Submission to the Senate Education and Employment Legislation Committee Inquiry into the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020

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About the submission

This submission is made in our capacity as academic experts in the field of labour law and labour regulation, and the views expressed are ours alone. We draw here not only on our own research, and that of others in our field, but on the practical experience of workplace relations that many of us have gained in acting for management, unions and/or workers, whether in legal practice or otherwise.

The submission does not comprehensively address every provision in the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (**the Bill**). Nevertheless, we touch on many of its key proposals for amending the Fair Work Act 2009 (**FW Act**) and indicate those which we support, or oppose, or believe could be improved through amendments. We also briefly highlight a number of missed opportunities for reform, as the country struggles not just to recover from the effects of the COVID-19 pandemic, but to deal with more longstanding concerns over the regulation of labour markets and the conduct of workplace relations.

Key points

1. We support a number of proposals in the Bill, in particular those concerning compliance and enforcement. There are some elements that we believe could be improved through appropriate amendments. But there are also many key reforms that we oppose, especially in relation to awards and agreement-making. We are concerned that the Bill will not just fail to address pressing labour market issues such as wage stagnation, insecurity of work and entrenched inequalities, it will exacerbate them. Overall, this is a deeply flawed initiative.

2. On **casual employment**, we agree that a statutory definition is much needed, not least to create greater certainty for both businesses and workers. But the definition proposed in the Bill would entrench the practice of long-term (or 'permanent') casuals doing jobs which are not truly casual, without necessarily precluding legal challenges to some of those arrangements. We are also concerned about having key elements of the changes operate retrospectively, without proper justification. The Bill could be improved by:

    - making the definition of casual employment genuinely objective;
    - requiring offers of conversion to permanent employment after six months rather than 12 months;
    - making any new definition of casual employment operate prospectively only;
    - creating sanctions for employers who knew or should have reasonably have known that the relevant employment was not genuinely casual; and

- strengthening the role of the Fair Work Commission (**FWC**) in resolving disputes.

We also note that the Bill will substantially increase administrative costs for employers, in support of a conversion right that few casuals are likely to even try to exercise.

3. In relation to the changes to **modern awards**, we oppose the proposals concerning both 'simplified additional hours agreements' and 'flexible work directions'. The former are a method of contracting out of overtime pay entitlements that will disproportionately affect women workers, while the latter permit employees to be redeployed or relocated in situations which need have nothing to do with recovery from the pandemic.

   Although both regimes would initially be limited to certain industries, they could be extended to all award-covered workers by regulation. No compelling evidence of efficiency and productivity gains for business has been presented. Nor does the supporting material for the Bill explain why the task of striking an appropriate balance between an employer's desire for flexibility and the desire of award-covered employees for stable and predictable working arrangements should not be left to the FWC.

4. In regard to **enterprise agreements**, the proposed new exception to the **better off overall test (BOOT)** would tear a gaping hole in the award safety net, and agreements created under the proposed changes could continue in existence well past the two-year sunset clause. No case has been made out as to why the existing BOOT provision for the approval of sub-award agreements in exceptional circumstances is not adequate to the task of assisting pandemic-hit employers. Even if the exception is not extensively used, it will encourage employers to pursue wage reduction strategies.

5. As for the Bill's proposals on the **process for making agreements** and having them approved, it is important to understand that, even as it stands, the FW Act does not require agreements to be the product of genuine bargaining or negotiation. The proposals to 'simplify' the process and preclude intervention by 'outsiders' will weaken some of the few procedural safeguards the Act provides for unrepresented workers. There will be no process clearly set out in the legislation for ensuring an agreement is genuinely made, and it will be harder to identify substandard deals, or to challenge the approval of agreements voted up by small and unrepresentative cohorts of workers.

6. The removal of the requirement for the FWC to ensure that agreements are consistent with the **National Employment Standards (NES)** will increase the chances of unenforceable provisions being included. Employees and employers will need legal advice to understand their legal rights and responsibilities, instead of being able to rely on the text of their agreement.

7. The **sunsetting of pre-FW Act agreements** is a welcome and long overdue step. But restricting access to **agreement termination** for three months after the nominal expiry date of an agreement could help preserve the effect of substandard 'zombie'

agreements made under the current regime. And for agreements that are substantially above the safety net, the change would reinforce the employer's bargaining power by giving them a timeframe in which to apply for agreement termination to pressure employees to accept their proposed new terms. Where bargaining over replacement agreements is deadlocked, arbitration is a better solution than agreement termination.

8. As for the **transfer of business** rules, the proposed exception for voluntary transfers within a corporate group has a sensible objective. But amendments are needed to ensure it cannot be used to allow corporate restructures that would deprive employees of the benefit of existing agreements.

9. The proposed changes to **greenfields agreements** would place the FW Act further in breach of international labour standards, by abrogating the rights of affected workers to strike for up to 8 years. Under International Labour Organisation (**ILO**) principles of freedom of association, workers in this position must be afforded access to timely mediation and arbitration to resolve disputes, something the Bill does not do. This becomes especially important for greenfields 'agreements' that are not agreements at all, but simply proposed by an employer and accepted by the FWC without either worker or union consent.

10. We generally support the changes proposed in relation to **compliance and enforcement**, although we have identified a number of uncertainties that could usefully be resolved. We also identify ways in which the reforms could be enhanced. In relation to the proposed **small claims process**, for example, we believe it would simpler and more effective for applicants to be given the option of lodging a claim directly with the FWC, as is presently possible with general protections disputes.

11. We are also concerned at how complex the process of determining **penalties for non-compliance** has become, and at the difficulties that will be presented in drawing a line between conduct which constitutes a 'serious contravention' (for which higher civil penalties can be imposed), and the dishonest and systematic underpayment which could attract criminal liability. While we support the changes, we recommend that once they are bedded down, a formal review of the penalty regime should be undertaken, to assess whether further clarification or simplification is required.

12. We support the proposals to expand the **FWC's powers and discretions**, subject to one concern. Not enough has been done to identify the criteria for requiring applicants who have previously had an 'unmeritorious' application dismissed to seek special permission before being allowed to make further applications.

13. Finally, there are a number of **missed opportunities** in the Bill. A number of these relate to the compliance and enforcement framework. They include the failure to take up previous proposals or recommendations to:

- introduce director disqualification orders as a sanction for non-compliance;
- narrow the current defence for employers accused of sham contracting;
- require wages to be paid into bank accounts;
- clarify how sanctions imposed under the FW Act affect the rights and obligations of migrant workers and their employers;
- introduce a licensing or registration scheme for labour hire; and
- make the superannuation guarantee scheme part of the NES.

14. We also identify other important topics that are crying out for action, such as:

    - a clearer definition of employment, and clarification of the status of digital platform workers and unpaid interns, among others;
    - implementation of the recommendations made by the Australian Human Rights Commission in its *Respect@Work* report; and
    - greater support for the FWC's role in promoting management/labour cooperation.

    These are matters that deserve a much higher priority than they are currently receiving, if they are being addressed at all.

Schedule 1 – Casual employees

Background – The prevalence of 'permanent casuals'

In February 2020, before the onset of the COVID-19 pandemic, around a quarter of all Australian employees, some 2.6 million in total, were estimated to be working on a casual basis. By May 2020, that figure had fallen to 2.1 million, as casuals bore a disproportionate burden of the job losses associated with the pandemic, before a recovery to 2.3 million by August.[1] Later surveys show that resurgence continuing, with casual employment accounting for 60% of all waged jobs created since that low point in May.[2]

For those covered by the FW Act, being a casual generally means having no minimum entitlement to annual leave, paid personal/carer's leave, notice of termination or redundancy pay. In compensation for not having those benefits, casuals are generally entitled to a loading of 25% on top of the basic pay rate they would otherwise receive,[3] although in practice those loadings are often not paid, either at all, or in full.[4]

The regulation of casual employment has long been complicated by the difficulty in determining who should be regarded as a casual.[5] The term has a range of possible meanings.[6] Almost all awards, and many enterprise agreements, define a casual as anyone who is 'engaged and paid' as a casual. Until recently, this had been generally understood to mean that, as a Full Bench of the FWC put it in a 2017 test case on award regulation of casual and part-time employment, 'casual employment for award purposes is usually no more than a method of payment selected by the employer and accepted by the employee at the point of engagement'.[7]

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[1] Australian Bureau of Statistics, *Characteristics of Employment, Australia, August 2020*, 11 December 2020.

[2] Dan Nahum and Jim Stanford, *2020 Year-End Labour Market Review: Insecure Work and the Covid-19 Pandemic*, Briefing Paper, Centre for Future Work, December 2020,

[3] As to the factors relevant to the calculation of such compensation, see *Re Metal, Engineering and Associated Industries Award, 1998 – Part I* (2000) 110 IR 247. The Australian Industrial Relations Commission noted in this case that while, historically, the loading 'may at times have been intended to deter employers from employing too many casuals', this should no longer be considered part of the rationale for determining an appropriate loading: ibid at [87], [187].

[4] David Peetz, *What Do the Data on Casuals Really Mean?*, Centre for Work, Organisation and Wellbeing, Griffith University, November 2020, pp 9–10.

[5] Andrew Stewart, Anthony Forsyth, Nark Irving, Richard Johnstone and Shae McCrystal, *Creighton & Stewart's Labour Law*, 6th ed, 2016,,[10.06]–[10.08].

[6] See Anthony O'Donnell, '"Non-Standard" Workers in Australia: Counts and Controversies' (2004) 17 *Australian Journal of Labour Law* 89 at 94–104; Peetz, above.

