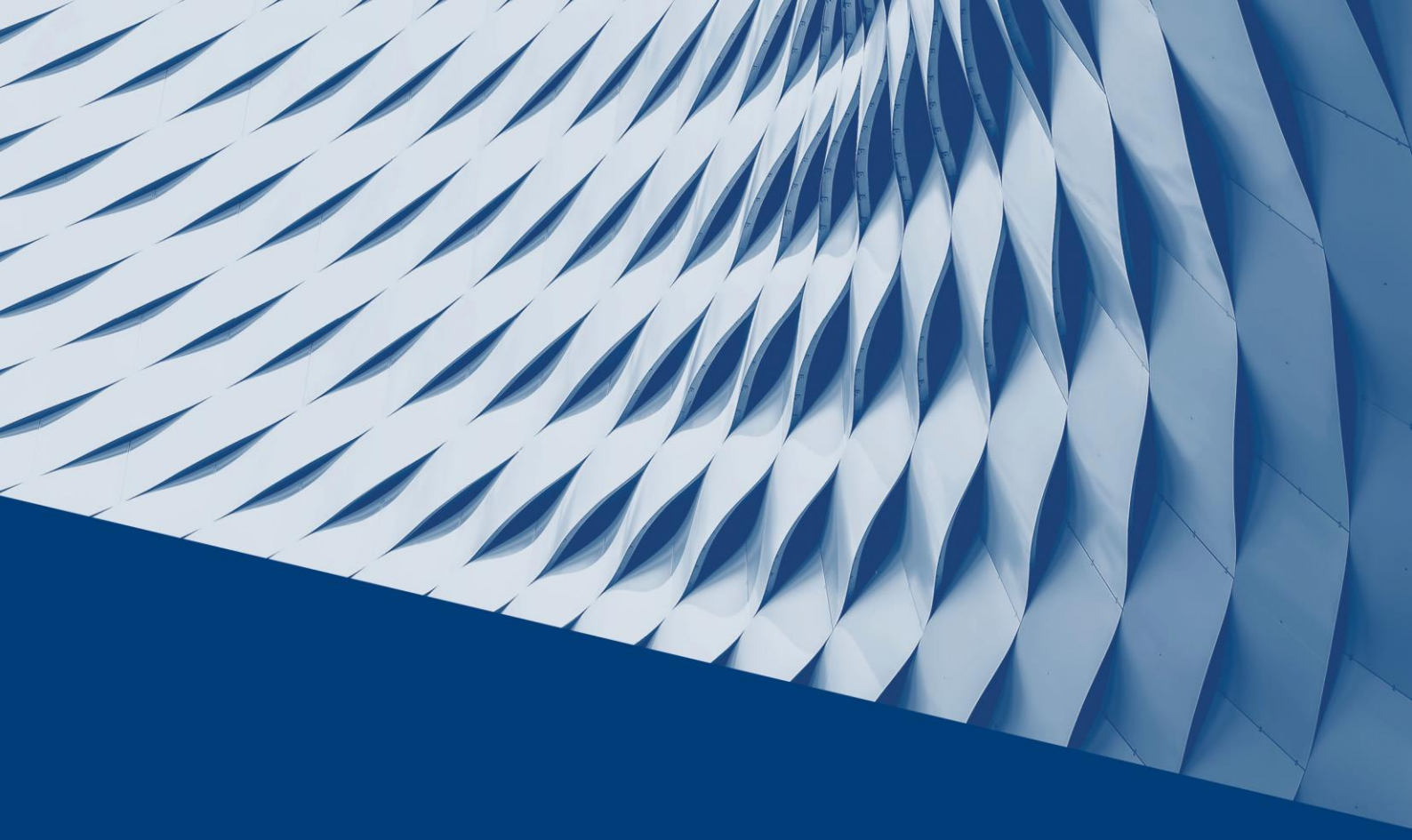

Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

Submission by the Australian Council of Trade Unions

ACTU Submission, 29 September 2023
ACTU D. No 42/2023

ACTU
australian council of trade unions

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Abbreviations

ACTU	Australian Council of Trade Unions
Closing Loopholes Bill	Fair Work Legislation Amendment (Closing Loopholes) Bill 2023
Explanatory Memorandum	Explanatory Memorandum to the Closing Loopholes Bill
FDV	*Family and domestic violence*
FDV leave	Paid family and domestic violence leave
FW Act	*Fair Work Act 2009 (Cth)*
FWC	Fair Work Commission
FWRO Act	*Fair Work (Registered Organisations Act 2009 (Cth)*
Independent Contractors Act	*Independent Contractors Act 2006* (Cth)
SJBP Act	*Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022 (Cth)*
WHS Act	*Work Health and Safety Act 2011 (Cth)*

Introduction

About the ACTU

Since its formation in 1927, the ACTU has been the peak trade union body in Australia. It has played the leading role in advocating for, and winning the improvement of working conditions, including on almost every Commonwealth legislative measure concerning employment conditions and trade union regulation. The ACTU has also appeared regularly before the Fair Work Commission and its statutory predecessors, in numerous high-profile test cases, as well as annual national minimum and award wage reviews.

The ACTU is Australia's sole peak body of trade unions, consisting of affiliated unions and state and regional trades and labour councils. There are currently 43 ACTU affiliates who together have over 1.7 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

Executive Summary

Driven by a decade of Coalition government negligence, Australia is facing a cost of living crisis where wages have continued to decline in real terms despite continued profit growth.[1] For over a decade nearly all productivity growth has been taken in profits and now while families are struggling to make ends meet,[2] big companies are posting record profits[3] while real wages are seeing record decline. This is not fair, it is not equitable nor is it sustainable.

Work has become more precarious. New forms of work have emerged where millions of workers are now engaged outside the protections that are meant to be afforded by the Fair Work Act. Too many employers have engaged in wage theft costing Australian workers billions. Our laws have not kept pace with the changing nature of work or the ways some employers have restructured, reorganised or use technicalities to avoid laws that are designed to protect working people.

The existence of myriad loopholes means that even where industrial legislation is designed to protect working people's interests, it is not operating as designed. Balance and fairness must be

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[1] Wage Price Index ABS release & Consumer Price Index release show growth in real wages (WPI/CPI), which printed negative growth on a quarterly basis for 11 quarters in a row between September 2020 and March 2023 and returned to 0.0 per cent growth in June 2023
ABS national accounts shows aggregate profit growth (measured as gross operating surplus) and compensation of employees, with a steady upwards trend in profits despite a bit of near-term volatility (due to the nature of the terms of trade).

[2] ABS national accounts shows between June 2012 and June 2019 real compensation per hour worked barely rose while productivity increased steadily.

[3] For example : Jonathan Barrett, Commonwealth Bank posts record $10bn profit amid rising stress for borrowers | Commonwealth Bank, The Guardian, 9 August 2023

restored to a system that for too long had the scales tipped towards the interests of large corporate interests over every day working Australians.

Returning balance and fairness to our industrial relations system is not an attack on businesses at large. Rather, it is in recognition of our current laws having been dragged to their present state by some well-resourced big corporates who have engaged teams of lawyers to identify and apply every possible exception or loophole in the current laws. For example:

- Workpac, who, in order to overturn a Federal Court decision on the definition of casual employment (*Skene*), concocted a further litigation (*Rossato*), in which they remarkably paid the legal costs of their employee from the outset, as a vehicle for High Court consideration;
- BHP, who through complicated corporate structuring operates its own labour hire company which supplies labour to the BHP group on terms less favourable than its other employees;
- Qantas, for whom it is common to see multiple different rates of pay apply to different cabin crew on the same flight, as an artefact of outsourcing and labour hire;
- Uber, who not only deny the employment or employment-like nature of their workers, but even go so far as to deny that they have any sort of contractual relationship with their workforce altogether.

Sadly, the big end of town has been aided and abetted in their efforts to strip away working conditions at large by past Governments. In response to the deterioration of working conditions, laid bare by a cost of living crisis, Australians voted for change. Part of that change, the part before Parliament now, involves making sure that existing loopholes in our industrial laws can no longer be cynically exploited by those employers with the resources to identify and take advantage of them.

The Closing Loopholes Bill will plug several gaps that need to be addressed if we are to embrace the concept that all workers should be treated fairly:

1. Casual employment will continue to be an available and valid form of engagement where it is genuine and reflects the mutual understanding and preferences of both parties. It will not be a means of denying workers their right to entitlements such as leave whilst demanding their undivided loyalty;
2. Wage theft will be harder for unscrupulous employers to flagrantly get away with. There will be real deterrence measures and the evidence so critical to investigations will be more readily obtained;
3. Workers who are subjected to family and domestic violence will be protected from workplace discrimination and reprisals for exercising their rights, and will have options for recourse if those things do occur;
4. Workers who are not employees will receive appropriate rights and protections, instead of nothing at all;
5. Workers who are engaged by labour hire companies on far lesser conditions than those with whom they work side-by-side will be fairly and equally remunerated;
6. Workplaces will be safer. There will finally be serious consequences for employers who cut corners on safety that result in the death of workers.

7. Injured workers will be supported and those that suffer serious mental health conditions due to exposure to trauma at work will not be forced to relive these experiences just to receive compensation.

Overarching Recommendation

Recommendation 1. The ACTU recommends that the Closing Loopholes Bill is passed in full, subject to the further recommendations made in this submission.

List of Further Recommendations

Recommendation 2. Insert the words: "within the meaning of s15A(1) - (4)" at the end of 359A(1).

Recommendation 3. Insert provisions which have the effect of counting service that does not meet the definition of casual employment towards eligibility for parental leave.

Recommendation 4. Amend the definition of employment to include reference to the multi-factor test and indicia, and the integrative test. It should be clearly stipulated that these tests are to be ascertained objectively with respect to actual practice, rather than the stated terms of a contract.

Recommendation 5. Provide the FWC the ability to arbitrate on the question of whether a worker is an employee or an independent contractor (directly, as opposed to as an artefact of another proceeding, such as an entitlements claim).

Recommendation 6. The Commonwealth and States to co-ordinate for the purpose of identifying and resolving deficiencies in the current industrial relations referrals, as they relate to the definition of employee.

Recommendation 7. Extend application of "employee-like" provisions to all "employee-like" workers, irrespective of whether they are engaged by a platform.

Recommendation 8. The FWC should be required to consider funding and regulatory arrangements for government-funded sectors to establish a level playing field (such as the NDIS) when making Minimum Standards Orders and Minimum Standards Guidelines.

Recommendation 9. Include a strong anti-avoidance provision relating to the provisions for regulated employees.

Recommendation 10. Allow for referral of bargaining disputes (for agreement making for employee-like workers) by a single party to the bargaining, with a provision to be modelled on FW Act s 240.

Recommendation 11. Agreements made for regulated workers should continue to operate after their (nominal) expiry, until replaced or expressly terminated.

Recommendation 12. Provide FWC with the power to examine (employee-like) agreement content against minimum standards.

Recommendation 13. Contractual chain provisions should be added to the road transport industry provisions.

Recommendation 14. There should be capacity for the FWC to order a period of 6 months or less under s 536KE(2)(c) in appropriate circumstances.

Recommendation 15. The qualifying period for an unfair termination application (road transport industry) should be reduced to 6 months.

Recommendation 16. Either party negotiating a collective agreement in the road transport industry should be able to notify disputes to the FWC.

Recommendation 17. A general road transport industry related disputes power should be inserted.

Recommendation 18. Allow for orders to be made for the payment of money in connection with any unfair contract set aside, declared void or amended or varied.

Recommendation 19. Amend the Sham Contracting provisions to legislate that the sham contracting itself, and not merely misrepresentations, be prohibited.

Recommendation 20. Remove the sham contracting defense in subsection 357(2).

Recommendation 21. Streamlined provisions for extension and variation of regulated labour hire arrangement orders made under proposed section 306E be introduced, to deal with consecutive and/or multiple engagement of suppliers by a given regulated host.

Recommendation 22. Additional provisions be inserted into proposed Part 2-7A to expressly permit applications for regulated labour hire arrangement orders to be heard together in appropriate circumstances.

Recommendation 23. The exclusion at proposed subsection 306G(1) regarding employees on training arrangements be removed, so as to enable apprentices and trainees to benefit from regulated labour hire arrangement orders.

Recommendation 24. Include superannuation in the wage theft offence.

Recommendation 25. Include clarification that the wage theft provisions in the Bill do not override or operate to the exclusion of superior state wage theft criminalisation laws, or otherwise operate to override the activities of state based wage theft regulators.

Recommendation 26. Remove the distinction between "serious" and other contraventions in the FW Act.

Recommendation 27. Empower the courts to apply the appropriate penalty for contraventions of the FW Act, up to the set maximum, that is warranted by the case before them.

Recommendation 28. Expand the protection for delegates to include actions that are threatened or organised as well as carried out.

Recommendation 29. Expand the protections afforded to delegates and union members through a new general protections division.

Recommendation 30. Amend the FW Act to clarify that only conduct which is specifically sanctioned by anti-discrimination legislation is 'not unlawful' for the purposes of s351(2) of the FW Act.

Recommendation 31. Amend the FW Act to clarify that where conduct might be considered discriminatory in one jurisdiction but not in another jurisdiction that the worker has access to, the conduct should be considered discriminatory for the purposes of s351(2) of the FW Act.

Recommendation 32. Amend the breach element of the industrial manslaughter offence to ensure that an officer engaging in conduct which falls short of either their specific duty, or the duty of the PCBU, is sufficient to make out the offence.

Recommendation 33. Section WHS Act 30A(f) be amended to insert "risk of death or serious illness or injury".

Recommendation 34. Imposition of strict liability on WHS Act section 31A(1)(c).

Recommendation 35. The ASEA must be empowered to move from a coordinating agency to one with direct authority to require action. This should include the power to require jurisdictions to report on matters necessary to monitor and evaluate progress on the implementation of measures to prevent exposure to silica and asbestos.

Recommendation 36. The ASEA should be responsible for implementing the national plan for silicosis, not just monitoring, updating and developing the plan.

Recommendation 37. The membership of the ASEC should be increased to include three (3) representatives of employee organisations.

Recommendation 38. A subcommittee of the ASEC should be established that includes all jurisdictional health and safety regulators along with appropriate representatives of unions and employer organisations.

Recommendation 39. Expansion of the definition of "first responder" in subsection 7(13) to whom the presumption in subsection 7(11) would apply.

Recommendation 40. The ability for the Minister to make a legislative instrument specifying further occupations, agencies, organisations or licensees for whom presumption should be granted with the indicative list above serving as the basis for initial consultation.

Recommendation 41. Amend s7(11) to 'an employee has been diagnosed by a medical practitioner, psychiatrist or psychologist as suffered, or is suffering, from post-traumatic stress disorder'.

Recommendation 42. Delete s7(12).

Recommendation 43. That consideration be given to extending the regime of employee organisation consent (s. 180A) and voting request orders (240A-240B) to single enterprise agreements proposed in franchise settings pursuant to the provisions in Part 3 of Schedule 1 of the Closing Loopholes Bill.

Recommendation 44. Consideration be given to further amendments to incentivise arbitration as of right (rather than only by mutual consent) in dispute resolution terms in enterprise agreements.

Recommendation 45. Item 42 be amended to ensure that both current employees and employees foreseeably within the scope of a replacement single enterprise agreement are assessed against the conditions in the extant multi enterprise agreement.

Casual Employment

Case Study

Peter Richards, 43, lives in Devonport, Tasmania. He has worked as a forklift driver in his current job for 14 years now but is still a casual – almost all of his co-workers are.

Working under these terms of employment gives Peter constant uncertainty – he says he missed out on a shift just the other day because he was in the shower when his boss called.

He says it's even harder for his younger co-workers who are just starting out and struggle to pick up enough work without any stipulated hours.

"Industrial relations needs to do a complete 180", Peter says. "The laws were all changed to suit employers, and they need to come back in favour of workers".

The relationship between casual engagement and casual employment has continued to deteriorate for decades. Workers engaged as casual employees often do not, in real terms, have a casual engagement with their employer. They work regularly and routinely but without the protections and entitlements provided to permanent staff.[4]

In fact, the majority of casual workers work every week and have been in their job for over a year.[5]

Casual employees on average now earn $11.59 less per hour than permanent employees. This is a gap of 28.6%, the highest gap on record. Even when comparing workers at the same skill level or in the same occupation, the pay gap between casuals and permanents is still between $3.55 to $3.84 an hour or about 11%. This is despite casuals supposedly getting a 25% loading.[6]

Continual use of casual employment where ongoing, regular work occurs is a major contributor to the rising lack of secure employment in Australia.

There's a big difference between casual work that's genuine, mutual, agreed and understood versus a situation where a worker is told they're "casual" but expected to be available and work as if they are permanent. This problem needs to be addressed, in the interests of fairness, so that workers don't miss out on leave, job security and other rights and entitlements just because they're incorrectly labelled.

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[4]For more information, see *Closing the Loopholes: Casual Work,* ACTU Research Note May 2023 <https://beta.actu.org.au/policies-publications-submissions/closing-the-loopholes-casual-work-actu-research-note-may-2023/>

[5] ABS, Characteristics of Employment Survey, August 2022, ACTU calculations

[6] Ibid

A worker engaged on a casual basis was supposed to be one who worked irregular or unpredictable hours and had no firm commitment of future work. They have no paid leave entitlements and limited job security. In return, a casual employee is supposed to receive a loading, usually 25% extra pay, on top of their base rate of pay, and a partial right to say no to requests by their employer for them to work.

Today, close to 2.7 million people are on casual work arrangements, or a little under 1 in 4 employees.[7] While casual employment was near a record high just before the pandemic, 2020 saw more than half a million casual workers lose their jobs as many customer facing businesses were forced to close their doors.

Businesses preferred to let casuals go, particularly as many of them weren't initially eligible for JobKeeper payments. Levels of casual employment have now largely recovered.

Women make up 55% of all casual employees. While 40% of casual employees are between the ages of 15 to 24, there are people of all ages on casual work arrangements. Retail, accommodation and food services and health care and social assistance together employ 55% of all casual employees.[8]

Casuals earn less than their permanent colleagues in every industry, with the scale of the gap being very industry specific.[9]

Casual work was supposed to be work that is irregular or intermittent. However, the majority of casual employees work the same hours, week in, week out, and often for years.

Based on the latest ABS data:

- 59% of casuals (1.5 million) say they usually work the same hours each week.
- 43% of casuals (1 million) have income that is the same from week to week.
- 54% of casuals (1.3 million) have been in that job for more than one year.
- 28% of casuals (682,000) work full time hours.

While many casuals are permanent in all but name, another cohort of casuals have a different problem: being denied enough hours of work. Here, the issue of low pay is even worse if you can't secure the hours of work that you need. Underemployment – those in work but wanting to work

[7] ABS Labour Force Detailed (March 2023)
[8] ABS, Characteristics of Employment Survey, August 2022
[9] *Closing the Loopholes: Casual Work,* ACTU Research Note May 2023 <https://beta.actu.org.au/policies-publications-submissions/closing-the-loopholes-casual-work-actu-research-note-may-2023/>

more hours – has grown significantly over the past decade, prior to the pandemic. And it is casual workers working less than full time hours that have borne the brunt of it.

In response to this massive loophole – which has enabled some businesses to deny job security for workers over many years – the former Morrison Government amended the FW Act in early 2021 to effectively make it legal to employ anyone as a "permanent casual", and effectively deny anyone fair backpay in the *Skene* or *Rossato* scenarios. Even KPMG, a big four accounting firm that gives big business workplace relations advice, said the laws could "permit an employer to engage a casual employee under a sham arrangement" and recommended the law be changed.[10]

Definition of Casual Employment

The proposed changes will return the legislative definition of a casual employee to one that is more consistent with the position prior to the High Court's decision in *Rossato*.[11] In *Rossato*, the High Court (following reasoning similar to that of their decisions in Personnel and Jamsek) determined that assessment of whether an employment relationship was casual properly involved assessment of the terms of a contract (which could be express or implied), rather than an analysis of how the working relationship was carried out in practice.

Just prior to the High Court's decision in *Rossato* (but following the Full Federal Court decision which was ultimately overturned) the then Coalition Government legislated a definition of casual employment which confined the assessment to the point in time when an employment contract is formed.

Prior to this, the Full Federal Court had considered that 'the essence of casualness is the absence of a firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work'. In determining this question in previous cases, the Federal Court (prior to the High Court Decision in *Rossato* and the introduction of a legislated definition of casual employment) had looked beyond the express terms of a contract with a view to the practical reality of the employment relationship.

The new provision will define a casual employee as someone for whom there is no firm advance commitment to continuing and indefinite work with an agreed pattern and who is entitled to a casual loading. However, and importantly, this is to be assessed with regard to a range of factors, such as: the real substance, practical reality and true nature of the employment; any mutual understandings or expectations; whether parties have the option to offer, accept and reject work;

[10] KPMG (2023) *Review into Casual Laws*, page 6.
[11] WorkPac Pty Ltd v Rossato [2021] HCA 23

whether the pattern of work is irregular; and, the nature of the employer's enterprise. A fixed (or maximum) term employee will not be considered a casual.

