) There was no need to replace the employee with a manager as the Store Manager would continue to work on Wednesdays, and there was a new part time team member who could have been but was not asked to work the Wednesdays.

Without the ability to make an application to the Fair Work Commission to resolve the dispute, the employer's refusal on 'reasonable business grounds' cannot be tested, and the employee has no legal recourse. Her only alternative is to continue to work her rostered hours and not provide care to her grandchildren or resign.

There are only two National Employment Standards (NES) entitlements that aren't enforceable – and they both disproportionately affect women: the right to request flexible work and the right to extend unpaid parental leave. This gap in the safety net is unjustified. It discriminates against (predominantly female) workers with family responsibilities and undermines the development of innovative family friendly work practices in Australian workplaces, which are proven to benefit employers as well as employees, and the national economy as a whole.

Under current provisions in the FW Act, employees can request flexible working arrangements (such as a changes to hours of work, patterns of work, and location of work) in particular circumstances, including if they

have caring responsibilities for children or others, or where they are returning to work after the birth or adoption of a child. An employer can refuse the request on 'reasonable business grounds.' If an employer refuses an employee's request, whether reasonably or unreasonably, there is nothing more the worker can do – they cannot challenge that decision. This means that workers juggling care and work currently have no meaningful right to require their employer to help them balance those responsibilities.

A large percentage of requests for access to family friendly working arrangements are refused, either in whole or in part. In addition, a high proportion of employees who need flexibility (many of whom are men) do not ask at all. There is no way of knowing how many refusals are unreasonable, because employees are denied the right to have this reviewed by the independent umpire. The top reason women who want to work are unable to is, 'caring for children'[20]. After the age of 35, women are more than twice as likely to work part time than men, [21] demonstrating the need for stronger rights to flexible working arrangements in order to encourage a fairer sharing of caring responsibilities by men, and to prevent women being forced into insecure work at the crucial moment when they take on caring responsibilities.

The Bill addresses this by introducing a new requirement for employers to genuinely try to reach agreement at the workplace level with employees, including by having discussions with them and making efforts to identify alternative arrangements if they cannot accommodate the employee's request. Employers may only refuse requests on reasonable business grounds where they have taken these steps and have been unable to reach an agreement with the employee, and have had regard to the consequences of the refusal for the employee.

The Bill also gives workers a right of review in the Fair Work Commission by empowering the FWC to resolve disputes where employers have refused or not responded to a request for flexible work within 21 days. The FWC will be able to deal with the dispute as it considers appropriate, including by way of conciliation, making recommendations, expressing opinions, arbitration, or making orders. Contravention of an order is a civil remedy provision. The Bill also expands the circumstances in which an employee may request flexible working arrangements to include situations where an employee, or a member of their immediate family or household, experiences family and domestic violence.

[20] ABS Barriers and incentives to labour force participation (FY 2020-2021)
[21] ABS Labour Force, July 2022 page 5

ii. How the Bill can be strengthened

Reasonable Business Grounds

S65A(5) of the Bill contains the reasonable business grounds on which employers can refuse requests for reasonable work. These grounds are far too broad, give employers far too many opportunities to refuse requests, and place a number of obstacles in the way of workers who need flexibility. In some industries such as healthcare, it can be almost impossible for workers to get flexible working arrangements due to the employer's claims regarding the impact on service delivery. This section risks undermining the intent of the changes. The test should be narrowed and the FWC should be able to apply an objective test. For example, the provisions could be brought into alignment with the concept in anti-discrimination law, and only allow employers to reject requests for flexible working arrangements on reasonable business grounds if it was to cause them 'unjustifiable hardship'. This is an objective and more rigorous test which is well understood, and will not allow employers to dress up inconvenience as a reasonable business ground and hence a reason to reject requests for flexible working arrangements.

We note that one of the recommendations of the Interim Report from the Work and Care Inquiry was that the reasonable grounds provisions be replaced with a provision that only allows employers to refuse requests on the grounds of unjustifiable hardship.

Right to request extended unpaid parental leave

Extended unpaid parental leave is now the only NES entitlement which is unenforceable. If an employer refuses an application from an employee to extend their unpaid parental leave on reasonable business ground, there is no right of review for the employee. This exemption should be removed, the provisions related to flexible work should be extended to also cover requests for extended unpaid parental leave and the FWC should be given the ability to review requests for extended unpaid parental leave that have been refused or not responded to.

Government Amendment 19 – Terms in fair work instruments to override provisions

The amendment put forward by the Government (number 19) has the effect that the FWC will not be able to make certain orders in flexible work disputes where those orders would be inconsistent with a term of an enterprise agreement or an award, or another provision of the FW Act. Terms in enterprise agreements and awards that indirectly discriminate against certain groups of employees are not considered to be

discriminatory terms (and therefore unlawful). In order to be a discriminatory term, it is not enough that the term is capable of indirectly discriminating, a term must actually do so.[22]

This is a very concerning amendment, as it would allow terms in enterprise agreements that indirectly discriminate against a group of employees (for example, employees with caring responsibilities) to override the flexible work provisions. For example, if an enterprise agreement contained terms providing for how work is to be organised and performed (such as rostering provisions) that indirectly discriminated against workers with caring responsibilities, employees adversely affected by that term will have no recourse, compounding the discrimination. The FWC will not be able to make any orders it considers appropriate to ensure compliance by the employer with s65A, and will not be able to make orders that the employer grants the request or makes specified changes to accommodate the employee's circumstances. This would leave employees with effectively no ability to access flexible working arrangements. S65C(2A) should be removed from the Bill.

Ability of FWC to order that lack of response can be taken to amount to a refusal of the request

Section 463 of the Bill, relating to s65B(1)(b)(ii) and s65C(1)(a) states that where an employer fails to respond within 21 days, FWC can make an order that the lack of response can be taken to amount to a refusal of the request. It is a cumbersome process that requires an employee to have to wait for 21 days, and if no response is forthcoming, seek an order from the FWC that the lack of response amounts to a refusal of the request, all before they can proceed to arbitration on the substantive issues. If the 21 day requirement is to have any weight, this assumption should be reversed, so that if an employer has not responded within 21 days they are taken to have approved the request. At the very least, a lack of response within 21 days should automatically amount to a refusal without the FWC needing to order that it amounts to one.

Right to request flexible work should be extended to include reasons relating to reproductive health

The circumstances in which an employee can make a request for flexible working arrangements ought to be extended to employees experiencing reproductive health symptoms or concerns. Many workers, disproportionately women, require changes to working arrangements for reasons related to their reproductive health.

For example, 20% of women experiencing menopause have severe symptoms that can range from extreme fatigue, recurrent migraines, anxiety, and other physical and mental health concerns which significantly affect

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[22] *Application by Metropolitan Fire and Emergency Services Board* [2019] FWC 106 (Gostencnik DP, 15 January 2019) at [176]; *Shop, Distributive and Allied Employees' Association v National Retail Association (No 2)* [2012] FCA 480

them at work. Menopausal workers are generally highly skilled and experienced, but many feel forced to leave work because of menopausal symptoms despite the fact many symptoms can be managed effectively through the making of reasonable adjustments and access to flexible working arrangements. This contributes to lower rates of workforce participation for women.

Whilst it is possible that some aspects of reproductive health could be covered by the circumstance of "disability", given how these issues disproportionately affect women and their participation in work, the inclusion of reproductive health as a standalone circumstance is justified and has the potential to significantly improve women's workforce participation.

ii. Recommendations

8. The flexible work provisions should narrow the grounds on which a request can be refused, and require an objective test such as whether the request will cause the employer 'unjustifiable hardship'.
9. The flexible work provisions should be extended to also cover requests for extended unpaid parental leave, giving the FWC the ability to review requests for extended unpaid parental leave that have been refused or not responded to.
10. Government amendment 19 would effectively allow terms in enterprise agreements that indirectly discriminate against a group of employees (for example, employees with caring responsibilities) to override the flexible work provisions. This change should be reversed.
11. Remove s65C(1)(a) and insert a Note or subsection after s65B(1)(b)(ii) that where 21 days have passed since the employee made the request, and the employer has not given the employee a written response to the request under section 65A, the employer will be taken to have granted the request.
12. Include "experiencing reproductive health symptoms or concerns" as a circumstance under s65(1A).

4. Respect@Work

Women continue to face significant health and safety-related barriers to workforce participation. Two in five women recently surveyed had experienced sexual harassment at work in the past five years. The National Inquiry into Sexual Harassment in Australian Workplaces and the resulting Respect@Work Report by the Sex Discrimination Commissioner highlighted the failure of Australia's regulatory framework to keep workers safe from sexual harassment and other forms of gendered violence at work. Unions have been calling for the implementation of all 55 of the Respect@Work Report recommendations since its publication in 2020. The Bill will deliver the final legislative recommendations from the Respect@Work Report, meaning workers will have better protection from sex discrimination and sexual harassment under industrial relations laws.

The ACTU's 2018 National Survey on Sexual Harassment[23] showed that employer responses to incidences of sexual harassment are frequently ineffective, inappropriate and inadequate, and that employees who experience sexual harassment are often treated less favourably or forced to leave their jobs. The survey found that only 27% of those who had experienced sexual harassment ever made a formal complaint, and just over 40% told no one at all. The two most common reasons given for not making a formal complaint were a fear of negative consequences (55%) and a lack of faith in the complaint process (50%). More than a quarter of those who did complain reported less favourable treatment by their employer, including being forced to leave or resign, being bullied, or having their hours or shifts reduced. Of the 27% of people who did complain, 56% were 'not at all satisfied' with the outcome, 43% said their complaint was ignored or not taken seriously, and 45% said there were no consequences for the perpetrator. This demonstrates the need for workers to have access to options for early and urgent intervention to stop sexual harassment, resolve disputes, and allow people to stay in their jobs.

a. Prohibiting Sexual Harassment (Part 8)

An IR system not working

A female worker in a large bank told us she was sexually assaulted by her manager. The worker complained but was not believed and was adversely treated following the complaint in a number of ways, including a reduction of her hours, not having expenses reimbursed and ultimately not having her contract renewed. The worker has not worked since. The worker is pursuing a complaint through the courts under the Sex Discrimination Act, but is extremely concerned about the financial impact of the process. She has been advised that costs to run the matter (approximately $150,000) would outweigh any compensation she is likely to be awarded, and she has been advised of the risk of having to pay the employer's costs.

An IR system not working

A young female bartender was sexual harassed by her manager, including being followed home and hugged and kissed without her consent. The worker felt she had no other option but to leave her job to avoid the behaviour. The worker told us she had also experienced sexual harassment at a previous workplace.

[23] ACTU, 'Sexual Harassment in Australian Workplaces: Survey Results' (Report 2018)

Currently, the FW Act does not prohibit sexual harassment in the workplace. The FWC has very limited powers to deal with sexual harassment matters, as it can only issue 'stop sexual harassment orders' to prevent future harassment occurring, and has had no ability to remedy the harm caused by past sexual harassment. These powers were introduced by the former Coalition government in 2021, in partial implementation of the Respect@Work recommendations. Prior to this, the FW Act had no specific sexual harassment provisions. In addition, only certain workers (who work in a constitutionally covered business) have access to these orders. This has meant that workers are not properly protected from sexual harassment under our industrial relations laws. Given that the vast majority (68%) of sexual harassment complaints relate to conduct in the workplace, [24]the inability of the FWC to deal with such matters is an unjustifiable gap in our regulatory framework.

The Bill addresses these issues through provisions dealing with sexual harassment in a new Part 3-5 of the FW Act. These provisions prohibit sexual harassment of all workers (broadly defined to include an individual who performs work in any capacity) and prospective workers, with a breach of the provisions attracting a civil penalty. The prohibition extends to sexual harassment perpetrated by third parties in the workplace, such as customers and patrons (for instance in industries including hospitality, retail, transport and public services), patients, clients, residents, service users and visitors (for instance in industries including healthcare, disability and aged care, and community and public services), students and parents (in the education industry), and contractors, suppliers, volunteers and visitors (applicable in many industries).

The provisions also create a new dispute resolution function for the FWC, modelled on those for general protections dismissal disputes. The provisions will provide all workers with access to the FWC to resolve disputes about workplace sexual harassment and will give them access to a broader range of outcomes. The FWC will have the ability to both prevent future harassment and to remedy harm caused by past harassment. Employers can be held vicariously liable for sexual harassment perpetrated by other employees, unless they have taken all reasonable steps to prevent it. The Fair Work Ombudsman (FWO) will also be given investigation and compliance functions in relation to workplace sexual harassment.

Workers alleging they have been sexually harassed can make applications to the FWC to deal with a sexual harassment dispute. These applications will generally be able to be brought up to two years after the contravention. Where an application is made only for a stop sexual harassment order, and the FWC is satisfied the worker has been sexually harassed and that there is a risk they will continue to be sexually harassed, it can make any order it considers appropriate to prevent further sexual harassment occurring

[24] Australian Human Rights Commission, Working without fear: Results of the Sexual Harassment National Telephone Survey (2012).

(other than the payment of compensation). The FWC must start to deal with stop order applications within 14 days, meaning that disputes should be resolved quickly. Breach of a stop order is a civil penalty provision.

Where applications are made that do not solely consist of an application for a stop order (eg it may also consist of an application for compensation), the FWC must deal with these matters by way of conciliation, and can make recommendations or express opinions. Where all reasonable attempts have been made to resolve the dispute, the FWC can arbitrate where agreed to by the parties, and can make orders for compensation, lost remuneration, and requiring certain things be done, and can also express opinions in relation to certain matters. Where both parties do not agree to arbitration by the FWC, the matter can be progressed to a Federal Court.

Workers can seek both stop sexual harassment orders to prevent future harassment, and remedies for past harm, such as compensation. The Bill provides workers with a simple, quick and affordable complaints mechanism to resolve disputes about workplace sexual harassment, and provides access to a broader range of outcomes that will both prevent future harassment and remedy harm caused by past harassment. This will mean workers will be able to seek assistance from the FWC early on, have claims dealt with quickly, resolve issues before they escalate further and prevent future conduct. As a result, workers are more likely to be able to remain in employment instead of being forced out. This is a vast improvement on the present situation, where workers' only option for redress is to pursue a lengthy and costly claim in the courts.

Workers will now be able to pursue all aspects of a sexual harassment complaint through the FWC and the federal courts if they wish to, but will also retain the ability to initiate action in a state tribunal or court, or in the Australian Human Rights Commission. This gives workers choice and flexibility, as well as control in terms of where they pursue sexual harassment complaints. Importantly, pursuing a stop sexual harassment order in the FWC will not prevent workers from also seeking compensation in relation to the harm caused by sexual harassment (although, consistent with current legislation, they will only be able to pursue compensation in one jurisdiction – ie they would need to choose between FWC, a state tribunal or the AHRC.)

i. How the Bill can be strengthened

Arbitration powers

The FWC can only arbitrate sexual harassment disputes that do not solely consist of an application for a stop order where the parties consent. This will inevitably limit the utility of these provisions and the ability of workers to seek remedies through the FWC, as in practice employers and respondents will not consent to arbitration by the FWC, in the hope that the worker will give up rather than proceed to a Federal Court (a common occurrence in general protections claims, where consent arbitrations are exceedingly rare). This will limit the number of claims made due to the time, cost and resources involved in bringing federal court claims, and result in less decisions being made and a general lack of jurisprudence in this area. In order to give these

provisions full effect, arbitration should be available at the request of the worker or their union on their behalf where conciliation has not resolved the dispute. In addition, the provisions do not allow the FWC to make orders for compensation when dealing with applications for stop sexual harassment orders. The FWC should be able to make orders which effectively put the worker back into the financial position they were in prior to the commencement of the harassment – such as allowing for the recrediting of leave a worker may have been forced to take as a result of the harassment.

Third party harassment

Whilst it is clear that s527D applies to the conduct of third parties in the workplace as it covers conduct by a 'person', it would be helpful to provide additional clarification this is the case by including a reference to third parties in the heading to that section (ie "Prohibiting sexual harassment in connection with work, including conduct by third parties"), and a note in the section that gives examples of third parties. The note could explain that this section includes conduct by third parties, which can include for example customers, patrons, clients, service users, patients, residents, visitors, suppliers, contractors, volunteers, students and parents. This will ensure that employers, workers and others interpreting the legislation understand that third party conduct is included in the scope of the section.

S527E makes employers vicariously liable for conduct done by an employee or agent in connection with their employment or duties as an agent. Employers are not liable for the conduct of third parties and other workplace participants (such as independent contractors, apprentices, trainees, students and volunteers), meaning that any remedy involving compensation for third party sexual harassment would be very difficult to obtain, as the third party would need to be individually pursued. S527E should be amended so that employers are liable for third party conduct, for example by inserting the following words: "'If a third party does, in connection with the employment of an employee or agent of an employer, an act that contravenes subsection 527D(1), this Act applies in relation to the principal as if the principal had also done the act."

Risk of future harassment

In order to make a stop sexual harassment order, the FWC has to be satisfied that a person has been sexually harassed by one or more persons, and that there is a risk that they will continue to be harassed by ***that person or persons***. This means that the FWC can't consider a general risk that the person will continue to be sexually harassed by others (eg by other employees or other third parties) and can't make orders dealing with that. This unnecessarily limits the FWC's ability to make broadly applicable orders that could significantly reduce the risk of future harassment – for example, orders that require the employer to take certain steps, or make changes to how work is performed. The FWC should be able to consider workplace culture and the nature of the workplace (including specific risks present in that workplace) as relevant factors when considering future risk.