[7] *Re 4 Yearly Review of Modern Awards – Casual Employment and Part-Time Employment* (2017) 269 IR 125 at [362].

In practical terms then, as the FWC noted, 'casual employment may be used for the performance of short-term, intermittent and irregular work at one end of the range, but at the other end it may be used for long term work with regular, rostered hours'.[8] This explains why there are so many 'permanent casuals' in Australia.[9] These are workers who are hired as casuals, performing jobs which are either regular and ongoing from the outset, or turn out to be so. According to research quoted in the 2017 test case, 60% of casuals have regular rosters and have been with their current employer for at least six months. Just over a quarter (28%) have a job tenure of over three years.[10]

For many businesses, long-term casual employment has in effect become a way of purchasing flexibilities which may be real or apparent (or a mixture of both). For many workers, it is used (assuming they get a loading) to cash out leave entitlements which may not be wanted or needed. At a practical level, that may well suit many individuals and their employers. But the cost is a lack of job security that may have particular consequences at both an individual and societal level.[11] Those costs have certainly been exposed during the current pandemic, when having workers without paid leave entitlements in 'essential' jobs (such as cleaning and security for quarantine hotels, or aged care) has plainly had adverse consequences for public health.[12]

A further potential cost comes with the uncertainty over the legal status of many 'permanent casuals', a problem that has been known about for many years – even if it has taken two major recent cases to prompt belated action to address it. The issue is that while an employee may be *treated* by their employer as a casual, they may not actually *be* a casual as a matter of law. Or they might be a casual for some legal purposes, but not for others.

In *Workpac Pty Ltd v Skene*[13] a fly-in-fly-out worker in the mining industry who worked set rosters for nearly two years successfully argued that even if (as his employer believed) he had been engaged as a casual, he was not a 'casual employee' for the purpose of s 86 of FW

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[8] Ibid at [85].

[9] See Rosemary Owens, 'The "Long-term or Permanent Casual" – An Oxymoron or "A Well Enough Understood Australianism" in the Law?' (2001) 27 *Australian Bulletin of Labour* 118.

[10] Ibid at [115].

[11] See eg Independent Inquiry into Insecure Work, *Lives on Hold: Unlocking the Potential of Australia's Workforce*, ACTU, Melbourne, 2012; Anthony Forsyth, *Victorian Inquiry into Labour Hire and Insecure Work – Final Report*, Parliament of Victoria, 2016, Part II.

[12] See eg Rachel Clayton 'No paid pandemic leave for healthcare workers forces some to come to work sick', ABC News, 14 July 2020; Jennifer Coate, *COVID-19 Hotel Quarantine Inquiry: Final Report and Recommendations*, Victorian Government, December 2020, Vol I, pp 24, 193–8, 203–4.

[13] (2018) 264 FCR 536. For an earlier and similar finding, under equivalent provisions in the Workplace Relations Act 1996 (**WR Act**), see *Williams v Macmahon Mining Services Pty Ltd* (2010) 201 IR 123.

Act, which exempts such employees from the NES entitlement to annual leave. A Full Court of the Federal Court held that he was entitled to recover an amount in lieu of the untaken leave that should have been paid to him under s 90(2) of the Act when his employment ended.

As the court pointed out, there is no definition of 'casual employee' in the FW Act. Nor is there anything to suggest an intention by Parliament that if an employee is treated as a casual for the purpose of a particular award or agreement, they must necessarily have the same status for NES purposes.

The court held that the term 'casual', when not otherwise defined, should be understood to encompass an arrangement where there is no commitment by either the employer or the worker to ongoing employment. The court described the 'essence of casualness' as being 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'.[14] The court also held that, contrary to the general understanding set out above, an employee is not truly 'engaged' as a casual merely because their employer chooses to treat them as such. Their work must *objectively* have the characteristics of being temporary, irregular and uncertain.

In a follow-up case with broadly similar facts involving the same employer, *Workpac Pty Ltd v Rossato*,[15] a differently constituted Full Court upheld the decision in *Skene*. The court also held that the employer could not reclaim the casual loading it had paid to the misclassified casual. Nor could it 'set off' any of the loading against its liability for unpaid leave entitlements. An appeal against this second decision, backed by the federal government, is currently before the High Court, but a ruling is not expected for some months.[16] There is no certainty that the court will overturn the Federal Court's interpretation of the law – or, even if it does, that it will do so in a way that provides clarity for businesses and workers.

For the present, what the *Workpac* decisions mean in practice is that there may be a very substantial number of employees (though the exact number is unclear) who are being wrongly treated as casuals. Any of those workers – and indeed anyone in a similar position whose employment has ended in the last six years – may potentially have a claim for unpaid annual leave.[17] It is also quite possible that employers have been (and are) breaching the FW Act, awards or agreements in other ways, exposing them to liability for penalties or other types of underpayment. As employer groups have pointed out, the potential liability

[14] Ibid at [169], quoting *Hamzy v Tricon International Restaurants* (2001) 115 FCR 78 at [38].

[15] (2020) 378 ALR 585.

[16] 'Workpac wins chance to overturn Rossato judgment', *Workplace Express*, 26 November 2020.

[17] The six year limitation is imposed by s 544 of the FW Act. Note, however, that where an employee has left a job within that time period, it is unclear whether their claim for unpaid annual leave may extend back to the original date of their engagement, even if that was more than six years ago. That depends on the operation of s 545(5), which can be interpreted in different ways.

for employers, many of them small businesses, could run into the billions of dollars,[18] depending on how broadly the *Workpac* understanding of casual employment was applied.[19]

Casual employment and labour hire

It is also important to understand another and more specific aspect of the issues raised by the prevalence of casual employment. The *Workpac* 'problem' arose because the workers concerned were engaged on casual contracts by a labour hire agency, and then 'lent' to host employers who placed them on long term permanent rosters, working side-by-side with directly hired employees.

The phenomenon of labour hire has contributed to the problem of insecure work in Australia, not because it has necessarily prevented employees from obtaining long term work assignments, but because the legal protections that they enjoy while undertaking those assignments are often inferior to the entitlements enjoyed by directly hired employees.[20] That type of disadvantage may be compounded where the labour hire body is not an agency that conducts a general business of hiring out workers, but is just a shell company established to supply a single 'client'.[21]

These consequences flow from the 'triangular' nature of the arrangements involved and the way Australian law has decided to construe those arrangements. According to Australian law, the worker is generally deemed to be engaged by the labour hire agency, either as an employee or an independent contractor,[22] depending on the terms of the contract with the labour hire agency. Where the contract is one of employment, the labour hire agency is then said to delegate their authority to control the employee to the host employer, under the terms of the commercial contract between labour hire agency and host. The host employer, who in reality commands the terms and conditions (including rosters) under

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[18] See eg Australian Industry Group, 'Parliament needs to act quickly to protect businesses and the community from "double-dipping" by casuals', media release, 13 September 2018; Australian Industry Group, 'Casual employment decision increases JobKeeper risks', media release, 21 May 2020.

[19] Compare the fairly narrow approach taken in *Birner v Aircraft Turnaround Engineering Pty Ltd* (2019) 287 IR 174.

[20] See Forsyth, *Victorian Inquiry into Labour Hire and Insecure Work*, above, Part I; Senate Education and Employment References Committee, *Corporate Avoidance of the Fair Work Act 2009*, Commonwealth, Canberra, 2017, ch 5.

[21] See eg *Damesvki v Giudice* (2003) 133 FCR 438.

[22] See eg *CFMMEU v Personnel Contracting Pty Ltd* (2020) 381 ALR 457. An application for special leave to appeal this decision is presently before the High Court.

which the employee works, is deemed to have no direct contractual relationship with the employee at all.[23]

It is because the legal obligations in these triangular relationships are construed in this way that *Workpac*-type circumstances arise in the first place. An employee may be engaged by a labour hire agency on a casual contract, and paid an hourly rate of pay that is sufficient to meet the minimum wage stipulated by a modern award, including the 25% casual loading. The worker is then assigned to work for a host, who rosters the employee on to a permanent roster, often alongside directly hired staff who enjoy the benefit of a collectively bargained enterprise agreement with considerably higher wages. The directly hired employees may well earn a higher hourly rate of pay than the labour hire workers, even taking into account any casual loading paid to the labour hire workers, in addition to receiving their mandatory leave entitlements under the NES. Directly employed staff also enjoy protection from unfair dismissal (once they have met the minimum employment period).

The incentives for employers to use agency staff are clear, and explain why the decisions in the *Workpac* cases caused such concern among employer groups. An invention (labour hire), originally justified on the basis that it was a means of providing genuinely temporary staff to deal with unpredictable fluctuations in demand for labour, has become a practice for engaging a permanent workforce, largely because the legal construction of the triangular work arrangement helps the host to avoid many of the statutory obligations involved in the direct hire of permanent staff, not to mention the obligations imposed by collectively bargained enterprise agreements that they themselves may have negotiated and freely accepted.

The Bill's proposals

The proposals in Schedule 1 of the Bill have three main elements, each of which we discuss further below.

The first is to clarify what constitutes casual employment, by adopting in a new s 15A what the Regulatory Impact Statement (at p xi) describes as an 'objective definition which provides that a casual employee is a person who has accepted an employment offer on the basis that there is no firm advance commitment to continuing and indefinite work according to an agreed pattern of work'.