Applications will be able to be made to ensure that an award or enterprise agreement is consistent with the new definition of casual employment. These changes go a long way toward restoring the balance that existed prior to the enactment of *the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* by the former Morrison Government.

We welcome these long overdue changes, which will enhance fairness and job security, but suggest the following technical amendments to ensure that the policy intention behind these changes is best realised.

Casuals Framework

The Closing Loopholes Bill maintains existing employer-initiated pathways to permanent work for casuals, but new provisions will allow workers who are classified as casual but do not believe that they meet the definition to notify their employer of this belief.

Employers will be required to respond to such a notice, consult with the worker and advise if they accept the notification or not. If the notice is accepted, the worker will become a permanent employee. If the notice is not accepted, it will be open to the employee to initiate a dispute, and for the FWC to determine that dispute. The FWC's powers in doing so include arbitrating and making an order that the worker either should be treated as a part-time or full-time employee going forward or should instead continue to be treated as a casual employee. Orders would be enforceable by a court and contraventions could render an employer liable for civil penalties.

Eligible employees will have choice about whether they move from casual to permanent employment and can provide a notification that they believe they are not casual every 6 months.

A new provision (similar to existing provisions in relation to misrepresenting employment relationships) will prohibit misrepresenting a contract for non-casual employment as casual employment, subject to a defence of reasonable belief. New provisions will also prohibit dismissal to engage a person as a casual or misrepresentations in order to engage a person as a casual employee.

Overall, these provisions provide a simple and straightforward pathway for workers to address being incorrectly labelled as casuals. At the heart of the solution is dialogue and consultation at the workplace level, followed by assistance from the independent umpire where necessary. We are of the view that these measures are sensible, targeted and fit-for-purpose in our industrial relations landscape and should be supported and passed.

How the Bill can be strengthened

The misrepresentation section should more clearly address a scenario in which employment is misrepresented as casual employment on an ongoing basis, despite there being some attempt to construct a conducive factual scenario initially.

The Bill should also make clear that any period which does not qualify as casual service pursuant to the definition should count towards eligibility for parental leave.

Recommendations

Recommendation 2. Insert the words: "within the meaning of s15A(1) - (4)" at the end of 359A(1).

Recommendation 3. Insert provisions which have the effect of counting service that does not meet the definition of casual employment towards eligibility for parental leave.

Employment

Case Study

Nabin is a 27-year-old delivery driver working in the gig economy, originally from Nepal and now living and working in Canberra, ACT.

Nabin has worked for the last 4-5 years delivering food, alcohol, and flowers for the likes of UberEats and DoorDash; companies notorious for exploitative work practices. When asked about his last pay rise, Nabin said his wages tend to decrease, not increase.

Nabin's work has virtually no rights and the companies have barely, if ever, been held to account; something Nabin feels should change.

As the industry is highly unregulated there is no safety net for Nabin or his workmates, including no compensation for injury or even death. As a delegate himself, Nabin could easily be deregistered by platforms with no recourse.

There are no rights for unfair dismissal and algorithm-based payments per job mean Nabin and his workmates are forced to work for longer hours below standard minimum wages, under threat of being dismissed. With the growing costs of operations for delivery drivers – who are technically 'self-employed' – people are working upwards of 70-80 hours per week just to earn a somewhat liveable wage.

Much of our industrial relations law is fundamentally based on a binary between employment and all other forms of work. However, the reality is that as new modes of work emerge, engagement as a worker is best seen as a spectrum along which employment is located. The current system – where some workers receive certain rights and entitlements and others miss out completely – is outdated and in need of reform.

It is simply unfair that large swathes of workers do not receive the protections of labour law simply by virtue of complicated corporate structures and arrangements that in many cases are specifically used to ensure that workers do not have these legal protections.

As early as 1992, the groundbreaking "Supiot Report" observed that the traditional distinction between "employment" and other forms of work was based on an outdated Fordist (i.e. a large-scale industrialist production) model which presupposed the continuity of a single career, occupation and even an employer throughout a person's working life. The report recommended:

> 'Employment status should no longer be determined on the basis of the restrictive criterion of employment, but on the broader notion of work.' [12]

[12] European Commission, 1992, Transformation of labour and future of labour law in Europe, Final Report, 91-2 <https://op.europa.eu/en/publication-detail/-/publication/b4ce8f90-2b1b-43ec-a1ac-f857b393906e>

Another approach calls for dispensing with the distinction between employment and other forms of work entirely, as a means of ensuring that all workers receive labour rights protections.

However, resolving this academic debate is arguably of little immediate benefit to the large swathes of Australian workers who missed out on their proper rights and entitlements because they are labelled as independent contractors instead of employees, let alone those – such as platform economy workers – who miss out entirely in any scenario. A more practical approach is offered by Davidov, who argues that:

> 'Change is certainly needed. It should involve re-thinking of the proper role for the concept of "employee". It may also be useful to add new, intermediate categories, in between "employees" and "independent contractors". [13]

Part 15 - Definition of Employment

> *'Firstly, it must be stressed that no European country allows the parties to an employer-employee relationship to define the legal status of this relationship, since this would make it optional to enforce labour law. The general principle, applied everywhere, is that ascertaining whether or not a given worker is self-employed is contingent not upon the existence of a conventional arrangement, but rather on the circumstances actually prevailing. And this principle must be firmly maintained if action is to be taken against fraudulent self-employment and the resulting unfair competition'*[14]

The FW Act confers various rights on employees. However, the Act does not currently define what an employee is. Instead, the term "employee" has its ordinary meaning, which means that it is up to courts to determine who is, and isn't, an employee.

Courts have taken various approaches to determining what makes a worker an employee (as opposed to an independent contractor or some other form of arrangement). The High Court's recent decisions in *Personnel* and *Jamsek* have settled on an approach which places a lot of emphasis on the rights that are apparent from the terms of the written contract, without detailed regard to the working history between the parties.[15] Prior to this, courts had made their determination based on a range of factors (or "*indicia")* that were apparent from the contract itself as well as the reality of how the work was actually performed – for example, whether someone

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[13] Guy Davidov, The Reports of My Death are Greatly Exaggerated: "Employee" as a Viable (Though Over-used) Legal Concept', in Guy Davidov and Brian Langille, *Boundaries and Frontiers of Labour Law* (Hart Publishing, 2006), 152

[14] European Commission, 1992, Transformation of labour and future of labour law in Europe, Final Report, 3 <https://op.europa.eu/en/publication-detail/-/publication/b4ce8f90-2b1b-43ec-a1ac-f857b393906e>

[15] Construction, Forestry, Maritime, Mining and Energy Union & Anor v. Personnel Contracting Pty Ltd [2022] HCA 1 (Personnel) and ZG Operations Australia Pty Ltd & Anor v. Jamsek & Ors [2022] HCA 2 (Jamsek); See Personnel at [59], [61] (per Kiefel CJ, Keane & Edelman JJ)

wore a uniform, was under a high degree of supervision and control, was in practice required to perform work personally instead of being able to sub-contract, or worked only for the one person. The simple common sense of this approach – as against an approach which gives primacy to the terms of a contract – is evident in the following observation by the Federal Court:[16]

> "The parties cannot create something which has every feature of a rooster, but call it a duck and insist that everyone else recognise it as a duck"

The common law test to determine whether an employment relationship exists at all is the critical factor in deciding which workers are covered by the FW Act and which are completely outside its reach.

The law has come to the point where it is now in need of urgent statutory reform to ensure that the legitimate claims of workers, and indeed the integrity of the industrial system itself, are not defeated by the clever drafting of so-called commercial contracts.

The Closing Loopholes Bill seeks to achieve this by defining employment in the FW Act – thereby specifically and clearly regulating which workers will receive the full rights and entitlements of that Act. Crucially, the new definition of employment is intended to again require courts to look to the practical reality of how work is performed in assessing whether a worker is an employee.

The ACTU has previously called for, and fully supports, a statutory definition of employment which looks beyond contractual labels and into the true nature of the working relationship and, by doing so, recognises the inherent power imbalance in those relationships – which is arguably most pronounced at and prior to the point of engagement.

We welcome the insertion of a statutory definition of employment into the FW Act, that is based on objective criteria. We are of the view that the proposed legislation delivers in principle on its main aims in this area. However, we are also cognisant of the need for further changes which need to be made to the proposed provisions, so that the statutory definition of employment can more fully deliver those aims.

How the Bill can be strengthened

An essential part of the courts' approach to assessing the totality of a working relationship (in order to determine employment or independent contracting) has been to apply a "multi-factorial" test. The Explanatory Memorandum to the Closing Loopholes Bill describes the multi-factorial test as follows:

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[16] Porter, Re Transport Workers Union of Australia (1989) 34 IR 179 at 184 per Gray J

> 'Under the multi-factorial approach, guidance for the outcome is provided by various factors or indicia. A considerable number of case authorities, including *Brodribb* and *Hollis*, identify factors relevant in the characterisation of a relationship as one of employment or one of contractor and principal.' [17]

The legislation should not only specify the indicia to be used in ascertaining an employment or contracting relationship but should also clearly stipulate – in line with the policy intention – that the actual practice, not merely the contractual assertions are relevant to that assessment. For example, it should clearly be insufficient to rely alone on that a contract specifies a right to sub-contract (which is indicative of a contracting relationship) when such a right is not afforded in practise.

Another test (the integration test) involves assessment of whether or not the person performing work is carrying on their own business (suggestive of independent contracting) or working in the business of another (suggestive of employment). In *Personnel*, Federal Court Chief Justice Allsop drew on the previous and long-established High Court authorities of *Marshall* and *Hollis v Vabu* as follows:

> 'Windeyer J in *Marshall* [1963] HCA 26; 109 CLR 210 was concerned with injury and workers' compensation. In that latter context, Windeyer J said at 217:
>
> > [The] distinction between a servant and an independent contractor … is rooted fundamentally in the difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own.
>
> In his concurring reasons in *Hollis v Vabu* 207 CLR at 48 [68], McHugh J expressed the concept of an independent contractor as "someone who acts as an independent principal, exercising an independent discretion in carrying out a task for his own business interest and who is retained simply to produce a result."' [18]

While the amended definition of casual employment to be brought in by the Closing Loopholes Bill will make clear that the totality of the employment relationship is relevant, we are of the view that the provisions are in need of bolstering by including reference to the multi-factor test and the integrative tests, and the inclusion of indicia within the legislation itself.

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[17] Explanatory Memorandum at [983] – 986]
[18] Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2020] FCAFC 122 at [13] – [14]

The Bill and transitional provisions (see proposed FW Act Schedule 1 Part 15 Item 92) allow for application to be made to the FWC to resolve uncertainties between the FW Act definition of employment and a Fair Work Instrument. Such applications should properly be made and assessed in a way that recognises the broad application and significance of the relevant instrument, and the different cohorts of workers which may be covered by a single instrument. Accordingly, it is submitted that an application concerning a single employee is an inappropriate vehicle to properly reach a satisfactory conclusion as to the interaction which best gives rise to the policy intent of the Closing Loopholes Bill. For this reason, we are of the view that – insofar as the interests of employees are concerned – application to modify an award on the basis of its interaction with the definition of employment should only be able to be made by an employee organisation.

In order for the definition of employment to be meaningful, it must be capable of accessible enforcement. This means that the FWC must have the power to ascertain whether or not an employment relationship exists and make orders accordingly. It is insufficient that the power to do so would arise as an incident of another proceeding – such as an unfair dismissal. In that scenario, even if a worker was found to be an employee, that finding would arrive too late for them to seek the assistance of the independent umpire in resolving other matters, such as the non-payment of leave entitlements.

We also raise a further matter, but acknowledge that this is beyond the scope of the Commonwealth Parliament to resolve. We note that the proposed definition of employment will not apply to all workers who might properly be considered to be employees. In particular, a number of workers who are within the national-system by way of a state referral of industrial relations powers may not be captured. We urge the Commonwealth and States to address this to ensure that adequate protections apply to all employees.

Recommendations

Recommendation 4. Amend the definition of employment to include reference to the multi-factor test and indicia, and the integrative test. It should be clearly stipulated that these tests are to be ascertained objectively with respect to actual practice, rather than the stated terms of a contract.

Recommendation 5. Provide the FWC the ability to arbitrate on the question of whether a worker is an employee or an independent contractor (directly, as opposed to as an artefact of another proceeding, such as an entitlements claim).

Recommendation 6. The Commonwealth and States to co-ordinate for the purpose of identifying and resolving deficiencies in the current industrial relations referrals, as they relate to the definition of employee.

Part 16 – Provisions Relating to Regulated Workers – Platform Workers

Regulating the working conditions of non-employees isn't new. However, the areas in which it occurs is limited. For example, parts of discrimination law extend beyond the employment relationship to other forms of work, superannuation law seeks to capture a wide range of workers

and different forms of engagements and workplace health and safety is not limited simply to the confines of employment. By contrast, the regulation of minimum standards of rights and entitlements has largely been limited in its application.

Presently, the FW Act makes some provisions for workers other than employees, but the bulk of its provisions are directed at regulating the employment relationship. This means that many workers – such as those in the "gig economy" – miss out.

Under the new provisions, the FWC would be able to make Minimum Standards Orders on application by a Registered Organisation or a regulated business. Those Minimum Standards Orders would cover digital platform workers.[19] Workers who are not engaged through a digital platform will not be covered by these changes, and some digital platforms which are not labour based (for example, AirBnB) would also not be covered.

Minimum Standards Orders would be required to include terms that set out who is covered, and may also include terms about:

- Payment terms;
- Deductions;
- Working time;
- Record-keeping;
- Insurance;
- Consultation; representation; delegates' rights;
- Cost recovery; and
- Other matters.

The FWC would also be able to make non-binding "Minimum Standards Guidelines" the terms of which would follow the same rules as for Minimum Standards Orders.

The FWC will have a broad discretion in setting minimum standards for digital platform workers, however this will be guided by a Minimum Standards Objective (similar to the Modern Awards Objective). Standards will need to be clear, simple and easily applied; provide a relevant safety net; have regard to comparable employees; and, take into account the needs and preferences of workers for flexibility and labour market access, as well as the impacts on business and the economy.

[19] Note: The scheme is intended to cover both vertical and horizontal platforms. A vertical platform is one in which there is a hierarchy between the platform and the provider of labour in terms of the provision of that labour, whereas a horizontal platform is one which genuinely acts as a mere conduit between labour provider and consumer.

Consent agreements will be able to be reached between businesses, the union and regulated workers, which may then be certified by the FWC. Negotiations will be commenced by agreement between the parties, one of whom must then give workers notice that specifies:

- The business that will be covered by the proposed agreement;
- The workers who will be covered;
- The union that will negotiate and sign off on the agreement on behalf of workers; and
- The likely content of the agreement.

FWC will be able to assist parties in resolving a dispute during the negotiations if both parties consent to it doing so. A collective agreement will be made when it is agreed and signed by the (business and union) negotiating parties.

The new provisions will also allow platform workers to challenge "unfair deactivations". This will mean that employee-like workers who work for platforms (and have done so for over 6 months), who are "deactivated" (removed from the platform involuntarily, so that they can no longer perform work on it) by the platform, will challenge the deactivation in the FWC if the FWC is satisfied that:

- The person has been deactivated from the platform;
- the deactivation was unfair; and
- the deactivation was not consistent with the Digital Platform Deactivation Code (which will be made by the Minister).

Unfairness will be determined according to:

- whether there was a valid reason relating to the workers' capacity or conduct;
- whether any relevant processes in the code were followed; and
- any other matters the FWC considers relevant.

The primary remedy for an unfair deactivation will be "reactivation" on the platform. If FWC orders that a worker be reactivated, it may also make an order to restore lost pay.

A study by the Centre for Future Work at The Australia Institute estimates Uber drivers earn on average less than $15 per hour before tax and net of expenses, an amount below the Federal minimum wage and approximately half the award minimum wage for transport drivers.[20] A TWU survey suggests most ride hailing drivers are both reliant on this work for income and also receive too little to make it worthwhile. Rather than freely chosen for its flexibility, half of respondents

[20] Jim Stanford, *Subsidising Billionaires: Simulating the Net Incomes of UberX Drivers in Australia*, Centre for Future Work at the Australia Institute, March 2018.

report doing it full-time, and almost one third are doing it because they have debts to pay.[21] 85% of drivers say they are unhappy with the pay, and three quarters say that company commissions are too high. As a result of the very low conditions in the industry, an extraordinary 50% of Australian ride hailing workers leave within the first three months.[22]

A United States survey suggests a staggering 96% of American Uber drivers leave within their first year, with similar annual turnover of workers expected here.[23] It seems that after discovering the cumulative impact of GST, cost of fuel, insurance, vehicle maintenance, and other expenses on their take home wages, as well as the impact of the lack of paid leave, drivers exit as soon as possible.

Whether independent contractors or employees in sham contracting arrangements, gig workers are invariably subjected to:

- lack of standard employment protections such as minimum wages, paid sick leave and holiday pay, superannuation, and various forms of work insecurity (intermittency of work, varied start and finish times, unpredictable pay, job insecurity, and most especially, disaggregated working time, short shifts, and unpaid downtime between gigs whilst still being 'at work)';
- lack of coverage by the platform operators' workers' compensation insurance;
- pay below the legal minimum that would apply to employees, in many cases, well below. Food delivery riders report being paid as little as $6 per hour;[24]
- where gig workers are legally independent contractors, an inability to collectively bargain due to commercial competition rules;
- continuous competition for work and shifts with other workers. This can take the form of pressure to underbid or undercharge for work on platforms like Airtasker or pressure for food delivery riders to be available to accept work and deliver at unsafe speeds;
- other unreasonable surveillance and continuous performance pressures, due to digital tracking and harsh, and usually unchallengeable, consumer feedback ratings that can limit or end work opportunities;
- an inability to find sufficient work;
- poorer health and safety outcomes. Gig work has a negative impact on training, service quality and skills due to a number of factors. The lack of a clearly identified employer means that the obligation to provide workers with information, instruction and training

[21] See TWU, Rideshare Drivers Survey, available at https://www.twu.com.au/home/campaigns/rideshare-drivers/; Ally Foster, 'Drivers ditching rideshare apps due to low pay and long hours', *News.Com.au*, 13 November 2018.
[22] Ibid.
[23] Chantel McGee, 'Only 4% of Uber drivers remain on the platform a year later, says report', CNBC, 20 April 2016.
[24] Naaman Zhou, 'App delivery riders say they are paid as little as $6 an hour in Australia', The Guardian, 14 March 2018.

under Occupational Work Health and Safety legislation is not enforced. Platforms such as Airtasker have been shown to actively circumvent consumer protections such as the requirement for high-risk occupations such as electricians requiring a licence to perform the work. There is no requirement in most gig work platforms to verify the person performing the task is qualified or in fact licenced to perform the task. This poses a threat to both the gig workers health and safety but also that of consumers;[25] and

- being engaged through start-up businesses with a high chance of failure or closure and lost wages and entitlements or outright entitlements theft. For example, Foodora recently exited from Australia in the wake of prosecution for sham contracting and the threat of class actions from thousands of workers owed millions of dollars in backpay and superannuation.[26]

A Victorian inquiry into platform economy work found that many platform workers are remunerated at around or even below the national minimum wage and are required to perform duties associated with work outside of working hours.[27] Clearly, in the interests of fairness, this problem begs for a solution.

These changes will ensure that workers within scope continue to have the benefit of some of the rights and entitlements enjoyed by employees, rather than losing all of them the moment they cross into contractor territory.

In particular, changes to allow for unfair deactivations to be challenged can be anticipated to have a significant effect on moderating the currently profound unevenness of bargaining power between platforms and platform workers, by removing the ability for platforms to exclude workers unfairly or without cause.

These changes are important, and necessary. Platform work has expanded rapidly since its emergence in the Australian market, but labour market regulation has failed to keep pace.

How the Bill can be strengthened

While the provisions provide important protections and standard setting for some platform workers, engagement of a worker through a platform should not be the primary determining factor, or a factor at all, in defining the scope of the FWC's new functions. Currently, many gig workers who are not engaged through platforms would miss out on these protections (such as freelance

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[25] See concerns raised by Unions NSW in Katherine Gregory, 'Airtasker: Unions raise safety concerns over 'gig economy' cowboys', ABC News Online, 9 March 2018.
[26] See David Marin-Guzman, 'Foodora administrators admit 'misclassified' delivery riders underpaid $7.5m (afr.com), Australian Financial Review, 8 November 2018.
[27] Industrial Relations Victoria, *Report of the Inquiry into the Victorian On-Demand Workforce*, https://engage.vic.gov.au/download/document/7387 at 58-9

journalists and dancers). The purpose of the new functions is to establish and maintain standards for all workers regardless of their legal label not by reference solely to a present manifestation of how work is given out, but by reference to appropriate perpetual touchstones (see above for more detail) such as:

a) The degree of vulnerability of the worker and degree of disparity of economic and bargaining power between the worker and the person or persons for whom the work is performed;
b) The extent to which the work or activity engaged in by the worker involves commercial or financial risk through the acquisition or utilisation of equipment, materials or premises;
c) The degree of job insecurity, variability of hours or engagement and remuneration instability of the worker;
d) The degree of control exercised by the hirer over who, what, when, where, if and how work is done, including by personal or electronic supervision, monitoring, assessment or verification of the work;
e) The nature of the remuneration or conditions which would be applicable to the work undertaken by the worker if the work, or substantially similar work, was engaged in by the worker as an employee.