For example, if young female staff at a hospital kept getting harassed by male patients with dementia, the FWC could consider orders that would reduce that risk, such as an order that young female staff are not to be rostered on in that ward on their own/unsupervised. Another example may be an employee who is harassed in a male dominated workplace where sexual harassment is rife (such as the constant presence of sexualised jokes, comments and material in the workplace). Simply making a stop order against one individual will not reduce the risk that the employee may be harassed by others due to the workplace culture. The FWC could consider orders that required the employer to take steps to address the workplace culture, such as education and training, or having designated contact officers in the workplace.

This could be achieved by amending s527J(1)(b)(ii) to refer to "any person" (rather that "the person or persons"). Additional factors that the FWC is to take into account when considering the terms of an order could also be added to s527J(3) – such as workplace culture, workforce profile, specific risks and drivers of sexual harassment in the workplace, work design and systems of work.

Former workers not covered

Part 3-5A is only available to current workers, not to former workers. This means former workers would only have the option of making complaints under anti-discrimination law, and could not bring any claim for compensation or reinstatement to the FWC. This is a significant gap in the provisions, and deprives former workers of a quick, affordable and efficient right of action under the FW Act. Given how common it is for people who have experienced workplace sexual harassment to be forced out of their employment as a result, it is important that they are given access to remedies (including reinstatement) under our industrial laws.

This can be rectified by amending s527D(1) to include the words "a person who is **or was**" a worker, and by including reinstatement as an order that can be made in s527S(3)(a).

ii. Recommendations

13. **Give the FWC stronger powers with regard to sexual harassment disputes, allowing it to arbitrate where the worker or their union requests this. Give the FWC the ability when dealing with applications to stop sexual harassment to make orders designed to put the worker back into the financial position they were in prior to the commencement of the harassment.**
14. **Make it clear that third party conduct is covered by s527D, and extend vicarious liability for employers in S527E to include sexual harassment perpetrated by third parties.**

15. Amend sexual harassment provisions so the FWC can have regard to the general risk that a person will continue to be sexually harassed by others in a workplace and make orders that will reduce the risk of future harassment occurring.
16. Extend sexual harassment provisions to cover former workers and include reinstatement as a remedy.

b. Anti-Discrimination (Part 9)

Stronger protection from gender discrimination in the workplace

The current anti-discrimination provisions in the FW Act provide protection against discrimination on the basis of race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin (the protected attributes). The FW Act does not currently protect workers against discrimination based on the protected attributes of breastfeeding, gender identity or intersex status, and are inconsistent with the provisions of the SD Act, which do protect against discrimination on these grounds.

This means that if adverse action, including termination of employment, is taken against workers based on those attributes, they would be unable to challenge that through the FWC. For example, if someone was denied employment, had their employment terminated or was treated unfairly because they were breastfeeding or expressing milk whilst at work, they would have no recourse in the FWC.

The Bill addresses this issue by including breastfeeding, gender identity and intersex status as protected attributes in the FW Act– meaning workers cannot be discriminated against because they have those attributes, and making the FW Act consistent with the SD Act. The inclusion of these new grounds will increase protection for groups that are often the target of discrimination, and will enable the FWC to protect workers from discrimination on these grounds at work.

Workers will be able to bring complaints in the FWC, which could be cheaper, more effective, and more accessible than seeking remedies under the SD Act. Modern awards and enterprise agreements will also not be able to discriminate against workers based on these attributes, and the FWC will need to take into account the need to prevent and eliminate discrimination on these three grounds while performing its functions and exercising its powers. This will lead to better protection from discrimination in the workplace, and improve economic and job security for people with these attributes.

Ability to achieve gender equity and equality through bargaining

The FW Act currently limits the ability of workers and unions to achieve gender equity and equality more broadly in the workplace through bargaining. Two the ways in which it does this are set out below.

Firstly, the FW Act requires that an enterprise agreement be made about permitted matters, which includes matters pertaining to the relationship between the employer and its employees, matters pertaining to the relationship between the employer and unions, authorised wage deductions, and matters about how the agreement will operate. Terms in enterprise agreements that are not about a permitted matter are of no effect.

This generally means that any term in an agreement needs to be expressly linked to an employee's terms and conditions of employment, and clauses that specify broader aspirations, actions and goals (such as gender equity, or closing the gender pay gap) may not be permissible if they are not sufficiently linked to other employment terms and conditions, or if they are not linked to procedural requirements such as an obligation to consult with workers in respect to those aims and goals. There is currently doubt about whether measures to achieve gender equity or equality more broadly are permitted matters for enterprise agreements, and whether they are or not would depend on the specific wording of the proposed term.

For example, the decision by the Full Bench of the FWC in *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board* [2016] FWCFB 2894 found that gender quotas in relation to the number of applications to be considered for acceptance by an employer at the beginning of a selection process were not a matter pertaining to the employment relationship.

Secondly, the FW Act requires that before approving an enterprise agreement, the FWC must ensure that the agreement does not include unlawful terms, which includes discriminatory terms. Section 195 of the FW Act states that a discriminatory term is a term that "discriminates" against an employee because of a protected attribute, including their race, colour, sex, sexual orientation age, family or carer's responsibility or religion.

This means that positive discrimination in order to achieve gender equality would likely currently be considered a discriminatory term. For example, an employer who wished to include clauses in an enterprise agreement regarding affirmative action measures that offered a set number of positions to women, or that provided for a higher rate of superannuation to be paid to female employees to combat the gender pay gap across their industry or between industries, would likely be unlawful under current law as they discriminate against people who are not female.

The Bill addresses these issues by confirming that 'special measures to achieve equality' are matters pertaining to the employment relationship and are therefore matters about which an enterprise agreement may be made. The Bill also clarifies that 'special measures to achieve equality' are not discriminatory terms and therefore are not unlawful terms in an enterprise agreement. These changes are consistent with other anti-discrimination laws, which expressly exclude positive discrimination measures from the concept of unlawful discrimination (see for example, section 7D of the SD Act), and will align the FW Act with those laws.

These changes remove existing uncertainties and doubt in the current laws and provide much needed confirmation that parties can bargain for measures to achieve gender equality (and other types of equality). This will allow and encourage workers and employers to collectively negotiate and bargain for terms in enterprise agreements which will accelerate progress towards achieving substantive gender equality, and equality for employees who have other protected attributes. By expressly permitting bargaining for these terms, the Bill will accelerate equal treatment, representation and participation across workforces of employees with particular protected attributes or a combination of attributes.

For example, unions and their members would be able to bargain for measures in enterprise agreements that have been effective in reducing the gender pay gap in other OECD countries,[25] such as terms requiring employers to:

- Implement a gender equality action plan and measure progress against that plan
- Share the results of pay gap reporting with workers and undertake equal pay audits, including for discretionary pay
- Introduce gender neutral job classification and evaluation systems which determine the value of job classes within an organisation, and correct for the historic undervaluation of female-dominated jobs
- Implement gender neutral evaluation criteria for career progression, such as specific conditions for women returning from parental leave to compensate for career and wage progression breaks, to reduce the gender pay gap in discretionary pay and ensure women are not losing out on the basis of performance criteria such as 'work attendance' which don't acknowledge that women spend less time in paid work than men

The changes will also give workers and unions alternatives to equal remuneration applications to pursue wage increases in low paid and historically undervalued feminised industries. Given that such applications can be lengthy, expensive, and have to be decided on by the FWC, the ability to pursue these claims through bargaining is a crucial complementary measure that will lead to quicker outcomes that can be agreed between the parties, and will accelerate gender equity in the workplace.

[25] OECD (2021), Pay Transparency Tools to Close the Gender Wage Gap, OECD Publishing, Paris, https://doi.org/10.1787/eba5b91d-en

i. How the Bill can be strengthened

Reproductive Health

Many workers are discriminated against in the course of their employment for reasons related to their reproductive health – for example menstruation, menopause and IVF. Whilst it is possible that some aspects of these could be covered by other protected attributes, given how these issues disproportionately affect women and their participation in work, and the ongoing stigma and lack of understanding associated with them, inclusion of reproductive health as a standalone protected attribute in the FW Act is justified and has the potential to significantly improve women's workforce participation.

Substantive Equality

The Bill contains a 'safeguard' in s195(6) that confirms that a term of an enterprise agreement ceases to be a special measure to achieve equality after substantive equality for the particular employees has been achieved. There is a lack of clarity about what substantive equality means and how it is measured – for example, is it to be understood as equality within the particular workplace, between workplaces or across society more broadly? And would a comparison with male employees be necessary, and if so, which male employees? This has the potential to re-introduce a concept of a 'male comparator' to the legislation, which would be an undesirable outcome. For example, if an enterprise agreement contained a provision allowing female employees to be paid more super than male employees, it is unclear whether that measure would need to cease once the female employees in that workplace have the same level of super as the male employees in that workplace, or when the retirement income gap is closed at a broader industry or societal level. In addition, substantive equality may be achieved, but the special measures that have been taken to achieve it may be necessary to maintain the substantive equality. This is not contemplated in the provisions as drafted. This could mean that a term that was lawful in order to achieve substantive equality becomes unlawful once equality is achieved, and then becomes lawful again at a later point in time when inequality has reemerged due to the cessation of the special measure. Section 195(6) should be removed, as it introduces too much uncertainty and ambiguity into the legislation.

Section 195(4)(b) also requires that in order for a term to be a special measure to achieve equality, a reasonable person has to consider that the term is necessary in order to achieve substantive equality. This seems to be an unnecessarily high bar, which would prevent parties to an agreement implementing measures that they think will help to achieve equality, or which are desirable but are not strictly necessary to achieve equality. It raises complex issues of how parties could prove that a measure is necessary to achieve equality, and carries substantial risk that the provisions will fail to achieve their intended purpose due to a highly technical and strict requirement, and that well intentioned and helpful measures would not be approved as a result. Furthermore, there is no such requirement of necessity in the SD Act. Therefore, section 195(4)(b)

should be removed.

ii. Recommendations

17. Include reproductive health as a protected attribute under the FW Act.
18. Remove s195(6) that provides that a term of an enterprise agreement ceases to be a special measure to achieve equality after substantive equality for the particular employees has been achieved.
19. Remove the 'necessity test' for special measures to achieve substantive equality in section 195(4)(b).

5. Getting Bargaining Moving Again

Collective bargaining is in desperate need of a jumpstart. In 2010, 8,037 enterprise agreements were approved by the FWC, covering 1,164,800 workers.[26] By the middle of the decade in 2015, this figure had plummeted to just 4,998 enterprise agreements covering 643,800 workers.[27] In 2021, only 4,362 agreements were approved covering 546,700 workers.[28] Over the same period, the number of current agreements has fallen from 25,152 agreements covering 2,604,300 workers in Q4 2020 to just 10,650 agreements covering 1,656,800 workers in Q4 2021.[29] As a result, less than one in seven workers today are covered by a federally registered enterprise agreement.

The above figures suggest that after an initially positive response to enterprise bargaining under the FW Act, levels of successful take-up deteriorated and have stayed low since. This means that fewer employers are now bargaining with their workforce than they were a decade ago. Not only does that equate to less enthusiasm to bargain amongst employers who currently do not have an enterprise agreement in place, it also suggests that even those employers who did initially conclude enterprise agreements with their workforce have declined to participate in ongoing renegotiation of replacement agreements.

The decline in bargaining has also coincided with the decline in wage growth. Conversely, where employees are still able to bargain, they are winning wage increases well above the national average.[30] From 2012 to 2021, wage increases in enterprise agreements grew in real terms by 9.1%, while the Wage Price Index only grew by 1.4% over the period (before then heading into negative territory).[31] This shows that sensible reforms to revive bargaining would make a significant contribution to getting wages moving again.

There are many potential reasons for the decline in bargaining, ranging from the observation that employers have too much power under the current framework to simply refuse to bargain (the mechanisms to initiate bargaining are at best cumbersome), to consideration of the deficiencies with the process itself (for example, the ease with which the current system can be circumvented by "surface bargaining").

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[26] DEWR, *Historical Trends Data – Approved by Quarter*, <https://www.dewr.gov.au/enterprise-agreements-data/resources/historical-trends-data-approved-quarter> (own calculations);
[2727] Ibid
[28] Ibid
[29] DEWR, *Historical Trends Data – Current by Quarter*, <https://www.dewr.gov.au/enterprise-agreements-data/resources/historical-trends-data-current-quarter>
[30] ABS, *Wage Price Index* (own calculations)
[31] DEWR, *Historical Trends Data – Approved by Quarter*, <https://www.dewr.gov.au/enterprise-agreements-data/resources/historical-trends-data-approved-quarter>

The provisions of the Bill aim to re-invigorate the bargaining system and drive participation once more. Approvals will be smoother, but contain safeguards; bargaining for a replacement agreement will be easier for workers to initiate; and, provisions will be inserted allowing for the independent umpire to assist parties that cannot reach agreement on all matters.

These provisions do not represent everything that is needed to deliver good outcomes in collective bargaining, but they are a solid start to the reformation of a bargaining system that is no longer fit for purpose.

a. Enterprise Agreement approval (Part 14)

i. Agreement Approvals

The Agreement Approval process is often criticised by employer representatives. While we don't support these criticisms, we note that at any rate the Bill Part 14 (Enterprise Agreement Approval) dispenses with or modifies many of the requirements. We also consider this sentiment under the section c. Better of Overall Test (BOOT) (Part 16).

Part 14 will insert a new section 188B into the FW Act which will require the FWC to publish 'a statement of principles for employers on ensuring that employees have genuinely agreed to an enterprise agreement'.[32] The statement must be within set parameters – for example it must deal with matters such as providing a employee a genuine opportunity for consideration and an explanation of terms and their effect.[33] In light of this change, Part 14 also amends the FW Act to no longer specifically require a 7 day "access period" prior to voting on an enterprise agreement. Existing provisions which allow the FWC to overlook "minor procedural or technical errors" are preserved but safeguarded by a requirement that the FWC be satisfied that employees are not likely to have been disadvantaged by those errors.[34]

ii. Small Cohort Agreements

The Bill Schedule 1 Part 14 tightens a loophole exploited by employers, involving the practice of making agreements with a small group of workers and then subsequently applying that agreement to a much greater number of workers.

[32] Bill Part 14
[33] Bill Part 14 proposed s 188B
[34] Bill Part 14, proposed s 188(5)

An IR system not working

In August 2014 three casual workers from Perth voted to approve *the Catalyst Services Enterprise Agreement 2014.* One of the employees asked to vote was a casual brought in through a friend's father; he worked for six days.

Almost 2 years later and nearly 3,500 kilometres away, 55 workers at the Abottsford Brewery in Melbourne – operated by well known beer producer Carlton & United Breweries (CUB) –were told that due to a contract change their employment would terminate, but that they could apply to keep working with the new service provider, Catalyst.

For those 55 workers, this would have meant doing the same job for less pay and worse conditions. This is because those workers would have been covered by *the Catalyst Services Enterprise Agreement 2014*, set all those years ago by three casuals with no connection to Abbotsford.

This situation was manifestly unjust and quietly accepting the new arrangements would have meant being stuck on lesser conditions with no rights to collectively bargain (because of the existing EA).

On this occasion, the workers fought back and, with the support of the public, were able to get back their jobs and their employment conditions. However, not every story involving a small cohort agreement is resolved so favourably.

A video by the ETU which provides more information about the CUB55 is available here: https://www.youtube.com/watch?v=CHgUa3ODygg

The current state of law lacks clarity as to the availability and breadth of this loophole. A 2015 Full Federal Court overturned a FWC Full Bench decision which had found that: in circumstances where an agreement contained 10 classification bands applying potentially to "a number of different occupations" across an entire state but was approved by and made with just 3 employees engaged at a single site; FWC could not be satisfied that the group of employees covered by the agreement was "fairly chosen".[35] In overturning the FWC Full Bench's decision, the Full Court also found that it had misdirected itself to the question of whether making an agreement in these circumstances would undermine collective bargaining when it lacked the statutory authority to consider this question.[36]

A more recent (2018) decision of the Full Federal Court considered similar circumstances, in which once again 3 employees were asked to approve an agreement covering a multitude of classifications and

[35] *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd* [2015] FCAFC 16 at [8], [10], [32]-[33], [57]
[36] *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd* [2015] FCAFC 16 at [84]

occupations beyond those they were engaged in (and covered by about 11 different modern awards).[37] In that case, however, the Full Court held that the FWC had failed to properly consider whether such an agreement could possibly be "genuinely agreed" in the circumstances.[38]

Part 14 will provide clarity on this question by inserting a new FW Act Section 188(2) which provides that the FWC cannot be satisfied that an enterprise agreement has been genuinely agreed to unless the employees who were requested to vote for it:

- Had a sufficient interest in the terms of the agreement; and
- Were sufficiently representative with regard to the employees that the agreement is expressed to cover.