The second is to strengthen and extend the capacity for conversion from casual to 'permanent' status. In the 2017 test case mentioned above, the FWC decided, as part of its review of modern awards, to adopt a standard provision for the making and determination

[23] See eg *Staff Aid Services v Bianchi* (2004) 133 IR 29; and see further *Creighton & Stewart's Labour Law*, above, [10.23]–[10.28].

of requests by long-term casual employees to convert to full-time or permanent part-time employment. It was decided that 85 awards should have such a provision, on top of the 27 awards that already provided for casual conversion. In most instances, the new casual conversion provisions took effect in October 2018.[24]

Under the Bill, the right to request conversion would become a (qualified) right to be *offered* conversion. This would be part of the NES, under a proposed new Division 4A of Part 2-2 of the FW Act. As such, it would potentially apply to *all* national system employees, regardless of whether their employment was governed by an award or an enterprise agreement. If a casual worked for 12 months, with regular hours over at least the most recent six months, they would either need to be formally offered conversion to permanent employment, or given written reasons why such an offer would not be appropriate (which might, for example, include anticipated reductions in working hours). If an eligible employee was not offered conversion, they would still be entitled to request it, with employers able to refuse on reasonable grounds. The FWC would, at least as a general rule, be able to help resolve disputes about the operation of the new Division.

To bolster awareness of these rights, there would also be a new administrative requirement for employers when engaging *any* casual employee, under new ss 125A–125B. All new casuals would need to be given a pro forma Casual Employment Information Statement prepared by the Fair Work Ombudsman (**FWO**).

Thirdly, the Bill seeks to protect employers, both prospectively and retrospectively, against the consequences of misclassification. Under a new s 545A, if an employee who had been paid as a casual, including an identifiable casual loading, subsequently established that they were not in fact a casual employee, and sought payment for certain unmet entitlements (including untaken annual leave, redundancy pay or pay in lieu of notice of termination), the employer would be able to offset against those amounts some or all of the loading. This would in effect overturn a key part of the decision in *Workpac v Rossato*. But the employer would remain liable for any penalties that might be imposed by a court for failing to provide the relevant entitlements.

The new definition of casual employment

We agree that a statutory definition of 'casual employee' for the purposes of the FW Act, such as the NES provisions in s 86 (annual leave), 97 (personal/carer's leave) and 123(1)(c), is much needed. It is clearly preferable to enact a transparent statutory definition so that employers understand their obligations and employees know their rights at the time they

[24] *Re 4 Yearly Review of Modern Awards – Casual Employment and Part-Time Employment* (2017) 269 IR 125.

enter into arrangements, rather than waiting for decisions of courts often months or years after disputes arise.

The proposed definition in the new s 15A, however, is flawed and will not necessarily avoid future disputes over whether an employee has been genuinely engaged as a casual. At its worst, the provision will increase the casualisation of the Australian workforce, to the detriment of initiatives to improve job security, and exacerbate the public health impacts of precarious working arrangements.

The essential characteristic of casual work stated in s 15A(1)(a) certainly *appears* to conform with the common law definition of casual employment developed in a body of case law and accepted most recently in the two *Workpac* cases discussed above. According to the Federal Court, as we have noted above, casual employment arises when an employer makes no firm advance commitment to provide continuing work according to an agreed pattern of work, and correspondingly, when the employee makes no advance commitment to accept shifts whenever they are offered. The proposed statutory definition, on its face, adopts the same approach, but includes some elements ostensibly to deal with what might be called the '*Workpac* problem' – the misclassification of permanent employees as casuals so that there is confusion as to whether they are entitled to NES leave entitlements, notwithstanding that the employer has paid wages recognising an entitlement to a casual loading.

The obvious weakness in the statutory definition is that an employee's status is to be determined only on the basis of the original offer made to the employee, and cannot take account of 'any subsequent conduct of the parties' (s 15A(4)). The terminology of 'offer and acceptance' adopts the language of classical contract law. A contract is made when one party (here the employer) makes an offer on sufficiently certain terms that it is accepted on those terms by the other party (here the employee).[25]

The reference to ignoring 'subsequent conduct' also appears to invoke the contract law doctrine that the conduct of parties in making their agreement is not permitted into evidence in resolving disputes as to what the parties have agreed. As Justices Gummow, Hayne and Kiefel JJ put it in *Agricultural and Rural Finance Pty Ltd v Gardiner*,[26] 'it is not legitimate to use as an aid in the construction of [a] contract anything which the parties said or did after it was made'. But even as a matter of common law, it is plainly permissible to have regard to the parties' later conduct in determining whether they reached agreement, or at what point they intended their agreement to take effect.[27]

[25] See Andrew Stewart, Warren Swain and Karen Fairweather, *Contract Law: Principles and Context*, Cambridge University Press, Melbourne, 2019, pp 80–1.

[26] (2008) 238 CLR 570 at [35]. See also *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603.

[27] *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540.

More relevantly for present purposes, it is now well established that subsequent conduct may also be relied upon to help characterise a contract for regulatory purposes – including in determining whether an agreement for the performance of work is an employment arrangement.[28] In that context, recourse to such evidence has been particularly important where employers have used standard-form contract documentation, without paying regard to whether the terms of the document reflect the actual arrangements made with employees. It has also been important in cases where employers (often on legal advice) draft contract terms strategically to avoid characterisation of the contract as one of employment, even when they have no intention of applying those terms during the management of the relationship.[29]

As Justice Wigney explained in a recent decision:[30]

> where the court must determine whether a relationship subject to a contract is one of employment, the relevance and weight of the parties' intentions in entering into that contract must be characterised in light of the reality of the respective bargaining positions of each party. While the execution of the contract may evince the requisite meeting of the minds to establish a binding contractual relationship, accepting this is only the starting point in analysing the nature of the parties' relationship …

In *Workpac v Skene*[31] the Full Court emphasised the importance of taking a similar approach to the determination of casual status, insisting that it is necessary to consider '[t]he conduct of the parties to the employment relationship and the real substance, practical reality and true nature of that relationship'.

Clearly, the new definition is intended to overturn that aspect of the *Workpac* decisions, by insisting that casual status must be determined according to what has been initially agreed, and not anything that subsequently happens. This is made clear in the Explanatory Memorandum (at para 19):

> the absence of a firm advance commitment is only to be assessed on the basis, and at the time, of the offer and acceptance of employment, and any subsequent conduct is irrelevant. This means a person's employment status cannot unintentionally change over time.

Proposed s 15A(5) also makes it clear that once an employee accepts an offer of employment as a casual, they will retain that status unless and until converted to

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[28] See Pauline Bomball, Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (2015) 32 *Journal of Contract Law* 149.

[29] For notable examples, see *Autoclenz Ltd v Belcher* [2011] ICR 1157; *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146; *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346.

[30] *Jamsek v ZG Operations Australia Pty Ltd* (2020) 297 IR 210 at [196].

[31] (2018) 264 FCR 536 at [180].

permanent employment, or they accept an alternative offer of employment other than as a casual and commence work on that basis.

It seems to us to be inevitable that if this new definition is introduced, it will become standard practice (to the extent it is not already) for any employee whom an employer wishes to treat as a casual to be engaged under carefully drafted written terms that insist there is no commitment that work will be offered, and no expected pattern of hours – even if that is completely at odds with the intended or likely reality of the work arrangement.

There are two possible consequences of this practice. Either it works, and the socially damaging practice of 'permanent casual' employment is entrenched or even extended. Or, it doesn't, and employers are caught out by courts or tribunals seeing right through such an arrangement. The latter could happen in at least two ways. The initial offer could be treated as a sham, or pretence,[32] with the 'real' agreement being a verbal or tacit offer of ongoing and predictable employment. Or, if an arrangement that is formally presented as irregular and unpredictable quickly settles down into a regular pattern, it night be concluded that the parties have implicitly agreed to vary or replace the initial contract, so that there would now be the 'alternative offer of employment' contemplated by s 15A(5).[33]

Of those two possibilities, we are inclined to think the first is more likely. But even so, the new formula will not, in our opinion, provide anything like a complete level of comfort to employers who want an unfettered freedom to engage employees as casuals. The insistence on using the 'objective' language of the *Workpac* definition, while simultaneously insisting on a preference for contractual form over substance and practical reality, seems to us to create a tension which is ripe for exploitation by subsequent litigants.

It is our strong view that the reference to determining casual status upon original 'offer and acceptance', with no recourse to any evidence of the 'subsequent conduct of the parties' should be deleted from the proposed definition. This would ensure that employers' arrangements with employees will be assessed on the basis of the reality of the arrangements they make with recruits, not on any cloud of words provided in written documentation that the parties themselves may have tacitly agreed to ignore, or that the employee concerned has no power to change.

The way in which the definition of casual employment in proposed s 15A has been drafted will also exacerbate the problem of labour hire workers being treated as casual, even when filling something other than temporary labour needs. A focus only on the terms of the

[32] As to the distinction at common law between a sham and a pretence, see Stewart, Swain and Fairweather, above, pp 169–70; and see further Pauline Bomball, 'Intention, Pretence and the Contract of Employment' (2019) 35 *Journal of Contract Law* 243.