An increasing number of people use platform services to access government funded services such as aged care or disability care. Government funding for these services is often tied to minimum wages and conditions in safety instruments like Modern Awards and Equal Remuneration Orders. Platform services are not bound by those instruments which can give them an unfair cost advantage over other service providers. The FWC should be required to consider the funding and regulatory arrangements that apply in government funded sectors when making Minimum Standards Orders or Guidelines for platforms operating in these industries and establish a level playing field for all workers and service providers.

In terms of who the provisions presently capture, the definition of digital labour platform requires there to be the aggregation of payments (15L(1)(b)). This serves the critical intention to ensure appropriate capture of various platforms in line with policy intent. However it is equally critical to ensure protections are in place against platforms being able to restructure their payment arrangements to escape application of the proposed provisions.

No industrial entitlement or mechanism can truly be effective if it is capable of easy avoidance. On the basis of this relatively straightforward proposition, it is submitted that there should be included, in relation to the provisions relating to "regulated" platform workers, a strong anti-avoidance provision which allows for the addressing of conduct designed to thwart the operation of the scheme.

In relation to the ability for parties to refer bargaining disputes to the FWC, the Bill is lacking in terms of the jurisdiction it confers on the FWC to assist parties in resolving those disputes. The Bill currently requires both parties to consent to the referral of a bargaining dispute to the FWC (s 536MP). This means that one party – and one might expect this to be the party that sought to avoid scrutiny of their conduct in bargaining – could simply avoid subjecting their bargaining position to external opinion by refusing to allow the FWC to assist. A preferable solution would be

to allow the FWC to assist parties in relation to a bargaining dispute on referral by either party. Such a provision should be modelled on the existing FW Act s 240. For the avoidance of doubt, this would not mean that an unwilling party would be compelled to change their actual position in bargaining, or that the FWC could make binding orders absent of the consent (to arbitrate) of both parties.

A further issue arises in relation to the expiry of agreements made under this part. Pursuant to s 536JN(2) an agreement will cease to operate on a specified date or when terminated earlier. This mechanism is fundamentally different to the way in which enterprise agreements operate for employees. With respect to employees' enterprise agreements, a nominal expiry date is specified, after which further bargaining is enlivened, but the agreement (unless terminated) continues in operation until it is replaced. This means that terms and conditions of employment that have been negotiated (in some cases over many years and successive agreements) do not suddenly vanish into the ether. This system should be adopted in relation to agreements made for regulated workers, so that they similarly do not come to a point where their negotiated conditions disappear overnight.

In terms of the content of agreements, there is currently no power for the FWC to scrutinise what is included in this category of agreements. Whilst content should generally be left to the parties, the independent umpire should be given a role in ensuring that included content at least surpasses certain minimum standards.

Recommendations

Recommendation 7. Extend application of "employee-like" provisions to all "employee-like" workers, irrespective of whether they are engaged by a platform.

Recommendation 8. The FWC should be required to consider funding and regulatory arrangements for government-funded sectors to establish a level playing field (such as the NDIS) when making Minimum Standards Orders and Minimum Standards Guidelines.

Recommendation 9. Include a strong anti-avoidance provision relating to the provisions for regulated employees.

Recommendation 10. Allow for referral of bargaining disputes (for agreement making for employee-like workers) by a single party to the bargaining, with a provision to be modelled on FW Act s 240.

Recommendation 11. Agreements made for regulated workers should continue to operate after their (nominal) expiry, until replaced or expressly terminated.

Recommendation 12. Provide FWC with the power to examine (employee-like) agreement content against minimum standards.

Part 16 – Provisions Relating to Regulated Workers – Road Transport Industry

Sustainable and viable road transport industry supply chains and contract networks are vital to the economic future of Australia as well as the safety of all road users. The road transport industry is a price taking industry that operates on small margins and tight timelines. Decades of domestic and international evidence has established that where unfair commercial influence and pressure is applied to transport operations, business viability is compromised with deadly consequences for transport workers and road users. The industry is responsible for more workplace deaths and bankruptcies than any other by a factor of ten.[28]

Transport operations are uniquely reliant on entities with economic power and influence at the top of supply chains and/or in charge of contractual networks. The viability and sustainability of transport operations are determined by the economic arrangements imposed by these entities and this, in turn, determines the standards applying to transport workers.

To achieve and maintain a safe, sustainable, viable and fair road transport industry, it is necessary that protection of work arrangements is actioned beyond the employee-employer relationship. The reality of the modern transport economy is that protections must exist for all transport workers - regardless of their legal label – through the establishment and maintenance of enforceable standards and dispute resolution mechanisms having proactive effect throughout road transport industry supply chains including, critically, on those with economic influence and power over transport operations. The necessity for such change has become more acute given the relatively sudden emergence of "gig" type arrangements that are exacerbating the deadly downward spiral of standards and business viability.

The proposed changes will establish a Road Transport Panel which deals with all matters concerning road transport (including the gig economy). A Road Transports Objective will be set, which will inform the setting of minimum standards in the road transport industry.

An advisory board will be established, consisting of unions and businesses. The advisory board will be able to make recommendations on matters within the FWC's jurisdiction as well as matters concerning the road transport industry more broadly.

Under the new provisions, the FWC would be able to make Minimum Standards Orders on application by a Registered Organisation or a regulated business. Those Minimum Standards Orders would cover Road Transport Industry Workers.

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[28] Australian Securities and Investment Commission, *Insolvency Statistics*, 2019, Insolvency statistics - Series 1A Companies entering external administration and controller appointments by industry | ASIC
Safe Work Australia, 2021, Work-related Traumatic Injury Fatalities, Australia, Work-related traumatic injury fatalities Australia 2021 | Safe Work Australia

Minimum Standards Orders would be required to include terms that set out who is covered, and may also include terms about:

- Payment terms;
- Deductions;
- Working time;
- Record-keeping;
- Insurance;
- Consultation; representation; delegates' rights;
- Cost recovery; and
- Other matters.

However, they cannot include terms about:

- Overtime rates;
- Rostering arrangements; commercial matters that don't affect the terms and conditions of engagement;
- Any term that would change the nature of the engagement (for example, to one of employment)
- Matters comprehensively set out in WHS law (and the Minister has the power to determine what this means);
- Any road transport matter that is comprehensively dealt with in the Queensland Heavy Vehicle laws; or by another Commonwealth, State or Territory law;
- Any matters prescribed by the regulations.

The FWC would also be able to make non-binding "Minimum Standards Guidelines" the terms of which would follow the same rules as for Minimum Standards Orders.

Consent agreements will be able to be reached between the union and regulated road transport contractors, which may then be certified by the FWC. Negotiations will be commenced by agreement between the parties, one of whom must then give workers notice that specifies:

- The business that will be covered by the proposed agreement;
- The workers who will be covered;
- The union that will negotiate and sign off on the agreement on behalf of workers; and
- The likely content of the agreement.

FWC will be able to assist parties in resolving a dispute during the negotiations if both parties consent to it doing so.

A collective agreement will be made when it is agreed and signed by the (business and union) negotiating parties.

The new provisions will also allow Road Transport platform workers (who have performed worked in the industry for a business for over 12 months) to challenge "unfair terminations". This will

mean that Road Transport workers whose engagement is terminated can challenge that termination if FWC is satisfied that:

- The person was performing work in the Road Transport Industry
- The person was terminated; and
- The termination was unfair.
- The deactivation was unfair; and
- The deactivation was not consistent with the Road Transport Industry Termination Code. (which will be made by the Minister).

Unfairness will be determined according to:

- Whether there was a valid reason relating to the workers' capacity or conduct;
- Whether any relevant processes in the code were followed; and
- Any other matters the FWC considers relevant.

The primary remedy for unfair termination will be reinstatement in the form of a new contract. The FWC may also make an order for lost pay if a worker is reinstated. FWC may also order compensation up to a maximum of 26 weeks' pay or 50% of the contractor high income threshold (whichever is lesser).

Minimum standards calibrated in the manner suggested above will greatly reduce the extent to which FW Act standards applying to employees are avoided and thereby undermined by employers engaging independent contractors to perform work.

We need these changes because the Australian Road Transport industry is gripped in an ongoing state of crisis, characterised by calamitous market pressures with dire safety consequences. To put this crisis into its tragic context, the road transport industry has one of the highest rates of insolvencies in Australia[29] and the highest rate of work-related deaths in Australia[30]. As the following paragraphs will explain, these two sobering statistics are inextricably linked.

Decades of academic studies, coronial inquests, judicial determinations and Government reports have confirmed the correlation between economic and contractual pressures through road transport supply chains and dangerous safety outcomes.[31] To put this simply, commercial

[29] Australian Securities and Investment Commission, *Insolvency Statistics*, 2019, Insolvency statistics - Series 1A Companies entering external administration and controller appointments by industry | ASIC

[30] Safe Work Australia, 2021, Work-related Traumatic Injury Fatalities, Australia, Work-related traumatic injury fatalities Australia 2021 | Safe Work Australia

[31] See for example Mayhew, C & Quinlan, M, 2006. Economic Pressure, Multi-Tiered Subcontracting and

pressures in the road transport industry force companies and workers to reduce safety standards to remain competitive. There is for example, a strong and well-evidenced correlation between rates of pay, payment structures and risk-taking practices such as forgoing vehicle and fleet maintenance, speeding, drug and stimulant use, and fatigued driving.[32] In this context, operating unsafely too often becomes a competitive imperative for transport companies and workers.

These economic and contractual pressures undermine business sustainability, certainty and viability in the road transport industry, as most recently evidenced by the collapse of two major road transport companies Rivet Mining Services and Scott's Refrigerated Logistics who together employed 2,000 workers. Most tragically, however is the devastating loss of hundreds of Australian lives each year. The road transport industry is currently Australia's deadliest industry, accounting for over 21% of all work-related deaths in the past five years.[33] This crisis is worsening with a 26% increase to the fatality rate over the five-year average to 2021 and further increases in the years which have followed.[34]

The primary and long-identified source of these economic and contracting pressures are those imposed by 'economic employers' such as major clients in transport supply chains. In the context of hyper-competitive markets with low barriers to entry, major transport clients having almost untrammelled power to determine price and therefore standards throughout their contractual supply chains. Transport companies tendering for the work of these major clients are increasingly pressured to undercut standards to compete for contracts through relentless tendering cycles. As a result, unsustainable contracts, often below cost, are frequently awarded to companies which cannot profitability or safely provide the service. That leads to pressure on those companies to further contract-out that is commercially unviable and results in deadly downward spiral of standards.

The road transport industry has more recently been subject to a second wave of market pressure following the rise of transport companies operating in the so-called 'gig economy'. These 'gig transport companies' directly engage workers outside of the system of employee protections on piecemeal rates and conditions which, as evidenced in numerous studies, are well below

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Occupational Health and Safety in Australian Long- Haul Trucking', Employee Relations, Vol. 28 No. 3, p.225; 2008, National Transport Commission, Melbourne; Belzer, M. 2000. *Sweatshops on Wheels: Winners and Losers in Trucking Deregulation*, New York: Oxford University Press, 2000; Safe Work Australia, 2014, Attitudes towards risk taking and rule breaking in Australian workplaces, December 2014; Australian Parliament, 2000. *Beyond the Midnight Oil: Managing Fatigue in Transport*, House of Representatives Standing Committee on Communications, Transport and the Arts.

[32] National Transport Commission, 2008, Safe Payments: Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry'; Rodriguez, D, Targa, F & Belzer, M. 2006. Pay Incentives and Truck Driver Safety: A Case Study, Industrial and Labor Relations Review, Vol. 59, Issue 2, pp. 205-225, 2006.

[33] Safe Work Australia, 2021, *Work-related Traumatic Injury Fatalities, Australia,* Work-related traumatic injury fatalities Australia 2021 | Safe Work Australia

[34] Safe Work Australia, 2023, *Preliminary work-related fatalities*, https://www.safeworkaustralia.gov.au/dataand-research/work-related-fatalities/preliminary-work-related-fatalities

comparable award conditions[35]. As a result, gig transport companies are rapidly expanding throughout the transport industry while undercutting traditional transport operators already strained by dangerous commercial pressures by an estimated 30%.[36] This has had deadly consequences for the workers immediately engaged by gig transport companies as well as the industry more broadly. A reported 33% of food delivery workers are seriously hurt or injured, 70% fear being killed every day[37] and the pressure arising from low remuneration is reported by workers to be the major cause of this safety crisis[38].

On August 29, 2022, an unprecedented delegation of major representatives from all parts of the road transport industry[39] presented the Minster for Industrial Relations, the Hon. Tony Bourke, with a statement recognising these pressures and advancing a program for fundamental change. The statement called on the Government to adopt and implement the full recommendations of the "*Senate Rural and Regional Affairs and Transport References Committee Without Trucks Australia Stops: the development of a viable, safe, sustainable and efficient road transport industry*" including by establishing a body with specialist expertise in the road transport industry, to set enforceable standards for all transport supply chain participants. Following this, Minister Burke announced his intention to empower the Fair Work Commission (FWC) to deliver a 'Safe, Sustainable and Viable' road transport industry.

We welcome the Government's action on its commitment toward sensible regulation that will make the road transport industry safer for workers and the public. The proposed changes in the Closing Loopholes Bill represent a significant step forward in achieving that goal, however, there are also a number of matters which need to be addressed in order to fully realise the policy intention.

How the Bill can be strengthened

The ACTU supports the submission of our affiliates, including the TWU, which set out the ways in which these provisions can be strengthened, and set out reasons in support of this. In particular, we point to the following issues which should be addressed:

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[35] McKell Institute, 2023, Tough Gig: Worker Perspectives on the Gig Economy, https://mckellinstitute.org.au/research/reports/tough-gig-worker-perspectives-on-the-gig-economy/

[36] See Freight Waves, 2019. *Breaking: Amazon's digital freight brokerage platform goes live*, https://www.freightwaves.com/news/breaking-amazons-digital-freight-brokerage-platform-goes-live

[37] TWU, 2020, SURVEY SHOWS $10 PAY FOR FOOD DELIVERY WORKERS AS NSW POLITICIANS PUSH FOR MORE RIGHTS, https://www.twu.com.au/press/survey-shows-10-pay-for-food-delivery-workers-as-nsw-politicianspush-for-more-rights/

[38] Centre for WHS, 2020, *Work health and safety of food delivery workers in the gig economy*, (Sydney: NSW Government, 2020), Work-health-and-safety-of-food-delivery-workers-in-the-gig-economy..pdf (nsw.gov.au) p.26.

[39] These representatives included major road transport clients (Coles & Woolworths), the peak road transport employer's association (Australian Industrial Transport Industrial Organisation), major transport and logistics operators (Linfox, Toll Global Express, FBT Transwest and ACFS), representatives of small owner-driver operators (the National Road Freighter's Association), on-demand transport companies (Uber and Doordash) and the Transport Workers Union of Australia.

1. The current provisions do not currently adequately address the reality of supply chains and the multiple layers that exist between the producer and the consumer;
2. There is no failsafe mechanism in the legislation;
3. The current period for further consultation pursuant to a subsequent notice of intent could operate to unreasonably delay making minimum standards orders.
4. In certain circumstances, the FWC should have the power to hear from specified affected persons;
5. The qualifying period for an unfair termination application is currently not aligned to other similar provisions, such as the current unfair dismissal provisions and proposed unfair deactivation provisions;
6. Either party should be able to notify disputes to the FWC (see above, in relation to "employee-like" for reasons.
7. The FWC currently does not have a general disputes jurisdiction under the proposed provisions.
8. There should be provisions addressing the reality of contractual chains, and consequential amendments (e.g. objects etc.);

Recommendations

Recommendation 13. Contractual chain provisions should be added to the road transport industry provisions.

Recommendation 14. There should be capacity for the FWC to order a period of 6 months or less under s 536KE(2)(c) in appropriate circumstances.

Recommendation 15. The qualifying period for an unfair termination application (road transport industry) should be reduced to 6 months.

Recommendation 16. Either party negotiating a collective agreement in the road transport industry should be able to notify disputes to the FWC.

Recommendation 17. A general road transport industry related disputes power should be inserted.

Unfair Contracts

The ability of courts and tribunals to review and regulate the arrangements of contractors is not new. In 1993, legislative measures were introduced that allowed the Australian Industrial Relations Commission (and later the courts) to review contracts on general 'unfairness' grounds and set aside or vary contracts to remedy any unfairness. This jurisdiction was later moved into a separate but much watered-down Independent Contractors Act which continues to exist. Currently a party to a services contract that is unfair can apply, pursuant to the Independent Contractors Act, to the Federal Circuit Court or Federal Court for a review of that contract. Unsurprisingly, given the high cost and time associated with court proceedings, this mechanism is rarely used and is largely ineffectual. That Act also had the effect of overriding contract review processes that had operated in state jurisdictions such as NSW for many years.

The new provisions will provide a low-cost, flexible and informal process for resolving disputes about unfair terms in services contracts by placing key provisions from the Independent Contractors Act into the FW Act.

Under the new provisions, any independent contractor paid below the high-income threshold who is subject to unfair terms in a service contract will be able to go to the FFWC instead of having to go to court – a far cheaper, easier and more timely option. Existing access to court processes will remain.

In determining whether a contract term is unfair, the FWC will consider matters like:

- The bargaining power of the parties;
- Whether the term is harsh, unjust or unreasonable;
- Whether the term is reasonably necessary to protect the parties' legitimate interests;

If the FWC considers that a term is unfair, it will have the power to set aside part or all of the contract, but will not award compensation. These changes will only apply to contracts formed after the new legislation commences.

How the Bill can be strengthened

The only remedy provided for a services contract in the Bill that is found to contain unfair terms is similar to the current section 16 of the Independent Contractors Act. As noted above, that Act has been used sparely. Although it has been found that those provisions permit a remedial effect to be made based on past events or transactions, to make the provisions more effective they should permit orders to be made for the payment of money in connection with any contract set aside, declared void or amended or varied.

Recommendations

Recommendation 18. Allow for orders to be made for the payment of money in connection with any unfair contract set aside, declared void or amended or varied.

Sham Contracting

The FW Act prohibits an employer from misrepresenting an employment relationship as contract for services (independent contracting). Employers currently have a defence if they didn't know and weren't reckless as to whether the contract was in fact an employment contract and not a contract for services. This defence means that very few sham contracting arrangements are successfully prosecuted.

The proposed legislation will remove this defence and insert a different defence. The new defence will be based on an employer's reasonable belief (even if incorrect) that a contract was a contract

for services. Reasonableness will be assessed with regard to the size and nature of the business and any other factors considered to be relevant.

Sham contracting in the employment context involves an attempt to avoid industrial regulation by characterising an employment relationship as one of principal and independent contractor. The current legislative protection (s.357 of the Fair Work Act 2009) prohibits misrepresentations by employers that employees are contractors. It provides a defence for an employer who can prove they did not know or were not reckless as to whether the contract was an employment contract. Given the complexity with distinguishing between employment arrangements and independent contracts, the defence is and has been easily invoked.

Notably, whether or not there has been a misrepresentation, and the reasonableness of an employer's belief as to the nature of the contract will require assessment of the new definition of employee.

The current provisions in the FW Act that deal with sham contracting are ineffective insofar as they turn on the employer's state of mind. It is incongruous that employers are not able to avoid liability for individual breaches of industrial instruments such as awards or agreements by relying on their own state of mind as a defence but can avoid liability for the more serious practice of avoiding industrial regulation altogether by showing that their actions were carried out without any actual knowledge or recklessness as to a worker's status as an employee or contractor.

Many commentators have pointed to the need for labour law to adapt to meet the challenges of the modern workplace. This need is no more obvious than in the case of the most basic categories of employment and independent contracting. Professor Anthony Forsyth has said:

> " ...profound changes (over the last 30 years or so) in the way in which work is organised and carried out have challenged the traditional distinction between employees and independent contractors, and the assumptions that went with it as to who w's 'deserving' of labour law protection. For many observers, the focus on the contract of employment as the 'touchstone' for determining the scope of labour regulation ignores the fact that power imbalances also arise in many of the new forms of work relationship adopted by entrepreneurial workers, especially those that force workers into the realm of commercial law."

It is critical that this be addressed.

How the Bill can be strengthened

The current protection has the wrong focus; the sham contracting arrangement itself, and not merely misrepresentations about the nature of an employment relationship, should be prohibited. The protection against misrepresentations should remain but should be strengthened.
This can be achieved by:

- Legislating that the sham contracting itself, and not merely misrepresentations, be prohibited.
- Removing the defence in subsection 357(2).

Recommendations

Recommendation 19. Amend the sham contracting provisions to legislate that the sham contracting itself, and not merely misrepresentations, be prohibited.

Recommendation 20. Remove the sham contracting defense in subsection 357(2).

The Labour Hire Loophole

The FW Act provides mechanisms for regulating the terms and conditions of employees of particular employers. However, some large companies such as Qantas and BHP use the fact that if their employees are moved to a new or different company, even if they are doing the same job, they can completely side-step all of the pay and rights they negotiated in enterprise agreements. This is a legal loophole, and some companies also use the threat of outsourcing to labour hire as a means of suppressing wages. The provisions of Part 6 of Schedule 1 of the Closing Loopholes Bill respond to close this avenue and restore equity and fairness.