This change is sensible and reflects the general understanding of the current status of the law, whilst removing uncertainty and doubt. The practical effect of this change will be that large businesses cannot conclude agreements with small cohorts of employees before then locking in potentially thousands of workers who didn't have a say about those agreements, thereby avoiding negotiations with the wider group and potentially imposing pay and conditions worse than what would have been achieved through genuine bargaining between the parties. Such a cynical practice should have no place in industrial relations.

iii. How the Bill can be strengthened

The access period for a proposed agreement is the 7-day period ending immediately before employees are asked to vote on that agreement.[39] It's called the access period because during that time, workers are given access to the proposed agreement that they're going to vote on and given information about where and when they can vote.[40] This is a critical time for workers to be able to look at the final text of the document that will play a key role in regulating their working conditions for the next few years. It's also a time that workers can use to seek assistance and advice from their union, so that they can better understand what each term of an agreement means for them. As employers can and do put agreements out to vote without having reached agreement in bargaining (if any meaningful bargaining has occurred at all), workers may also need to be informed about the different positions of the bargaining representatives before making their own decision on whether or not to make the agreement. Given the rigid requirements of giving notice for right of entry, and the many different shift and rostering patterns that apply in modern workplaces, the fixed 7 day access period is crucial in facilitating this. In addition to this are other barriers, such as language and location which mean that workers may need more time to seek advice and understand the terms of their agreement.

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[37] *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union (CFMEU)* (2018) 262 FCR 527
[38] *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union (CFMEU)* (2018) 262 FCR 527 at [168]
[39] FW Act s 180
[40] FW Act s 180

Employers can and do put agreements out to vote without having reached agreement with workers and their unions in bargaining (if any meaningful bargaining has occurred at all). Workers may also need to be informed about the different positions of the bargaining representatives before making their own decision on whether or not to make the agreement.

If an agreement can apply for four years or even more, are we really going to skimp on seven days?

The need for a 7 day access period was considered around the introduction of the FW Act. In its Inquiry into the Fair Work Bill 2008, the Senate Standing Committees on Education, Employment and Workplace Relations heard from unions and academic experts about why it is important to have a fixed access period.[41] The Committee heard from the ACTU who gave the example of Emirates Airline, which had earlier conduct an approval ballot via email of the Easter break, so that many employees didn't even know the vote was occurring.[42] The TCFUA raised concerns that in their sector even the 7 days was not enough time for CALD workers on multiple shift patterns to speak to their union and consider a proposed agreement. Professor David Peetz agreed with the ACTU that the access period should run for 14 days, unless bargaining representatives agreed to a shorter period of 7 days.[43] All of these concerns remain just as valid now as they did then.

In light of the above submissions, the Committee recommended that the period for the access period be 14 days, and not 7 as the Bill provided for.[44] This suggestion was not taken up by Government. This suggests that, if anything, the access period should be lengthened to ensure that workers have a genuine say over their terms and conditions, not taken away completely.

iv. Recommendations

20. The parts of the Bill which dispense with the requirement for a 7-day access period be removed from the Bill. The Committee should further consider whether the access period be increased to a greater period, such as 14 days.

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[41] Senate Standing Committees on Education, Employment and Workplace Relation, *Fair Work Bill 2008 [Provisions]*, Inquiry into the Fair Work Bill 2008, 51-2, <https://www.aph.gov.au/~/media/wopapub/senate/committee/eet_ctte/completed_inquiries/2008_10/fair_work/report/report_pdf.ashx>

[4242] Ibid

[43] Ibid

[44] Ibid

b. Initiating Bargaining (Part 15)

Workplaces with a history of regular bargaining should be enabled to continue to bargain when their agreement expires. That happens already in a lot of workplaces, but often employers initially refuse to commence bargaining for a replacement agreement or hold out to delay wage increases as much as possible.

There are presently 11,053 current enterprise agreements which have not yet passed their nominal expiry date, covering 1.74 million workers.[45] By comparison, there is a remarkably high number – some 56% in total – of enterprise agreements which remain in force but have passed their nominal expiry dates.[46] This entire group of expired but still applicable agreements have not been re-negotiated despite the potential to do so. That this number of unreplaced agreements is so high - covering approximately 16% of all employees - is suggestive of a failure of our current system to facilitate subsequent rounds of bargaining in workplaces that have demonstrated an initial capacity and willingness to engage in enterprise bargaining. This is attributable to the significant control that employers have under the current framework in relation to whether and how they will enter into negotiations for a replacement agreement.

In 2012, the Full Federal Court affirmed a FWC Full Bench decision that it was perfectly legitimate for union members to apply to take protected industrial action where an employer refused to commence bargaining.[47] Following this, the FW Act was amended by the then Coalition Government to deny workers the right to apply to take protected industrial action in these circumstances.[48] The effect of this change was that without the lever of industrial action, workers had to either wait patiently to see if the employer would change their mind and agree to bargain, or go to the additional expense and effort of seeking a majority support determination (which would itself occasion greater delay, particularly if contested by the employer). The current state of the law is that employers have too much power and control over bargaining, including whether they'll even take part at all from the outset. This trend led the Centre for Future Work to conclude back in 2018 that enterprising bargaining would be close to extinction by 2030 – a prediction that is currently on track.[49]

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[45] Department of Employment and Workplace Relations, *Trends in Federal Enterprise Bargaining (June Quarter 2022)*, <https://www.dewr.gov.au/download/14675/trends-federal-enterprise-bargaining-june-quarter-2022/30617/document/PDF/en>

[46] Department of Employment and Workplace Relations, Trends in Enterprise Bargaining, March 2022.

[47] *JJ Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53

[48] FW Act s 437(2A) which was inserted by *the Fair Work Amendment Act 2015 (Cth)*

[49] Alison Pennington, (December 2018), *On the Brink: The erosion of enterprise agreement coverage in Australia's Private Sector*, Centre for Future Work.

The Bill Part 15 (Initiating Bargaining) will amend the FW Act to allow for bargaining for a replacement single-enterprise agreement where no more than five years has passed since the nominal expiry date, to commence upon a written request being made by a bargaining representative to start negotiations.

These changes will jumpstart bargaining and allow for agreements to be negotiated when old ones have expired, rather than requiring workers to go through convoluted processes to prove that they really do want a pay rise.

i. How the Bill can be strengthened

Proposed section 173(2A)(d) confines the application of this mechanism to scenarios where 'the proposed agreement will cover the same, or substantially the same, group of employees as the earlier agreement'. We are concerned that the limitation as presently drafted could have the unintended effect of limiting the availability of access to bargaining for a new agreement in some circumstances where a different scope is sought for a new agreement. For example, where a replacement agreement is sought in relation to the same employees *as well as* other employees that were not previously covered by the agreement (this might arise where two agreements are being combined).

ii. Recommendations

21. Proposed s 173(2A)(d) should be redrafted so as to provide clarity that bargaining can be initiated in the manner provided where parties seek a new agreement that covers the same, or substantially similar, workers as a previous agreement, even if the new agreement would also cover additional workers.

c. Better of Overall Test (BOOT) (Part 16)

The Better Off Overall Test (BOOT) is a safeguard to ensure that terms and conditions set by enterprise agreements do not leave workers worse off than the minimum modern award safety net that applies to them.

Employers and their representatives have offered criticism of the BOOT and its application to the approval of enterprise agreements by the FWC, including the FWC's consideration of how the agreement might affect workers in the future.[50]

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[50] See The Australian Industry Group, Submission No 70 to the Education and Employment Legislation Committee, *Inquiry the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery Bill 2020 [Provisions]*, February 2021, 41 <https://www.aph.gov.au/DocumentStore.ashx?id=578665f5-eeeb-483b-a9bf-9c9934c9203c&subId=701309f>; See also Australian Chamber of Industry and Commerce, 'Outline of Submissions', Submission in Aldi Prestons Agreement (AG2017/1925), Aldi Stapylton Agreement (AG2017/1943), Workpac Pty Ltd Manufacturing Agreement 2017 (AG2017/3027), 1 <https://www.australianchamber.com.au/wp-content/uploads/2018/01/acci_submission_-_01112017.pdf>; See also Productivity Commission, October 2022, *Interim Report No. 6,* 5-year Productivity Inquiry: A more productive labour market, 58 <https://www.pc.gov.au/inquiries/current/productivity/interim6-labour/productivity-interim6-labour.pdf>

Whilst we do not share their view, we understand the critiques of the BOOT, reproduced above, that are made on behalf of large corporate interests. We also understand that representatives of genuine small businesses have expressed similar concerns.

The Bill Part 16 (Better off overall test) provides that in applying the BOOT, the FWC will only have regard to patterns of work (i.e. rosters etc.), kinds of work or types of employment that are "reasonably foreseeable" at the test time.[51] This provision entirely addresses the concerns highlighted above. A built-in safeguard also ensures that the system cannot be "gamed" by locking in conditions based on a current scenario then proceeding to make changes which leave workers worse off. The provisions allow for the FWC, on application, to reconsider whether the agreement *continues* to pass the BOOT in light of subsequent patterns or kinds of work, or types of employment which have emerged post-approval (for example, a change of roster).[52]

The Bill also modifies the FW Act to specify that the BOOT requires a "global assessment" and sets up a rebuttable presumption that an employee belonging to a class of employees who are better off, will also be better off.[53]

FWC must also give primary consideration to any views held in common by the bargaining representatives.[54] This will simplify the approval process to assist the FWC in examining agreements more efficiently where parties to the agreement fully concur as to its effect.

The ACTU's assessment is that these changes will streamline agreement approval processes, whilst also providing for robust safeguards to ensure that workers are not left worse off.

i. How the Bill can be strengthened

Proposed FW Act s 227A(1)(c) allows for *inter alia* "an employee organisation covered by the agreement" to apply to the FWC for reconsideration of whether an agreement passes the BOOT. Whilst this appears intended to permit trade unions to make such an application, the present drafting admits a significant practical limitation. In circumstances where a trade union was not a party to the original negotiations despite having coverage of workers, it may be barred from making an application under the proposed section as it would not have participated in the agreement's approval process and therefore would not be covered by the

[51] Bill Sch 1 Part 16 cl 528 which inserts FW Act s 193A(6)
[52] Bill Sch 1 Part 16 cl 534 which inserts FW Act s 227A
[53] Bill Sch 1 Part 16 cl 528 which inserts FW Act s 193A(4)
[54] Bill Sch 1 Part 16 cl 528 which inserts FW Act s 193A(2), 193A(7)

agreement. This should be amended to allow applications to be made by any employee organisation which is entitled to represent the industrial interests of workers covered by the agreement.

We note that an amendment to proposed s 191A(3) has been moved, such that the FWC would be required to seek the views of parties including workers and their unions if intending to amend an agreement during the approval process. The ACTU supports this amendment.

ii. Recommendations

22. Proposed s 227A(1)(c) should be amended to allow for an employee organisation that is entitled to represent the industrial interests of a worker covered by the agreement to make an application for reconsideration of whether an agreement passes the BOOT.

d. Dealing with errors in Agreements (Part 17)

The Bill Part 17 allows the FWC to deal with errors in agreements. Proposed s 218A would allow the FWC "to correct or amend an obvious error, defect or irregularity". A similar power, in relation modern awards already exists under the FW Act s 160 which allows for the FWC to vary an award to remove an ambiguity or an uncertainty or to correct an error. By contrast, the existing provision in FW Act s 217 which corresponds to enterprise agreements only allows the FWC to make variations to remove an uncertainty or ambiguity. This aspect of the Bill would more closely align the FWC's powers in relation to modern awards and enterprise agreements.

Cragcorp Pty Ltd T/A Queensland Bridge and Civil concerned an employer who had erroneously sought and obtained the FWC's approval of an earlier draft enterprise agreement that differed from the later version approved by employees.[55] In that case, the employer applied to alter the approval decision to substitute the correct version of the enterprise agreement in question as the approved version. Despite acknowledging that the incorrect version of the agreement had been submitted and approved, and agreeing that that version should not continue to have effect, a single member of the FWC held that it lacked the statutory authority to remedy the situation and that the appropriate course was to appeal the matter to a Full Bench of the FWC.

The Bill Part 17 will insert a new FW Act s 602A, which will clearly confer a power on the FWC to deal with similar situations of inadvertence in the future. Proposed s 602A will allow the FWC to substitute a correct version of an agreement in circumstances where an incorrect version has previously been approved, provided that the correct version of the agreement would have been approved if it had been submitted.

[55] [2020] FWC 2830

e. Bargaining Disputes (Part 18)

People don't always agree. Even when they do agree, they may not always agree on everything. And that's OK; but when that happens, it may not necessarily mean that they don't want to be in agreement, or that they want things to go unresolved.

The architecture of bargaining under the FW Act is prefaced on a binary notion of agreement versus the lack of agreement – if parties agree on everything (whether through total alignment from the outset or the cut and thrust of bargaining) an enterprise agreement is made; if they do not, then there is nothing.

The current situation provides no middle ground.

The solution to this problem presented by the Bill Part 18 (Bargaining Disputes) allows for the independent umpire to assist parties in reaching agreement on matters that remain unresolved in bargaining.

The Bill Part 18 replaces the current mechanism relating to "serious breach declarations" and replaces this with "intractable bargaining declarations".[56] The new provisions appear intended to ensure that the making of an intractable bargaining declaration is far from a first resort. Under the new provisions, an intractable bargaining declaration could only be made:

- If an application has been made by a bargaining representative;
- The proposed agreement is not a greenfields agreement or a multi-enterprise agreement (unless a supported bargaining authorisation is in operation); and
- The FWC is satisfied:
    - That the FWC has dealt with a dispute about the proposed agreement under the FW Act s 240 and the applicant for the intractable bargaining declaration participated in those processes;
    - There is no reasonable prospect of agreement being reached unless the intractable bargaining declaration is made; and
    - Making the intractable bargaining declaration is reasonable in the circumstances, taking into account the views of bargaining representatives.

The making of an intractable bargaining declaration opens up a pathway similar to the existing framework for making workplace determinations. If FWC makes an intractable bargaining declaration it may also specify a

[56] FWC Act s 234 (current); Bill Part 18 which repeals and replaces s 234.

post-declaration negotiating period. That period, of a duration to be set by the FWC, is intended to allow parties to reach agreement on any outstanding matters, drawing on the assistance of the FWC as necessary.

If no post-declaration negotiating period is set, or after the expiry of such a period, the FWC will proceed to the making of a workplace determination. This process and its outcome are materially similar to other mechanisms for the making of workplace determinations which have been a feature of the FW Act since inception.

The provisions to be inserted by the Bill Part 18 are clearly contemplated as a last resort where parties cannot agree on everything (despite potentially being able to agree on some or many things). In those circumstances, the new provisions would allow a pathway toward resolution that doesn't involve extended disputation at the workplace.

i. How the Bill can be strengthened

Whilst we are supportive of the mechanism for resolving intractable bargaining negotiations that is proposed in the Bill, we are mindful that there should be sufficient time for other agreement-related processes contemplated within the FW Act to run their course. There should also be no provision for the cynical use of such a mechanism by a bargaining representative who has not been genuinely trying to reach agreement. We are of the view that intractable bargaining declarations should be a last resort only and therefore should not be available until bargaining has been ongoing for a suitable length of time.

We note that an amendment to the Bill in the House of Representatives provides that an intractable bargaining declaration cannot be made until the earlier of:

A. 6 months after bargaining commenced; or
B. 3 months after the first application is made pursuant to FW Act s 240

We are concerned that these provisions may in practice operate as a deadline of six months. This could incentivise bargaining representatives to structure their engagement in bargaining with this deadline in mind. This may undermine both the bargaining process and positive bargaining outcomes. Consideration should be given to longer timeframes to ensure this does not occur and so arbitration only occurs when bargaining is truly intractable.

i. Recommendations

23. The Bill should be amended to increase the minimum bargaining period for intractable bargaining declarations (currently set at 6 months after bargaining commences or 3 months after the first application is made under section 240) to ensure that a declaration may only be made after bargaining has been engaged in for an appropriate period and bargaining is truly intractable.