[33] Note that even if the original contract insisted that any variation must be in writing, this could not preclude effect being given to a subsequent and sufficiently clear oral agreement to vary the original terms: see *Bundanoon Sandstone Pty Ltd v Cenric Group Pty Ltd* (2019) 373 ALR 591 at [122].

contract between the worker and the labour hire agency that ignores the reality of the working arrangement between the worker and host will perpetuate the proliferation of casual engagement of what are effectively permanent staff. As we have noted, the COVID-19 pandemic has exposed the public health risks of hiring large sections of the workforce in arrangements that do not provide for paid leave. Workers without paid leave entitlements are more likely to attend for work when unwell, risking the transmission of disease. This Bill is said to be justified on the basis that it promises some necessary adjustments to the regulation of working relationships in a time of a public health crisis. The particular proposal put forward for a definition of casual employment does nothing to address the problems exposed by the pandemic, and is very likely to exacerbate the public health risks caused by a proliferation of insecure work.

The casual conversion provisions discussed below will do nothing to address this in the case of workers hired by labour hire agencies, because the nature of the commercial arrangements between labour hire agencies and host employers will generally justify a claim by the labour hire agency that its contracts with workers cannot be other than casual, because they are subject to the risk of termination if the commercial contract is terminated. Unless labour hire employees have an option of converting to permanent employment with the host employer, the conversion entitlements are of no real benefit to these employees at all.

Casual conversion rights

We do not oppose the notion of creating a general right to be offered or to request conversion to permanent employment, once an engagement that was initially casual in nature has gradually evolved to become a regular and stable arrangement. But we do not see such a right as an effective way of dealing with the misuse of casual employment for a job that, in functional and practical terms, was never anything but ongoing from the outset. This is for the simple reason that there is no evidence conversion rights have any practical effect:

> There are few reported instances of casuals even asking for conversion, let alone getting it. Aside from the fact that casual employment genuinely suits some workers, a major barrier for others may be the prospect of a drop in take-home pay with the loss of their casual loading. Even for those who might be inclined to prefer a switch, individual workers are naturally reluctant to challenge their employers while still in a job, especially if they lack union support.[34]

The main point here is the question of pay. Few lower-paid casuals are likely to be able to afford the loss of a casual loading (assuming it has been paid), after relying on it for at least a year, especially if it is to be sacrificed to gain contingent benefits such as paid sick leave or

[34] *Creighton & Stewart's Labour Law*, above, [10.12] (references omitted).

redundancy pay that may never eventuate. For that matter, even wealthier employees with expensive mortgages to service may feel disinclined to take the pay cut.

If the rather convoluted provisions on conversion are unlikely to provide any real benefit to employees, they will nonetheless create considerable record-keeping and other administrative requirements for employers, given the detailed timing requirements and formalities proposed. We note that, by virtue of proposed clause 47 of Schedule 1 to the FW Act (see Schedule 7 to the Bill), those requirements will include having to make a formal assessment of the status of *every casual* working for a national system employer, within six months of the new provisions commencing.

Notwithstanding the length and detail of the conversion provisions, from an employee's point of view they provide nothing more than a practically unenforceable entitlement to request conversion to permanency. They can be used only when the employee has been employed for at least a year, and on a permanent basis (from the perspective of the common law definition of casual employment) for at least six months.

If conversion entitlements are to be legislated, employees who do in fact work regularly and systematically with an expectation of continuing work should be granted an entitlement to regularise their working arrangement from a legal point of view as soon as their working arrangements become settled and they have a reasonable expectation of continuing work on a regular and systematic basis. Accordingly, if the conversion provisions are to be retained, the right to be offered permanent employment should cut in at six months, not 12 – the same time as most regular casuals become entitled to bring unfair dismissal claims, under ss 383 and 384(2(a).

A final point concerns the issue of dispute resolution over the operation of the conversion provisions. Under proposed s 66M, there is no access to arbitration by the FWC unless the employer agrees. Moreover, in the case of award/agreement-free employees, employers will be able to contract out of any role for the FWC, even of a facilitative kind, simply by offering an internal and entirely non-independent review. Both of these are deficiencies in the scheme that should be addressed. We also believe that the FWC should have broader powers to deal with disputes concerning the initial classification of 'casuals', not just what are likely to be the much rarer instances of disputation over conversion decisions.

Protecting employers against liability for misclassification

We accept the proposition that a fair and balanced resolution of the problem highlighted by the *Workpac* decisions should include some protection for employers (and especially smaller employers) who have unintentionally misclassified permanent employees as casuals. Without needing any recourse to the unhelpful language of 'double-dipping', we can also see the force in the argument that if an employee has been paid a casual loading that was both legally designed and intended by the employer to compensate for the absence of

certain benefits, that payment should be taken into account in assessing an employer's liability for failing to provide those benefits.

However, aside from the fact that we do not see the Bill as offering a fair and balanced solution, because of the flawed definition of casual employment and the over-reliance on conversion processes that are likely to be of little practical value, there are a number of problems with the way it seeks to immunise employers.

The most important of these is the intent to remove or qualify the rights of misclassified casuals with retrospective effect, something that is sought to be achieved by the transitional provisions in Schedule 7 to the Bill, and in particular the proposed addition of subclauses 46(3) and (7) to Schedule 1 of the FW Act. This can be contrasted with the far more conventional approach taken to the operation of other changes proposed by the Bill.[35] We find it astonishing that no attempt appears to have been made in the material accompanying the Bill to justify this kind of retrospective operation. It is worth emphasising in particular that the problem exposed by the *Workpac* cases is not in any sense a new one, as the extensive earlier case law canvassed in those decisions reveals. *The risk of misclassification is one that has been known about for many years*.[36] Clearly many employers (and certainly those with access to professional advice) have been choosing to take the risk of adverse legal decisions as to the status of long-term casuals.

We stress that this does not of itself mean that some level of protection is not appropriate. But any retrospectivity in a change to the law should ordinarily call for a level of justification and careful analysis that is simply missing here. To take just one point, what is the status now of any annual leave payouts previously made to employees who were correctly determined on the basis of the law as it stood at the time to be permanent employees, but who would now be deemed by the new s 15A to have been casuals all along? Is the employer now entitled to a refund? To avoid such problems, we strongly urge, at the very least, the deletion of the proposed subclause 46(3).

We would also highlight the element of moral hazard that the Bill's approach to immunising employers appears to create, in that the 'shield' that the new scheme seeks to provide is likely to be most useful to employers who have knowingly taken the risk of misclassification and sought to anticipate that by ensuring there is a clearly identified 'loading amount'.

That raises the broader question of whether the protections offered by the Bill should be available to employers who have intentionally or recklessly misclassified workers. The notion of penalising employers for such conduct is already recognised in the 'sham

[35] Compare, for instance, the proposed clause 55 of Schedule 1 to the FW Act. This ensures that the higher penalties for remuneration-related contraventions introduced by Schedule 5 to the Bill only apply to conduct after commencement of the amendments.

[36] See eg Breen Creighton and Andrew Stewart, *Labour Law*, 5th ed, Federation Press, Sydney, 2010, [8.07].

contracting' provisions in ss 357–359 of the FW Act. These provisions were originally introduced into federal legislation by the Howard Government at the time the Work Choices laws and the Independent Contractors Act 2006 (Cth) were enacted,[37] demonstrating that Australian governments of all persuasions have been alert to the risks of permitting mischaracterisation of employment relationships. As presently drafted, however, the sham contracting provisions deal only with sham independent contracts. In our view, the proposed definition of casual employment should be supported by similar anti-avoidance provisions, making it a breach of the Act to misrepresent a continuing employment relationship as a casual engagement, to discourage any practice of documenting offers of employment in terms that deliberately disguise the reality that the agreement is one for continuing employment.

Conclusion

It is important to appreciate that there are a number of separate problems with casual employment that need to be addressed, even though they have a common source. One is the prevalence of long-term (or 'permanent') casuals, doing jobs which are not truly casual. A second is the use of casual labour hire engagements to avoid the responsibilities of direct employment. A third is the potential exposure of employers to billions of dollars in claims for unpaid entitlements from misclassified casuals.

The source of each of these problems is the lack of a clear, accepted and consistently adopted definition of casual employment that confines it to employment that is genuinely temporary, irregular or uncertain. The current position is one that governments of both sides, tribunals, employers and unions have allowed to develop over several decades. It is not one that started with the FW Act.

Overall, what the Bill proposes is not a balanced resolution to the problem of the misuse or misclassification of casual employment. It could be improved by making the definition genuinely objective, requiring offers of conversion at six months rather than 12, making any new definition operate prospectively only, penalising employers who knew or should have reasonably have known that the relevant employment was not genuinely casual, and strengthening the role of the FWC in resolving disputes.

[37] *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006* (Cth) Sch 1.

Schedule 2 – Modern awards

Part 1 – Additional hours for part-time employees

The Bill proposes, as part of a new Division 9 of Part 2-3 of the FW Act, to allow permanent part-time employees who work at least 16 hours a week, and to whom certain awards apply, to agree to work additional hours at ordinary rather than overtime rates of pay. The awards in question would initially be limited to those in the retail and hospitality sectors, as well as the Business Equipment, Meat Industry, Nursing, Seafood Processing, and Vehicle Repair, Services and Retail Awards. But that list of 'identified modern awards' could be expanded at any time by regulation.

'Simplified additional hours agreements' (**SAH agreements**), as they are termed, would not be able to cover shifts of less than three hours, or that fell outside the span of ordinary hours specified under the relevant award, or that took the employee over certain award limits, such as 38 hours per week. Nor (at least in theory) would the employer be able to require employees to enter into SAH agreements, or put them undue pressure to do so, or take adverse action against them for failing to do so. Agreements would also be terminable by either party on 7 days' notice.

The stated policy intention underpinning the creation of SAH agreements is to promote flexibility and efficiency for business. However, part-time employees covered by identified modern awards will be financially worse off when working overtime hours and, as discussed below, women workers are likely to be disproportionately impacted by this proposal. This is a change we strongly oppose.