The circumstances and arrangements under which persons other than directly employed workers will perform work in or for the benefit of a particular enterprise are many and varied along a continuum involving labour hire, outsourcing and contracted service provision.

The most recent data released by the ABS suggests that just under 330,000 people worked for labour hire in June 2023.[40] Of these people, most worked full-time hours (81%) but most also had no paid leave entitlements (84%) – a stark illustration of the abuse of casual employment as currently defined. Labour hire has typically accounted for between 2-3% of employed persons over the last decade on ABS measures, however the ABS measurement technique will likely not include employees who are part of labour hire entities within a corporate group serving that group.[41]

Additionally, other data sources, such as the WGEA Reports and Modern Slavery statements of large labour hire companies as well as State Licensing and Workers Compensation data, suggest that numbers employed in the industry outside of internal corporate group arrangements, exceed half a million (as at 2019-20). Labour hire workers earn around $4,700 less over a year than the median hourly rate for full time workers (as at August 2022).[42] These whole of economy figures tend to obscure the true extent of the disparity between workers performing the same work, for example:

- The McKell Institute estimated that mining industry remuneration for labour hire workers was typically 24% lower across the six mining sites examined for the purposes of their research.[43]

[40] ABS, Labour Hire Workers, June 2023.
[41] ABS prefers to measure the number of workers in labour hire by reference to the Labour Account industry allocation. This methodology assigns jobs based on the industry of economic activity of the employer. So, for example, an internal labour hire company that exclusively supplied labour to its related entities in the mining industry would be likely to be assigned to the mining industry rather than the labour hire industry, and its jobs not counted in the "Labour Hire Workers" publication.
[42] ABS, Characteristics of Employment, August 2022.
[43] McKell Institute, Submission to Senate Education and Employment Committee inquiry into the *Fair Work Amendment (Equal Pay for Equal Work) Bill 2002*, August 2022.

- In the meat processing industry, labour hire workers can earn in the order of $500 per week less than their directly employed colleagues for performing the same work.[44]

Labour hire (as traditionally understood and as it has evolved) is but one mechanism by which workers (however engaged) can come to perform the work previously undertaken by others in a particular business. A diverse range of corporate structures and contracting models are increasingly having the effect of undermining the wages and conditions of direct employees. These include successive competitive tendering arrangements for outsourced services, corporate restructuring which alienates or supplements core operations and opaque service provision contracts which involve both labour supplementation and some local management or facility control. Many large, listed corporates such as BHP, Qantas, Qube and CIMIC have also established their own internal labour hire and/or services subsidiaries with the effect of eroding negotiated rates of pay for work traditionally performed by a direct workforce.

The drivers for an enterprise engaging external labour vary. They may include supplementation in peak periods, technical expertise of external providers, operational decisions to minimise the cost and liability of direct engagement, or a desire to avoid existing enterprise agreements. Not all decisions to engage external labour are made because of a desire to undercut or undermine prevailing rates of pay. However, there should be a mechanism to address that consequence, irrespective of the intent.

Closing Labour Hire Loopholes

Currently, labour hire workers often work side-by-side with direct employees, perform the same work but receive less pay. The Closing Labour Hire Loopholes provisions in Part 6 seek to address this.

The amendments will insert a new Part 2-7A into the FW Act and make consequential amendments. The key features of the scheme are as follows:

- Where a "regulated host" (that is, the entity for whose benefit the work is wholly or principally performed) is covered by an enterprise agreement[45] and supplied with the employees of another employer, an application may be made to the FWC for an order (a "regulated labour hire arrangement order").

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[44] Payslips available on request.

[45] The formal requirement requires the host to be covered by a "covered employment instrument". An enterprise agreement is included within that definition, and due to their prevalence are expected to be the most common example of "covered employment instrument" where the provisions will be utilised. Other covered employment instruments include: workplace determinations, Public Service Act determinations, instruments made under other Commonwealth Laws or State/Territory laws setting terms and conditions of public sector workers, or other instruments which may be prescribed by regulation.

- Where an order is made, the employer of the workers that are supplied to the regulated host will become subject to an enforceable obligation to pay those workers ("regulated employees") no less than the rates of pay in an enterprise agreement.
- Those rates of pay, usually based on the full rate of pay in the enterprise agreement of the regulated host, will be referred to as the "protected rate of pay" of the "regulated employees" who benefit from the order.
- The obligation to pay this rate will be supported by a right of labour suppliers to request information of the regulated host to assist them to comply with the order, and a duty on regulated hosts to comply with such requests.
- The FWC will be able to resolve disputes about the operation of the new Part 2-7A where regulated labour hire arrangement orders have been made.

The scheme contained in Part 6 is flexible enough to permit applications for these orders being made either before or after the supply of labour commences. Applications can be made by either the regulated host employer or the employees of either that entity or the entity supplying their labour (or their union).

The FWC will be obliged to make regulated labour hire arrangement orders when validly applied for, except where it is not fair and reasonable to do so having regard to numerous criteria and any other matter the FWC considers relevant.

There are some exceptions, exemptions, modifications and conditions, as follows:

- If the regulated host is a small business employer, no order is available;
- If the supplier of the labour does not comply with an order because it relied on information requested from and supplied by the regulated host which is incorrect in a material particular, the supplier will not be taken to have contravened its obligation;
- Employees who perform the relevant work while a training arrangement applies in respect of that work do not benefit from an order;
- Where an order has been made, the obligation to pay the protected rate of pay will ordinarily not apply for the first 3 months that a regulated employee performs the relevant work. This exemption period may be shortened or lengthened by the FWC, or a recurrent exemption period established (for example to cover seasonal work year after year);
- Whilst it is expected that the "Protected rate of pay" generally will be contained in the enterprise agreement of the regulated host employer and ordinarily apply to identical work, the FWC will be permitted to make an order specifying how a regulated employee to is to be paid based on a different rate if it would be unreasonable for the default rate to apply. The different rate must be either the rate that would apply in different circumstances under the terms of the agreement (for example for the same work at a different location to that where the work is being performed) or the rate could be drawn from the enterprise agreement of a related body corporate of the regulated host which covers the same kind of work.

There strong anti-avoidance measures, including provisions which, among other things, prohibit:

- Schemes entered into for the sole or dominant purpose of preventing the FWC from making a regulated labour hire arrangement order (for example reducing workforce size so as to become a small business employer);
- Rolling engagement of new employees for less than the relevant exemption period, where this is done for the purpose of ensuring that the substantive obligation to pay a protected rate of pay never arises;
- Rolling engagement of new labour hire providers for less than the relevant exemption period, where this is done for the purpose of ensuring that the substantive obligation to pay a protected rate of pay never arises; and
- Labour hire employers from dismissing their employees in order to engage independent contractors, with the purpose of ensuring that the substantive obligation to pay a protected rate of pay never arises.

The anti-avoidance provisions - along with the substantive provisions requiring payment of the protected rate of pay (or alternative rate of pay), the provision of requested information and compliance with any orders made to resolve disputes - are to be enforceable as civil remedies in the usual way.

How the Bill can be strengthened

Whilst labour hire arrangements often do involve a single host retaining a single labour hire labour company, it is common in some industries - including meat processing, construction and horticulture - for there to be more than one supplier of labour to a given enterprise and/or for the suppliers to change over time. The provisions proposed in Part 6 are capable of addressing such circumstances, but with minor amendment could do so more efficiently.

In circumstances where there are consecutive labour supply arrangements with different operators, there should be a relatively streamlined procedure for extending an existing regulated labour hire arrangement order to the replacement supplier and its employees that will perform the same or similar work. Such a procedure could, for example, operate on the basis of a presumption that an order should be preserved and varied to specify the new employer and its regulated employees unless it is proved that a different kind of work is to be performed.

Similarly, where there is an expansion of the number of suppliers and/or the kinds of work to be performed by regulated employees, a specific power to vary the order with streamlined requirements should be available. If the circumstances are as straight forward as an additional supplier being engaged to perform work of a kind already covered by an existing order relating to a different employer, it would be appropriate to provide a positive obligation on the regulated host to apply for the variation (without diminishing the right of other parties with standing to apply if the regulated host failed to do so).

Additionally, it would be convenient to expressly highlight circumstances in which applications for regulated labour hire arrangement orders may be heard at the same time. For example, a particular undertaking may involve either regulated hosts or employers of regulated employees that are related bodies corporate; or it could involve workforce arrangements for a joint venture or

common enterprise. Where such facts and circumstances overlap, it is reasonable to facilitate the applications being heard together provided doing so would not lead to any unreasonable delay.

In terms of the universality of the scheme, we note that State and Local Governments use external labour, including traditional labour hire, extensively. The provisions of Part 6 rely on regulated hosts being national system employers with statutory employment instruments that apply to national system employees, which creates a gap in the scheme for some State and Local Government entities, among others. We would encourage cooperation to facilitate State laws, referrals, or other arrangements that would ensure a more universal operation of the scheme.

The breadth of the scheme should also be extended to employees to whom a training arrangement applies, including apprentices. Apprentices and trainees are among the few categories of worker who are permitted to be paid (and pare paid) wages that are less than the National Minimum Wage. Budget Standards research commissioned by the FWC for this year's Annual Wage Review estimated that $891 per week was required to meet basic living costs with some austere allowance for discretionary spending, in a single person household.[46] Most award level apprentice and trainee rates are between $500-800 per week, with some trainee wages being substantially lower. These wages are simply insufficient to support workers to meet their reasonable needs therefore also insufficient to support the continued development and supply of skills the country needs. The exclusion of apprentices and trainees from the scope of regulated labour hire arrangement orders as currently proposed is plainly unfair and should not be proceeded with.

More generally, and while recognising the progress made in provisions contained in Part 6, we are supportive of further steps being taken toward a universal right to "Same Job, Same Pay" for equal work.

Recommendations

Recommendation 21. Streamlined provisions for extension and variation of regulated labour hire arrangement orders made under proposed section 306E be introduced, to deal with consecutive and/or multiple engagement of suppliers by a given regulated host.

Recommendation 22. Additional provisions be inserted into proposed Part 2-7A to expressly permit applications for regulated labour hire arrangement orders to be heard together in appropriate circumstances.

[46] Bedford, Megan; Bradbury, Bruce and Naidoo, Yuvisthi (2023), Budget Standards for Low-Paid Families. Report prepared for the Fair Work Commission, Melbourne, Australia.

Recommendation 23. The exclusion at proposed subsection 306G(1) regarding employees on training arrangements be removed, so as to enable apprentices and trainees to benefit from regulated labour hire arrangement orders.

Wage Theft

Case Study

Pamela Speers is a midwife from Sydney. Pamela is currently spearheading a campaign to tackle the rampant wage theft at her workplace. One staff member that Pamela is advocating for is owed $16,500 and, Pamela hopes, is about to successfully receive their due payment.

"They just hoped she wouldn't notice that they didn't pay her backpay."

The union's involvement has been a hugely effective vehicle in driving positive change in Pamela's workplace.

"They get results. On my own, I wasn't really getting anywhere fast. Communication from the hospital was non-existent," Pamela says, "I could send 10 emails and proof of these underpayments and nothing. But I give them all to the union, and the union sends them, and it gets responses."

Wage theft – the failure by employers to pay employee entitlements - is widespread, systemic and rampant across all sectors of the economy. In many industries and for many employers, wage theft has become a feature of doing business. This is made permissible by legal loopholes which allow wage theft to go undetected and unpunished. Estimates of the amount of wages stolen from workers each year vary, including estimates of as much as $12 billion per annum.

However, wage theft must also be understood as a problem that affects individual workers – usually those earning the lowest salaries to begin with – for whom having even a couple of hundred dollars stolen from their pay packets could mean the difference between paying bills, buying groceries, going to the doctor, affording to travel to work, buying school books, and not doing so. This is money they need to pay for necessities, or which should be funding their retirement. Workers cannot afford to keep having their wages stolen in the middle of a cost-of-living crisis, or at any time for that matter.

Wage theft is most common where workers have the least power – those in insecure work, migrant workers, women, young people, and First Nations people in lower-skilled jobs are the most vulnerable.[47] A March 2022 Senate Committee examining wage theft described the problem as 'systemic, sustained and shameful'.[48]

[47] Parliament of Australia, *Systemic, Sustained and Shameful. Unlawful underpayment of employees' remuneration,* March 2022, Accessed online. Pp 30-32 <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024434/toc_pdf/Systemic,sustainedandshameful.pdf;fileType=application%2Fpdf>

[48] Ibid

In this context, it is impossible to do too much to address wage theft. The fact that some employers believe that such behaviour is conscionable is a national disgrace.

The current regulatory environment

Technically understood, wage theft is the unlawful underpayment or non-payment of workers' wages and entitlements. However, in reality, wage theft is diverse, complex and insidious – it can take a number of forms, each of which is difficult to identify and address. The environment in which wage theft has thrived is one where there has been a continuing policy failure to empower the social institution most capable of addressing the crisis – the union movement – to do so.

The current industrial relations framework does very little to prevent wage theft from occurring and does not lend itself to resolving wage theft where it occurs and is detected. Even when wage theft is discovered, workers face a complex and lengthy process to claim the money they are rightfully owed. This can take months, or years and require hours of their unpaid time. The FWC does not have vested in it the jurisdiction to deal with wage theft, the courts are expensive and inaccessible to ordinary workers and, there is no dedicated Commonwealth industrial court.

Furthermore, there has been no effective deterrent for wage theft. The current penalties for wage theft are inadequate and do not have sufficient deterrent effect. The worst outcome the employer faces in many cases is ultimately paying back the money owed in the first place – meaning that for unscrupulous employers there is almost no real risk, even if caught red-handed.

Wage theft has become an everyday reality for many workers in our economy. In some sectors, there are business models based on the theft of workers' wages. This will remain the case until the legal loopholes and financial fictions that allow wage theft to occur are closed. In the middle of a cost-of-living crisis where working people are struggling to get by, those loopholes must be urgently closed to prevent billions more being stolen at this critical time where workers need every cent they are owed to stay afloat.

The scale of wage theft

Wage theft is often treated, particularly by those in big business, as a minor problem. Any measure designed to combat it is dismissed as an 'overreaction' and business advocates dismiss cases of wage theft as 'inadvertent'. Essentially, much of the public conversation around wage theft treats it as if it were a minor or unavoidable problem. This narrative is completely inappropriate, not only because of the significant impact that wage theft has on working people, but because wage theft is arguably the most significant type of theft in Australia.

Estimates of the scale of wage theft vary. This is in part because of its nature as a secretive, insidious practice, often perpetrated on workers who dare not complain due to insecurity or their employment or migration status. The lack of meaningful enforcement equally contributes to the complexity in identifying the quantum of wage theft– because a significant portion of wage theft goes unreported.

Due to these factors, there is no single authoritative estimate of the losses workers suffer each year due to wage theft. Estimates have been made, ranging from $1.35 billion a year by PWC[49] to more than $2 billion a year in Queensland alone by the Queensland Parliamentary Inquiry into Wage Theft[50]. In the ACTU 2020 submission to the Senate Economics Committee Inquiry into the Unlawful Underpayment of Employees' Remuneration, the ACTU, utilising the Queensland figures and assuming that Queensland's experience was replicable across the national labour market, estimated a national wage theft cost of between $6 and $12 billion.[51]

Incidents of large scale wage thefts such as the $600 million underpayment by Woolworths[52], $430 million by BHP[53] and $155 million by 7-Eleven[54] can be taken as warning signs that even these estimates may be conservative. Estimates have also been made regarding the scale of certain sub-types of wage theft. Theft of superannuation, for instance, has been estimated by Industry Super Australia at between $4.3 and $4.7 billion per year[55] - indicating that many estimates of total national wage theft were likely conservative. The Fair Work Ombudsman - which can only respond to reported incidents of wage theft - recovered around $530 million in unpaid wages and entitlements in a single year[56]. Taken together, these figures reveal an uncomfortable truth that that the true scale of wage theft is staggering and that existing mechanisms are failing to meaningfully curtail it.

Equally confronting are the effects on workers. Two reports from the Australian Institute of Criminology[57] show that theft of superannuation alone is 144% more costly than all other types of theft combined. Wage theft overall is costing Australian workers between 454% and 700% more than every other type of typical individual theft. Despite the vastly greater sums of money that are being stolen through wage theft than other types of theft combined, it is treated far less seriously. Wage theft should be taken as seriously as any other sort of theft – it's that simple.

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[49] PWC, Navigating Australia's Industrial Relations, 2020

[50] Queensland Parliament, Report No. 9, 56th Parliament - A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland, November 2018.

[51] ACTU, *Wage Theft: The exploitation of workers is widespread and has become a business model*, ACTU, 2020. Calculations based on Queensland representing 19% of Australia's labour market in terms of the number of persons employed and then assuming that the rate of underpayment in the broader economy was either half that of Queensland or comparable to that in Queensland to arrive at a range of figures for the potential cost of wage theft nationally.

[52] The New Daily, Woolworths wage theft blows out, flags redundancies, June 23, 2020.

[53] The SMH, BHP Reveals $430 million staff holiday hit, 1 June 2023

[54] The Guardian, 7-Eleven repays $173m to workers after some franchisees falsified records in underpayments scandal, 30 October 2020.

[55] Industry Super Australia, Media Release: The government moving to payday super will get millions of Australians the super they are owed, 2 May 2023

[56] Brisbane Times, Unsavoury and difficult': Instances of wage theft reach record highs, February 8, 2023.

[57] Smith R *et al.* 2014. *Counting the costs of crime in Australia: A 2011 estimate*. Research and public policy series no. 129. Canberra: Australian Institute of Criminology; Smith R & Franks C 2020. *Counting the costs of identity crime and misuse in Australia, 2018-19*. Statistical Report no. 28. Canberra: Australian Institute of Criminology. https://doi.org/10.52922/sr04756 To make current the figures provided, the material cost to victims of the various types of theft have been updated from the reference year to 2023 dollars.

The impact of wage theft

Wage theft can have a significant impact on the future living standards of workers. When workers are not paid what they are owed, it can make it difficult for them to financially plan for the future. This can lead to deferred spending, lower levels of saving, and even taking on debt. In some cases, workers may be forced to sell their possessions in order to make ends meet.

Wage theft can affect all workers. Any underpayment is likely to result in some degree of hardship, but it particularly impacts low paid workers (who are already struggling to meet increased cost of living pressures).[58]

In one case, the Federal Court heard evidence from a restaurant worker for whom wage theft meant being hardly able to support herself and pay living expenses, even though she worked 4-6 days per week and took cost-cutting measures like living in shared accommodation, buying cheaper goods (including groceries) and borrowed from friends and family.[59] One severely exploited worker was made to work 12 hours days in the horticultural industry but only received about $60-70 per week due to the employer deducting for expenses like fuel, food and accommodation.[60]

Wage theft causes financial stress, impacts on physical and mental activity and can lead to social disconnection.[61] Highlighting just how far reaching the flow on effects of wage theft are is evidence showing that poverty – which can be brought on by wage theft – makes it more difficult for survivors of domestic violence to leave violent relationships and access assistance.[62]

As outlined in the 2019 McKell report *Ending Wage Theft*, while any worker can be a victim of wage theft, some types of workers are more vulnerable. Research and years of experience by unions have shown that casuals, temporary migrant workers, young workers, and women are most at risk.[63]

The solutions to wage theft

Existing processes and penalties have failed. The Compliance Working Group convened by the previous Coalition Government in 2020 did not reach any consensus on the issue of criminalising wage theft, or any other measures to reduce non-compliance.

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[58] Senate Economics References Committee, 2020, Op. Cit pp 29, 34
[59] Fair Work Ombudsman v Xia Jing Qi Pty Ltd [2019] FCCA 84 at [37]
[60] ABC News, *Debt bondage for workers in Australian horticulture akin to slavery, inquiry hears*, October 2017, https://www.abc.net.au/news/rural/2017-10-19/debt-bondage-in-horticulture-sector-akin-to-slavery-in-australia/9057108
[61] Senate Economics References Committee, 2020, Op. Cit pp 34-5
[62] Ibid pp 35
[63] The McKell Institute, Ending Wage Theft: Eradicating Underpayment in the Australian Workspace, March 2019.

In March 2022, the Senate Economics References Committee handed down its report into the unlawful underpayment of employee entitlements.[64] The report contained 19 recommendations. These included the key recommendation that the FW Act be amended to criminalise wage theft and include a penalty for the falsification of records. The recommendation said that these new measures should be drafted in consultation with the states to ensure that they did not weaken existing state legislation. It also recommended that civil penalties for wage theft be increased.

Prior to the May 2022 election, the ALP announced that if elected, it would move to criminalise the non-payment of the wages and entitlements of workers. Labor's Secure Australian Jobs Plan said that in relation to this change, Labor would *"consult with unions, States and Territories, and employer groups. Labor's federal wage theft laws will not override existing State and Territory laws where they currently operate."*

The systemic nature of wage theft calls for systemic solutions. There is no single measure which will fix the wage theft crisis. The ACTU supports the criminalisation of wage theft as part of a coordinated strategy to address the totality of the problem. What is required is a suite of measures that put in place a system of regulation and associated compliance which will help workers and their unions in addressing wage theft, rather than stifling their ability to do so. These measures should provide a fast, informal and inexpensive means by which disputed claims can be resolved. Criminalisation is a critical element of this solution to this systemic and complex issue.