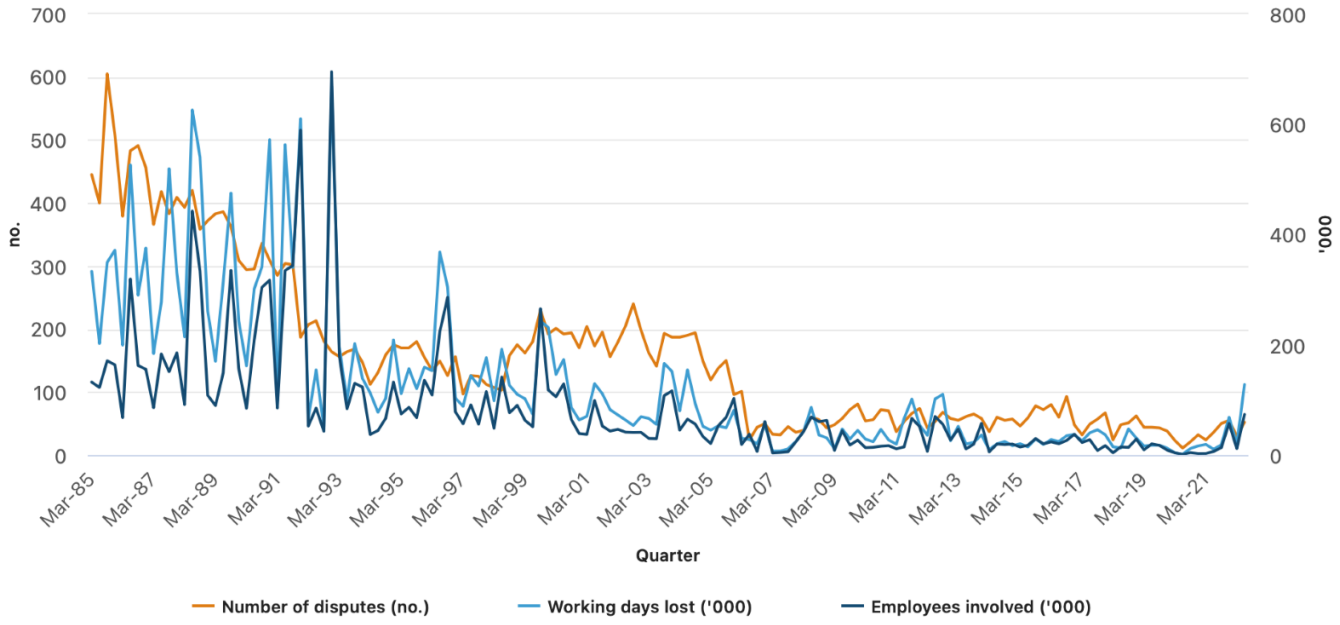
f. Industrial Action (Part 19)

The provisions of Part 3-3 of the FW Act are concerned with industrial action and impose an onerous set of requirements which must be met in order for a union and its members to organise and take 'protected' industrial action in support of the making of an enterprise agreement. Strikes are sometimes met with lockouts by employers and such lockouts are also a form of 'protected' industrial action. The designation of action as protected signifies that the action is legitimate and that employees and their unions (or employers, where the action takes a form of lockout) cannot be subject to discrimination, coercive orders or proceedings for penalties or in respect of loss or damage suffered as a result of their involvement in it.[57]

The provisions of Part 3-3 are accordingly the means by which Australia aims to give effect to the right to strike, as recognised in the International Convention on Economic, Social and Cultural Rights and International Labour Organization Convention 87 on Freedom of Association and the Protection of the Right to Organise. The right to strike is an essential means through which workers and their unions can promote and defend their economic and social interests. Strikes and lockouts however have become increasingly uncommon in Australia, as the historical data from the ABS *Industrial Disputes* catalogue clearly shows in Figure 8 below.[58]

[57] With some limits: see section 415, 346.
[58] Industrial disputes are defined in this series to include only those that result in a stoppage or work, whether the stoppages be worker initiated (strikes) or employer initiated (lockouts).

Figure 8: Industrial disputes, 1985-2022



Many provisions of the FW Act have been found by the supervisory mechanisms of the International Labour Organization to require review and monitoring to ensure fundamental labour rights are properly protected, including the provisions that provide for the suspension of termination of industrial action[59], the provisions which make protected industrial action unavailable in the absence of majority support or employer agreement to bargain[60], the unavailability of protected industrial action in support of most agreements involving multiple employers[61] and the provisions that require protected action ballots to be conducted before protected industrial action can occur.[62] The amendments proposed in this Part of the Bill do not respond to all of the concerns raised through these supervisory processes. The scope of access to protected industrial action will be broadened (at least formally) by the amendments now proposed, but the procedural requirements for accessing such action will be streamlined in some respects and more burdensome in others. Overall the level of restriction on the right to strike - indeed the right to take all forms of industrial action such as work to rule or bans on overtime or specific tasks – will remain excessive in the event the Bill is passed.

[59] Observations of the ILO Committee of Experts on the Application of Conventions and Recommendations, 2019 regarding sections 423, 424 and 426 of the FW Act.
[60] Direct request of the ILO Committee of Experts on the Application of Conventions and Recommendations, 2019, regarding section 437(2A) of the FW Act.
[61] Report of the ILO Committee on Freedom of Association re case no. 2698, June 2010.
[62] Observations of the ILO Committee of Experts on the Application of Conventions and Recommendations, 2012, regarding sections 437-443 of the FW Act.

Protected Action Ballots

Currently, the FWC is required to make a protected action ballot order as one of the many pre-requisites for action being designated as 'protected'. Protected action ballot orders became part of the Australian workplace relations framework as part of the *Workchoices* reforms in 2006. A protected action ballot order does no more than grant an authorisation for a ballot to occur but is often contested by employers as part of a strategy to delay or prevent the taking of any protected industrial action. Numerous other steps, including a majority vote with a turnout quorum and compliance with strict notice requirements, are also required before any protected action may be taken.

A protected action ballot order will identify who is to conduct the ballot. By default this is the Australian Electoral Commission, who conduct these ballots without charge. However, the Australian Electoral Commission does not offer any method of balloting other than postal ballots or attendance ballots (and the latter only rarely). The standard time frame for a postal ballot is 30 working days. As a result, many unions seek to use an alternate provider which offers electronic voting, notwithstanding that this can come at significant expense. Currently, the FWC needs to satisfy itself, for every application in which a provider other than the AEC is proposed, that the provider is a 'fit and proper person'. This is unnecessary red tape – there are there only a handful of providers offering this service and it benefits nobody for them to be required to prove their propriety to the FWC on each and every occasion they offer their service (even where they have done so before).

The provisions of Division 2 of Part 19 of Schedule 1 of the Bill seek to replace this requirement to demonstrate suitability as a 'fit and proper person' with a capacity for such providers to seek registration with the FWC as an "eligible protected action ballot agent". Such registration will involve the application of the 'fit and proper person' test, and registration will be valid for a period of 3 years. This will ensure that applications for protected action can be progressed with slightly less complexity. Perplexingly, the Bill proposes that whilst ballots must be conducted as expeditiously as possible, there must be at least 14 days from the issuing of the order and the closing of votes[63], which would erode some of the advantages of using a provider other than the AEC.

Whilst we welcome streamlining of the protected action ballot process, we retain real concerns about the protected action ballot requirement. Australia's protected action ballot process was studied in detail by Creighton & McCrystal et al including through an empirical review of ballot applications processed through the FWC and the events which followed the making of those applications. Importantly, the authors found that the

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[63] See Item 584.

process is designed and utilised to meet legal objectives rather than democratic outcomes, was productive of delays and preferred methods of voting that were least likely to facilitate democratic voice or timely access to the right to strike.[64]

Protected action for supported bargaining and for single interest employer agreements.

In chapter 6, part b. below, we set out the operation of the low-paid bargaining framework and the proposed supported bargaining framework which is proposed in the Bill to replace it. The provisions contained in Division 3 of Part 19 of Schedule 1 of the Bill make the technical changes necessary to permit access to protected industrial action in respect of bargaining that is occurring with multiple employers pursuant to a supported bargaining authorisation issued by the FWC.

It is proposed that the requirements for the taking of protected action be different in respect of the multi enterprise agreements in respect of which industrial action is available (supported bargaining agreements and single interest employer agreements) compared to single enterprise agreements. Whilst the standard time of 3 working days will remain in respect of single enterprise agreements, the notice period when bargaining for multi enterprise agreements will be extended to 120 hours.

Compulsory conciliation

The provisions of Division 5 of Part 19 of Schedule 1 are designed to require an additional step be taken prior to the taking of protected industrial action. It is proposed that once a protected action ballot order has been issued by the FWC, the FWC make an order requiring the bargaining representatives to attend a mediation or conciliation at the FWC prior to the voting period for the ballot closing. A failure of an employer bargaining representative to attend would deprive the relevant employer of it of its capacity to take protected industrial action in response to employee action authorised by the ballot order. A more stringent rule would apply to employee bargaining representatives – a failure of *any* employee bargaining representative to attend would disqualify *all* employee bargaining representatives from taking the protected industrial action authorised by that ballot order (multiple bargaining representatives may apply jointly for a protected action ballot order). This lack of balance is deeply concerning and lacks any rational justification.

Whilst it seems overtly attractive and in keeping with our historical system of conciliation and arbitration that the FWC be given a role in attempting to de-escalate disputes, it should be noted that the only forms of bargaining in respect of which protected action is available are those where the FWC will already have a role

[64] Breen Creighton, Catrina Denvir, Richard Johnstone, Shae McCrystal, Alice Orchiston, "Strike Ballots, Democracy, and Law", Oxford University Press (2020).

in resolving disputes through conciliation, either on its own initiative (in the case of supported bargaining)[65] or at the request of one bargaining representative (in the case of supported bargaining, single enterprise bargaining and bargaining for a single interest employer agreement), including with multiple employers.[66]

i. How the Bill can be strengthened

Protected industrial action is an appropriate and long overdue addition to the suite of rights available to workers seeking to bargain with multiple employers. However, there are longstanding concerns with the protected action ballot system and the onerous requirements for the taking of protected industrial action. On balance, Part 19 of the Bill with the additional amendments we propose above should pass, as it will complement the revisions to the forms and scope of bargaining otherwise proposed in the Bill. The ACTU nonetheless continues to be opposed to the limitations on the right to strike contained in FW Act and retained in the Bill.

For the reasons set out above, we are opposed to the proposed 14 day wait period between the issuing of an order and the closing of a vote and to the inclusion of a requirement for there to be compulsory conciliation as part of the process for taking industrial action. We are of the view that the imposition of such a requirement (inclusive of its embedded rule making industrial action unavailable to all employee bargaining representatives based on the conduct of one) would only move us further away from meeting our labour rights obligations arising under international law, not closer towards them.

ii. Recommendations

24. The provisions requiring compulsory conciliation in connection with the seeking of a protected industrial action ballot order should be removed from the Bill.

25. The proposed requirement that there be minimum of 14 days between the issuing of a protected action ballot order and the closing of votes should not be adopted.

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[65] See section 246.

[66] See Items 601 and 630B

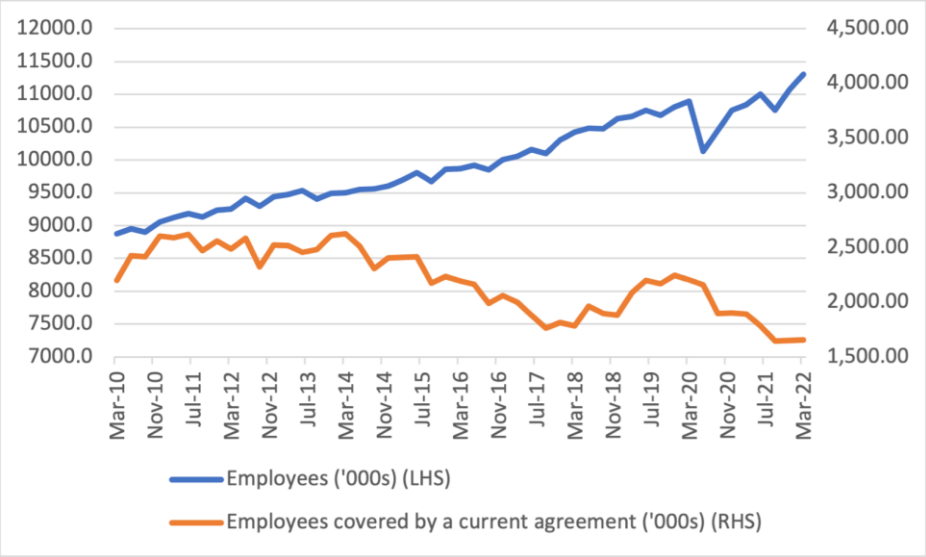
6. Expanding Bargaining

Aside from the Annual Wage Review, which reviews and adjusts wages both in modern awards (for the award reliant workforce) and in national minimum wage orders (for employees not covered by an award or an enterprise agreement), the bargaining framework is the only mechanism that the FW Act provides for the regular renegotiation of wages. It is therefore critically important to make that framework accessible for everyone.

The amendments proposed in Parts 20-23 promise to open up the bargaining framework to more participants, give them the support they need to negotiate and bring wage rises within reach for a larger share of the employee workforce.

The existing enterprise bargaining system is failing to deliver for workers and business in the ways it once did. By comparing the size of the employee workforce from 2010 to 2022 (as measured by the ABS in its Quarterly *Labour Force, Detailed*) with the number of employees covered by current enterprise agreements (as measured by the Department of Employment and Workplace Relations in its *Workplace Agreements Database)* over the same period, the reduction in coverage of the bargaining system is glaringly apparent.

Figure 9: Employees v. employees covered by a current agreement, 2010-2022



Enterprise agreements provide for wage increases during their period of operation, with the most common formulation being an annual wage increase for each year of operation prior to the agreement's nominal expiry date. Employees on enterprise agreements typically have significantly higher wage rates than those fixed through the annual wage review, which are only required to constitute a "safety net". As at May 2021[67], the

[67] ABS *Employee Earnings and Hours*, May 2021 is the most recent release.

average weekly total cash earnings of award reliant employees was $848.30, compared to $1425.60 for employees on collective agreements – including expired agreements that were no longer offering any wage increases. Underpinning this is the ability of these employees to secure higher rates of wage growth over the past decade. Pay rates in EBA's have grown by 9.1% in real terms from 2012 to 2021 whereas the Wage Price Index had only grown by 1.4% over that period.

There is also a gendered element to the pay disparity. As at May 2021, 59% of the non-managerial award reliant workforce were women[68], and the Expert Panel which conducts the FWC's annual wage review has found that women are disproportionately represented among the low paid, more likely than men to be paid at minimum award rates than bargained rates and substantially more likely to be paid award minimums rather than bargained rates when working in higher classification/skill levels.[69] Getting wages moving again through greater access to bargaining could therefore make an important contribution to closing the gender pay gap.

In seeking to understand the impact of the changes proposed by the Bill to the bargaining framework, it helpful to map out the framework as it currently stands. Essentially, this involves three variables:

1. the types agreements that can be made;
2. the rights and obligations of participants in bargaining; and
3. the role of the FWC

The types of agreements that can be made

The current system of enterprise bargaining provides for *Single Enterprise Agreements* and *Multi Enterprise Agreements*. They differ in the scope of employers that can be covered by them, as follows:

- A *single enterprise agreement* is the most common type of agreement that is made, and it is most often made with a single employer. A single enterprise agreement *can* be made with more than one employer if the employers concerned are related bodies corporate; or are engaged in a joint venture or common enterprise; or if there is single interest employer authorisation in place. Such a determination can be issued by the FWC if it is satisfied that the employers are all operating as part of the same franchise, or if the FWC is provided with a declaration from the Minister permitting the employers to bargain together.

[68] *Ibid.*
[69] [2017] FWCFB 3500 at [78] and [99].

- A *multi enterprise agreement* is less common (due to the inferior mix of rights and obligations and limited role of the FWC associated with such bargaining), and may be made with two or more employers who are not all single interest employers.
- *Greenfields agreements* may be either single enterprise agreements or multi enterprise agreements. What distinguishes them is that they are made directly between businesses and unions and expressed to cover a new enterprise that the businesses are establishing (or propose to establish) which have not yet employed any of the persons who will be necessary for the normal operation of that enterprise. Greenfields agreements are more commonly associated with construction and major infrastructure projects.

Rights and obligations of participants in bargaining

Not all rights and obligations are applicable to all forms of bargaining (see Table 2 – Table 4). The main rights and obligations are as follows:

- Representation: Employees and employers have a right to choose who represents them in bargaining, and can also choose to represent themselves. These persons are called 'bargaining representatives'. There are also rules in the FW Act that assign bargaining representatives to participants in bargaining by default. Australia is unique insofar as it provides a statutory mechanism for collective bargaining which permits the conclusion of such collective agreements with no union involvement or assent.
- Refusing to bargain: No section of the FW Act expressly sets out a right to refuse to bargain, however many operate on the basis that such a right exists and therefore provide means for the FWC to compel a person to bargain[4].
- Providing information: When bargaining is underway, employers can be obliged to distribute a "Notice of Employee Representational Rights", which is a form of notice set by the regulations which provides basic information about rights and representation during bargaining.
- Good faith: Where bargaining representatives are bargaining, in many cases they are required to do so in good faith. This means they must:
    - attend and participate in meetings at reasonable times;
    - disclose relevant information (other than confidential or commercially sensitive information) in a timely manner;
    - respond to proposals made by other bargaining representatives in a timely manner;
    - give genuine consideration to the proposals of other bargaining representatives, giving reasons for responses to those proposals;
    - refrain from capricious or unfair conduct that undermined freedom of association or collective bargaining;
    - recognise and bargain with other bargaining representatives

- Protected Industrial Action: Bargaining representatives and those they represent may organise or engage in protected industrial action for some forms of bargaining, provided other requirements are met (including that bargaining is actually taking place). The enables employees to strike or otherwise limit their performance of work in support of their claims, and for employers to lock their workers out.
- Protection against discrimination: The "general protection" provisions found in Chapter 3 of the FW Act provide protections against adverse action and coercion for employers and employees in some circumstances connected with bargaining, refusing to bargain and their choice of representative in bargaining.

The role of the FWC

Aside from approving agreements, the FWC has a facilitative role in bargaining. Not all types of interventions are available in all forms of bargaining (see Table 2 – Table 4).

- Dispute resolution: Where bargaining representatives are in dispute about issues arising during bargaining, they can seek the assistance of the FWC to resolve their dispute.
- Compelling bargaining: The FWC can issue determinations the effect of which is start the process of bargaining between employers and a group of employees, even if some have refused to bargain (or bargain with respect to a particular group of workers) before that point. These include low-paid determinations, majority support determinations and scope orders.
- Arbitrating the terms of an agreement: The FWC can determine some or all of the terms of an enterprise agreement. In some situations this can occur by consent, in other situations this can occur against the will of one or more bargaining representatives by the making of a workplace determination. There are conduct based triggers that enliven the power to make a workplace determination.

The Bill aims to expand the options for bargaining and adjust the mix of rights and obligations that attach to them, as well as the role of the FWC. The present mix of rights and obligations and the role of the FWC in respect of each type of enterprise agreement is set out in Table 2 to Table 4.