SAH agreements comprise a mechanism which fundamentally enables employers to contract out of a minimum labour standard. An underpinning rationale for the imposition of overtime pay on additional hours worked by part-time employees is to compensate those employees who agree to work hours for the inconvenience of working longer, unsocial, irregular or unpredictable hours, often with limited notice.[38] The impact of lowering labour costs by obviating employers' obligations to pay part-time employees overtime for unexpected additional hours is to eliminate the availability of compensation for this substantial inconvenience. Before this detriment is imposed, data should be presented demonstrating the efficiency and productivity gains for business that this statutory amendment would produce. That has not been done.

[38] See eg *Re 4 Yearly Review of Modern Awards – Casual Employment and Part-Time Employment* (2017) 269 IR 125 at [546]–[550], agreeing to a claim that casual workers in the hospitality sector be entitled to overtime rates.

Research also shows that more women than men are employed on a part-time basis.[39] Inequality and gaps in labour market outcomes in Australia, including for women, rose even prior to COVID-19.[40] Furthermore, in recent times, there has been little improvement in the gender pay gap.[41] We are concerned that the implementation of SAH agreements could disproportionately impact women workers by exacerbating existing earnings inequality. This is particularly significant given emerging research that the COVID-19 pandemic has already had an effect of this type in Australia.[42]

It is possible to argue that under current modern award terms requiring the payment of overtime rates, part-time workers would never have been offered additional hours, in preference over casuals. If so, it may be that some part-time workers who can accept additional hours (including women) will be better off if this amendment is enacted. However, in practical terms, these workers would be performing more hours for less pay than they would be entitled to receive under current modern award terms. And the casuals who might previously have been getting those extra hours, also more likely to be women, would lose out.

The proposed record-keeping requirements for SAH agreements are also capable of operating in a manner that could conceal instances where there has been no meaningful discussion of the terms of a SAH agreement between an employer and employee, or genuine agreement by an employee to those terms. The absence of any obligation to provide an employee who agrees to a SAH agreement with a written record capturing the terms of that agreement (unless the employee specifically requests it) is also likely to lead to an increased risk of disputes.

The proposal to introduce SAH agreements also comprises a duplication of a form of flexibility already existing under the FW Act, albeit with a more prescriptive procedural framework. Specifically, an employer and employee can already agree to vary the application of modern award terms relating to overtime in order to meet the genuine needs of both the employee and employer via an individual flexibility arrangement (**IFA**) under each identified modern award. If the underpinning rationale for the introduction of SAH agreements is concern that the IFA process is less efficient, this might be better addressed

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[39] Rae Cooper and Marian Baird, 'Bringing the "Right to Request" Flexible Working Arrangements to Life: From Policies to Practices' (2015) 37 *Employee Relations* 568.

[40] Peter Davidson, Bruce Bradbury, Melissa Wong and Trish Hill, *Inequality in Australia, Part 1: Overview*, Australian Council of Social Service and UNSW, Sydney, 2020, p 9.

[41] WGEA and Diversity Council of Australia, *She's Price(d)less': The Economics of the Gender Pay Gap*, 2016, p 35.

[42] Elizabeth Hill, *Reducing Gender inequality and Boosting the Economy: Fiscal Policy after COVID-19*, Labour Market Policy after COVID-19 Research Series, Committee for Economic Development of Australia, 2020; Davidson et al, above, p 16.

through an appropriate amendment to s 144 of the FW Act – though not if that involved any removal of the better off overall requirement in that provision.

Finally, the proposal creates a risk that it will create an incentive for employers to reduce guaranteed hours for permanent part-time staff, and so exacerbate rather than address the problem of chronic underemployment in the Australian labour market. Presently, and at least in most instances, employers have an incentive to set guaranteed hours at a level to match reasonable expectations of their need, because any underestimation requiring overtime will attract the obligation to pay higher rates. Under the proposed changes, employers will have an incentive to strip guaranteed hours back, in the knowledge that they will regularly be able to request additional hours without any overtime penalty. The proposed arrangements accordingly shift more of the burden of fluctuating demand onto the part-time workers. The present arrangements in awards generally encourage employers to make a reasonable assessment of needs when settling guaranteed hours, and so encourage predictable and secure rostering arrangements for permanent part-time employees. We see no reason why the FWC should not continue to have responsibility for setting award standards for each sector, and for striking an appropriate balance between an employer's desire for flexibility and the desire of employees to have stable and predictable hours.[43]

Part 2 – Flexible work directions

In April 2020, Part 6-4C was added to the FW Act.[44] It allows employers participating in the JobKeeper scheme the flexibility to stand down workers receiving government payments, or to reduce their hours of work, or change their job locations or duties.

Those provisions are due to expire in March 2021. However, the Bill proposes to replace them with a new Part 6-4D, to operate for a period of two years. This would continue to permit certain employers to direct employees to perform any duties within their skill and competency, or to perform their duties at somewhere other than their normal place of work. These powers could be exercised even in relation to employees never covered by the JobKeeper scheme. But they would be available initially only for employers and employees to whom an 'identified modern award' applies – that is, one of the awards in the sectors outlined above in relation to SAH agreements. Again, however, the provisions could be extended to any other award simply by regulation.

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[43] To take just one example of a provision that strikes such a balance in a careful and pragmatic way, see clause 10 of the Hospitality Industry (General) Award 2020, originally added by the 2017 test case: see *Re 4 Yearly Review of Modern Awards – Casual Employment and Part-Time Employment* (2017) 269 IR 125.

[44] Coronavirus Economic Response Package Omnibus (Measures No 2) Act 2020 (Cth) Sch 1 item 5.

'Flexible work directions' (**FWDs**), as they are called, would not be allowed to reduce working hours, nor cause any reduction in the employee's base rate of pay. They could apply only to the extent they were necessary to assist in the revival of the employer's enterprise, and were not unreasonable in all the circumstances. But the 'revival', it may be noted, need have nothing whatsoever to do with the pandemic, or the circumstances that spawned the need for JobKeeper and the provisions in Part 6-4C.

The stated policy intention underpinning the introduction of FWDs is to extend these two temporary JobKeeper flexibilities to employers in certain industries. However it is clear that FWDs could unfairly reduce certainty of labour conditions and/ or flexibility for employees. In our view, if there is a need for flexibilities of these kinds on an ongoing basis in any particular sector, appropriate applications should be made to the FWC, which would be in a position to consider the case for change on an industry-by-industry basis. The FWC has demonstrated during the COVID-19 crisis that it has both the flexibility and willingness to respond quickly and effectively where the evidence for change is sufficiently compelling.[45]

The term 'flexibility'

The term 'flexibility' is, of course, not defined in the FW Act. During the pandemic, we have seen that employers and workers exhibited very different conceptualisations of flexibility. This context has demonstrated that it is essential to delineate between employer-led directions to enhance flexibility for businesses, and employee-led requests for flexibility to address conflict between work and non-work obligations, such as family or carer responsibilities.[46]

The terminology used in Schedule 2 Part 2 of the Bill does not have regard to this distinction. Instead, it generalises the concept of flexibility at work. It employs a unitary view of labour relations that presumes that the interests of employers and employees are aligned with respect to flexibility.[47] The pandemic has illustrated that these interests are frequently divergent and potentially conflicting.[48] It is unsuitable to adopt this terminology, in the context of a statute in which the concept of 'flexible working' is used (in s 65) to denote arrangements some employees might request from employers to promote substantive equality at work, without that distinction being thoroughly explained. Alternatively, another

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[45] To take just one of many examples, see *Australian Industry Group and Australian Chamber of Commerce and Industry* [2020] FWCFB 6985; and see further Jill Murray, Charlie Schaffer and Bodhi Shribman-Dellmann, ''Invidious Choices'? Adapting the Fair Work Safety Net during the Pandemic' (2021) 34 *Australian Journal of Labour Law* (forthcoming).

[46] See further Dominique Allen and Adriana Orifici, 'Home Truths: What Did Covid-19 Reveal About Workplace Flexibility?' (2021) 34 *Australian Journal of Labour Law* (forthcoming).

[47] See further *Creighton & Stewart's Labour Law*, above, [1.21]–[1.22].

[48] WGEA, 'Gendered Impact of COVID-19', <https://www.wgea.gov.au/topics/gendered-impact-of-covid-19> , viewed 1 February 2021.

term could be used to describe these employer-led directions that does not employ the concept of 'flexibility'.

Directions regarding work location

The Bill proposes to introduce a right for employers to make FWDs regarding an employee's work location, in prescribed conditions. At present, however, none of the identified modern awards include terms that limit employees to specific work locations. In fact, some of the identified awards explicitly anticipate that employees' work locations will change from time to time.[49] It is possible for an employer to direct that an employee (to whom an identified modern award applies) work at an alternative location by relying on the implied duty arising under the common law of the contract of employment owed by employees to comply with all lawful and reasonable directions,[50] subject to any other contractual obligations (such as an express agreement that work be performed only in a specified place). These directions can, therefore, at least within reasonable limits, already be issued at common law and do not require the more complex statutory mechanism proposed in the Bill.

Reasonableness

There is also insufficient detail in the Bill with respect to how employers or employees are to determine whether a FWD is 'reasonable in all of the circumstances' (proposed s 789GZJ). Firstly, it is unclear whether the reasonable business requirements of the employer are a relevant factor to determining the reasonableness of the direction overall, as well as the circumstances of the employee. In addition, it is unclear to what extent a direction needs to impact on an employee's individual circumstances (for example with respect to parental or carer responsibilities or a disability) in order to constitute an unreasonable direction. At a minimum, a non-exhaustive range of relevant factors should be stipulated. Among other things, this will facilitate meaningful consultation between employers and employees about proposed directions.