Part 14 – Criminalisation of Wage Theft

Wage theft robs working people of money they are rightfully owed for their work. Super theft compounds this, taking money from workers that would be built on due to interest over decades to provide for them in their retirement. Stolen wages trap workers in poverty and deny them the ability to buy the basic necessities they need to live. While other forms of theft are treated as crimes, in many parts of Australia wage theft is not.

Criminal sanctions are not always reserved for the worst cases of anti-social conduct or for 'high-level' or repeated offences. There are many 'low-level' criminal offences in our criminal law system - for example, record-keeping offences, offensive language matters and some traffic offences. Although imprisonment is generally regarded as the ultimate sanction for criminal behaviour and appropriate in the most serious of cases, criminal *fines* are by far the most commonly used penalty in regulatory legislation. These fines are applied to both low and high-level offences.

[64] See *Systemic, sustained and shameful*, Report of the Senate References Committee, 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.

There are also many serious contraventions in different areas of the law that only attract a *civil* and not a criminal penalty, including those that involve very significant financial civil penalties. The key question in determining whether conduct should be considered 'criminal' in nature is whether it is appropriate that the social censure of criminality should attach to the conduct. Another factor is whether the conduct involves, or has the potential to cause, considerable harm to society or individuals.

It is not uncommon for federal legislation to provide for civil and criminal penalties as alternatives for the same or similar conduct. An example is the 'good faith' obligations in s 181 and 184 of the *Corporations Act 2001* (Cth), the latter section imposing a criminal sanction for conduct of the kind described in the former section which is engaged in recklessly or dishonestly. Section s 1311 of that Act also provides that a contravention of a (non-criminal) provision of the Act can constitute a criminal offence. Likewise, civil penalties created in some parts of the *Australian Consumer Law* are replicated with no or very little modification as strict liability criminal offences.

Criminal and civil sanctions for non-observance of awards have co-existed in industrial legislation before. For example, sections 119 and 122 of the *Conciliation and Arbitration Act* 1904 (Cth) and sections 92 and 93 of the *Industrial Arbitration Act* 1940 (NSW) permitted civil *or* criminal proceedings to be brought in relation to alleged non-payments. Unions and regulators had standing to commence either civil or criminal proceedings under those sections.

The new provisions in Part 14 of the Closing the Loopholes Bill will criminalise wage theft. The new offence will be established when:

- An employer is required to pay an amount to, on behalf of, or for the benefit of, an employee under the FW Act, a "Fair Work Instrument", or a "transitional agreement". [65]
- "The employer engages in conduct" (defined to mean: do an act or omit to perform an act); and,
- "the conduct results in a failure to pay" the required amount in full when it is due; and,
- The conduct is intentional, and the employer intends for there to be a failure to pay the worker.

However, the following exclusions apply:

  - Certain payments are not included within the wage theft criminal offence:
    - Superannuation;
    - For workers who are only part of the FW Act's "National System" because of a referral of state legislative powers over industrial laws: payments for Long Service Leave; paid leave for victims of crime; and paid leave for service on a jury or for emergency services duties are not captured.

[65] Note: there is "absolute" or "strict" liability for this point.

Prosecutions will be able to be initiated by the Director of Public Prosecutions (**DPP**) or the Australian Federal Police (**AFP**). FWO will have the power to refer matters for prosecution. Proceedings can be commenced at any time within 6 years after the commission of the offence.

The Minister will have the power to put in place a "Voluntary Small Business Wage Compliance Code." If the FWO is satisfied that a small business employer complied with the Code in relation to a failure to pay an amount, it must not refer any conduct that resulted in the failure for prosecution, or enter into a cooperation agreement with the employer regarding any conduct that resulted in the failure. The FWO will retain the ability to exercise other powers it has in relation to any conduct that resulted in the failure, including instituting civil proceedings, accepting an enforceable undertaking, or giving a compliance notice. The FWO will also publish a compliance policy covering the new offences, in consultation with the National Workplace Relations Council. This will include guidelines relating to the circumstances in which the FWO will or will not accept or consider accepting undertakings, or enter or consider entering into cooperation agreements.

The FWO will be given a new power to enter into a written "Cooperation Agreement" with a person where that person has self-reported non-compliance or possible non-compliance with the new wage theft criminalisation provisions to the FWO. This is intended to provide a person with an opportunity to access 'safe harbour' from potential criminal prosecution if they have engaged in conduct that amounts to the possible commission of the new wage theft offence or related offences and have self-reported their conduct to the FWO. If the FWO decides to enter into a cooperation agreement with the person, it must not refer conduct engaged in by the person that is covered by the agreement for possible criminal prosecution while the agreement is in force. The FWO must have regard to certain matters when deciding whether to enter into a cooperation agreement, such as whether the person has made a voluntary, frank and complete disclosure of the conduct, whether the person has cooperated with and will continue to cooperate with the FWO, the nature and gravity of the conduct, and the person's history of compliance with the FW Act.

Cooperation agreements can be varied by the parties by mutual consent in writing. A cooperation agreement can be terminated by the employer, if the FWO agrees, or by the FWO at any time by written notice on certain grounds. As an alternative to termination, the FWO can apply to a court for orders, such as orders directing the person to comply with the cooperation agreement, orders to give or produce information or documents, or orders awarding compensation for loss. The FWO maintains its other powers when a cooperation agreement is in force, however an enforceable undertaking or compliance notice will have no effect to the extent they are inconsistent with a cooperation agreement, regardless of when they were made.

Offenders will be liable for up to:

- 25,000 penalty units, or 3 times the value of the underpayment in fines for corporations;
- 5,000 penalty units or 3 times the value of the underpayment, and/or imprisonment of up to 10 years for individuals

How the Bill can be strengthened

Superannuation

An employer deliberately not paying superannuation is wage theft. It is one of the easiest forms of wage theft to get away with and one of the most prevalent. Almost three million workers lose an average of $1,700 in super annually, or close to $5 billion in total each year according to estimates by Industry Super Australia.[66] This represents a catastrophe of non-payment where workers have not had the protection, and in many instances the awareness, that they were not being paid their superannuation. Unpaid superannuation compounds over time, and thus has a significant detrimental impact on workers retirement outcomes and as a consequence money that is invested into the economy (including on major social and infrastructure projects) by superannuation funds.

The ATO cannot keep up with the scale and prevalence of superannuation theft, meaning that employers increasingly get away with it. After a decade of cuts, less than 15% of unpaid super identified by the ATO is recovered by the ATO according to a highly critical report from the Auditor General in 2022.[67] Superannuation theft, like broader wage theft, disproportionately affects lower paid, casual, and insecure workers who are more likely to miss out when super is paid less frequently.

Women are also over-represented in superannuation theft. Super theft is one of many factors that contributes to the $41,200 gap in median superannuation balances between men and women at age 65[68] and also partly explains why women at retirement age are increasingly likely to experience homelessness, housing stress and poverty.[69]

Underpayment of super is associated with significantly reduced retirement outcomes for workers. This means that people are not just losing occasional payments, they're getting ripped off systemically. The ISA "Super Scandal: Unpaid Super Guarantee in 2016-17' report published in 2019 stated:

> In 2016-17 there was on average, a 50 per cent difference in the super balance of a person underpaid compared to a person of similar age and income who received their correct super entitlements. Across most age and income cohorts the difference adds up to tens of thousands of dollars less in their super nest eggs.[70]

[66] Industry Super Australia, Unpaid Super: End the $4.7 billion a year rip off, 28 October 2021
[67] Australian National Audit Office, *Addressing Superannuation Guarantee Non-Compliance*, 28 April 2022, https://www.anao.gov.au/work/performance-audit/addressing-superannuation-guarantee-non-compliance
[68] Australian Bureau of Statistics, *Gender Indicators*, 2020
[69] Australian Human Rights Commission, Older Women's Risk of Homelessness: Background Paper, 2019 and National Older Women's Housing and Homelessness Working Group, Retiring into Poverty: The Cold Reality Older Women and Homelessness, 2020.
[70] 'Super Scandal: Unpaid Super Guarantee in 2016-17' (Report, Industry Super Australia, 2019).

Not only does superannuation theft mean workers will have smaller superannuation balances when they retire and consequently experience a lasting reduction in post-retirement incomes; governments will also share a significant portion of the resulting damage: they will collect less in taxes on superannuation contributions and investment income and, will pay out more in means-tested Age Pension benefits.

In order to ensure that the superannuation system is operating efficiently and effectively, superannuation entitlements must be properly enforced. Superannuation should not be excluded from the wage theft offence. Whilst superannuation entitlements are enforceable under the superannuation framework and as workplace entitlements under the FW Act, these are by way of civil rather than criminal proceedings. Its exclusion from the wage theft offence sends a message that underpayment of superannuation is less serious than the underpayment of other entitlements. However superannuation is typically the first employee entitlement which an employer stops paying, and superannuation theft frequently accompanies other forms of wage theft, is more difficult for workers to detect and identify, and leads to significantly reduced retirement outcomes for workers. Accordingly, superannuation should be captured in the wage theft offence.

Interaction with state wage theft laws

The Commonwealth wage theft regime proposed in the Bill should not override or operate to the exclusion of superior state wage theft criminalisation laws or otherwise operate to override the activities of state-based wage theft regulators. The new provisions do not make clear that they do not completely override state wage theft criminalisation legislation. This should be clarified in the Bill for the avoidance of doubt. In a current matter before the High Court, *Rehmat & Mehar Pty Ltd & Anor v. Hortle*, the employer is arguing that a prosecution under Victoria's wage theft laws is invalid under s109 of the Constitution, which states that valid federal laws prevail over inconsistent state laws. This matter demonstrates the need for urgent clarification of this point.

Recommendations

Recommendation 24. Include superannuation in the wage theft offence.

Recommendation 25. Include clarification that the wage theft provisions in the Bill do not override or operate to the exclusion of superior state wage theft criminalisation laws, or otherwise operate to override the activities of state based wage theft regulators.

Part 11 – Penalties for Civil Remedy Provisions

Any regime of criminal sanctions that is introduced should sit alongside improved compliance mechanisms and a system of increased civil penalties. Both are directed at achieving different, but complementary, purposes.

In *Fair Work Ombudsman v Pulis Plumbing PTY LTD & Anor* [2017] FCCA 3013, Riethmuller J described the purpose of civil penalties as follows:

The purpose of imposing penalties under the Fair Work Act 2009 provisions was discussed by the High Court in *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate; Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46 at [55] when the court said:

'whereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty, as French J explained in *Trade Practices Commission v CSR Ltd*, is primarily if not wholly protective in promoting the public interest in compliance:

> "Punishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation. Neither retribution nor rehabilitation, within the sense of the Old and New Testament moralities that imbue much of our criminal law, have any part to play in economic regulation of the kind contemplated by Pt IV [of the Trade Practices Act]. … The principal, and I think probably the only, object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravener and by others who might be tempted to contravene the Act."'

This approach is reflected in a number of regulatory schemes – for example, the price of a parking fine greatly exceeds the cost of paying for parking in the first instance.

A particularly striking example of the current mismatch between the extent of wage theft and the ultimate penalty is George Calombaris' MAdE group, who were able to make a $200,000 "contrition payment" after engaging in wage theft to a total of $7.8 million (the fine therefore being less than 3% of the underpayment amount).[71]

The FWO's ratio of wages recovered to court-ordered penalties show that within the known cases of wage theft that are dealt with by the regulator, employers who engage in wage theft – taken as an aggregate – pay a small fraction in penalties compared to the wages originally withheld:

- In FY2016/2017, FWO recovered over $30 million, and achieved court-ordered fines of about $4 million.[72]
- In 2017/2018 FWO recovered just under $30 million, and achieved court-ordered penalties of just over $7 million.[73]

[71] 'George Calombaris' fine for multi-million-dollar wages scandal too low, Attorney-General says', *ABC News* (Online) <https://www.abc.net.au/news/2019-07-24/george-calombaris-master-chef-judge-fine-too-light/11341096>; 'George CAlombaris's MAdE Establishment underpaid workers $7.8 million <https://www.abc.net.au/news/2019-07-18/george-calombaris-made-establishment-backpays-underpaid-workers/11320274>.
[72] Fair Work Ombudsman, *'Annual Reports'* < https://www.fairwork.gov.au/about-us/access-accountability-and-reporting/annual-reports>.
[73] Ibid.

- In FY2018/19 FWO recovered over $40 million in stolen wages, and achieved just over $4 million in court-ordered penalties.[74]

With respect to wage theft, the current regulatory scheme expects that instances of millions or tens of millions of dollars of wage theft can be deterred by the remote prospect of thousands of dollars of penalties.

By contrast:

- In Sydney, the fine for travelling without a valid public transport ticket $200, with a maximum penalty of $550, against a ticket price of less than $10 (making the penalty 55 times the price of original compliance).[75]
- In South Australia, the fines for driving an unregistered car are between $1,000 and $1,500, against a registration cost of about $800 (making the penalty up to almost double the price of original compliance).[76]
- In the City of Melbourne, a parking fine is between $83 and $165, against an hourly metered rate of $7, making the fine between about 12 and 23 times the price of compliance.[77]

In all these examples:

- The people who are caught are fined; and,
- the quantum of the fine is many multiples of the cost of compliance in the first instance.

Only by creating a true and direct linkage between the value of the wage theft and the amount of the penalty, can those civil penalties achieve a truly deterrent purpose.

The new provisions in Part 11 of the Closing the Loopholes Bill seek to create this linkage by:

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[74] Australian Government Transparency Portal, 'Fair Work Ombudsman and Registered Organisations Commission Entity Annual Report 2018-19' <https://www.transparency.gov.au/annual-reports/fair-work-ombudsman-and-registered-organisations-commission-entity/reporting-year/2018-2019-12>; Fair Work Ombudsman, 'FWO recovers $40 million for workers' < https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/october-2019/20192110-annual-report-2018-19-media-release>.

[75] Transport New South Wales, *'Fines and Fare Compliance'* <https://transportnsw.info/tickets-opal/fines-fare-compliance>, *'Adult Fares'* < https://transportnsw.info/tickets-opal/opal/fares-payments/adult-fares>; *Passenger Transport (General) Regulation 2017* (NSW) r 77A.

[76] Brett Williamson, 'Drivers beware: Unregistered vehicle fines in South Australia about to triple', *ABC Adelaide (online),* 23 December 2013; <http://www.abc.net.au/local/stories/2013/12/23/3916415.htm>; Government of South Australia, 'Calculate Registration Fee' <https://account.ezyreg.sa.gov.au/account/vehicle-rego-enquiry.htm>.

[77] City of Melbourne, *'Parking Fines'* <https://www.melbourne.vic.gov.au/parking-and-transport/parking/parking-fines/Pages/default.aspx>; City of Melbourne, 'Parking locations and fees' <'https://www.melbourne.vic.gov.au/parking-and-transport/parking/parking-locations-fees/Pages/parking-locations-and-fees.aspx>

- Increasing penalties for:
    - Contraventions and serious contraventions that are likely to involve non-payment of remuneration (such as non-compliance with minimum wage orders, modern awards, enterprise agreements and equal remuneration orders);
    - Contraventions of particular provisions concerning job advertisements below minimum rates, liability of franchisors, FWO compliance powers, and the NES rights to paid parental leave and notice of termination as applicable to non-national system employers; and
- Changing the definition of serious contravention

Maximum penalties for contraventions of most civil remedy provisions of the FW Act are currently set at 60 penalty units ($18,780 from 1 July 2023), and 600 penalty units ($187,800 from 1 July 2023) for "serious contraventions".[78] A court has the power to order up to this penalty amount against an individual, and 5 times this amount against a body corporate.[79]

Under the new provisions, the increased maximum penalties for matters identified above will be set at:

- 300 penalty units (or $93,900) for contraventions other than serious contraventions, noting that a court may impose 5 times this amount for a body corporate.
- 3,000 penalty units (or $939,000) for serious contraventions, noting that a court may impose 5 times this amount for a body corporate.

Additionally, in relation to contraventions associated with an underpayment amount, courts will be able to award penalties of up to 3 times the value of the underpayment amount (if this is greater than the amounts set out above).

The definition of "serious contravention" will be changed from being a knowing contravention *and* part of a systematic pattern of conduct to a knowing contravention *or* a reckless contravention.[80]

A contravention will be reckless where the person is aware of a substantial risk that the contravention would occur, and having regard to the circumstances known to the person, it is unjustifiable to take the risk.

How the Bill can be strengthened

The distinction between 'serious' and 'other' contraventions

[78] FW Act s 539; *Crimes Act 1914 (Cth)* s 4AA(1), (3); see also https://asic.gov.au/about-asic/asic-investigations-and-enforcement/fines-and-penalties/
[79] FW Act s 546(2)
[80] FW Act s 557A(1)

As outlined above, the objective of a civil penalty is to put a price on contraventions that is sufficiently high to deter, rather than being an acceptable cost of doing business.[81] That objective can be frustrated by too much legislative prescription about when a level of penalty is available. Therefore, the FW Act should not erect barriers to achieving high penalties for serious contraventions, in the form of a technical gateway or threshold to accessing those penalties.

Rather, deterrence is better served by the creation, in the mind of the putative contravener, of uncertainty and risk regarding the maximum penalty. A penalty regime that clearly signals that a capacity to demonstrate ignorance of the law necessarily results in a 90% discount of the maximum penalty will do less to promote compliance than one that does not. The existing jurisprudence on the determination of civil penalties ensures that a court considers all relevant circumstances of the contravening conduct before imposing a penalty.[82]

Accordingly, we recommend that the definitional elements of 'serious contravention' do not apply as gateways for accessing the higher level penalty, and that the distinction between "serious" contraventions and other (by extension, "not serious") contraventions be removed. Courts should be empowered to apply the appropriate penalty, up to the set maximum, that is warranted by the case before them. The set maximum should be those set out in the Closing Loopholes Bill as applying to "serious" contraventions, and include the ability for the maximum penalty in relation to underpayment amounts to be three times the value of the underpayment where this amount is greater than the maximum penalty specified. This would be a more robust deterrent than specifying differential penalty rates for certain contraventions – particularly as wage theft is often attended by other contraventions.

Recommendations

Recommendation 26. Remove the distinction between "serious" and other contraventions in the FW Act.

Recommendation 27. Empower the courts to apply the appropriate penalty for contraventions of the FW Act, up to the set maximum, that is warranted by the case before them.

Part 10 – Exemption certificates for suspected underpayment

Any supposition that the Fair Work Ombudsman (FWO), as the regulator, can adequately deal with wage theft given its scale and depth must be immediately cast aside. The Fair Work Ombudsman

[81] *ABCC v. CFMEU* [2017] FCAFC 113 at [98]
[82] See for example, FWO v. NSH North [2017] FCA 1301, Mason v. Harrington [2007] FMCA 7, Australian Ophthalmic Supplies v. McAlary-Smith [2008] FCAFC 8.

will never have enough resources to take on the full responsibility of ensuring compliance with workplace laws, and the employers who commit wage theft know this.

Registered employee associations are the only social institution with the motivation as well as the capacity, scale and the connections to workers to adequately address wage theft. A suitable policy environment would enable registered employee associations to perform this role, rather than restrain them. It is unsurprising that as greater powers have been given to the regulator, accompanied by an increase on the limitations placed on registered employee organisations, wage theft has flourished.

The ability for registered employee associations to effectively enter workplaces, engage with workers and investigate suspected contraventions must form part of any meaningful response to wage theft.

Currently there are significant restrictions on the right of registered employee organisations to access workplaces and carry out their representative functions. Procedural requirements are cumbersome, accreditation requirements are onerous and time-consuming, but the most simple example of this comes in the form of notice requirements which, in the case of suspected contraventions, routinely provide time for wage thieves to remove relevant evidence or otherwise be obstructive.

Currently, a union permit holder has the right to enter a workplace for two overarching purposes:

1. To hold discussions with union members and prospective members;[83] and
2. To investigate suspected contraventions.[84]

The new provisions in Part 10 of the Closing the Loopholes Bill rectify a loophole in the right of entry provisions in relation to investigating suspected contraventions in relation to wage theft.

The FWC can currently issue an exemption certificate which dispenses with the requirement to give notice of an entry to investigate a suspected contravention, on application by a union.

Under the new provisions, the grounds for issuing an exemption certificate will be amended, so that the FWC will be required to issue the certificate if it reasonably believes that:

1. relevant evidence might be destroyed, concealed or altered if notice were given;[85] *or*
2. the suspected contravention relates to underpayment of wages or other monetary entitlements of employees.

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[83] FW Act s 484
[84] FW Act s 481
[85] This is currently the only circumstance in which an exemption certificate is available.

This means that an exemption certificate can be issued when a suspected contravention relates to wage theft, without having to also prove that there is a risk of evidence being tampered with if notice is given (a test that is largely impossible to satisfy as it requires evidence of potential, suspected future conduct of the employer).