Table 2: Rights, Obligations and the role of the FWC in bargaining for single enterprise agreements (non-greenfields)

		Single Enterprise Agreements- Non Greenfields	
		With one employer	*With more than one employer (Single interest)*
	Formal steps required to seek this form of agreement	None.	None if the employers are related bodies corporate or conducting a joint venture. Otherwise, a Single Interest Employer Authorisation must be issued by FWC.
Rights and obligations	*Representation during bargaining*	The employer is a bargaining representative and may appoint another person as their bargaining representative. The employees may appoint a bargaining representative. An employee's default bargaining representative is the registered union they are a member of.	The employer is a bargaining representative and may appoint another person as their bargaining representative. The employees may appoint a bargaining representative. An employee's default bargaining representative is the registered union they are a member of.
	Right to refuse to bargain / capacity to compel bargaining	If an employer initiates bargaining, employee bargaining representatives can be compelled to bargain with them through bargaining orders. If employees initiate bargaining, employers cannot be compelled to bargain unless the employees' bargaining representatives can demonstrate majority support among the employees proposed to be covered.	(A) If no single interest authorisation has been issued: If an employer initiates bargaining, employee bargaining representatives can be compelled to bargain with them. If employees initiate bargaining, employers cannot be compelled to bargain unless the employees' bargaining representatives can demonstrate majority support among the employees proposed to be covered. (B) If a single interest authorisation has been issued: The authorisation can only be issued if the employers have agreed to bargain together (among other requirements). Thereafter, employee bargaining representatives can be compelled to bargain with them through bargaining orders.
	Notice of Employee Representational Rights	Required.	Required.
	Requirement to bargain in good faith	Enforceable.	Enforceable.
	Right to take protected industrial action	Yes.	Yes
	Protection against discrimination and coercion	Yes.	Yes
Role of FWC	*FWC may resolve bargaining disputes*	Yes.	Yes.
	Majority support determinations	Available.	Available.
	Scope orders	Available.	Available.
	FWC may arbitrate terms of agreement	If all bargaining representatives consent or if a workplace determination process has been triggered.	If all bargaining representatives consent or if a workplace determination process has been triggered.

Table 3: Rights, obligations and the role of the FWC in bargaining for single enterprise greenfields agreements

		Single Enterprise Agreement – Greenfields	
		With one employer	*With more than one employer (single interest)*
	Formal steps required to seek this form of agreement	None.	None, however the employers must be related bodies corporate or conducting a joint venture as the conditions for the issue of single interest authorisation cannot be met in a greenfields context.
Rights and obligations	*Representation during bargaining*	The employer is a bargaining representative and may appoint another person as their bargaining representative. The prospective employees' bargaining representative(s) are the registered unions eligible to represent the relevant types of employees that will be covered by the agreement, provided that the employer agrees to bargain with those unions.	The employer is a bargaining representative and may appoint another person as their bargaining representative. The prospective employees' bargaining representative(s) are the registered unions eligible to represent the relevant types of employees that will be covered by the agreement, provided that the employer agrees to bargain with those unions.
	Right to refuse to bargain / capacity to compel bargaining	A registered union can be compelled to bargain through bargaining orders. A registered union cannot compel an employer to bargain.	A registered union can be compelled to bargain through bargaining orders. A registered union cannot compel an employer to bargain.
	Notice of Employee Representational Rights	Not required.	Not required.
	Requirement to bargain in good faith	Enforceable, other than against an employer who has refused to bargain at all.	Enforceable, other than against an employer who has refused to bargain at all.
	Right to take protected industrial action	No.	No.
	Protection against discrimination and coercion	Yes.	Yes.
Role of FWC	*FWC may resolve bargaining disputes*	Yes.	Yes.
	Majority support determinations	Not available.	Not available.
	Scope orders	Not available.	Not available.
	FWC may arbitrate terms of agreement	If all bargaining representatives consent or if a workplace determination process has been triggered.	If all bargaining representatives consent or if a workplace determination process has been triggered.

Table 4: Rights, obligations and the role of the FWC in bargaining for Multi Enterprise Agreements

		Multi Enterprise Agreements			
		Low Paid Authorisation in place: Non-Greenfields	*No Low Paid Authorisation in place: Non Greenfields*	*Low Paid Authorisation in place: Greenfields*	*No Low Paid Authorisation in place: Greenfields*
	Formal steps required to seek this form of agreement	A low paid determination must be issued by FWC.	None.	Not possible to seek this type of agreement.	None.
Rights and obligations	*Representation during bargaining*	The employer is a bargaining representative and may appoint another person as their bargaining representative. The employees may appoint a bargaining representative. An employee's default bargaining representative is the registered union they are a member of which has applied for the low paid determination . The default bargaining representative for non-union members is the registered union that has applied for the Authorisation and is eligible to represent the relevant types of employees that will be covered by the agreement	The employer is a bargaining representative and may appoint another person as their bargaining representative. The employees may appoint a bargaining representative. An employee's default bargaining representative is registered union they are a member of.	N/A	None.
	Right to refuse to bargain / capacity to compel bargaining	Bargaining representatives of either party can be compelled to bargain through bargaining orders.	Bargaining representatives cannot be compelled to bargain.	N/A	Bargaining cannot be compelled.
	Notice of Employee Representational Rights	Required.	Required.	N/A	Not required.
	Requirement to bargain in good faith	Enforceable.	Not enforceable.	N/A	Not required.
	Right to take protected industrial action	No.	No.	N/A	No.
	Protection against discrimination and coercion	Yes.	Yes.	N/A	Yes.
Role of FWC	*FWC may resolve bargaining disputes*	Yes.	Only if all bargaining representatives agree to apply to FWC.	N/A	No.
	Majority support determinations	Not available.	Not available.	N/A	Not available.
	Scope orders	Not available.	Not available.	N/A	Not available.
	FWC may arbitrate terms of agreement	(A) If all bargaining representatives consent; or (B) At the request of one bargaining representative, if the FWC is satisfied it should do so.	If all bargaining representatives consent.	N/A	Not available.

a. Supported Bargaining (Part 20)

Supported bargaining will amend and re-name the current provisions dealing with low paid bargaining and low paid authorisations. It will remain the case, as noted in Table 4, that this form of bargaining will be confined to the making of multi enterprise agreements. Low paid bargaining - and supported bargaining which is intended to replace it under these amendments - is best understood as a gateway or pathway to greater rights and obligations and a greater role of the FWC than would otherwise be this case in bargaining for multi enterprise agreements.

A low paid authorisation is significant under the current framework for multi enterprise bargaining because it facilities assistance from the FWC in bargaining and resolving disputes during bargaining (even without all parties consenting), enlivens the good faith requirements (and the capacity to enforce them through bargaining orders), allows FWC to direct a third party to participate in bargaining by attending FWC conferences and opens up the prospect of arbitration of the contents of an agreement through the making of a workplace determination. These essential features will remain the case should the Bill pass. What will change is the process and criteria for granting a low paid authorisation (which will become a supported bargaining authorisation). In addition, protected industrial action will become available in connection with supported bargaining, and there will be special rules for the variation of agreements that are made through the supported bargaining pathway. As noted in chapter 5 above, bargaining through the supported bargaining pathway will open the possibility for arbitration of a workplace determination if bargaining proves to be intractable. The availability of protected action will also enable the FWC to terminate that action and make an industrial action-related workplace determination under existing provisions. The current pathway for the making of a *low paid workplace determination* will however be removed.

The low paid bargaining pathway was intended to be a "framework to facilitate bargaining for multi-enterprise agreements for certain types of employees, being low-paid employees who either have not historically had access to collective bargaining or who face substantial difficulties in bargaining at the enterprise level".[70] Despite the low paid bargaining pathway having been in place since the inception of the FW Act, few applications for low paid authorisations have been made and only one has succeeded. For example:

- An application made on behalf of nurses employed in medical centres and general practice clinics failed, including on the basis that more efforts should have been made to negotiate single enterprise agreements with each of the 682 employers identified in the application before seeking an authorisation.[71]

[70] Explanatory memorandum to the *Fair Work Bill* 2009.
[71] [2013] FWC 511 at [160].

- An application made on behalf of security guards employed by 5 employers in the ACT failed including on the basis that the that low wages paid in existing or previous agreements were considered irrelevant to the question of difficulty in bargaining, and that the low skill levels of the workers concerned were considered irrelevant to the assessment of their bargaining strength. In addition, the FWC reasoned that because the security industry as whole paid at or about the minimum safety net award level, the particular employees identified in the application could not be considered to be disadvantaged.[72]
- An application on behalf of aged care workers succeeded[73], but did not result in any multi-enterprise agreement being made.

The changes proposed to make this stream of bargaining work are comparatively modest, and detailed and discussed below.

Access to supported bargaining

There is one change proposed to who may obtain a supported bargaining authorisation as compared to a low paid bargaining authorisation. The FWC will not be permitted to make supported bargaining authorisation of the proposed enterprise agreement would cover employees in relation to 'general building and construction work', as defined in proposed section 23B.

FWC consideration of whether of an authorisation should be issued.

The proposed amendment to section 243 requires the FWC to consider whether it is appropriate that the relevant employers should bargain together, having regard to a non-exhaustive list of considerations. The current formulation requires the FWC to consider whether it is in the public interest to make the authorisation, having regard to specific matters. The reference to the public interest had in practice directed attention to the objects of the Act, inclusive of the preference there expressed for "enterprise -level collective bargaining" and proved to be an obstacle to the making low-paid authorisations.[74]

The specific matters that the FWC will be required to be consider under these amendments, as set out in Table 5 below, suggests that obtaining an authorisation will be easier and that some of the difficulties experienced to date will be ameliorated.

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[72] [2014] FWC 6441.
[73] [2011] FWAFB 2633.
[74] s 3.(f), [2013] FWC 511 at [152].

Table 5: Current vs proposed matters for the FWC consider when an authorisation is applied for

Current considerations	Proposed replacement considerations
The current terms and conditions of employment of the employees who will be covered by the agreement, as compared to relevant industry and community standards.	The prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector)
The extent to which the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process.	Whether the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process.
The degree of commonality in the nature of the enterprises to which the agreement relates, and the terms and conditions of employment in those enterprises.	Whether the employers have clearly identifiable common interests. Examples of common interests that employers may have include the following: • a geographical location; • the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises; • being substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory.
The extent to which the terms and conditions of employment of the employees who will be covered by the agreement is controlled, directed or influenced by a person other than the employer, or employers, that will be covered by the agreement.	[see common interest above]
[no predecessor provision]	Any other matters the FWC considers appropriate
Whether granting the authorisation would assist low-paid employees who have not had access to collective bargaining or who face substantial difficulty bargaining at the enterprise level	[Any other matters the FWC considers appropriate].
The history of bargaining in the industry in which the employees who will be covered by the agreement work	[Any other matters the FWC considers appropriate].
The relative bargaining strength of the employers and employees who will be covered by the agreement.	[Any other matters the FWC considers appropriate].
Whether granting the authorisation would assist in identifying improvements to productivity and service delivery at the enterprises to which the agreement relates.	[Any other matters the FWC considers appropriate].
The views of the employers and employees who will be covered by the agreement.	[Any other matters the FWC considers appropriate].
Whether granting the authorisation would assist low-paid employees who have not had access to collective bargaining or who face substantial difficulty bargaining at the enterprise level	[Any other matters the FWC considers appropriate].
The history of bargaining in the industry in which the employees who will be covered by the agreement work	[Any other matters the FWC considers appropriate].
[no predecessor provision]	That at least some of the employees who will be covered by the agreement are represented by an employee organisation. The FWC must disregard any employee organisation excluded for the purposes of the agreement by an order under section 178C (regardless of how recently the order was made).
The extent to which the applicant for the authorisation is prepared to consider and respond reasonably to claims, or responses to claims, that may be made by a particular employer named in the application, if that employer later proposes to bargain for an agreement that: • would cover that employer; and • would not cover the other employers specified in the application.	[See section on "interaction rules" below]

The removal of references to the employees being low-paid presumably stems from the FWC's adoption through its jurisprudence in annual wage reviews of a benchmark for the assessment of those who are low paid at 2/3rds of median full time earnings and a reluctance by the FWC to assess low pay through cross industry comparisons under the existing provisions. The removal of references to past bargaining practices is likely a response to the FWC's tendency in past decisions to be unpersuaded of the need for support where some bargaining had taken place in the past, even where agreements had expired or ultimately failed the better off overall test, and inconsistency between decisions as to whether "access to bargaining" was a

practical assessment of employees' capacity to advance their interests through the bargaining framework versus a mere assessment of whether the formal legal right to bargain existed.

The role of third parties

In the supported bargaining stream, the Bill will retain current s 246(3), which empowers FWC to order a third party, with "such a degree of control over the terms and conditions of the employees who will be covered by the agreement" to attend FWC conferences in respect of the bargaining. Given that the Bill appears to aim the supported stream at funded sectors (see s 243(2)(c)) it may be prudent to specify in this section that such persons include a funding entity (as appears to be intended).

A further question arises as to the role of FWC in relation to such a third party. Plainly the third party can be compelled to attend conferences. But the FWC's power appears to end there. A recalcitrant third party could frustrate the intent of the power by attending, but not participating in the process. Consideration should be given to empowering FWC to order third parties to attend conferences, and to comply with the "good faith bargaining requirements" which apply to the other bargaining parties under s.228 of the Act.

Variation to authorisations

As is currently the case, the FWC will have a power to vary authorisations to include or exclude employers. Employers may be added having regard to the same criteria which applies to the making of an authorisation, save that a public interest test will also apply. Applications can be made by the same class of persons as currently, however the variation would not be permitted to extent coverage into general building and construction work.

Interaction rules

One of the problematic incentives associated with the low paid bargaining pathway was that it ceased to be available in respect of employers who made single enterprise agreements after the authorisation was issued. This "divide and conquer" incentive is a significant reason for fragmenting of the cohort authorised to bargain together in the aged care industry. Additionally, the existing criteria made it unlikely that an authorisation would be issued in respect of employers that had an enterprise agreement, notwithstanding that the agreement had expired, offered no ongoing wage increases and offered very little above safety net conditions. The replacement supported bargaining pathway will suffer less from these limitations, owing to the following provisions:

- Proposed subsections 243A(1)-(2) will prevent the FWC from making an authorisation, and render such authorisation ineffective, only to the extent that an employee is covered by an single enterprise agreement that has *not* passed its nominal expiry date.

- Proposed subsections 243A(3) will create an exclusion to that rule in circumstances where the FWC is satisfied that the relevant employer's intention in entering into an agreement was to avoid its employees being specified in an authorisation.
- Proposed subsection 172(7) will preclude any employer that is specified in a supported bargaining authorisation from bargaining with their employees specified in that authorisation for any agreement other than a supported bargaining agreement.
- Proposed amendments to section 58 will ensure that a supported bargaining agreement will operate to the exclusion of a single enterprise agreement. Whilst the preceding provisions mean that a supported bargaining agreement will not initially operate with respect to employers and employees that are covered by an unexpired single enterprise agreement, consensual variations to supported bargaining agreements (see below) may have the effect of expanding its coverage to workplaces where single enterprise agreements are in operation.

A real question remains however as to whether the amendments will be sufficient to overcome the "divide and conquer" incentive referred to above, noting that proposed section 243A(3) effectively requires proof of intent ('main intent' to be precise) , but does so without the benefit of the presumption or reverse onus often associated with proof of matters entirely within the knowledge of one party. Some reconsideration of the question of the extent, if any, to which prior single enterprise agreements work to exclude an employer from the making of an authorisation is warranted.

Variation of supported bargaining agreements

If the utilisation of the supported bargaining pathway ultimately results in an agreement, that agreement may thereafter be varied to add further employers pursuant to proposed sections 216A-216BC. It is proposed that there be two means of achieving this: with the consent of the proposed new employer; and without the consent of the new employer. In either case, a variation that has the effect of extending an agreement to cover employees performing general building and construction work will not be permitted.

Where the agreement is proposed to be varied with the consent of the new employer, the new employer would be required to explain the variation to the affected employees, submit the variation to a vote of the employees and make an application to the FWC. In addition to having regard to the vote and whether the employees had genuinely agreed to the variation, the FWC would be required to consider the criteria that apply to the making of an authorisation (see Table 5), other than the matters relevant to the number of bargaining representatives or the requirement that the employees be represented by an employee organisation. The FWC may refuse to approve the variation on serious public interest grounds.

Where the agreement is proposed to be varied without the consent of the employer, the application can only be made by an employee organisation that is already covered by that agreement. The FWC will then need to

satisfy itself that there is majority support among the employees who would become covered by the agreement, which in practice may be established via the same type of voting processes used for consensual variations. The views of the proposed new employer and the employee organisations already covered by the agreement would need to be considered and may have regard to the matters that apply to the making of an authorisation (see Table 5). The variation cannot be approved by the FWC if the employees of the new employer who are proposed to be covered by the agreement are already covered by an agreement that has not passed its nominal expiry date.

I. How the Bill can be strengthened

The proposed removal of the public interest test in section 243 for the making of a supported bargaining authorisation is not consistent with the creation of a public interest test in proposed subsection 244(5) to be applied when varying such an authorisation or in proposed section 216AB when considering a variation of a supported bargaining agreement. Public interest tests necessarily invite the consideration of the objects of the FW Act, which presently state that the "...balanced framework for cooperative and productive workplace relations" is to be provided "..through an emphasis on **enterprise level** collective bargaining.." (emphasis added). This risks the clear intent of Part 20 being frustrated and should be addressed by amendments.