Consultation

We are also concerned that proposed s 789GZL provides insufficient guidance to employers and employees about the consultation obligation. This undermines the significant benefits that genuine consultation can produce for employers and employees, including with respect to providing individuals with a real opportunity to contribute to decision making and minimising disputes.[51] Modern awards include various examples of more detailed

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[49] See eg Meat Industry Award 2020 cl 20.3(c).

[50] See *Creighton & Stewart's Labour Law*, above, [17.02]–[17.04].

[51] *CEPU v QR Ltd (No 2)* [2010] FCA 652 at [49].

consultation requirements, including about clauses that relate to consultation on major workplace changes and consultation on changes to rosters or hours of work.

At a minimum, the proposed s 789GZL should require employers to provide an employee (or a representative of the employee) with information about the proposed change to duties or location; and invite the employee or their representative to give their views about the reasonableness of the direction (including any impact on the employee's caring responsibilities), or any other relevant matter. With respect to FWDs about duties, the information an employer must provide to an employee should address each of the criteria set out in proposed ss 789GZG(a)–(c); and, with respect to FWDs about location, the information an employer must provide to an employee should address each of the criteria set out in proposed s 789GZH(a)–(c).

Interaction with other terms

The interaction between the proposed Division 2 of Part 6-4D and modern award terms requires further consideration, including to ensure that it does not erode existing rights to flexible working arrangements available to eligible employees under industrial instruments. Specifically, the proposed Division 2 is described as operating subject to the NES (s 789GZO(4)), but nevertheless prevails over an inconsistent provision of an identified modern award to the extent of any inconsistency (s 789GZf).

One practical effect of requiring FWDs to operate subject to the NES is that these directions are subject to any relevant requests for flexible working arrangements made by employees under s 65 of the FW Act. For example, an employee might respond to a FWD to change the employee's work location by submitting a request for a flexible working arrangement that includes a term that requests the current work location be maintained. In particular, an employee might do so in order to ensure their specific flexibility needs are considered by the employer, in accordance with s 65 of the FW Act.

However, each identified modern award includes other terms about employee-led requests for flexibility. In particular, the model term inserted into all modern awards by the *Family Friendly Work Arrangements Decision*[52] confers a more favourable right to request on eligible employees than that available under the FW Act. This term, for example, allows an employee who believes their employer has not correctly consulted or responded to a request made pursuant to the model term to initiate a dispute under the dispute resolution clause in the applicable modern award. On one reading, the proposed Division 2 could operate to exclude the model term in some circumstances. If so, it could prevent some eligible employees from accessing the more favourable entitlements to request flexible working arrangements under the modern award. It is unclear whether this adverse impact

[52] (2018) 276 IR 249.

on employees is intended, particularly as Division 2 is supposed to operate subject to the NES.

Schedule 3 – Enterprise agreements, etc

Schedule 3 of the Bill proposes changes to Part 2-4 of the FW Act, which deals with the making and approval of enterprise agreements. While we support a number of the changes, we believe that the case for certain others has not been made out, and that some of the proposed amendments will weaken the already limited protections available for unrepresented employees in the processes of enterprise agreement-making and approval.

Agreement-making and bargaining under the FW Act

As a basis for some of the arguments that follow, it is important to understand the practical operation of Part 2-4 and in particular the distinction between 'agreement-making' and 'collective bargaining' under the FW Act.

Section 171(a) of the current FW Act states that it is an object (purpose) of Part 2-4 'to provide a simple, flexible and fair framework that enables *collective bargaining* in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits' (our emphasis).

Despite that reference to collective bargaining, and a similar mention of 'enterprise-level collective bargaining' in s 3(f), it is clear that Part 2-4 *does not actually require collective bargaining, or indeed bargaining of any kind, for enterprise agreements*. This can be contrasted with the emphasis on the value of bargaining and party input that is often now expressed in the context of collective agreements made by small businesses in dealing with large suppliers or customers.[53]

Part 2-4 sets out the requirements which must be met by an employer in the process of making an enterprise agreement, and which the FWC must consider in approving an enterprise agreement. These requirements do not mandate that an enterprise agreement be the product of negotiation or collective bargaining between an employer and the employees of that employer, or that those employees have been represented in any way in the process of creating that agreement.[54]

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[53] See Kurt Walpole, 'The Fair Work Act: Encouraging Collective Agreement-Making But Leaving Collective Bargaining to Choice' (2015) 25 *Labour & Industry* 205; Umeya Chaudhuri and Troy Sarina, 'Employer-Controlled Agreement-Making: Thwarting Collective Bargaining Under the Fair Work Act' in Shae McCrystal, Breen Creighton and Anthony Forsyth (eds), *Collective Bargaining under the Fair Work Act*, Federation Press, Sydney, 2018, p 138.

[54] See eg Explanatory Memorandum, Competition and Consumer Amendment (Competition Policy Review) Bill 2017, para [9.9]; Australian Competition and Consumer Commission, *Small Business Collective Bargaining Notification and Authorisation Guidelines*, December 2018, pp 2, 6; and see further Tess Hardy and Shae McCrystal, 'Bargaining in a Vacuum? An Examination of the Proposed Class Exemption for Collective Bargaining for Small Businesses' (2020) 42 *Sydney Law Review* 311.

While Division 8 of Part 2-4 sets out good faith bargaining requirements, which include the obligation to recognise and bargain with other representatives for an enterprise agreement (s 228(f)), these obligations are only triggered where there *are in fact* employee bargaining representatives in an agreement-making process, *and* those bargaining representatives seek to enforce those obligations.

This means that under the FW Act, enterprise agreements can be made between an employer and the employees to be covered who are employed at the time of making the agreement, without any discussion, negotiation or bargaining over the terms, and without any employee being represented in that process. An agreement, once made, operates to the exclusion of any otherwise applicable modern award for the nominal life of the agreement and potentially beyond, even for employees hired after it is made to perform work covered by the agreement.

We have no accurate data on the prevalence of agreements made without negotiation and bargaining, compared with those that are the product of genuine bargaining.[55] With the partial exception of greenfields agreements, the FW Act makes no formal distinction between 'union' and 'non-union' agreements, and the process for making enterprise agreements effectively follows that originally established under the Howard Government's WR Act for the creation of non-union agreements.

The coverage data that we do have relies on whether or not a trade union has filed an F18 coverage form in the process of approving an agreement – which they may do if they have a member present at the workplace, irrespective of whether or not they have been involved in the negotiation of that agreement. Conversely, even where they have been involved, they may not file such a form. Therefore, this data does not provide an accurate picture of whether a union has been involved in the process at all, and provides no indication whatsoever of the role or involvement of non-union bargaining representatives.

While we have no accurate picture of the extent of agreement-making without negotiation that goes on under the FW Act, rough estimates can be made. Analysing data from the federal government's Workplace Agreements Database, Bray, McCrystal and Spiess concluded that the annual average percentage of agreements that are non-union is around 40% of all agreements, constituting about 11% of all employees covered by an agreement.[56]

This data is corroborated from reported court decisions where a trade union has become involved at approval stage and challenged approval of an agreement. The most prominent example is the *One Key* case,[57] where the Full Court of the Federal Court observed that

[55] See Mark Bray, Shae McCrystal and Leslee Spiess, 'Why Doesn't Anyone Talk About Non-Union Collective Agreements?' (2020) 62 *Journal of Industrial Relations* 794.

[56] Bray, McCrystal and Spiess, above at 790–2.

[57] *One Key Workforce Pty Ltd v CFMEU* [2018] FCAFC 77 at [5].

'there was no union bargaining representative for the Agreement ... there was no bargaining'. This was in relation to an agreement made between an employer and just three employees (two of whom were casual), and which at the time of the hearing applied to over 1,000 mining employees in Queensland and New South Wales.

Because the FW Act sets out a system of agreement-making, not necessarily bargaining, it must be understood that the agreement-making and approval provisions are not simply procedural in nature. For the significant number of employees who are unrepresented in agreement-making, the agreement-making and approval provisions are the **only** mechanism in the FW Act which operate to protect their interests in making an enterprise agreement.

Therefore it is important not to understate the significance of the provisions or to see the provisions as 'procedural' only and therefore ripe for reform in the name of removing complexity or 'red tape'. Changes to these provisions must be evaluated through the lens of ensuring that the interests of all employees, both represented and unrepresented, are safeguarded.

Part 1 - Objects

The proposed new s 171 is arguably more accurate than the current version in capturing the fact that Part 2-4 routinely permits enterprise agreements to be made without bargaining. But we note that it also seems to confirm that while collective bargaining may deliver agreements that reflect the needs and priorities of both employers and employees, enterprise agreements which do not do that may still be made under Part 2-4. We would argue that, at the very least, that goal should be a general object, not just something expected of a bargaining process that might or might occur. We also see merit in emphasising the need for *genuine* agreement, while removing any suggestion that 'business growth' is to be prioritised over other outcomes.

We propose that paragraph (b) be replaced with the following:

> '(b) to enable the making of agreements to which genuine consent is given, and which as far as possible:
>
> > (i) reflect the needs and priorities of the employer(s) and employees they cover, and;
> >
> > (ii) deliver productivity benefits; and'

Part 2 – Notice of employee representational rights

We see no problem with the proposed changes.