The new provisions enable the FWC to take action in relation to the future issue of such exemption certificates if those rights are misused (for example, by imposing conditions, or banning their issue for a specified period). They also allow the FWC to impose conditions on a permit, as an alternative to revoking or suspending an entry permit in the circumstances set out in section 510 of the FW Act.

Part 12 - Compliance Notice Measures

Compliance notices are an attractive enforcement tool with the potential to achieve rectification of underpayments more efficiently than would be the case through the commencement of court proceedings.

S716(2) of the FW Act enables a FWO Inspector to give a person a compliance notice requiring that person to take "specified action", to remedy the effects of a contravention that the inspector reasonably believes has occurred. A failure to comply with a compliance notice, without reasonable excuse, is enforceable by civil penalty proceedings[86], although a person issued with a notice can apply to court for it be reviewed (and stayed while such review occurs).[87] The new provisions in Part 12 of the Closing Loopholes Bill expressly give FWO inspectors the ability to include as a "specified action" that the person calculate and pay the amount of any underpayment. The practical effect of this is to clarify that compliance notices can place the onus of determining the amount of the underpayment on the person to whom the notice is issued. This amendment is consistent with the view of the Migrant Workers' Taskforce that there should be 'no unnecessary legislative or administrative barriers' to the effective use of compliance notices.[88]

S545 of the FW Act gives a broad discretion to relevant courts to grant an appropriate remedy for a contravention of a civil remedy provision under the FW Act, and provides examples of the kinds of orders that can be made. The new provisions will add to the types of orders that can be made, giving courts the specific power to issue an order requiring a person to comply with a notice (other than an infringement notice) given to them by the Fair Work Ombudsman or a FWO Inspector. In the case of a compliance notice issued under section 716(2)(a) as proposed to be amended, this would include an order to calculate and pay the underpayment. Non-compliance with such an order of the court could be enforced as a contempt in the usual way.[89]

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[86] See FW Act s. 716(5)-(6)
[87] See FW Act s. 717
[88] See at Australian Government (2019), Report of the Migrant Workers Taskforce, at p 89-90
[89] Federal Court of Australia Act s.31; see also Flamingo Park v. Dolly Dolly & Ors [1985] FCA 123

Delegates Rights

Case Study

Pepe is a crane operator from Ingleburn, New South Wales. As well as being a union delegate, she is a health and safety representative, seeing both as her way to contribute positively to society and changing the world for the better.

However, being a workplace delegate comes with its own set of distinct challenges; especially when contending with a powerful employer.

When asked if Pepe had ever been targeted for her role as a workplace delegate she quips, "Definitely. I'm black, I'm Māori, I'm a woman. So yeah, I'm a businessman's target."

Though she says this wryly, her message is serious. Without protections for workplace delegates, they're prone to victimisation and prejudicial treatment. Some groups more than others.

She believes in the importance of delegate rights, so that she can continue to use her voice to advocate for those who aren't able to advocate for themselves.

"Our dispute process is something our workers need help with often. In our industry we have many… female migrants [and] lower paid demographics who do not have the confidence to speak up. Delegates give them the confidence once they've seen us do our thing."

Pepe spends 15 hours a week – mostly of her own time – conducting her voluntary delegate duties. With a recent redistribution of Pepe's work hours to three twelve-hour days a week, she sees this 'free time' as more time to fight for her members and better her workplace.

Union delegates are volunteers. They take on a responsibility for advocating on behalf of employees in the workplace. Union delegates make a significant contribution to workplace harmony and productivity. They help workers and employers in avoiding and settling workplace disputes, contributing to the building of a culture of compliance and respect and act as a facilitator of discussions between employers and employees. Sometimes delegates are targeted by employers because of their work as a workplace delegate. Delegates can be undermined by an unscrupulous employer who seeks to mislead or deliberately misinform a delegate. Union delegates are not experts in workplace law and need basic training to assist them doing their job. Many good employers support delegates being trained, but others do not.

It is normal for workplace delegates to be supported and respected in their role in most highly successful and productive economies. The more workers are listened to, the better the decision making, and the higher the job satisfaction. Unions support building more cooperative and collaborative workplaces where issues can be resolved quickly and respectfully as close to the source as possible. We would like to see a move away from combative behaviours and would welcome better collaboration. Recognising and respecting the rights of delegates to carry out their representative function is key to this.

In every workplace, union delegates play a pivotal role in shaping a fair and collaborative environment. These delegates serve as the voice of workers, advocating for their rights, and fostering constructive dialogue between workers and management.

Union delegates are chosen by their work colleagues to be their representative. They are volunteers who tirelessly dedicate their own time to address their colleagues' concerns and support meaningful conversations with managers to improve working conditions.

The complexity of union delegates' roles demands specialised skills and subject-matter knowledge, which cannot solely be learned on the job. The provision of accessible and professionally conducted training courses, along with rights to paid training leave, empowers union delegates to enhance their capabilities and make significant contributions to workplace transformation.

The vast community of delegates, numbering in the tens of thousands, selflessly volunteer their time to ensure the voices of workers are not merely heard but also respected and valued. In a society that upholds the principles of fairness and cooperation, the role of union delegates becomes even more pivotal, as they play a crucial part in shaping better, safer, and more productive workplaces.

Part 7 – Workplace Delegates' Rights

Freedom of association and the right to organise are fundamental rights recognised by the International Labour Organisation, and the subject of ILO Conventions which Australia has signed and ratified.

It is well accepted that the full enjoyment of rights requires them to be respected, protected and fulfilled. This means that the state must:

1. Establish laws enshrining rights;
2. Protect against retaliation for the exercise of those rights; and
3. Enable people to fully realise their rights.

The right to organise and freedom of organisation are interdependent, their exercise requires the establishment of laws which enable workers and unions to associate and organise, protect them when they do so, and support the full exercise of their rights. The ILO's Committee on Freedom of Association has found that 'anti-union discrimination is one of the most serious violations of freedom of association, as it may jeopardize the very existence of trade unions.'[21]

ILO Convention 135 (which has been ratified by Australia) Article 2 provides that: 'Such facilities in the undertaking shall be afforded to workers' representatives as may be appropriate in order to enable them to carry out their functions promptly and efficiently'.

The interdependence of rights is such that it is insufficient to merely protect workers and trade union activists when they exercise their rights, without removing all doubt as to the existence of a corresponding set of rights to be exercised in the first instance.

The new provisions establish rights for delegates at 3 levels:

- Rights contained in the FW Act;
- Rights contained in Modern Awards; and
- Rights contained in enterprise agreements.

A delegate will be defined as someone who is appointed or elected under a unions' rules. Delegates' rights will include:

- Representing members' industrial interests, including in disputes;
- Reasonable communication with members and prospective members in relation to their industrial interests;
- In relation to those industrial interests, reasonable access to:
    - The workplace and facilities;
    - paid time during normal working hours, for the purposes of related training (note: this does not apply to small businesses).

An employer will be taken to have afforded the above rights if they have complied with the relevant Modern Award or enterprise agreement term on delegates' rights, or otherwise having regard to the enterprise's size and nature, available resources and facilities.

Under the new laws, the FW Act prohibits an employer from unreasonably:

- unreasonably failing or refusing to deal with a delegate;
- knowingly or recklessly making a false representation to a delegate;
- unreasonably hindering, obstructing or preventing the exercise of a delegate's rights under the FW Act, a Modern Award or an enterprise agreement.

From 1 January 2025, Modern Awards will be required to include a term that provides for delegates' rights. Any enterprise agreement voted up after 1 January 2025 will also be required to include a term that provides for delegates' rights.

If (for agreements voted up after 1 January 2025) an agreement's delegates rights term is less favourable than the relevant Modern Award term, then the Award term is taken to apply.

How the Bill can be strengthened

The proposed provisions will provide critical protections and supports to the tens of thousands of union delegates currently serving their workplaces across the country. Further, however, the rights provided will have an impact well beyond union delegates alone. Having effective representation and support in the workplace will assist all working people is addressing those rampant workplace issues having the most serious impact on workers wellbeing and safety – such as wage theft, safety issues, workplace harassment and bullying.

While the provisions provide good protections for union delegates, improvements could be made to provide more certainty of their protection. The scope of the delegates' rights protections does not mirror that of the adverse action protections in that the delegates right protections only apply to action actually taken and not action that is planned but not yet taken. We therefore propose

that the scope of delegates' rights protections could be expanded to include "threatening and organising" the actions covered by ss 350A(1) and 350B(1), which would mirror s 342(2).

In order for Australia's industrial relations system to move more closely toward recognising the right to organise and freedom of association, it needs to move to implement Convention 135. It can take steps toward this by enacting a prescribed protection for delegates through a new Division in Part 3-1 General Protections, which provides for:

- A right for employees to be represented by a delegate in the workplace.
- An entitlement for delegates to paid leave beyond training.
- An explicit right for delegates to engage in discussions with workers and other union officers during work time.
- An explicit right for delegates to use an employer's facilities to communicate with members and their union.
- A right for employees to attend union meetings.
- The ability for the FWC to resolve disputes, including by arbitration, over delegates' rights.

Recommendations

Recommendation 28. Expand the protection for delegates to include actions that are threatened or organised as well as carried out.

Recommendation 29. Expand the protections afforded to delegates and union members through a new general protections division.

Stronger Protections Against Discrimination

Case Study

Family and domestic violence has a significant impact on the ability of employees to attend work, to meaningfully engage in work, to fulfill the expectations of their role, and to participate in the workplace environment.

Numerous survey respondents to a research report undertaken by Monash University for the Fair Work Commission[1] attributed the loss of their job to their experience of FDV, for either direct or indirect reasons. Respondents shared their experiences that their earlier disclosures of FDV victimisation had impacted the way in which they were viewed in the workplace and ultimately impacted their career progression. Respondents also shared the stigma associated with accessing FDV supports. Survey respondents said the following:

"People saw me have a breakdown at work from [my] ex-husbands abuse, and I lost credibility because of this and lost work opportunities. I was told that I should never have let other people know or see the impact DV had on me as I was not offered a job because of this and my future employment opportunities would be impacted."

"I was unable to progress in my career … And was continued to be refused promotions after experiencing family violence."

"I was told my contract would not be renewed because I clearly couldn't manage my personal life."

"If you look at their DFV policy, leave and intranet page you'd give it full marks. The issue was, and is, that if you identify as a DFV victim in the legal profession – you're marked and your career is over – it doesn't matter what the policies say it matters what employers actually do and how they treat you."

A staggering 3.8 million Australians (2.7 million women and 1.1 million men) have experienced violence from an intimate partner or family member since the age of 15.[90] The statistics are particularly alarming for women – 1 in 4 women have experienced violence from a partner since the age of 15 and on average one woman a week is killed by a current or former partner.[91]

The cost of family and domestic violence is felt beyond the affected individuals and their workplace and is distributed (both directly and indirectly) across society.[92] This includes the social cost to the community, particularly the increased demand for social, health and emergency services. Family

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[90] Personal Safety, Australia, 2021-22 financial year | Australian Bureau of Statistics (abs.gov.au), Table 1.1

[91] Fair Work Commission, 5 April 2022, Information note - Initiatives to reduce family and domestic violence in Budget 2022–23

[92] Expert Report of Dr. James Stanford, Annexure JS-3 (from p47) to the Witness Statement of Dr James Stanford, filed in Family and domestic violence leave review 2021 (AM2021/55) (Stanford Report) at [13]

and domestic violence contributes negatively to workplaces through decreased productivity and attendance and increased turnover (and associated costs such as recruitment and training).[93] Family and domestic violence is estimated to cost the national economy $20 billion per annum or around 1% of GDP.[94]

For over a decade, unions campaigned for, and won, the right to take paid family and domestic violence leave in workplaces across the country – through enterprise bargaining, bringing cases in the Fair Work Commission, and lobbying for legislative change. This resulted in the introduction of paid family and domestic violence leave in the National Employment Standards (**FDV leave**), an entitlement that is now available to over 11 million employees in Australia, and once the *Violence and Harassment Convention 2019* (ILO Convention 190) comes into force on 9 June 2024, will be an entitlement available to every single employee in the country.[95]

Addressing family and domestic violence (**FDV**) requires complementary action across a range of policy areas from health, housing and criminal and family law to employment.[96] Employment measures, such as provision of FDV leave or protection from discrimination can encourage other positive complimentary measures and changes in culture and attitudes in workplaces, which in turn shift broader social norms.[97]

The comments of the Full Bench of the Fair Work Commission (**FWC)** that considered paid FDV Leave remain apposite:[98]

> …the introduction of paid FDV leave is not a panacea for the devastating effects of FDV; but it will provide a critical mechanism for employees to maintain their employment and financial security, while dealing with the effects of FDV.

Identifying the workplace dimensions of family and domestic violence is crucial to creating supportive working environments to assist those who are experiencing it.[99] Economic studies of family and domestic violence have shown that women with greater access to resources and better access to external options are more likely to be able to leave violent family and domestic

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[93] Baird et. al. in Report prepared by Bankwest Curtin Economics Centre for the Australian Council of Trade Unions, Annexure AD-3 (from p25) to the witness statement of Professor Alan Duncan, filed in the Family and domestic violence leave review 2021 (AM2021/55) (Duncan Report) at [14] – [15]
[94] Stanford Report
[95] See Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022 (Cth)
[96] Chappell, L., & Curtin, J. (2013). Does Federalism Matter? Evaluating State Architecture and Family and Domestic Violence Policy in Australia and New Zealand. Publius, 43(1), 24–43, 25
[97] Duncan Report at [12]
[98] [2022] FWCFB 2001 at [999]
[99] See Elizabeth Broderick, Sex Discrimination Commissioner, Australian Human Rights Commission (Speech), 24 October 2011, Vincent Fairfax Speaker Series, Melbourne Business School, University of Melbourne,

situations.[100] Economic and financial independence can increase the security of individuals who are affected by family and domestic violence, or allow those individuals to avoid perpetrators and therefore reduce future incidences.[101]

Part 8 – Strengthening Protections Against Discrimination

Workers subjected to family and domestic violence change their job more often, miss out on promotions, are more likely to resign or be terminated and more likely to be bullied at work. Everybody wins when a worker who is being subjected to FDV keeps their job. Sometimes being at work is the only place where that person feels safe. Paid work also plays a critical role in enabling a worker and their children to leave an abusive relationship.[102]

Subjection to FDV is not currently a protected attribute in the FW Act or in other Commonwealth anti-discrimination laws. The proposed changes in Part 8 of the Closing the Loopholes Bill would include a new protection for employees and prospective employees by recognising subjection to FDV as a protected attribute within the FW Act's anti-discrimination provisions, meaning workers cannot be discriminated against on that basis. The changes flow through to several parts of the FW Act, give effect to Australia's obligations under ILO Convention 190 and complement recent reforms by strengthening workplace protections for employees subjected to FDV.

The FW Act's general protections provisions prohibit employers from taking adverse action against workers for reasons such as their race, gender, caring responsibilities and other listed factors.[103] Similarly, the FW Act's unlawful termination provisions prohibit employers from dismissing employees on certain grounds, such as their race, gender, caring responsibilities and other listed factors.[104] Under the proposed changes, a person being subjected to family and domestic violence would be added to the list of protected attributes in these sections of the FW Act. This would enable workers who are the subject of adverse action at work because they have been subjected to family and domestic violence, to make a general protections claim. The proposed changes would also allow workers who are terminated because they have been subjected to family and domestic violence to make an unlawful termination claim if they are unable to bring a general protections claim.

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[100] Amin, M., Islam, A.M. and Lopez-Claros, A. (2021) 'Absent Laws and Missing Women: Can Domestic Violence Legislation Reduce Female Mortality?', Review of Development Economics, 25(4), pp. 2113–2132

[101] Duncan Report at [11]

[102] ASU (2018) A Workplace Guide to Preventing & Responding to Domestic Violence, available at ASU-dv-guide-2018-web.pdf (d3n8a8pro7vhmx.cloudfront.net)

[103] The complete list appearing in the FW Act s 351(1) is: race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

[104] The complete list appearing in the FW Act s 772(1)(f) is: race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

The FW Act also currently provides that modern awards and enterprise agreements cannot include terms that discriminate *against* a person on the basis of certain attributes (for example, race, gender etc.).[105] Under the proposed changes a person being subjected to family and domestic violence would be added to the list of protected attributes, meaning that a modern award or enterprise agreement could not include a term that discriminated *against* someone because of this.[106]

Finally, section 578(c) of the FW Act requires the FWC, in performing its functions and exercising its powers, to take into account the need to respect and value the diversity of the workforce by helping to prevent and eliminate discrimination on certain grounds. Under the proposed changes a person being subjected to family and domestic violence would be added to the list of protected attributes in s578(c).

These changes recognise the impacts of FDV and are important protections to ensure that workers who are subjected to FDV are not discriminated against at work, are protected from reprisals for exercising their workplace rights, and have better options for recourse if such discrimination and reprisals do occur.

FDV can impact many aspects of a person's life, including their wellbeing and productivity at work, and can be a significant impediment to workforce participation. This can result in adverse action being taken against a person because they have been subjected to FDV (for example, through reduced hours of work, demotion or dismissal). As such, being subjected to FDV can be a source of discrimination in the workplace. Under current provisions in the FW Act, employees subjected to FDV are not protected from adverse action unless it is connected to the exercise of their workplace rights (such as accessing FDV leave) or it can be argued to be protected by another attribute, such as sex.

Workers who are subjected to FDV have certain rights and entitlements, such as the ability to request flexible working arrangements and 10 days paid FDV leave. Despite workers having these entitlements, there is still a stigma attached to FDV, which may prevent employees from accessing their entitlements. Legislating to protect workers from discrimination on this basis complements these entitlements, and is consistent with Australia's treaty obligations, including future obligations under the International Labor Organisation's Violence and Harassment Convention (ILO 190). It also builds on the work of unions for over a decade in campaigning for paid FDV leave and related entitlements, such as negotiating clauses in enterprise agreements that stipulate there should be no adverse action against employees experiencing FDV.

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[105] FW Act ss 153(1), 195(1)

[106] Note: for the avoidance of doubt the recently enacted "special measures to ensure substantive equality" provisions ensure that certain terms which positively discriminate are permissible.

Financial security is crucial to enabling women to leave violence. Paid FDV leave enables women to remain in their jobs, which makes it far more likely and possible that they will have the resources and support to leave violence. In reaching its decision in favour of including paid FDV in modern awards, the FWC found as follows:[107]

> In summary, the evidence demonstrates that employees experiencing FDV face acute financial circumstances at the time they seek to leave violent relationships or otherwise deal with the consequences of FDV. Income security is necessary for employees experiencing FDV to bear the cost of relocating and to spend time seeking legal advice and attending court proceedings and accessing medical treatment and other forms of support. The absence of such income security may mean employees experiencing FDV do not leave violent relationships.

Making FDV a protected attribute builds on the entitlement to paid FDV leave, by ensuring that employers cannot dismiss or take other adverse action against employees because they have been subjected to family and domestic violence, hence maintaining their economic security. It should help victim-survivors to feel more comfortable accessing paid FDV leave and flexible work, without the fear of losing income or their job, or being penalised in any way. Inclusion of FDV as a protected attribute will also ensure that the FW Act is keeping pace with contemporary community standards and developments in anti-discrimination law. Multiple states and territories are moving to include FDV status as a protected attribute.[108]

How the Bill can be strengthened

Section 351(2) of the FW Act provides that the protections contained in s351(1) do not apply to action that "is not unlawful under any anti-discrimination law in force in the place where the action was taken." This 'not unlawful' exemption has been interpreted by the FWC as meaning that only conduct which is specifically prohibited by discrimination legislation is actionable pursuant to FW Act s 351.[109]

This is a complete inversion of the ideal policy position, which would be to ensure that the highest levels of protection from discrimination are afforded to workers. The FW Act should make clear that only conduct which is specifically sanctioned by anti-discrimination legislation is 'not unlawful' for the purposes of the FW Act. Moreover, where conduct might be considered discriminatory in

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[107] [2022] FWCFB 2001 at [678]

[108] For example, see *Discrimination Act 1991* (ACT) s 7(1)(x); *Industrial Relations Act 2016* (QLD) s 296; *Anti-Discrimination Act 1992* (NT) s 19(1)(jb); *Equal Opportunity (Domestic Abuse) Amendment Act 2023* (SA). See also Law Reform Commission of Western Australia, Review of the Equal Opportunity Act 1984 (WA) (Project 111 Final Report), May 2022, pp. 12, 121-4.

[109] Scott McIntyre v SBS [2015] FWC 6768

one jurisdiction, but not discriminatory in another jurisdiction which the worker can access, that conduct should be considered discriminatory for the purposes of the FW Act – on the basis that if proceeding under anti-discrimination law the worker would have choice of jurisdiction and an available course of action. For example, many workers are covered by anti-discrimination legislation at a Commonwealth and at a state/territory level, which often have different provisions. If one piece of legislation makes certain conduct unlawful and the other does not, the worker should be entitled to pursue a claim under the FW Act on the basis that the conduct is unlawful in a jurisdiction that covers them.