Proposed section 243A and related provisions which govern the interaction between prior single enterprise agreements and the making of an authorisation should be further considered. The circumstances in which an employer with an existing single enterprise agreement which has not reached its nominal expiry date can be included within a supported bargaining authorisation should be broadened, to include for example, circumstances in which the Fair Work Commission considers the participation of such an employer in multi-employer bargaining for a supported bargaining agreement will improve the prospects of such an agreement being made or their absence would detract from the likelihood an agreement will be reached.

It may be beneficial to expand on the provision in section 246(3) to specifically mention a funding entity as among the class of persons who can compelled to attend a conference as part of a supported bargaining process.

ii. Recommendations

26. Part 20 should be strengthened by providing greater priority for supported bargaining, clear rights to compel funding entities to attend and meaningfully contribute to those conferences and the bargaining process in good faith.

27. To better support the intent of Part 20, the objects of the Act should be amended to no longer preference any particular level or form of bargaining as the means through which those objects should be realised.

b. Single Interest Employer Authorisations (Part 21)

As seen in Table 2 and Table 3, the mix of rights and obligations and the role of the FWC is virtually identical in bargaining for all species of single enterprise agreements. However, the scope of employers that can be included in a single enterprise agreement varies based on whether a *single interest employer authorisation* can be issued by the FWC. These basic architectural features will not change under the Bill, although the nomenclature will. What will change substantively is that the FWC will be permitted to include broader categories of employers in such an authorisation.

Under the present framework, a desire by employers and their employees to bargain together for a single enterprise agreement can only be accommodated without an authorisation if the employers concerned are engaged in a joint venture or common enterprise or are related bodies corporate. Beyond those employers (whom the Bill refers to as "related employers"), an authorisation is required. Furthermore, the grounds for issuing such an authorisation are limited, and in some case require a ministerial determination. Where an authorisation is not available or not granted, bargaining would need to be progressed toward the making of a multi-enterprise agreement, which (as seen in Table 4) involves a lower level of rights, obligations and assistance from the FWC, in particular:

- An absence of good faith requirements;
- An inability to compel bargaining through majority support, bargaining orders or otherwise;
- An inability to take protected industrial action;
- An inability to seek bargaining assistance from the FWC unless all parties agree; and
- An ability to arbitrate an outcome unless all parties agree.

The amendments proposed will address these shortcomings in part, as well as ensuring that in the event an authorisation is given, an employer named in the authorisation cannot bargain with their employees covered by the authorisation for a different agreement. Additionally, where bargaining is occurring pursuant to a single interest employer authorisation, the bargaining will now be described as being in aid of a multi enterprise agreement (rather than a single enterprise agreement) and in particular a type of multi enterprise agreement called a single interest employer agreement.

The detail of changes proposed to single interest authorisations are discussed below.

Obtaining a single interest employer authorisation

Under the existing framework, only employers can apply for a single interest employer authorisation, or the ministerial determination that is a prerequisite to the issuing of such an authorisation. The proposed amendments to Division 10 of Part 2-4 mean that the decision on whether to issue an authorisation will rest entirely with the FWC and either the employer or an employee bargaining representative will be entitled to

apply. Table 6 below summarises the current criteria and thresholds for the granting of an authorisation and those proposed in the Bill.

Table 6: When a single interest employer authorisation can be issued

Current criteria for issuing an authorisation		**Proposed criteria for issuing an authorisation**	
Applied by Minister (when issuing facilitative declaration)	*By FWC (when issues authorisation)*	*By FWC, if employer applies*	***Additional***[75] *criteria that apply if employee bargaining representative applies.*
	Employers have agreed to bargain together; **and**	Employers have agreed to bargain together; **and**	A majority of the employees of each employer wants to bargain; **and**
	Employers have not been coerced or threatened; **and**	Employers have not been coerced or threatened; **and**	The employers that would be covered have consented to the application, **or**:
Must take into account whether it would be more appropriate for the employers to make separate enterprise agreements with their employees.		The employers and the bargaining representatives of the employees have had an opportunity to express their views on the authorisation; **and**	Any non-consenting employers that would be covered: - Are not a small businesses; and
		At least some of the employees that will be covered are represented by a registered union; **and**	- Have not made their own application for a single interest authorisation; and
	Employers carry on similar businesses under a franchise; **or**	Employers carry on similar businesses under a franchise; **or**	-Are not covered by an unexpired agreement; and
	Ministerial declaration has been made.	All of the remaining criteria are met:	- Are not named in another single employer authorisation or a supported bargaining authorisation; and
Must take into account the employers' common interests, and if they are relevant to whether they should be permitted to bargain together.		The employers have clearly identifiable common interests, to be determined having regard to matters including their geographical location, the regulatory regime, the nature of the enterprises and the terms and conditions of employment in those enterprises.	- Have not agreed in writing with a registered union to bargain for a single enterprise agreement for the same (or substantially the same) group of employees.
Must take into account the history of bargaining of the employers.		[See common interest test above]	
Must take into account whether the employers are governed by a common regulatory regime.		[See common interest test above]	
Must take into account whether the relevant employers are substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory.		[see common interest test above]	
Must take into account the extent to which the relevant employers operate collaboratively rather than competitively		It is not contrary to the public interest to make the authorisation.	

[75] If an employee bargaining representative applies, there is no need to demonstrate the employer's agreement to bargain together (although their consent is relevant depending on their size and instruments applicable to them).

May take into account any other matter the Minister considers relevant		[see public interest test above]	

Currently, single interest employer authorisation are used most commonly in franchise businesses (where no ministerial declaration is required), for non-government schools that are represented by a common association and in the Victorian hospital system. The significant modifications to the conditions for the issuing of an authorisation will ensure that employees voices are properly represented in bargaining under a single interest authorisation, unlike the status quo where franchise authorisations are approved and agreements made with little opportunity for representation. In addition, the broader common interest test will ensure that bargaining within any given industry[76] can be more widespread, given the fact that employers in an industry are competing in the same market will no longer be such a central or decisive consideration. The opportunities this presents may include the following:

1. The non-university higher education sector is a for profit sector servicing around 170,000 students including those on student visas. There are no enterprise agreements in operation in the sector and some workers in the sector have been underpaid their award entitlements (with some receiving less than a third of the award rate) and the use of "independent contractors" to avoid award entitlements is currently being challenged. Being able to bargain collectively with multiple employers in that sector would help get wages moving again and provide a stable and sustainable basis for this growing industry to develop and retain their staff.
2. Renewable energy zones are an important planning strategy for matching renewable rich areas with infrastructure and transmission capacity. The capacity to bargain with multiple employers within such a zone would ensure support for training and career paths and enable local communities to sustainably benefit from the energy transition.

It should be recalled that the present framework does much to *inhibit* but nothing to *prohibit* employees and their unions seeking to establish industry standards through bargaining, even where employers are in competition with one another. Unions can, and often do, advance claims with some similarity among employers in an industry, however establishing such standards is resource intensive and time consuming because of the need to do so via separate bargaining processes and because of the risk that doing so in different simultaneous bargaining processes will make protected industrial action unavailable.[12]

We note with concern that the government has made amendments which would have the effect of empowering the FWC to grant immunity to some employers from inclusion in a single interest authorisation, where those employers and employees are bargaining collectively for a new agreement to replace one that expired less than 6 months ago and have a history of bargaining together.[77] This immunity could be granted notwithstanding the wishes of the relevant employer and its employees. This amendment will perpetuate the

[76] Note however that authorisations will not be able to be made covering employees in the general building and construction industry.
[77] Item 636A.

current limitations in the system for structuring of bargaining cohorts and is an anathema to the stated policy intent of the Bill – to get wages moving again. In reality, employees who want their employer to participate in multi-employer bargaining, and who have expressed that desire through the majority support process required to enable their union to seek an authorisation, will have to spend six months resisting their employer's attempt to make a new single enterprise agreement before they can get moving on engaging with their employers in the form of bargaining they wish to use. Thus, the amendment promotes conflict, disputation, and delay.

Further, we note that the public interest test for the making of an authorisation necessarily invites the consideration of the objects of the FW Act, which presently state that the "…balanced framework for cooperative and productive workplace relations" is to be provided "..through an emphasis on **enterprise level** collective bargaining.." (emphasis added). This risks the clear intent of Part 21 being frustrated and should be addressed by amendments.

Variation of authorisations

A single interest employer authorisation, once made, will be able to be varied by the FWC to add or remove employers from it. Such a power presently exists, although it is proposed to be amended so as to provide a fairer process in both respects.

The power to remove an employer will be exercisable on the application of either of the employer or an employee bargaining representative, rather than just the employer alone. Whilst the power to vary to remove will continue to be grounded in the FWC being satisfied there has been "a change in the employer's circumstances" rendering it "no longer appropriate" for the employer to be included the authorisation, the proposed amendments will ensure that all employers and employee bargaining representatives covered by the authorisation will be entitled to express their views on the matter.

The power to add an employer to an authorisation is presently only exercisable by the FWC on the application of an employer seeking to be added. It is proposed that this be amended and supplemented with a power to vary on the application of an employee bargaining representative. Variations will not be permitted if their effect would be to cover employees in relation to general building and construction work.

The proposed amended power to add an employer on the application of the employer involves the same merit tests as are proposed to apply to employer applications for the issuing of a determination (as set out column 3 of Table 6 above), to ensure those requirements would still be met if the variation was granted. This includes the public interest test which we have expressed concerns about above in relation to its interaction with the objects of the Act. Additionally, employers and employee bargaining representatives covered by the authorisation will be entitled to express their views on the matter. Unlike the making of an authorisation, it is

not proposed to be a requirement that any of the employees of the new employer are represented by a registered union.

The proposed new power to add an employer on the application of an employee bargaining representative would be exercisable only by an employee bargaining representative already covered by authorisation that is also representing employees of the employer they are applying to add. The FWC would apply the same merit test as would apply if the application were one made by a bargaining representative for the issuing of an authorisation (as set out column 3 of Table 6 above), to ensure those requirements would still be met if the variation was granted, including the public interest test which we have expressed concerns about above in relation to its interaction with the objects of the Act. Additionally, employers and employee bargaining representatives covered by the authorisation will be entitled to express their views on the matter. Furthermore, the FWC would need to be satisfied, in respect of the proposed new employer, that it was not a small business employer; that it is not covered by an unexpired enterprise agreement; that a majority of its employees' want to bargain for the agreement; that it has not made its own application for a single an interest authorisation; that it is not named in another single employer authorisation or a supported bargaining authorisation; and has not agreed in writing with a registered union to bargain for a single enterprise agreement for the same (or substantially the same) group of employees.

The proposed immunity for employers where those employers and employees are bargaining collectively for a new agreement to replace one that expired less than 6 months ago and have a history of bargaining together will also be available in respect of applications to vary the authorisation (even against the proposed new employer's wishes and the wishes of its employees).[78]

Variation of agreements

The existing provisions for the variation of enterprise agreements (Subdivision A of Division 7 of Part 2-4) permit variations to add employers, based on (among other things) a majority vote in support in a cohort comprised of both of the employees already covered by the agreement and the employees who would be covered if the proposed variation took effect. The Bill proposes to retain those provisions (which apply to any form of enterprise agreement including one in relation to which a single employer authorisation was in place) as well as adding alternative options for varying single interest employer agreements. Neither the existing pathway to variation or the proposed new pathways will permit such an agreement to be varied to cover an employer and their employees in respect of general building and construction work.

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[78] See proposed section 251(8)

These new options will require majority support of only the employees who would become covered by the agreement if the variation took effect and employers and employee organisations already covered by the agreement will be entitled to express their views. The other requirements differ depending on whether the variation is progressed jointly by the proposed new employer and its employees, or alternately by an employee organisation that is already covered by the agreement.

If the variation is progressed jointly (that is, with the agreement of the proposed new employer), majority support is to be established by a vote of those employees prior to an application being made to the FWC for approval of the variation; and the FWC will need to be satisfied that those employees have genuinely agreed to the variation. If the variation is progressed by an employee organisation, the FWC will need to establish majority support as part of the determination of the application; as well as being satisfied that the proposed new employer is neither a small business employer or covered by an unexpired agreement. The merit tests reflect the criteria for issuing a single interest employer authorisation: The new employer must either be part of the same franchise or have clearly identifiable common interests with the employers already covered. If the latter is the case, the FWC will also need to consider whether it is in the public interest to approve the variation, which is problematic insofar as it interacts with the objects of the Act as identified above. Similarly, the exclusions (in the case of applications by employee organisations) where there are unexpired agreements or written agreement to bargain will apply. The immunity in respect of parallel bargaining will also be available.

Good faith bargaining

The proposed insertion of subparagraph 230(2)(e) will mean that the issuing of a single interest employer authorisation will enable a bargaining representative to seek bargaining orders to compel compliance with the good faith bargaining requirements. Unlike a single enterprise agreement with related employers where no authorisation is required, a majority support determination will not have the effect of compelling the employers to bargain.

Protected industrial action

Protected action is already available to employers and employees covered by a single interest employer authorisation, although additional thresholds are now proposed as discussed in section (f) of Chapter 5 above. It is envisaged that more employees and employers will be permitted to take protected industrial action as a result of the amendments. For example, in Victoria, the Independent Education Union currently bargains with Catholic school employers for a multi-enterprise agreement with the minimal rights, protections and role of the FWC that accompanies such bargaining. This form of bargaining occurs at the employer's insistence and provides enormous latitude for intransigence and delay by the employers in the conclusion of

any agreement. The capacity to take protected industrial action will incentivise concluding agreements within a reasonable time, even if the protected action available is not ultimately taken.

I. How the Bill can be strengthened

The expanded deliberative role of the FWC should not be fettered by the proposed requirement that a small business employer cannot be included in an authorisation without their agreement;
The effective immunity available to employers against the making or variation of a single interest authorisation or subsequent inclusion in single interest employer agreement for employers that are bargaining together and have done so before, as has been introduced via in government amendments[79], should not proceed.

Ii. Recommendations

28. **Part 21 requires some amendment to provide the FWC greater freedom in structuring bargaining cohorts in accordance with employees' wishes. Items directed to limiting bargaining cohorts for single interest employer agreements, including by way of the immunity in respect of current bargaining and the small business exemption, should not be proceeded with.**
29. **To better support the intent of Part 21, the objects of the Act should be amended to no longer preference any particular level or form of bargaining as the means through which those objects should be realised.**

c. Varying Enterprise Agreements to remove employers and their employees (Part 22)

The provisions of this Part provide options to vary multi enterprise agreements that are not greenfields agreements, provided at least 2 employers covered by such agreement at the time the application is made.

It is proposed that variations of this nature be progressed consensually, with employers wishing to exit the agreement providing their employees (affected employees) with an opportunity to vote in favour. If the majority vote is in favour, either the employer, an affected employee or an employee organisation entitled to represent an affected employee may make the application for approval. In order to approve the variation, the FWC will need to be satisfied of the majority vote (and that there are no reasonable grounds for disbelieving it), that the affected employees were given a reasonable opportunity to decide and that each employee

[79] See proposed sections 216DC(3D), 251(8)

organisation covered by the agreement that is entitled to represent the effected employees agrees to the variation.

d. Co-operative Workplaces (Part 23)

The provisions of this Part are intended to achieve five main things:

b. Rename multi enterprise agreements that are made without a supported bargaining authorisation or single interest employer authorisation as 'cooperative workplace agreements';
c. Identify such agreements the only types of multi enterprise agreements that can be made to cover employees performing general building and construction work;
d. Require at least some employees bargaining for such agreements to be represented by an employee organsation as a condition of the approval of such agreements, where they are not greenfields agreements;
e. Prevent non-greenfields multi enterprise agreements generally from being varied so as to cover employees performing general building and construction work; and
f. Provide a dedicated means of varying cooperative workplace agreements to add employers;

The definition of general building and construction work and the exclusions from it are drawn from the *Building and Construction General On-site Award 2020* and other modern awards that cover the building and construction industry.

Variations of cooperative workplace agreements would be progressed consensually, with employers wishing to join the agreement providing their employees (affected employees) with an opportunity to vote in favour. Thereafter, the employer would be required to apply to the FWC for approval of the variation. The FWC would consider the vote and if the variation had been genuinely agreed to by the affected employees and would need to satisfy itself that it would not be contrary to the public interest to approve the variation. The FWC would also need to be satisfied that the employers and employee organisations already covered by the agreement have had an opportunity to express their views to the FWC. This pathway to variation would not be available if the result would be that the agreement would start to cover employees in relation to general building and construction work. Nor would it be available for existing cooperative workplace agreements that are greenfields agreements that already cover employees in relation to general building and construction work.

7. Termination of Agreements

a. Termination of EAs after their nominal expiry date (Part 12)

If an employer succeeds in an application to unilaterally terminate an enterprise agreement, it can throw its employees back on the inferior pay and conditions of an applicable Award. So even the threat of termination in negotiations serves to greatly weaken the bargaining position of employees during agreement negotiations. It wasn't always this way.

An IR system not working

In early 2022, after receiving billions in public money over the course of the pandemic, including $2 billion in 2021 alone, Qantas told its international flight attendants it had applied to the FWC to terminate their enterprise agreement.