Part 3 – Pre-approval requirements

The Bill proposes to repeal and replace provisions of the FW Act that deal with the process by which enterprise agreements are made by employers and employees, and the basis on which the FWC can approve those agreements.

In our view, the current agreement-making and approval provisions do not adequately protect the interests of unrepresented employees, because they do not substantively address whether or not those employees have had input into the proposed agreement. However, as they are currently worded, they do at least require the FWC to be satisfied that the employees who have been involved in making the agreement have provided their 'informed consent' to that agreement.[58] The proposed changes weaken the role of the FWC in ensuring that such informed consent has been given.

The existing provisions of s 180 set out the procedural steps an employer must take to make an agreement, including: providing notice of the place and method of vote; providing a copy of the proposed agreement (and incorporated material); and appropriately explaining the agreement. The proposed amendments retain these steps but they are no longer to be mandated.

The proposed s 180(2) provides that an employer must take reasonable steps to ensure that the relevant employees are given a 'fair and reasonable' opportunity to decide whether or not to approve the agreement. The new s 180(3) provides that this obligation will be met, if 'reasonable steps' have been made to comply with the pre-existing procedural requirements.

This change must be read in conjunction with an associated change to s 188, which sets out the basis on which the FWC approves an agreement. Instead of the FWC being required to be satisfied that the employer has complied with the pre-approval steps, a new s 188(1)(a)(i) will only require the FWC to be satisfied that the employer has complied with s 180(2) – that the employer has taken reasonable steps to ensure employees are given a 'fair and reasonable' opportunity to decide whether or not to approve the agreement.

This change to the pre-approval steps shifts the focus away from ensuring that employees have at least provided their informed consent to an agreement through being given appropriate information about the agreement and the time and place of the vote, to considering whether or not the employer has given employees a 'fair and reasonable' opportunity to decide whether to approve the agreement. While compliance with the previously mandated steps will be sufficient to satisfy the new requirement in s 188(1)(a)(i), the proposed change does not require compliance with those steps – and proposed s 188(3) clearly states that it is not intended to limit the effect of s 188(2).

[58] See Chaudhari and Sarina, above.

This means that a FWC member could be satisfied under s 188(1)(a)(i) that an employer has given employees a 'fair and reasonable' opportunity to decide whether to approve the agreement where none of those steps have been complied with and an entirely different process has been conducted – in effective abrogating any uniform legislative process for the creation of enterprise agreements.

There might be a case for a simplified process of agreement approval in cases where an agreement has actively been negotiated between employee and employer bargaining representatives. Here it might be possible to be reasonably satisfied without more that employee representatives have ensured that employees have had a 'fair and reasonable opportunity' to approve the agreement.

However, the existing procedural safeguards are a crucial baseline for non-union agreement-making, to enable the FWC to focus on ensuring that employees have been given every opportunity to understand and consider the agreement that they have been asked to make.

The removal of these procedural safeguards mean that *parties will have to read FWC published decisions to ascertain the minimum necessary for an employer to undertake a fair agreement-making process.*

Compounding this problem is the proposed amendment in Part 9 of Schedule 3, which proposes to introduce new s 254AA into the FW Act, outlining how the FWC may inform itself in determining an application to approve an enterprise agreement or a variation of an enterprise agreement. Proposed s 254AA(2) provides that the FWC may only receive submissions, evidence or other information from a 'bargaining representative for the agreement' unless there are exceptional circumstances.

This section will have the effect in practice of limiting the ability of employee organisations to present evidence before the FWC in respect of the practice of 'small cohort' agreement-making. This practice involves an employer creating an agreement with a small group of employees (in some cases between two and five casually engaged employees), that may be substantially below industry standard wages and conditions. The agreement may then used as the basis of a tender for future work, or as the basis of engagement of new employees, with neither they nor their unions having had the chance to be involved in the negotiations.[59]

A prominent example of this practice included the CUB dispute in Melbourne, where CUB terminated a labour hire agreement with a company who had a union-negotiated agreement, and instead entered a labour hire contract with an agency tendering on the basis of an enterprise agreement negotiated in Western Australia by three employees (two

[59] See *Corporate Avoidance of the Fair Work Act 2009*, above, pp 14–20.

of whom were casual). That agreement provided pay rates of 50 cents above the minimum wage for the relevant work.[60] Another example is the *One Key* litigation in the Federal Court described above. Other cases have involved agreements which have set out terms and conditions for a multitude of different trades covered by different modern awards, agreed to by a small group of employees engaged in only one of those trades or awards.[61]

The reason we know about these cases is that employee organisations have been paying close attention to enterprise agreement-making, and challenging agreements created by employers with very small cohorts where there are legitimate grounds to believe that the genuine consent of the employees who are covered by the agreement has not been given. In intervening in this way, relevant employee organisations are seeking to protect the working conditions of their members who may subsequently be offered work on sub-standard agreements. They also seek to protect the working conditions of those members who receive industry wages under genuinely bargained enterprise agreements – where those agreements are threatened by businesses tendering for work at low prices backed by a non-union small cohort agreement (as happened in the CUB dispute).

The changes outlined here may seem technical or procedural, but they will have significant effects in practice through the potential for the continued suppression of wages and conditions for workers engaged under non-bargained, non-union agreements.[62] They also do nothing to counter the more general stagnation of wages and conditions across the enterprise agreement system.[63]

Part 4 – Voting requirements

The changes proposed in Part 4 relate to when casual employees are to be counted as part of the cohort who must be included in the vote for an enterprise agreement. There has been considerable uncertainty in the case law on this issue, and the changes proposed seem to us to represent a workable solution to the problems identified.

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[60] Ann Arnold, 'Carlton and United Breweries Worker Agreement Was Voted on by Three Casuals, ABC Online, 26 August 2016; *Corporate Avoidance of the Fair Work Act 2009*, above, [5.26]–[5.41].

[61] See eg *Re KCL Industries Pty Ltd* [2016] FWCFB 3048.

[62] We agree in this respect with the points powerfully made about the Bill by Alison Pennington, *How Non-Union Agreements Suppress Wage Growth – And Why the Omnibus Bill Will Lead to More of Them*, Briefing Paper, Centre for Future Work, February 2021.

[63] See Alison Pennington, 'The Fair Work Act and the Decline of Enterprise Bargaining in Australia's Private Sector' (2020) 33 *Australian Journal of Labour Law* 68; Jim Stanford, 'The Fair Work Act and Wages' (2020) 33 *Australian Journal of Labour Law* 18; Alison Pennington, *On the Brink: The Erosion of Enterprise Agreement Coverage in Australia's Private Sector*, Centre for Future Work, December 2018.

Part 5 – Better Off Overall Test

The BOOT is a vitally important part of the enterprise agreement approval process, ensuring that employees engaged under an enterprise agreement do not have working conditions that, taken overall, fall below the modern award safety net. The test is of most importance when the FWC is asked to approve an agreement where the agreement reached does not provide terms and conditions that are a clear improvement on the relevant modern award, but instead are seeking to alter aspects of a modern award in the pursuit of flexibility for employers. In the case of non-union agreements it is likely that such agreements will not have been the subject of any negotiation, bargaining or input from affected employees.

The Bill proposes a number of changes to the BOOT. Of these, there is one we oppose in the strongest possible terms. This would create a new and potentially far-reaching exception to the BOOT. It would potentially tear a gaping hole in the award safety net.

Under the current FW Act, the FWC can only approve an agreement that fails the BOOT where, because of exceptional circumstances, the approval of the agreement would not be contrary to the public interest (s 189(2)). An example specifically mentioned in the legislation is where the agreement is 'part of a reasonable strategy to deal with a short-term crisis' in an enterprise.[64] Where an agreement is approved on this basis, however, it can have a nominal duration of no more than two years (s 189(4)).

Proposed new s 189(1A) would create an additional exception, allowing the FWC to approve a sub-standard agreement where 'it is appropriate to do so', taking into account all the circumstances, including:

- the views of any affected employer, employees and bargaining representatives;
- the circumstances of the employees and employer(s);
- the impact of COVID-19 on the enterprise(s) concerned; and
- the extent of employee support for the agreement, as determined by the vote to approve it.

The FWC would also need to be satisfied that because of 'those circumstances' (which could be read to mean either *all* the circumstances, or just the four listed above), approval 'would not be contrary to the public interest'.

An agreement approved on this basis could only have a nominal duration of up to two years, because of s 189(4). But although the special approval power would sunset in 2023, enterprise agreements created under this power could continue to apply indefinitely after their nominal expiry date, unless and until terminated or replaced. At the very minimum,

[64] See eg *Re ABC Developmental Learning Centres Pty Ltd* [2010] FWAA 1687.

the impact of the change could be felt well into 2025 – and potentially, for some enterprises, well beyond then.

Four features of the new provision are immediately apparent. Firstly, the contrast with the existing s 189(2) makes it clear that the basis for seeking approval through this exception need not be 'exceptional' in any way. This is plainly intended to create a much broader capacity for the approval of sub-standard agreements, in circumstances that could be entirely routine and potentially applicable to very large numbers of employers.

Secondly, it is completely incorrect to see this as a 'COVID exception'. The proposed justification for approval of an agreement need have nothing whatsoever to do with COVID-19, since the impact of the pandemic is only one factor that needs to be considered, and that factor is accorded no special significance over and above the others listed. As an aside, we note that the term 'impact' is in any event entirely neutral – it need not be significant, unusual or even adverse.