Whilst the above interpretation by the FWC is not the only one that is available, the FWC's General Protections Benchbook states:

> The operation of s.351 is limited by reference to exceptions derived from anti-discrimination legislation. A person needs to be covered by either the Commonwealth law or applicable State or Territory Law for the protection to apply. The only exclusion of this type is for people in New South Wales and South Australia who are seeking protection on the grounds of 'Religion' or 'Political opinion' – neither State's law provide that discrimination on these grounds is unlawful and there is no Commonwealth law which provides protection for these grounds. As a result a person in New South Wales or South Australia would not be eligible to make a general protections application in respect of adverse action taken on the grounds of 'Religion' or 'Political opinion'. HOWEVER these persons would be eligible to make an application for Unlawful Termination instead if the adverse action was constituted by a dismissal, as 'Religion' and 'Political opinion' are expressly covered and these protections extend to ALL Australian workers.[110]

Given the above, it is not unreasonable to assume that this is indicative of the FWC's views on this matter. Furthermore, practitioners and workers who read the Benchbook will be left with the impression that this is the correct interpretation of the "not unlawful exemption". Given that being subjected to FDV is only a protected attribute in three state/territory jurisdictions, there is a real risk that the new FW Act protection will be rendered useless for workers in the majority of Australian states and territories. This is therefore a matter which requires urgent clarification.

<u>Recommendations</u>

Recommendation 30. Amend the FW Act to clarify that only conduct which is specifically sanctioned by anti-discrimination legislation is 'not unlawful' for the purposes of s351(2) of the FW Act.

[110] Fair Work Commission (2023) Benchbook - General Protections, page 117

Recommendation 31. Amend the FW Act to clarify that where conduct might be considered discriminatory in one jurisdiction but not in another jurisdiction that the worker has access to, the conduct should be considered discriminatory for the purposes of s351(2) of the FW Act.

Work Health and Safety

Case Study

After returning from maternity leave, Joanna was asked to undergo a fit for work test.

The test result changed her life in an instant. The 34-year-old mother of two girls was diagnosed with silicosis.

Joanna said: "It's the unknown which is so terrifying. What I have since learnt about silicosis is that there is no cure, and you just don't know how it will progress. At the moment I am feeling healthy, but I don't know if that will be the case in one year, let alone five or ten years and as a mum of two young daughters that terrifies me."

Joanna contracted silicosis whilst working at a quarry in Montrose, Victoria. She was initially employed in an administrative role, but it also involved more hands-on work, and for her to visit all parts of the site.

"No matter where you were in the plant you would be exposed to dust. It would be all over your clothes and skin. I fear this will affect my life and my family's life and I am angry. I should never have been exposed to this disease."

"There is no information in my employer's induction packs about exposure to silica dust, despite being a large multinational company. There are still no signs and warnings around the plant to warn workers. People need to be aware of this."

Everyone should come home safe from work, yet on average every week four people are killed in their workplace in Australia. A further 5,000 Australians will die each year from diseases caused by their work.

In 2019, the Boland review of model WHS legislation handed down 34 recommendations, including that the model WHS Act be amended to introduce industrial manslaughter as an offence in workplace health and safety legislation. The review also highlighted the growing incidence of psychological injuries at work and recommended government introduce regulation to protect workers, along with increased penalties. The Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 introduces protections for workers in three key areas; harmonised industrial manslaughter laws, expansion of the Asbestos Safety and Eradication Agency to coordinate and evaluate measures to decrease the incidence of silica-related diseases, and the streamlining of the workers' compensation claims process for first responders suffering with Post-Traumatic Stress Disorder (PTSD). These changes aim to not only provide justice for the families of those injured or killed at work, but by acting as a deterrent, also forcing cultural change that will hopefully reduce these shameful statistics.

The case for national, uniform industrial manslaughter laws enshrined in WHS legislation is clear. Every worker in Australia, from the construction of office buildings to the gig economy, should have the right to a safe and healthy working environment. This Bill marks a systemic shift in how this

country will view the responsibility of employers for the safety of workers, and how our courts will address the tragic loss of life that has become an unacceptable feature of Australian workplaces.

The increase in silicosis and other silica-related diseases is deeply concerning and has raised the need for urgent coordinated national action to reduce rates of silica-related diseases and to support affected workers and their families. The amendments in Schedule 2 would expand the functions of the ASEA to include coordinating action on silica safety and silica-related diseases. This includes promoting and reporting on a Silica National Strategic Plan which will coordinate and track the progress of jurisdictions against nationally agreed targets.

Achieving the best outcome for first responders (or anyone else) who suffers, or is at risk of suffering, a work-related mental health condition is a vital and complex issue. The introduction of presumptive legislation covering PTSD is intended to help improve physical and mental health outcomes for first responders by streamlining the claims process, thereby reducing the stress and trauma associated with submitting claims and hastening access to treatment.

Amendment of the *Work Health and Safety Act 2011* - Industrial Manslaughter

There is currently no provision for industrial manslaughter in Commonwealth work health and safety laws. This is despite every state and territory, except for Tasmania, introducing or committing to introduce an industrial manslaughter offence.

The ACTU strongly supports the inclusion of a strong 'outcome-based' offence to sit alongside, and complement, the existing 'risk-based' offences in the WHS Act, with this reform being long overdue. The inclusion of an industrial manslaughter offence is critical to not only ensuring that both a strong effective deterrent exists within the WHS framework for employers who might otherwise cut corners on work health and safety; but also to ensure that justice is afforded to families where a worker is killed, with their family able to expect these deaths to the thoroughly investigated and employers held to account with appropriate penalties, including incarceration.

The proposed changes will insert an offence of industrial manslaughter into Commonwealth work health and safety legislation, based on conduct which breaches a PCBU or officers' WHS duties, causes the death of a worker and is reckless or negligent about causing that death. A court may also find a person who is charged with industrial manslaughter guilty of a category 1 or category 2 offence in the alternative (which are existing offences) if they are acquitted of the original charge of industrial manslaughter.

The existing category 1 offence (recklessness or negligence that exposes a person to a risk of death or serious illness or injury) will be modified to ensure that it is available where an officer breaches their own (due diligence) duties, as well if they engage in conduct which falls short of the PCBU's overarching health and safety duty. The industrial manslaughter offence should be similarly framed.

As noted in the review of the Model WHS Laws, the current criminal law is limited in its ability to respond effectively to work-related deaths caused by negligence in the workplace, in particular, by

larger corporations.[111] Governments across Australia and internationally have cited the challenges with their respective criminal codes and:[112]

> 'the need to identify an individual director or employees as the directing mind and will of the corporation… ultimately means that manslaughter prosecutions under the Criminal Code are only successful against small businesses and that prosecutions against large corporations are unlikely to succeed'.

It was nearly 5 years ago that governments received Marie Boland's review of the Model WHS Laws which called for an industrial manslaughter offence to be included in the Model WHS Laws. Since that time, we have seen nearly all harmonised jurisdictions introduce an offence. It is right that the Commonwealth also ensure that such an offence is included in the WHS Act.

How the Bill can be strengthened

Breach of duty element of offence

The proposed industrial manslaughter offence will be enlivened by a failure of a duty holder to fulfil their duty. However, the way in which the provision is expressed leads to a potential deficiency in its application. Proposed s 30A(1)(a) brings within the scope of the provision those persons who are either a PCBU or an officer. Proposed 30A(1)(b) then makes clear that it is those persons referred to in 30A(1)(a) who are duty holders, to whom the offence potentially applies. Proposed 30A(1)(d) contains the element of the offence relating to conduct which 'breaches ***the*** health and safety duty". This means that, in order for the elements of the offence to be made out, it must be the specific duty appertaining to the duty holder which is breached. As a result, a PCBU could be liable for a charge of industrial manslaughter if they fail to discharge their primary duty of care arising under the WHS Act s 19 (and the other elements of the offence are met), *but* an officer will only be potentially liable if they fail to discharge their specific duty – which arises under s 27 and relates to due diligence. In other jurisdictions, this issue does not arise. For example, in Queensland, the offence of manslaughter does not refer to a specific duty held by an officer, but rather to negligence generally (see s 34D); in Victoria, the breach element of an industrial manslaughter charge may be satisfied where the officer engages in conduct which ultimately falls short of *the PCBU's* applicable duty (see s 39G(2)(b)). A preferable solution would be to adopt the Victorian formulation, whereby an officer may be liable (all other elements being met) if the relevant conduct constituted a breach of either their applicable duty or the duty of the PCBU.

Section 30A(f) the person was reckless, or negligent, as to whether the conduct would cause the death of an individual

[111] The Review of Model WHS Laws 2018, Boland, M (pp127-128)
[112] Workplace Health and Safety, 2018 Queensland

The ACTU submits that this subsection be amended to insert "risk of death or serious injury or illness" into section 30A(f).

Subsection 30A(4) allows for alternative verdicts if, in proceedings for an offence (the prosecuted offence) against subsection (1), the trier of fact is not satisfied that the person is guilty of the prosecuted offence, and is satisfied that the person is guilty of an offence (the alternative offence) that is a Category 1 offence or a Category 2 offence, the trier of fact may find the person not guilty of the prosecuted offence but guilty of the alternative offence, so long as the person has been accorded procedural fairness in relation to that finding of guilt. As a result, there is an inextricable link between offences against subsection 30A(1) and Category 1 and 2 offences.

Category 1 offences are described in the amended s31(1)(b) as requiring proof that the person engages in conduct that exposes an individual to whom the duty is owed to a **risk** of death or **serious injury or illness.** Subsection 31(1)(c), which will remain unamended following the passage of the proposed Bill, states that the offence is made out where the person is reckless as to the **risk** to an individual of death or **serious injury or illness**. Category 1 offences therefore include the specific phrasing that the ACTU submits ought to be included in the manslaughter offence contained in section 30A(f).

The Bill removes reference to both "risk of" and "or serious injury or illness". In relation to the former, while it is true that the Commonwealth Criminal Code defines recklessness to a result at 5.4(2) as awareness of a "**substantial** risk that the risk will occur", meaning that risk is implicit in the standard of proof required by this element in any event, the addition of the word "risk" **independently** into s30A(f) (as in the Category 1 offence) arguably effectively lowers the evidential standard proof of that risk to encompass a broader range of circumstances. In relation to the latter, there are scenarios in which conduct could expose individuals to a risk of serious injury or illness but would not necessarily expose that individual to a risk of death (but death nevertheless later results). The removal of this phrasing from the manslaughter offence narrows the scope of the offence unnecessarily, which is not desirable given the historic under prosecution of these serious criminal offences; and indeed, undermines key objects of the Act.

Finally, there is the significant issue of drafting consistency. Given that Category 1 offences are alternative verdicts, and the phrasing "risk of" and "serious injury or illness" remain in that offence, it is important that similar proof elements are conserved where possible to avoid interpretation confusion and provide clarity to stakeholders regarding liability standards.

<u>Section30A(1)(c) the person intentionally engages in conduct</u>

Proving intention is a requirement to establish subsection 30A(1)(c). This is a requirement even if the word intention is removed from the subsection, due to 5.5 of the Criminal Code which states that if the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element. The Criminal Code at 5.2 states that a person has intention with respect to conduct if he or she means to engage in that conduct.

The ACTU submits that strict liability should be imposed on this element, noting that the imposition of strict liability is considered justifiable where it is difficult to prosecute those fault provisions. "Conduct" is defined in 4.1 of the Criminal Code to include an act, an omission to perform an act or a state of affairs. The difficulty in prosecuting section 31A(1)(c) in its current state, without the imposition of strict liability, does not arise from mere administrative inconvenience, but rather the inherent difficulties of prosecuting where the alleged conduct is an omission to perform an act – wherein specifically argument could arise as to whether such an omission could be "intentional". Section 31A(c) also operates in a WHS framework which is long established, with obligations that are well understood by employers, which supports the imposition of strict liability. Finally, there are also policy reasons for the imposition of strict liability in this element, given the difficulties of establishing that a body corporate had a state of mind in relation to a physical element of an offence, and the historic under prosecution of these serious criminal matters noted above.

Recommendations

Recommendation 32. Amend the breach element of the industrial manslaughter offence to ensure that an officer engaging in conduct which falls short of either their specific duty, or the duty of the PCBU, is sufficient to make out the offence.

Recommendation 33. Section WHS Act 30A(f) be amended to insert "risk of death or serious illness or injury".

Recommendation 34. Imposition of strict liability on WHS Act section 31A(1)(c).

Amendment of the Asbestos Safety and Eradication Agency Act 2013

Silicosis is an entirely preventable disease that over 100,000 workers are predicted to be diagnosed with in Australia, as well as 10,000 cases of lung cancer, based on exposures to crystalline silica dust in 2016.[113] Silica is one of the key components of soil, sand and granite. Fine silica dust, described as Respirable Crystalline Silica (RCS) is produced during construction, tunnelling, quarrying, excavating, mining, road construction (asphalt) and some manufacturing processes. RCS is also produced when engineered stone, commonly used for kitchen and bathroom bench tops, is cut or shaped. A 2012 survey estimated 6.7% of Australian workers were exposed to RCS. Silicosis is a lung disease caused by inhaling tiny bits of silica dust, which can lead to scarring (fibrosis) of lung tissue. Each year around 600,000 Australian workers are exposed to respirable crystalline silica (silica) dust at work. When breathed in, RCS is small enough to penetrate deep into the lungs, causing irreversible lung damage. Silicosis is incurable, progressive, and in many cases, fatal. Exposure to RCS also causes lung cancer and other diseases.

[113] Carey R and Fritschi L, The future burden of lung cancer and silicosis from occupational silica exposure in Australia: A preliminary analysis, Curtin University, April 2021

Currently, the Asbestos Safety and Eradication Agency is the Commonwealth agency responsible for co-ordinating the national response to Asbestos safety, awareness and eradication. The ACTU and our affiliates have been actively pursuing measures that will provide greater protections for all workers exposed to respirable crystalline silica, and, accordingly, the prevention of silica related diseases, for decades. As noted in our submission into the consultation on the expansion of the role of the Asbestos Safety and Eradication Agency (ASEA) to include matters relating to silica in July of this year, the ACTU recommended a strengthening of the functions of the agency by expanding its role from coordination to include the authority to require action. As silicosis is predominately a workplace issue, the ACTU submitted there was a need to diversify the membership of the ASEC. [114]

Whilst the challenges to managing silica exposure are comparable to those of asbestos there are several critical differences which should guide the expansion of the ASEA. Additionally, with now more than a decade of operation there are several areas that have been identified for improvement in relation to asbestos management that should be addressed in this Bill.

Unlike asbestos, which is both an occupational hazard and an environmental issue, silica exposure is exclusively a workplace issue and the solutions to eradicating silicosis and silica related diseases rely upon eliminating harmful exposures to silica at work. The rise of silicosis in the recent decade can be attributed to both a failure of policy makers to respond to gaps in our work health and safety framework, but also the failure of health and safety regulators to undertake more active and nationally coordinated compliance and enforcement activities.

The ASEA was established to deal with the legacy issues of widespread use of ACMs which have continuing impacts in our built and natural environment. The use of raw asbestos and new asbestos products was prohibited and the regulatory framework and compliance activity for the protection of workers from asbestos fibres was well established prior to the establishment of the ASEA. This contrasts with the current situation for silica dust exposures which are contemporary and are almost exclusively occupational. Perhaps most critically, currently there is no prohibition on the use engineered stone products and it is not possible to prohibit the use of most silica containing materials used in construction, mining, and manufacturing. For these reasons, the ACTU does not accept the proposition that dealing with silica issues involves working with the same stakeholders as for legacy asbestos issues.

[114] Consultation on the expansion of the role of the Asbestos Safety and Eradication Agency (ASEA) to include matters relating to silica, ACTU Submission, 16 June 2023, ACTU D. No 27/2023D27-ACTU-submission-on-the-expansion-of-functions-of-ASEA.pdf

Nevertheless, the ACTU acknowledges the reasoning outlined in the consultation paper for the selection of the ASEA as the government agency to take on responsibility for a national response to silica related diseases. On this basis, the ACTU gives qualified support to the expansion of the functions of the ASEA.

In addition to its existing key responsibilities of co-ordinating the response to legacy asbestos exposures, it is proposed that the new agency will also assume responsibility for coordinating and evaluating measures aimed at reducing exposures to silica, and accordingly, silica-related diseases. To reflect this, the agency will be renamed the Asbestos and Silica Safety and Eradication Agency.

Further associated and consequential changes include:

- Changing the title of the enabling legislation (currently the Asbestos Safety and Eradication Agency Act 2013) to the Asbestos and Silica Safety and Eradication Agency Act 2013;
- Amending the objects of the Act to:[24]
    - Also include objects in relation to silica,
    - Include fostering collaboration between relevant stakeholders,
    - Reflect the role of the agency in promoting national consistency, improving knowledge and awareness and supporting and monitoring implementation of national plans by the Commonwealth and the States
- Amending the Asbestos National Plan to reflect Commonwealth and State commitments for co-ordination in relation to asbestos safety and eradication. Creating a Silica National Strategic Plan
- Specifying the functions of the agency in the legislation, in light of its new functions in relation to Silica.

How the Bill can be strengthened

Powers of new Agency

The Explanatory Memorandum states that the renamed Agency's functions will include responsibility for silica coordination, awareness raising, research, reporting and providing advice to the government on silica.[115] The powers of the new Agency, comprising "providing advice", to "collaborate, rather than merely liaise with, other governments, agencies, and bodies and expressly refers to international governments", to "conduct, as well as commission, research", and "awareness raising" suggest a permissive, rather than mandated, function of the new Agency. The new Agency's function should be mandated, particularly in relation to reporting and information sharing between and across agencies and jurisdictions. Furthermore, the ASEA must be empowered to move from a coordinating agency to one with direct authority to require action. This

[115] 1663

should include the power to require jurisdictions to report on matters necessary to monitor and evaluate progress on the implementation of measure to prevent exposure to silica. The ACTU is concerned that the new Agency will lack powers to influence workplace policy, practice and behaviours and drive preventative action to better protect workers. To correct this, the ACTU supports the addition of a responsibility to enforce implementation of strategic plans and prevention strategies, rather than merely supporting and monitoring national plans. Specifically, this would look like the expansion of ASEA functions required to maintain information and report upon, for example, databases relating to workplace exposures, confirmed cases of silica related diseases, noncompliance with WHS duties and evaluation of jurisdictional activity.

Additionally, and given the occupational focus of silicosis prevention, it is critical that a greater focus is placed on the workplace. This should include expanding the membership of the current council to include two additional employee representatives. This is in recognition of the broad range of industries which are exposed to silica. It would also be preferable for the Bill to explicitly establish a subcommittee of the council that would ensure that each jurisdictional health and safety regulator along with social partners (unions and employer organisations) can ensure better coordination of silica related activities.

Furthermore, the Explanatory Memorandum refers to the creation of a "new plan for silica-related diseases", the "Silica National Strategic Plan".[116] Elsewhere, the Explanatory Memorandum explains that

> "The Lung Foundation Australia is currently developing a Silica National Strategic Plan pursuant to Recommendation 3(a) of the 2021 NDDT's Final Report to the Minister for Health and Aged Care. This work would provide an important foundation upon which the first Silica National Strategic Plan would be built."[117]

The ASEA functions need to separately list the 2023-2028 National Silicosis Prevention Strategy and Action Plan and include annual reporting of progress against all the key outcomes. Given that the Draft NSPS and AP have been extensively consulted upon, including with relevant federal and jurisdictional bodies and departments, it would be a disheartening and retrograde step if these Drafts were substantially changed or were to undergo another administrative or consultative process.

<u>Recommendations</u>

[116] 1684.
[117] 1692

Recommendation 35. The ASEA must be empowered to move from a coordinating agency to one with direct authority to require action. This should include the power to require jurisdictions to report on matters necessary to monitor and evaluate progress on the implementation of measures to prevent exposure to silica and asbestos.

Recommendation 36. The ASEA should be responsible for implementing the national plan for silicosis, not just monitoring, updating and developing the plan.

Recommendation 37. The membership of the ASEC should be increased to include three (3) representatives of employee organisations.

Recommendation 38. A subcommittee of the ASEC should be established that includes all jurisdictional health and safety regulators along with appropriate representatives of unions and employer organisations.

Amendment of the Safety, Rehabilitation and Compensation Act 1988

On 27 March 2018, the Senate referred '[t]he role of Commonwealth, State and Territory governments in addressing the high rates of mental health conditions experienced by first responders, emergency service workers and volunteers' (herein collectively referred to as 'first responders') to the Senate Education and Employment References Committee (the Committee) for inquiry. During that inquiry, some stakeholders raised concerns about workers' compensation claims processes, including that they currently may discourage some first responders from seeking timely assistance. In 2020, the Commonwealth Government released its response to the recommendations of the Senate Education and Employment References Committee Report 'The People Behind 000: Mental Health of Our First Responders', which included support for a nationally consistent approach to workers' compensation arrangements and the convening of a working group to consider the benefits of a coordinated national approach to presumptive legislation covering PTSD and other psychological injuries in first responder and emergency service agencies.