For some staff - who had endured 20 months of standdowns since the start of 2020 – this would have meant a 37% cut to their wages, taking them to the award minimum of about $45,000 *per annum*.

Qantas used its threat to ram through a new agreement – putting workers between a rock and hard place of having to choose between cuts to their working conditions or facing a massive wage reduction and more cuts.

Qantas announced an underlying profit of around $1.2 billion in the first half of 2022. It clearly didn't need to do this. The fact that it could represents a serious failure in our workplace laws.

The FWC's interpretation of the FW Act's provisions relating to termination of enterprise agreements have traversed the full spectrum from:

- Determining that agreement termination was not appropriate during a round of bargaining, for the effect it would have on workers' negotiating position;[80] to,
- Holding that current bargaining was no reason not to terminate an enterprise agreement;[81] to
- Considering agreement termination during a round of bargaining being appropriate precisely because it may alter workers' negotiating position and encourage further bargaining.[82]

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

[81] *Aurizon Operations Limited; Aurizon Network Pty Ltd; Australia Eastern Railroad Pty Ltd* [2015] FWCFB 540 and *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Aurizon Operations Ltd* [2015] FCAFC 126

[82] *AGL Loy Yang Pty Ltd* [2017] FWCA 226.

This greatly undermines the bargaining power of employees. The threat of having wages cut and hard-won conditions taken away should not be available for employers to compel settlement of an enterprise agreement on terms more favourable to it. In other legal contexts, such a scenario would be tantamount to duress. It should not be so easy for employers to abandon their promises. This is particularly the case where successive enterprise agreements encourage loyalty and retention through fair redundancy entitlements which are then stripped away immediately prior to major workplace changes and rounds of job losses. This loophole needs to be urgently closed. The case study of Qantas given in this submission is by no means an isolated example. In fact, the very act of an employer seeking to terminate its enterprise to gain an advantage in bargaining suggests a well-resourced company with access to external legal advisors. Another illustrative example is that of Alcoa who runs one of the world's largest integrated bauxite/aluminium mining and production operations in the world.[83] Despite recording massive company profits – including $1.07 billion in just 2017 alone – Alcoa applied to terminate its existing agreement during bargaining for a new one in 2018.[84] Despite it's solid financial position, Alcoa was successful in its application at first instance. This was subsequently overturned on appeal but not determined finally.[85]

The Bill (Part 12 - Termination of enterprise agreements after nominal expiry date) will help to refine the agreement termination provisions so that they are still available when workers are stuck on an old expired agreement that has not kept pace with modern workplace conditions, whilst limiting the circumstances in which an employer can seek agreement termination to those that are necessary for its viability – rather than being tactically advantageous in negotiations.

The provisions of the Bill Part 12 will amend the FW Act s 226 to enable termination of an enterprise agreement in 3 scenarios:

- If the continued operation of the agreement would be unfair to employees;
- If it does not cover any employees and is unlikely to in the future; or
- If terminating the agreement is critical to the viability of the employer and would reduce the likelihood of redundancies. In this scenario, employers would be required to guarantee employees' redundancy entitlements.

These provisions strike the appropriate balance. Enterprise Agreement termination would be available to workers who are stuck on expired and unfair agreements, and it would also be available to employers with genuine viability concerns. Before terminating an agreement, the FWC would be required to ascertain

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[83] See *Application by Alcoa of Australia Limited* [2018] FWCA 7624 at [6]
[84] See *Application by Alcoa of Australia Limited* [2018] FWCA 7624 at [222]
[85] [2019] FWCFB 2427

whether bargaining was occurring and whether terminating the agreement would adversely affect workers' bargaining position.

i. How the Bill can be strengthened

For the reasons above, the ACTU supports the intention of the provisions contained in the Bill. However, noting the contested nature of cases in this area and the significant shifts in jurisprudence in respect of the current provisions, we make technical and drafting recommendations below. We also recommend changes to strengthen the protection of worker entitlements following the termination of an agreement.

ii. Recommendations

30. Proposed section 226(1) should be redrafted to make clear that the circumstances provided for in that sub-section are the only circumstances in relation to which the FWC may terminate an agreement.
31. Proposed section 226(4) should be redrafted such that the FWC cannot terminate an agreement if doing so would have an adverse effect on the bargaining position of employees.
32. Proposed section 226(5) should be removed;
33. Sub-section 226A(4) should be amended to provide that a guarantee of termination of employment entitlements given in relation to the termination of an enterprise agreement should remain in force until a new agreement comes into force. It should remain in force for any worker not covered by a new agreement, until such time as a new agreement covers them.
34. All other terms and conditions should also be guaranteed for a period of at least 6 months.

b. Sunsetting of Zombie Agreements (Part 13)

"WorkChoices" is dead. Buried and cremated even.

Yet the embodiment of WorkChoices persists to this day in the form of agreement-based transitional instruments struck prior to the FW Act coming into effect.

An IR system not working

When fast-food giant Subway talks about freshness, they're clearly not referring to their wages and conditions.

There are roughly 300 Zombie Agreements still active at Subway alone, which are leading to thousands of workers – mostly teenagers – being ripped off

This year, 17-year-old SDA member Chantelle (with the support of the SDA) lodged an application in the FWC to terminate a non-union "Zombie" Enterprise Agreement which 60 Subway sites operate under. This Agreement has seen hundreds of Subway workers shortchanged by missing out on newer conditions and entitlements – but this isn't the only instance of this.

In 2019, the SDA helped April – a teenage Subway worker in the NT – file an application to terminate a different Subway Agreement, which saw her underpaid thousands in wage each year. This Agreement came into effect when April was just six years old and expired in 2012.

"When I started working at Subway, I was told they pay above the fast food award. I can't even say that this was misleading; it is just blatantly untrue.

On Boxing Day I worked alongside someone who said they were doing an 8-hour shift and were doing it because it was double pay.

Sadly, it wasn't. In fact, it wasn't even normal pay. People assume they are being treated fairly but are not," says Chantelle.

Pulling the pin on these Zombies is a no-brainer.

They are not within their intended lifespan, but yet they persist. Static, lingering and neither fully dead nor alive. It is this that earns them the apt moniker "Zombie agreements".

As estimated 450,000 workers are stuck on Zombie agreements or about 4% of the Australian workforce, including 180,000 in the accommodation and food services sectors, and 85,000 in retail.[86]

The very real presence of Zombie Agreements is felt for those workers whose terms and conditions of employment are set by outdated relics of agreements set not even in the last decade but the one preceding, under a decidedly anti-worker legislative framework. Doing away with this last vestige of WorkChoices is long overdue. The wages set by these Zombie agreements will have long ago ceased to be reflective of genuine market rates (to the extent that they ever were), and are now likely to have been supplanted by award minimum rates or the national minimum wage. Many Zombie agreements also provide for lesser penalty rates for workers who work unsociable hours. But being on a Zombie agreement doesn't just mean being stuck on low wages; it also means being stuck on employment conditions which have been frozen in time

[86] Daily Telegraph (5 November 2022), "Albanese's industrial relations bill gives workers more pay, overtime',

since before the FW Act. This means that workers on Zombie agreements have entirely missed out on any recent industrial developments that have flowed through to awards and enterprise agreements. The very existence of Zombie agreements also holds back wage growth across the sectors they dominate in.

The Bill Part 13 (Sunsetting of "zombie" agreements etc.) will slay Zombie agreements by automatically terminating (unless extended by application to the FWC) agreement-based transitional instruments which have remained in force since the introduction of the FW Act, locking workers onto low wages and conditions.

A list of the types of agreement-based transitional instruments which will automatically sunset 12 months after the Bill enters into force is set out in *the Fair Work Act (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)* Sch 3 cl 5 and includes:

- workplace determinations (formed under the predecessor legislation);
- preserved collective State agreements;
- pre-reform certified agreements;
- old IR agreements;
- section 170MX awards;
- ITEAs;
- preserved individual State agreements;
- AWAs;
- pre-reform AWAs.

which survive by virtue of that schedule.

Under the new provisions, the FW Act will allow for the FWC to consider applications to keep specific agreements in operation.

8. Job security

Over 4.1 million people – or nearly one in three workers – are on insecure work arrangements in Australia according to estimates by the ACTU.[87] Insecure work is work that lacks job security, certainty over hours, or key entitlements such as sick leave or annual. This covers workers in:

- Casual employment, particularly where an employment is labelled casual despite bearing the hallmarks of permanence;
- Labour hire and other contracting arrangements that use triangular relationships which provide no job security;
- On rolling fixed term contracts that deny them the ability to plan ahead despite long and loyal service;
- "Gig economy" work arrangements through platforms, and Sham contracting arrangements…

For workers, being in insecure work means: not being able to plan ahead or book a holiday; not knowing if you'll have a job next Christmas; not being able to plan major purchases like a car or a house; and, being anxious about whether you'll be able to feed your family in a month from now. Being in insecure work also means knowing that your employer could easily end your employment if you and your workmates try to improve your situation. It's little surprise that workers in insecure forms of employment are less able to bargain collectively and that insecure work and low wages create a vicious circle. Afterall, it is hard to join together with colleagues to ask for a pay rise if you don't know if you will have a job or hours tomorrow.

Insecure work is also highly gendered. Women are over-represented among workers in insecure and low-paid jobs. Work predominantly performed by women – including much of the frontline and essential work which kept us safe during the pandemic – is more likely to be low-paid and insecure because of gendered assumptions and discriminatory views about the skills required and the value and complexity of the work.

a. Objects

The reasons for specifying guiding principles and matters of importance in the objects of the FW Act and in the modern awards objective, as well as the significance of these matters to statutory construction are set out above in section 3(a) of this submission on inserting gender equity into the objects of the Act.

The Bill Part 4 will include 'promot[ing] job security…' in the FW Act s 3. Part 4 also amends the FW Act s 134 to refer to 'the need to improve access to secure work across the economy' as a means by which the modern award objective is to be achieved.

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[87] ACTU (March 2022), *Morrison's record of failure on Secure Jobs,* page 7

These changes will ensure that the FWC and courts are required to consider job security when making decisions about how to interpret the FW act, including when setting wages and conditions. Putting job security at the heart of the FW Act is important and necessary to support other positive changes to address insecure work both in this Bill and in future measures. Whilst we view these changes as a positive first step toward addressing job security, we are mindful of the many different variants of insecure work (just some of which we refer to above) which are all too common across the Australian workforce. We urge parliament to direct its attention to such further measures as would address insecure work in the future, including: the proper regulation of labour standards in supply chains; protecting workers in the "gig economy"; and enacting a fairer definition of casual employment.

c. Fixed Term Contracts (Part 10)

Fixed term contracts typically offer workers lesser protections from termination, which can occur for no reason other than that the contract has reached a set date or milestone.[88] In Australia, it is currently perfectly legal to engage a worker on five consecutive one year-long fixed term contract and terminate employment after the fifth such contract due to no longer needing the work performed, with no obligation to make a redundancy payment. A worker who was employed on a standard (i.e. not fixed-term) contract would be entitled under the NES to 4 weeks' of notice and 10 weeks' redundancy pay in similar circumstances.[89] Under the present law, a worker on a fixed (or maximum) term contract is denied access to the unfair dismissal jurisdiction if their employment ends after the specified term period. This is on the technical basis that a fixed-term employee is not dismissed, which mean even an employee with twenty consecutive one-year contracts can be capriciously terminated with no effective redress.[90]

There are now over 550,000 workers on fixed term contracts or about 5% of the workforce, a figure that has grown by 50,000 since 2015.[91] Most workers on these arrangements are women (56%), and most work in education, health care and public administration and safety and professional services.

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[88] International Labour Organisation, 2016, *Non-standard Employment Around the World: Understanding callenges, shaping prospects*, International Labour Office (Genvea), 22, 187 <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_534326.pdf>

[89] FW Act ss 117, 119

[90] See FW Act s 386(2)(a)

[91] ABS Characteristics of Employment, August 2021.

The Bill provides greater job security by limiting the use of fixed term contracts. In doing so, Australia would join nearly 100 other countries that already place legal limits on when fixed term contracts can be used, and for how long.[92]

The Bill inserts a new Part 2-9 Division 5 in the FW Act, which effectively limits the term of any fixed or maximum term contract to two years (subject to limited exceptions).[93]

An employer will contravene proposed s 333E if they enter into a fixed or maximum term contract for an employee who is not a casual and:[94]

- The specified duration of the contract is greater than 2 years;[95] or
- The contract is capable of being extended more than once or for greater than 2 years;[96] or
- The contract is consecutive with a previous contract which regulated the same or substantially similar work, there is substantial continuity of employment and the combined specified duration of both contracts is greater than 2 years or the contract contains a renewal or extension option.[97]

These provisions will not apply to certain categories of worker, such as high-income earners, trainees, essential workers in peak periods, backfill positions or certain positions subject to Government funding.[98] The limitation on fixed and maximum term contracts also will not apply if such contracts are permitted by a modern award.[99]

The new provisions will also require the FWO to produce a Fixed Term Contract Information Statement, which employers must provide to relevant employees.[100]

i. How the Bill can be strengthened

Whilst we are supportive of the broad policy intention underpinning the Bill Part 14 we are concerned that certain aspects of the provisions, as presently drafted, may undermine that intent. We note that by

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[92] ILO (2016), *Non-Standard Employment Around the World*, 270.
[93] Bill Sch 1 Part 10 Cl 441; Note: The term "fixed term contract" is used, whereas the definition appears to also capture maximum term contracts, see proposed Div 5 s 333E(1)(b)
[94] Proposed s 333E(1)
[95] Proposed s 333E(2)
[96] Proposed s 333E(3)
[97] Proposed s 333E(4)-(5)
[98] Proposed s 333F
[99] Proposed s 333F(1)(h)
[100] Proposed ss 333J, 333K

amendment the operative date of this part of the Bill will be delayed. We are of the view that this time should be used to facilitate further discussions aimed at ensuring that the Bill meets its objective.
For the reasons given above, under the section a. Objects (Part 4) in chapter 3 3. Gender Equity and Equal Pay we are of the view that the need to promote secure work should also be included in the factors for consideration when making a workplace determination arising under the FW Act s 275.

ii. Recommendations

35. The Government should facilitate further discussions aimed at ensuring that the Bill meets its objective of limiting the use of fixed term contracts.
36. The ACTU encourages the Government to implement its other commitments on job security, by further legislating to ensure labour hire workers get the same pay as directly employed workers doing the same job; protect workers in the "gig economy"; enact a fairer definition of casual employment, and strengthen rules to prevent sham contracting.
37. The need to promote job security should be included in the factors for consideration when making a workplace determination arising under the FW Act s 275.

9. Improving Compliance

Estimates of the scale of wage theft vary widely. PwC estimates that annual $1.35 billion in workers' entitlements are underpaid annually.[101] However this may well be a conservative estimate. A Queensland inquiry estimated that in that state alone wage theft accounted for $1.22 billion in income and $1.22 billion in superannuation lost to the economy (in addition to tax and consumer spending consequently lost also).[102] ISA have estimated that wage theft of superannuation alone accounts for $5.9 Billion nationally.[103]

There can, however, be no quibble about the gravity of wage theft. For a low-income worker, being deprived of even the smallest amount of wages can break an already stretched household budget. With many workers on the national minimum wage already below the poverty line – despite being gainfully employed – not being paid in full adds insult to injury.[104]

Wage theft is a complex problem with many causes and combatting it requires a range of policy and legislative initiatives. Two such measures are contained in the Bill, are:

- Changes to make the small claims jurisdiction more accessible; and
- The prohibiting of job ads with unlawful rates.

Whilst this is a solid first step toward addressing wage theft, much more needs to be done in the future. Necessary measures have been set out in detail by the ACTU in previous submissions and include:

1 Affording greater rights of entry and inspection to trade union permit holders;
2 Measures to ensure that principal contractors take responsibility for labour standards contraventions within their supply chains;
3 The establishment of a dedicated industrial court co-located with the Fair Work Commission;
4 Increased penalties for wage theft;
5 Including superannuation as a National Employment Standard and requiring payment at the same time as wages.

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[101] PwC, *Navigating Australia's Industrial Relations,* <https://www.pwc.com.au/publications/australia-matters/navigating-australias-industrial-relations.html>
[102] Education, Employment and Small Business Committee (Queensland), November 2018, A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland, Report No. 9, ix <https://documents.parliament.qld.gov.au/TableOffice/TabledPapers/2018/5618T1921.pdf>
[103] *'Super Scandal: Unpaid Super Guarantee in 2016-17*' (Report, Industry Super Australia, 2019) 3.
[104] *Annual Wage Review 2021-2022* [2022] FWCFB 3500 at [13] [71]-[76]

a. Enhancing the Small Claims process (Part 24)

In its 2019 report *'Systemic, sustained and shameful: Unlawful underpayment of employees' remuneration'* the Senate Economic References Committee, inquiring into wage theft considered some of the barriers to addressing it. . The Committee considered them to include *inter alia*:[105]

- **high costs**—'prohibitive' costs including small claims fees, court filing fees, and lawyers may prevent workers seeking redress; and
- **low small claims threshold**—currently capped at $20 000, denying access to redress through this avenue for some claimants;

Part 24 (Enhancing the small claims processes) of the Bill addresses the points raised above by amending the FW Act:

- To increase the small claims threshold from $20,000 to $100,000; and
- To allow the court, in a small claims proceeding, to make orders that allow workers to recoup any court filing fees as well as the wages that they are owed.

These changes will mean that more workers can access the streamlined and less formal small claims process. This is important because currently many workers who have been underpaid for extended periods of time may have claims that are above the current threshold. Giving those workers access to the cheaper and less formal avenue of small claims processes makes justice more accessible for them and reduces the burden on the courts.

While the fees for filing a small claim are significantly cheaper ($265 or $425 depending on the claimed amount) than ordinary court filing fees (which can also include hearings fees etc. and total several thousand dollars); a few hundred dollars is a lot of money for a low-income worker, especially when they've been historically underpaid.

The changes will also mean that workers who make successful small claims are not left out of pocket because of small claim filing fees.

b. Prohibiting Job ads with unlawful pay rates (Part 25)

We don't walk past shops and warehouses with signs saying "stolen goods for sale, enquire within"; so why do we still see job ads that specify rates of pay below the legal minimum?

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[105] Senate Economics References Committee, March 2022, *Systemic, sustained and shameful: Unlawful underpayment of employees' remuneration*, Inquiry into the causes, extent and effects of unlawful non-payment or underpayment of employees' remuneration by employers and measures that can be taken to address the issue, 67 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Underpaymentofwages/Report>

An IR system not working

The following examples are actual job ads specifying less than the applicable legal minimum rates:

Outdoor farms in small sheds in Sydney are urgently hiring agricultural workers

138 | Reply share

jason soon

2021-10-06, 08:38

Agency Fee: None **Location:** Central coast **Deadline:** None **Number of Persons:** 2 **Job Content:** Vegetable Planting, Picking and Packaging **Hourly Wage:** Hourly Wage

The farm is about an hour away from Sydney. There is an urgent need for a man and a woman, no work experience, no age limit, no English communication skills requirements, any nationality or visa is welcome. You can go to work immediately without waiting for work, and you have a job for many years.
Work 6-7 days a week, 9 to 11 hours a day (you can request the number of days and hours), $15 cash per hour (wage will be increased after familiarity with the work), and pay every Sunday.
There is an accommodation arrangement of $100 a week, including internet water, electricity, coal, cooking utensils and tableware, and a fare of $6 a day. There is no accommodation, and you can find accommodation by yourself.
If you are interested, please contact 0481158818 May. The peak season is coming, please do not disturb if you are unintentional.

CC酱

注册时间：2022-01-17 用户组：幼儿园

所在地区:	Carrara 黄金海岸 QLD
公司名称:	Pizza Hut Boonooroon Park
招聘职位:	清洁/搬运/库管/司机
工作性质:	不限
签证状态:	不限
工资待遇:	Hourly Wage $16 - $20
姓名:	Tracy
电话:	********5599 显示电话

联系我时，请注明来自亿忆网！未经书面许可，严禁转载！

Advertising a job at less than the legal minimum wage is pretty brazen, and it's a good indicator that some employers are openly flouting the law. If some employers are advertising jobs at rates below the legal minimum, then that's a fairly good indicator that they're also getting an unfair competitive advantage by ripping off their workers.


miniV0622
注册时间： 2022-02-03 用户组：幼儿园

所在地区:	Box Hill 墨尔本 VIC
公司名称:	宵帮
招聘职位:	厨师/服务员/帮工/外卖
工作性质:	全职
签证状态:	不限
经验要求:	需要
招聘人数:	2
工资待遇:	Hourly Wage $16 - $20
Annual leave:	无
姓名:	Jacky
电话:	********2988 显示电话
微信:	Jacky122622

联系我时，请注明来自亿忆网！未经书面许可，严禁转载！

Wage theft hurts everyone. For workers, it means being unable to pay the bills despite having a job. For good employers, it means being forced out of business by those that don't play by the rules.

Waiting until an employee has accepted an offer of employment, started work, performed their duties for a period of time and been paid before something can be done is clearly not the most efficient way to solve this problem. It also means that workers have to be underpaid, struggle to pay their bills and spend their own time and money just to get what should have been given to them in the first place.

The provisions that will be inserted into the FW Act by Part 25 (Prohibiting employment advertisements with pay rate that would contravene the Act) of the Bill will allow unions and the Fair Work Ombudsman to address wage theft before it occurs. They also provide some employers who aren't already doing the right thing a solid incentive to make sure they're paying correct wages and advertising accordingly.

i. How the Bill can be strengthened

The positive effect that the provisions of Part 25 could have as part of addressing wage theft could be nullified too easily if the provisions themselves aren't meaningful and can be escaped too easily. As presently drafted, the Bill allows for employers who advertise jobs at less than the legal minimum rate to escape scrutiny entirely if they have a "reasonable excuse". This exception is far too wide and should be removed.

ii. Recommendations

38. **Proposed sub-section 536AA(2) should be amended to refer to outworker entities, as well as employers, to ensure that responsibility is conferred to the correct hiring entity.**

39. Proposed sub-section 536AA(3) which allows for employers to escape scrutiny if they have a "reasonable excuse" should be removed from the Bill.

10. Positive Regulatory Culture

Trade unions are heavily regulated.

A positive regulatory culture can only exist within a system and a legal framework designed to help unions continue to be democratic, transparent and accountable.

The current system restricts union activities and presents a compliance burden which does not positively contribute to democratic functioning, transparency, accountability or outcomes for members.
There are multiple overlapping sources of compliance and reporting obligations placed on unions. Combine these onerous requirements with a harsh penalties regime and a punitive regulator (the Registered Organisations Commission (ROC), introduced by the former Coalition Government) and it's little wonder that a lot of rank-and-file union members are put off being more involved in running their union.
The right regulatory approach will encourage more workers to play a more active leadership role in their union, instead of discouraging them.

The ILO's Committee on Freedom of Association has found on numerous occasions that:[106]

> Legislative provisions which regulate in detail the internal functioning of workers' and employers' organizations pose a serious risk of interference by the public authorities. Where such provisions are deemed necessary by the public authorities, they should simply establish an overall framework in which the greatest possible autonomy is left to the organizations in their functioning and administration.

The Committee has further expressed the following view:[107]

> There should be outside control [of trade unions] only in exceptional cases, when there are serious circumstances justifying such action, since otherwise there would be a risk of limiting the right that workers' organizations have, by virtue of Article 3 of Convention No. 87, to organize their administration and activities without interference by the public authorities which would restrict this right or impede its lawful exercise.

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[106] International Labour Organisation, 2018, *Freedom of association - Compilation of decisions of the Committee on Freedom of Association* (6), Geneva, 563
[107] International Labour Organisation, 2018, *Freedom of association - Compilation of decisions of the Committee on Freedom of Association* (6), Geneva, 678

This is not to advocate for there being no regulation whatsoever. Rather, it is to remind the legislature that union rights and workers' rights are human rights and that the law should only burden those freedoms in a manner that is reasonable, proportionate and achieves a legitimate end.

The provisions of the Bill Parts 1-3 are a step towards the creation of a more balanced regulatory environment for trade unions. The amendments made by these provisions are sensible and targeted – whilst they do not represent all that needs to be done to create a well-functioning, appropriately balanced and positive regulatory culture, they consist of the most immediate and pressing measures toward that ultimate aim.

a. Abolition of the Registered Organisations Commission (Part 1)

A good regulator supports collaboration and is pragmatic and solutions-focussed - rather than being punitive for its own sake. A good regulator is one that works positively and constructively with unions.
The Registered Organisations Commission (ROC) was established by the then Coalition Government in 2016. It's actions as a regulator have shown a preoccupation with punishment, not a focus on improvement through collaboration.

The Bill Part 1 (Abolition of the Registered Organisations Commission) will amend the Fair Work (Registered Organisations) Act 2009 (Cth) to abolish the Registered Organisations Commission and the role of Registered Organisations Commissioner. The Bill Part 1 transfers the current powers of the Registered Organisations Commissioner to the FWC General Manager.

The Fair Work Commission (FWC) is Australia's independent industrial umpire and is best placed to regulate trade unions and employer associations in a fair and impartial manner. It had already done so effectively prior to the establishment of the ROC in 2016.

Abolishing the ROC; transferring its powers to the FWC; and, enabling the FWC to play a positive role will enhance and promote the democratic functioning of trade unions, rather than suppress it.

b. Additional registered organisations enforcement options (Part 2)

The Bill Part 2 (Additional registered organisations enforcement options) provides for the following additional regulatory options to the FWC in respect of registered organisations:

- Issuing of infringement notices;
- entering into enforceable undertakings.

iii. Infringement Notices

Infringement notices are notices imposing a financial penalty where a regulator believes that a contravention has taken place. In essence, they are fines. Corporate regulators, such as ASIC and APRA have the power to issue infringement notices and do so regularly as an alternative to prosecutions.[108]

The Bill Part 2 will provide that the FWC General Manager is an infringement officer for the purposes of *the Regulatory Powers (Standard Provisions) Act 2014 (Cth)* Part 5 and may further appoint other persons as infringement officers.[109]

A person to whom an infringement notice is issued will have the option to:

- Accept the notice and pay the specified amount, thereby discharging any liability for the alleged contravention;[110]
- Request the withdrawal of the infringement notice;[111]
- Not comply with the infringement notice, in which case the regulator may elect to pursue the matter further;[112]

Providing the FWC General Manager the ability to issue infringement notices allows for an additional option to resolve potential compliance issues in an efficient and proactive manner that can be utilised to encourage positive conduct. The judicious use of this option, coupled with the available review options make this a sensible regulatory power to provide to the FWC General Manager that is consistent with the powers of other regulators.

iv. Enforceable Undertakings

An enforceable undertaking is a legally binding agreement that is made with a regulator. Sanctions can be applied if its terms are breached. Enforceable undertakings are a tool commonly used by regulators.

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[108] See *Corporations Act 2001 (Cth)* s 1317DAN; *Competition and Consumer Act 2010 (Cth)* various sections; APRA, *Guidelines on the use of infringement notices by the Australian Prudential Regulation Authority* <https://www.apra.gov.au/guidelines-on-use-of-infringement-notices-by-australian-prudential-regulation-authority>

[109] See proposed FWRO Act s 316A

[110] *Regulatory Powers (Standard Provisions) Act 2014 (Cth)* s 107

[111] *Regulatory Powers (Standard Provisions) Act 2014 (Cth)* s 106

[112] *Regulatory Powers (Standard Provisions) Act 2014 (Cth)* s 108(b)(i)

No similar power to enter into enforceable undertakings is provided to the ROC, whose main regulatory options are investigation and litigation. This means that the only mechanism available is the most serious one. Compare this to another regulator, APRA, who states in its enforcement approach:[113]

> In most circumstances, non-formal tools are effective in achieving APRA's prudential outcomes in a resource-efficient and timely manner. This is particularly the case where regulated entities are willing to work in an open and cooperative manner with APRA.

The Bill Part 2 will provide that the FWC General Manager is an authorised person for the purposes of *the Regulatory Powers (Standard Provisions) Act 2014 (Cth)* Part 6.[114] This will allow the General Manager to accept court-enforceable undertakings as an alternative means of resolution to litigation.

This change will enhance the regulatory repertoire of the General Manager and enable them to take a pragmatic and practical approach their statutory task. Moreover, there is no weakening of the options which are currently available to the regulator.

c. Abolition of the Australian Building and Construction Commission (Part 3)

The Australian Building and Construction Commission and role of the Australian Building and Construction Commissioner trace their lineages back to Howard-era industrial relations reforms which targeted building and construction unions through the Building and Construction Industry Improvement Bill 2005 (Cth). The effect of those laws was the differential treatment of workers and their unions in one industry compared to others. This was the subject of a complaint to the ILO in 2005. In 2005, the ILO's freedom of association committee made recommendations covering:[115]

- Measures to ensure that consultation with unions took place;
- Bringing provisions relating to industrial action in line with freedom of association principles;
- Promoting collective bargaining, and allowing parties to determine the level at which bargaining occurs;
- Measures to ensure that the ABCC does not interfere with the internal affairs of trade unions, and that punitive measures are not harsh or disproportionate.

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[113] APRA, 3 September 2019, *APRA's enforcement Approach*, 6 <https://www.apra.gov.au/sites/default/files/apras_enforcement_approach_-_final.pdf>

[114] See proposed FWRO Act s 316C

[115] ILO, Committee on Freedom of Association, November 2005, *Report Number 338* at 457

It was not until a change of Government in 2007 that there was genuine effort made to address some of these concerns.

However, in 2016, the then Coalition Government re-established the Australian Building and Construction Commission, and the role of Commissioner once more.

The anti-union stance of the ABCC was swiftly apparent. In 2017, Nigel Hadgkiss, the then Australian Building and Construction Commissioner resigned after admitting to being aware of the ABCC disseminating information to employers encouraging restricting union right of entry in breach of legislation.[116]
From its creation in 2005 to the period following its re-establishment in 2016, the ABCC has been about interfering with freedom of association in the building and construction industry. It has done this even to the detriment of health and safety.

The re-establishment of the ABCC and its statutory mandate is the subject of a complaint to the ILO's Committee on Freedom of Association.[117] That matter remains on foot. In its consideration of the matter, the Committee has observed:

> The Committee recalls that governments should guarantee the access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers in order to apprise them of the potential advantages of unionization [see Compilation, para. 1590]. While taking due note of the Government's concern for the need to prevent undue pressure on workers and to protect their choices of association, the Committee also observes the importance of ensuring that workers are fully informed of their rights to collective representation.

The same laws that established the ABCC provided for the establishment of the building code, compliance with which was mandatory for building companies and contractors tendering for or performing government funded work.[118]

The recently amended building code contained provisions which banned union stickers on hats and which led to extraordinarily wasteful litigation – at the cost to taxpayers of close to half a million dollars – about whether

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[116] Richard Baines and Stephen Smiley, 'ABCC boss Nigel Hadgkiss resigns over Fair Work Act breach, Labor wants Michaelia Cash to follow', ABC (online, 13 September 2017) <https://www.abc.net.au/news/2017-09-13/abcc-nigel-hadgkiss-resigns-over-breach-labor-pressures-cash/8942558>
[117] See ILO, Committee on Freedom of Association, March 2019, *Report Number 388*
[118] *Code for the Tendering and Performance of Building Work 2016* at clause 18-19, 23-24 (provisions repealed in 2022)

or not the Eureka flag was allowed to be displayed at a building site.[119] The ABCC's pursuit of workers and their representatives appeared to know no bounds of sensibility. On one occasion, the ABCC expended significant amounts of taxpayer money by suing in relation to a union organiser having a cup of tea with a friend at a worksite. The assessment of the trial judge was reported as follows:

> In scathing and extraordinary criticism of the construction industry watchdog, Justice Tony North told parties on Friday it was "astounding" that commissioner Nigel Hadgkiss had briefed silk and conducted days of hearing with dozens of participants, including Australian Federal Police, over "such a miniscule, insignificant affair".
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> ...
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> [Justice North] said when the ABCC "use[s] public resources to bring the bar down to this level, it really calls into question the exercise of the discretion to proceed".

The code also banned enterprise agreements from containing beneficial provisions such as those mandating a ratio of apprentices to qualified tradespeople or protecting job security by requiring contractors and labour hire workers to be paid on no less favourable terms.

The ABCC's most recent annual report indicates that the 71% of the matters where it provided assistance or advice related to the Building Code. With much of the Building Code now repealed, the workload of the ABCC will reduce considerably.

The Bill Part 3 (Abolishing the Australian Building and Construction Commission) renames the Building and Construction Industry (Improving Productivity) Act 2016 to be the Federal Safety Commissioner Act 2022 and redefines its objects to include promoting WHS in the building industry. Part 3 also amends the Federal Safety Commissioner Act 2022 to replace their role of "authorised officer" with that of "Federal Safety Officer". Under the new provisions, the ABC Commissioner will retain a limited role of informing and assisting the FWO in relation to its powers relating to the building industry for a 2-month period.

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[119] Nick Bonyhady, Building watchdog spends almost $500,000 challenging Eureka flag displays, *Sydney Morning Herald* (Online, 24 March 2021) <Building watchdog spends almost $500,000 challenging Eureka flag displays>

11. Comcare

a. Amendment of the Safety, Rehabilitation and Compensation Act 1998 (Part 27)

The Bill Part 27 is directed at ensuring that volunteer firefighters in the ACT are protected by presumptive legislation regarding serious workplace illnesses.[120] In doing so, the Bill aims to address a discrepancy whereby volunteer firefighters are presently not protected by these mechanisms. The Bill Part 27 also adds malignant mesothelioma (a disease related to asbestos exposure) to the list of diseases for which a presumption will operate and reduces the qualifying period in relation to oesophageal cancer from 25 to 15 years.

i. How the Bill can be Strengthened

To ensure that the policy intention of widening coverage to volunteers whilst protecting the integrity of the scheme is maintained, we point to the need for consideration of related aspects of *the Safety, Rehabilitation and Compensation Act 1988 (Cth)*. In particular, the requirement under s 7(9) that in order to trigger the relevant presumption a person must be considered to have had firefighting duties make up 'a substantial portion' of their duties and how this might be equitably applied to both volunteer and non-volunteer firefighters.

ii. Recommendation

40. **The Committee support the passage of the Bill Part 27 and welcomes the recent commitment of the Minister for Employment and Workplace Relations to continue working with the relevant parties, including the union, to ensure that the intent of these changes are fairly and effectively met.**

[120] Cite case Minister for Employment and Workplace Relations, Second Reading Speech Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022