The final report on recommendations for amendments to the 2015 SWA Deemed Diseases List found that consistent evidence is available to demonstrate that emergency response workers; ambulance officers including paramedics, police officers and fire fighters, in particular, appear to be at higher risk of developing PTSD resulting from their work compared to members of the general public. That evidence on prevalence relative to the general public was strong enough that ultimately it was concluded that PTSD ought to be included in emergency responders on the Revised Deemed Diseases List[118].

[118] SWA Deemed Diseases List. Recommendations for Amendments to 2015 List Final Report. TG Driscoll, 2021.

In 2022, the ACTU made a submission to the Department of Employment and Workplace Relations Stakeholder Consultation Issues Paper indicating a high level of support for measures that remove barriers for workers who have been injured/made ill through the course of their employment to access benefits and payments which acknowledge that their employment has been detrimental to their health and safety. A paramount consideration is that any administrative processes must not exacerbate the severity of their injury/illness or impede their recovery. The current claims process may contribute to this by requiring injured workers to recount traumatic events in detail to prove that their PTSD was sustained during the course of their employment.

All workers who sustain a physical or psychological work-related injury must be entitled to comprehensive and quality rehabilitation services and to return to suitable and decent employment. Further, injured workers must be entitled to compensation that restores their health and employment as closely as possible to that enjoyed prior to their injury, including full access to superannuation and leave entitlements. Furthermore, the ACTU is of the view that workers' compensation should be available on a no-fault basis where an injury 'arises out of or in the course of employment', even where it is the aggravation of an existing injury or disease. We note that under new subsection 7(11), a person must have been employed as a first responder prior to the symptoms of post-traumatic stress disorder first becoming apparent, which may cause difficulties for first responders seeking assistance where pre-existing symptoms overlap with those attributable to post employment PTSD.

PTSD is a psychiatric disorder that occurs in people that have experienced or witnessed a traumatic event such as serious injury, death, threat of violence, sexual violence, rape or natural disaster. Exposure to these events may be first-hand or indirect (vicarious) and may occur after listening to recounts of trauma, looking at material (videos, case files) or responding to traumatic events. PTSD diagnosis is distinguishable from many other presumptive occupational diseases as it can only be diagnosed following a traumatic event. This contrasts with other diseases where the clinical diagnosis is clear, but the exposure is presumed to be work-related. The Safe Work Australia *Deemed Diseases in Australia Report* refers to the DSM-5 which requires specific linkage to the traumatic or stressful event as a diagnostic criterion when diagnosing PTSD. As the worker will need to detail the exposure it will be clear to the medical practitioner that the PTSD is work-related.

Schedule 3 would amend the *Safety, Rehabilitation and Compensation Act 1988* to introduce a rebuttable presumption that post-traumatic stress disorder suffered by specified first responders was contributed to, to a significant degree, by their employment.

The new laws provide a presumption that where a (specified) "first responder", who is covered by Commonwealth accident compensation legislation (i.e. *Safety Rehabilitation and Compensation Act*), suffers from (or has suffered) a post-traumatic stress disorder, it will be presumed that the person's prior employment as a first responder was the cause of their post-traumatic stress (unless the contrary is proven).[23]

Subsection 7(12) would enable the Minister to make a legislative instrument specifying the circumstances in which an employee is taken to have suffered, or be suffering from, post-traumatic stress disorder by making a determination outlining when a person will be taken to be suffering from a post-traumatic stress disorder.

Subsection 7(13) would specify that a person, being an 'employee' within the meaning provided by existing section 5, was a first responder if they were:

- the Commissioner of the Australian Federal Police, a Deputy Commissioner of the Australian Federal Police, or an AFP employee (all within the meaning of the Australian Federal Police Act 1979),
- employed as a firefighter,
- employed as an ambulance officer or paramedic,
- employed as an emergency services communications operator, or
- a member of an emergency service within the meaning of the Emergencies Act 2004 (ACT).

First responders, emergency service workers and volunteers (herein collectively referred to as 'first responders') experience high rates of mental health conditions due to the demanding work first responders perform for our community and the consequent risk to their psychological health, which, in some cases, is contributed to by workplace culture. While complex in nature, the ACTU maintains that seeing duty holders fulfil their obligations under work health and safety (WHS) laws to eliminate or minimise risks to psychological health in the workplace so far as is reasonably practicable must be the priority for legislators and regulators. However, acknowledging that exposure to such environments inevitably results in deleterious effects, the ACTU strongly supports the introduction of the presumptive legislation covering PTSD, noting that its introduction will not only encourage more first responders to seek timely assistance, but also ensure that claims are dealt with efficiently and do not contribute to workers having to relive these experiences as part of a claims process, which, by its very nature, may itself result in further trauma and in exacerbation of disease.

How the Bill can be strengthened

There is a range of working environments with potential exposure to trauma and vicarious trauma – these include, but are not limited to, the list of first responder occupations specified in the legislation. Subsection 7(13) would provide an exhaustive list of 'first responders' to whom the presumption in subsection 7(11) would apply.

Unions believe that, given the diagnostic criteria for making a claim for PTSD requires a direct link to a workplace traumatic event(s), all workers covered by the SRC Act should be afforded presumptive rights. However, we acknowledge the Commonwealth reluctance to do this and instead propose an expansion of the definition of 'first responder' to recognise that many workers covered by the SRC Act may be exposed to trauma and vicarious trauma during the course of their employment. These include, but are not limited to the following organisations/agencies or occupations:

- Australian Border Force – heightened risk not limited to just National Marine Unit, would be across the entire unit ABF.
- Services Australia – heightened risk not limited to just those doing disaster relief response, also include those working with vulnerable members of the community.

- Immigration case offices – exposed to trauma associated with those seeking asylum.
- Social Workers – Example Agencies include Services Australia and Federal Court staff
- Digital Forensics Officers – Example Agencies with specified Digital Forensics Teams – Australian Federal Police, Australian Border Force, Australian Taxation Office, Service Australia, ACIC
- Community Workers – working with Indigenous Communities – Example Agencies include Aboriginal Hostels, NIAA, Services Australia
- Health care – workers engaged in providing health care services, including but not limited to emergency medicine and midwifery.
- Security, including personal security (Armaguard and Wilson)
- Within the ACT Government:
    - First responder (police, fire, ambulance and emergency service workers),
    - Corrections – including youth detention,
    - Community workers, and
    - Health care - workers engaged in providing health care services, including but not limited to emergency medicine and midwifery.

The ACTU supports the United Firefighters Union proposal that the Act itself should describe the circumstances under which the presumption will operate, in order to streamline access. Particularly, by specifying who can diagnose and expanding the range of practitioners who can provide a diagnosis, to ensure that diagnosis by a General Practitioner qualifies a worker for the presumption.

<u>Recommendations</u>

Recommendation 39. Expansion of the definition of "first responder" in subsection 7(13) to whom the presumption in subsection 7(11) would apply.

Recommendation 40. The ability for the Minister to make a legislative instrument specifying further occupations, agencies, organisations or licensees for whom presumption should be granted with the indicative list above serving as the basis for initial consultation.

Recommendation 41. Amend s7(11) to 'an employee has been diagnosed by a medical practitioner, psychiatrist or psychologist as suffered, or is suffering, from post-traumatic stress disorder'.

Recommendation 42. Delete s7(12).

Part 3 – Enabling multiple franchisees to access the single enterprise Stream

The FW Act has, since its inception, permitted the making of enterprise agreements involving more than one employer in a franchise arrangement. In most circumstances, bargaining for such an agreement has required the FWC to make a single interest employer authorisation as a pre-condition. The amendments made by the SJBP Act improved access to the making of single interest employer authorisations by permitting applications for those authorisations to be made not only by employers but also by bargaining representatives of the employees.

The amendments proposed in Part 3 of the Closing Loopholes Bill will preserve the existing pathways for making enterprise agreements with more than one employer in a franchise arrangement. However, they will open an additional pathway – the making of a single enterprise agreement.

Single enterprise agreements are the most popular form of enterprise agreement, requiring no formality in the Fair Work Commission for the voluntary commencement of bargaining and well-established processes for initiating bargaining through majority support determinations. Whilst single enterprise agreements are *usually* made with only one employer, they *can* be made with more than one employer where those employers are either related bodies corporate or engaged in a joint venture or common enterprise. Such employers are referred to as "related employers". Item 31 of Schedule 1 of the Closing Loopholes Bill will expand the definition of "related employers" to also include employers that carry on similar business activities under the same franchise and are:

- franchisees of the same franchisor; or
- related bodies corporate of the same franchisor; or
- any combination of the above.

These are the same descriptors of franchise arrangements that have existed in subsection 249(2) of FW Act in relation to single interest employer authorisations since the commencement of the FW Act.

The franchise sector has often been identified by the Fair Work Ombudsman as a priority area[119], and there are numerous examples of compliance concerns in franchise networks including United Petroleum, Pizza Hut, Caltex and 7-11. Indeed, compliance concerns in franchise networks were a driver of reforms to the accessorial liability framework in the FW Act made by the previous

[119] See FWO (2019), *Emerging Franchises Compliance Activity Report*

government in the *Protecting Vulnerable Workers Act*[120]. A key benefit in strengthening access to bargaining among franchise operations is allowing franchisee operators and franchisor "own store" operations to bargain together on a level playing field for simple agreements that offer fair wages and conditions that are compatible with operating requirements across the network.

How the Bill can be strengthened

The enterprise agreement making framework in the FW Act is an outlier internationally insofar as it provides for the making of collective agreements without the consent of a union. This was ameliorated to some extent in relation to multi-enterprise agreements through the introduction in the *Secure Jobs, Better Pay Act* of a requirement on employers to seek the consent of employee organisation bargaining representatives before submitting an agreement (or variation thereof) to a vote of employees.[121] This requirement does not exist in relation to single enterprise agreements. Whilst the Bill seeks to introduce this requirement in relation to single enterprise agreements in some circumstances, it is not proposed that it be introduced in relation to the single enterprise agreements relating to franchising operations facilitated by Part 3 of the Bill.

Franchise operations are prevalent in the retail, fast food and restaurant/hospitality sector and tend to employ a high proportion of vulnerable workers, many of whom are engaged on a casual basis and for a mere fraction of the maximum nominal term of enterprise agreement. There is a high risk that poorly represented workers will have insufficient information to bargain effectively for terms and conditions that sufficiently protect and advance both their own interests and the interests of those who will perform their roles over the term of the agreement. There is a strong case for introducing a requirement for the consent of employee organisation bargaining representatives to be sought before submitting such agreements for an employee vote.

Recommendations

Recommendation 43. That consideration be given to extending the regime of employee organisation consent (s. 180A) and voting request orders (240A-240B) to single enterprise agreements proposed in franchise settings pursuant to the provisions in Part 3 of Schedule 1 of the Closing Loopholes Bill.

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[120] *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017, at Part 2 of Schedule 1;* See also FWO (2017) Submission at p 10-15; FWO (2023), 85 Degrees franchisor faces court

[121] See FW Act s. 180A, 207A

Part 4 - Model Terms

Currently, the FW Act requires enterprise agreements to contain (among other things) flexibility terms[122], consultation terms[123] and terms about resolving disputes[124]. Each of these terms must meet certain requirements. Model terms which meet these requirements are currently provided in the *Fair Work Regulations,* however they have not been revised in a decade.

Where an enterprise agreement does not contain a flexibility term or a consultation term that meets the requirements set out in the FW Act, the agreement can be approved but the relevant model term is taken to be included. Where an enterprise agreement does not contain a dispute resolution term that meets the relevant requirements, the agreement will either not be approved or potentially approved with undertakings. The practical function of the model dispute resolution term is to provide an example of a term which meets the relevant requirements which parties can then tailor to their needs.

It is desirable that all model terms meet contemporary standards and reflect that they will operate in negotiated instruments which are required to ensure that employees are better off overall than would be the case if they relied on the award safety net.

The amendments proposed by the Closing Loopholes Bill will require the FWC, constituted by a Full Bench, to determine new model terms for consultation, flexibility and dispute resolution. It is envisaged that a Full Bench will also have a power to periodically vary such determinations. In making (or varying) each such determination, a Full Bench must take into account:

- Whether the model term is broadly consistent with the comparable terms in modern awards;
- Best practice workplace relations as determined by FWC;
- Whether all persons and bodies have had a reasonable opportunity to be heard and make submissions to the FWC for consideration in determining the model term;
- The objects of the FW Act; and
- Any other matter the FWC considers relevant.

Additional requirements will apply to the determining of each of the particular model terms, as follows:

- A model flexibility term must meet the existing requirements set out at sections 203(2)-(4) of the FW Act, which deal with formal requirements, permitted matters, unlawful terms, protecting outworkers, genuine agreement and ensuring employees are better off overall.

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[122] FW Act s. 202-203
[123] S. 205
[124] FW Act s.186(6)

When determining the model flexibility term, the FWC will be required to take into account the objects of Part 2-4 of the FW Act (which dealing with bargaining and approval of enterprise agreements).

- A model consultation term must meet the existing requirements set out in section 205(1)-(1A) of the FW Act, which specify the matters that a consultation term should provide for and some procedural requirements. When determining the model consultation term, the FWC will be required to take into account whether the model term would be likely to have the same effect as an objectionable emergency management term and also take into account the objects of Part 2-4 of the FW Act (which dealing with bargaining and approval of enterprise agreements).
- A model dispute resolution term must be consistent with the existing requirements in section 186(6) of the FW Act, which deal with ensuring the term provides for the representation of employees in disputes and allows the FWC or person independent of the parties covered by the agreement to settle disputes relating to the NES and matters arsing under the agreement. When determining the model dispute resolution term, the FWC will be required to take into account the limits on the FWC's dispute resolution powers.

Corresponding amendments are also proposed to deal with model terms in copied state employment instruments. These are "notional" instruments that reflect the terms of instruments made in State industrial relations systems. Copied state employment instruments essentially function to preserve the terms and conditions of employment of State public sector workers whose jobs are transferred into the private sector through privatisation for a limited period of time and pending the making of any enterprise agreement.

It is high time for these model terms to be reviewed and it sensible that the independent umpire be given the task of doing so.

How the Bill can be strengthened

In employment disputes, the practical reality is that the employer is the arbiter of complaints and grievances. This is a power that few employers are willing to relinquish. For this reason, providing for arbitration of workplace disputes by mutual consent alone merely provides an employer with a veto over arbitration rather than extending employee rights to effective dispute resolution. This state of affairs provides no incentive for improved employer behaviour or cooperative workplace relations. Conversely, if unfair or unreasonable decision making was met with a genuine risk of arbitration, the behavioural incentives would be reversed.

When setting standards of conduct by way of model terms for dispute resolution, it should be remembered that arbitration has a rich history in our industrial relations system, as a foundation of the award system and countless sensible and effective conclusions to workplace disputes both large and small. The current model dispute resolution term does provide for arbitration as of right, provided that less interventionist approaches have not resolved the dispute. We would expect that this would continue in the model term determined by the Commission.

In order to incentivise the proliferation of arbitration as of right and its positive impact on cooperative workplace relations, we would invite the government to consider how it might motivate

more employers to agree to include arbitration as of right in their enterprise agreements. This may include, for example, a no-disadvantage type comparison to the model term as an addition to the relevant approval requirements in subsection 186(6).

Recommendations

Recommendation 44. Consideration be given to further amendments to incentivise arbitration as of right (rather than only by mutual consent) in dispute resolution terms in enterprise agreements.

Part 5 – Transitioning from multi-enterprise agreements

The new provisions would allow employers to exit coverage of a multi-enterprise agreement by concluding a single-enterprise agreement with their workforce.

The SJBP Act made important reforms to improve access to multi enterprise bargaining. This importantly included the replacement of the *Low Paid* bargaining stream with the *Supported Bargaining* stream and substantial revisions to *Single Interest* bargaining. These new mechanisms made it possible for many sectors previously cut out of the bargaining framework to finally be able to negotiate for improvements to wages and conditions, many of whom were from sectors most effected by low wages and most impacted by the cost of living crisis.

Within weeks of those reforms taking effect, employee organisations and employers made consent applications to the Fair Work Commission seeking authorisation to bargain together in the public interest. This is reflective of the crucial role that the new multi-employer bargaining provisions play in providing an effective mechanism for accessing bargaining in many sectors where it had not previously been feasible to do so.

The provisions proposed in Part 4 of the Closing Loopholes Bill provide for employers and their employees to consensually exit from a multi enterprise agreement that was underpinned by either a supported bargaining authorisation or a single interest employer authorisation and instead agree to be covered by a single enterprise agreement. The multi-enterprise agreement that the relevant employer and employees are exiting from would remain intact and continue to apply to all other persons within its scope of coverage. Whilst this is possible under the law as it stands today, the amendments would allow this to occur *before* the multi-enterprise agreement had reached its nominal expiry date.

Several safeguards are built in to ensure that this new mechanism operates to the benefit of workers. Firstly, moving from an unexpired multi-enterprise agreement to the single enterprise agreement must be voluntary and consensual, in the sense that neither majority support determinations, bargaining orders or scope orders will be available to progress bargaining.

Secondly, before submitting a proposed single enterprise agreement to a vote, the employer must seek the written consent of each employee organisation covered by the existing unexpired multi enterprise agreement and either obtain that consent or obtain an order to permit the vote (which could not be granted unless the FWC formed the view that the failure to give consent was unreasonable).

Thirdly, the relevant employees would need to either be assessed as being better off overall under the terms of the new single enterprise agreement than under the existing multi enterprise agreement (whether expired or not) - or an acceptable undertaking given or permissible amendment made to the agreement to ensure this is the case. Consequential amendments are proposed to ensure that the new agreement can be reconsidered against this modified test in the event that the patterns or kinds of work or types of employment engaged in change after the agreement has been approved.

How the Bill can be strengthened

The safeguards provided are crucial protection against the deterioration of standards secured in multi-employer agreements. With multi-employer bargaining being a unique vehicle for many sectors to overcome the barriers otherwise prohibiting them from negotiating fair wages and conditions, having protections in place to ensure those rights remain is fundamentally important.

Whilst we welcome the intent of the provisions giving effect to a higher standard against which the BOOT is applied to single enterprise agreements which replace multi enterprise agreements, we have concerns that the current drafting of Item 42 of Part 4 of Schedule 1 does not properly give effect to that higher standard. This is because the item provides no equivalent to the concept of "reasonably foreseeable employee" which exists in respect of award covered employees. The result is that an existing employee covered by an extant multi-employer agreement is assessed against that agreement, but an employee not currently employed but within the scope of the agreement is assessed only against the award.

Recommendations

Recommendation 45. Item 42 be amended to ensure that both current employees and employees foreseeably within the scope of a replacement single enterprise agreement are assessed against the conditions in the extant multi enterprise agreement.

Part 2 - Small Business Redundancy Exception

Small Businesses (those with fewer than 15 employees) are exempted from paying redundancy pay under the NES.[28] This creates a loophole where some workers miss redundancy payments during corporate insolvencies, if their employer downsizes and then meets the definition of a small business prior to making them redundant (as commonly occurs during insolvency processes). This also means that those workers will not have access to the Fair Entitlements Guarantee (**FEG**) if the company goes into liquidation.

The proposed legislation will close this loophole by ensuring that employees are entitled to a redundancy if the redundancy occurs in connection with bankruptcy and liquidation if:

- The employer is a small business, but is only a small business because they have previously terminated employees;
- A worker is made redundant; and
- Within 6 months of that worker being made redundant, the employer enters into bankruptcy or liquidation.

Workers should not lose their rights to redundancy pay in circumstances where a business becomes a small business as a response to insolvency or the threat thereof.

Currently, this could occur in circumstances where a business employs 30 people, is experiencing financial illiquidity and makes 16 workers redundant so that they can "trade their way out" of any difficulties. In this scenario, if the company – now considered a small business for the purpose of the FW Act – made a further 4 workers roles redundant, those 4 workers would be exempted in relation to the obligation to pay redundancy pay. Equally, if the company did become insolvent at that point, these workers would not receive redundancy pay and would not be able to make a claim to FEG.

Another situation in which this might arise is if the remaining workers remained employed deliberately during the insolvency process through loyalty and wanting to assist the company to function in the hopes of remaining a viable going concern or simply as part of the winding up process.

How the Bill can be strengthened

The ACTU does not identify any amendments to these provisions.

Part 13 – Withdrawal from Amalgamation

The Fair Work (Registered Organisations Act 2009 (Cth) provides a mechanism for certain parts of amalgamated unions to apply to withdraw from the amalgamated union and establish their own union. The default position is that an application may be made within five years (but not less than two years) after the merger during which that part became a part of the amalgamated union.[29]

In 2021, the then Coalition Government changed the legislative scheme to allow for withdrawals to be made after 5 years had passed since amalgamation. Under those changes, the FWC could accept a withdrawal application if it considered that was appropriate, taking into account compliance of the amalgamated union and the withdrawing part's ability to represent members.

The proposed changes would repeal the changes made by the then Coalition Government in 2021. This would mean that parts of amalgamated unions could still withdraw post-merger but would have to do so within two to 5 years – as was the case prior to 2021.

Any application made under the 2021 provisions which has been the subject of Federal Court orders would continue to have effect, however any application for which court orders have not yet been made (when the legislation comes into effect) would immediately lapse.

How the Bill can be strengthened

The ACTU does not identify any amendments to these provisions.

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