Thirdly, we note that there is no reference in the listed circumstances to the extent to which the proposed agreement fails the BOOT, either in terms of how many employees will not be better off, or how far the agreement goes in undercutting award conditions. The FWC could presumably still take that into account in determining whether it was appropriate to grant approval. But on one reading of the new provision (see the reference above to 'those circumstances'), the extent of the failure to meet the BOOT would *not* be relevant in applying the public interest criterion.

Fourthly, the vagueness of the criteria, and the lack of any clear or central basis for the exception to be applied (such as the need for 'exceptional circumstances', or a substantial and adverse impact by COVID-19), would pose major challenges for the FWC. The potential for inconsistent application of the exception seems obvious, even if there were an early test case to resolve any broad questions of interpretation.

If this exception were introduced, many employers are likely to be advised to try and make use of it, given the potential for reducing labour costs by undercutting award standards. In non-unionised enterprises, it might be difficult for employees to resist employer demands for approval of such agreements, especially if the employer were threatening business closure or lay-offs if consent were not forthcoming. An employer might also be able to secure agreement by a majority derived from one group of employees for cuts in pay and conditions primarily targeted at another group.

It is also important that the changes to agreement-making and approvals proposed by the Bill are seen in their totality. Their cumulative impact could make it easier for employers to make agreements without employee input, without compliance with the minimal procedural steps that currently seek to ensure informed consent by employees, and potentially below the award safety net. It would also be harder for unions to present

evidence to the FWC to counter assertions made by an employer as to the impact of COVID on the relevant enterprise.

It is possible that a sufficiently strict approach by the FWC could ultimately mean that the new exception was not widely used. But that would take time to emerge and in the short term at least, the message (amplified no doubt by an army of eager lawyers and consultants, not to say certain employer associations) would be to use the exception, or risk missing out. The potential pressure for reductions in wages would be apparent, at a time when Australia desperately needs precisely the opposite.[65]

No case has been made out for the new exception within the Explanatory Memorandum. As we have noted, the FWC already has the power to approve agreements in exceptional circumstances, which would include the adverse impact of COVID-19. No evidence has been presented to suggest that the FWC does not appropriately and carefully exercise its powers in this respect. Nor do we see any credible basis for suggesting that creating a broadly available mechanism for cutting pay and conditions below award standards will deliver economic growth and increased employment. If hard evidence for the success of that strategy existed, the business groups who have called for this type of 'flexibility' would have found and publicised it by now.

As to the changes proposed by the Bill in relation to the matters that may be taken into account by the FWC in applying the BOOT, we would oppose one and suggest an adjustment to another.

The one we oppose is the requirement for the FWC to give 'significant weight' to the views of those involved in making the agreement as to whether it passes the BOOT (proposed new s 193(8)(c)). The BOOT is meant to be an objective test, applied by an independent arbiter to safeguard the public interest in maintaining the integrity of award standards. The fact that the 'parties' who have made an agreement *believe* (or purport to believe) it does so, whether rightly or not, should not in any way be allowed to affect the tribunal's judgment on that vital matter. Those parties are already given the opportunity to put arguments to the tribunal to persuade it that the test is met, or to address any concerns that the tribunal may have. That should be sufficient.

As for the proposed s 193(8)(a), which would require the FWC to take account of work patterns or types of employment only if actually used or reasonably foreseeable at the test time, we can see the sense of that, especially in simplifying the process of assessing an agreement. But it seems to us that an important safeguard is missing. It should be open to any employee covered by such an agreement, or an organisation entitled to represent the

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[65] See the evidence and arguments reviewed in Andrew Stewart, Jim Stanford and Tess Hardy (eds), *The Wages Crisis in Australia: What It is and What to Do About It*, University of Adelaide Press, Adelaide, 2018.

interests of such an employee, to apply to the FWC to reassess the agreement against the BOOT, if it can be shown that (a) a work pattern or type of employment *is in fact* now being used that was not in use or reasonably foreseeable at the test time, and (b) the affected employees would not, as at the test time, have been better off under the agreement compared to the award safety net then in place.

Part 6 – NES interaction terms

The amendments in Part 6 of Schedule 3 seek to address what happens when a proposed enterprise agreement does not comply with the NES in Part 2-2 of the FW Act. This has been an ongoing problem at approval stage because, under s 55, enterprise agreements cannot contain terms that are inconsistent with the NES, except to the extent that the FW Act permits. The FWC is currently obliged by s 186(2(c) to refuse approval for any agreement containing such a provision.

For example, the NES does not permit cashing out of accrued annual leave. However, this can be agreed within an enterprise agreement, as long as an employee retains at least four weeks of accrued leave (FW Act s 93(2)). A provision to the contrary would not be consistent with the NES and would cause difficulties at approval stage. It would generally be resolved by an undertaking given by the employer to the FWC that it would not seek to rely on the inconsistent clause in the agreement.

The Bill proposes to simplify the process of agreement-making by repealing s 189(2) and instead require the insertion into all enterprise agreements of a 'model NES interaction term'. This term would be set by regulation, and would 'explain' the operation of s 55 and associated provisions. Although the Explanatory Memorandum does not go into detail as to what such a prescribed term would say, the Regulatory Impact Statement for the Bill seems to suggest (at p lxii) that it would look something like the 'NES precedence term' that the FWC already advises employers to include in agreements:[66]

> This Agreement will be read and interpreted in conjunction with the National Employment Standards (NES). Where there is an inconsistency between this agreement and the NES, and the NES provides a greater benefit, the NES provision will apply to the extent of the inconsistency.

The problem with this approach is that it means that enterprise agreements can be approved with terms that have no legal effect, *but which remain in the agreement itself*.

Take the example above. An enterprise agreement is sent to the FWC containing the term 'An employer and employee can agree between themselves that the employee can cash out their annual leave'. This term contravenes the NES, because it would permit the employee to cash out *all* of their annual leave. As such, it would not be enforceable, by reason of s 56.

[66] FWC, *Benchbook: Enterprise Agreements*, April 2019, p 57.

But employees reading the agreement would have *no way of knowing that*. All the model interaction term would do is to tell them that in the event of any inconsistencies, the NES would prevail. But they could not know where those inconsistencies were, without a source of expert advice. And indeed unless they somehow guessed at a possible contravention, they might well not even know to look for advice.

All employees should be able to rely on the plain text of an enterprise agreement to understand their rights and obligations, without the necessity of legal advice, or of a detailed understanding of the NES.

Accordingly, we oppose this amendment, on the basis that it encourages, or at least permits, the inclusion of terms in agreements which are capable of misleading employees (and indeed employers, where they are relying on external drafting) as to their rights and obligations.

In our view, the FWC should be obliged to refuse approval for agreements that contravene or conflict with the NES – and indeed be required to ensure they are removed or amended before approval, not just dealt with by an NES precedence term or a generally worded undertaking that does not specify the offending term. To the extent that the FWC needs broader powers to make such changes, the Act should be amended to do that, subject to safeguards similar to those that currently apply under s 190(3)–(4) in relation to the giving of undertakings.

A solution that ensures that the approved text of an enterprise agreement is compliant with the NES would ensure that both employees and employers can confidently rely on the text of the instrument when ascertaining their rights.

Part 7 – Variation of single enterprise agreements to cover eligible franchisee employers and their employees

Proposed Part 7 of Schedule 3 to the Bill provides franchisee employers with the option to join an existing single enterprise agreement that already covers two or more franchisees operating in the same franchise network. For the variation to take effect, eligible franchisee employees would need to vote in favour of the agreement. However, there would be no capacity under the proposed process for the franchisee employer or franchisee employees to modify the existing agreement.

While this proposal may provide employers with a more streamlined agreement-making option, this change is not necessarily benign for employees, as suggested in the Regulatory Impact Statement accompanying the Bill.[67] We have characterised Part 2-4 of the current

[67] The Regulatory Impact Statement states (at p xxii) that: 'It would not result in any negative impacts for employees, as employees of the new franchisee would be required to vote before the agreement covers them, and employees of franchisees already covered would not be affected.'

Act as not requiring any bargaining. But here it is more or less prohibited. The only clear option for employees who were concerned about the terms of the existing agreement would be to vote against it. They could not propose changes, and on the face of it they could not either seek bargaining orders against their employer to require it to bargain in good faith, nor take protected industrial action over the variation.[68]

The proposed process may also offer a further opportunity for a practice highlighted elsewhere in this submission, that of small cohort agreement-making. Under the proposed provisions, a new franchisee employer may invite a confined number of employees (some of whom may have a direct or beneficial interest in the employer company) to vote on joining the existing enterprise agreement. Once approved, that agreement may ultimately cover a much larger group of employees, who did not have any real opportunity to consider or consent to its terms.

Part 8 – Terminating agreements after nominal expiry date

The proposed amendment to s 225 of the FW Act would insert a three month delay between the nominal expiry of an enterprise agreement and any subsequent unilateral application to terminate that agreement. We oppose this change, for two very different sets of reasons that reflect the radically different circumstances in which termination of an expired agreement may be sought.

Termination of an agreement removes all of the obligations contained therein, leaving employees reliant on any relevant modern award and their contractual rights. In any industry where agreement conditions are substantially above safety net wages and conditions, this means that termination of an enterprise agreement can reduce the take home pay and conditions of those workers by a significant amount. Conversely, where the agreement contains pay and conditions that are below the award safety net, either because the agreement was erroneously approved by the FWC or because of subsequent developments (such as an improvement in award standards), termination will have a beneficial effect for employees.[69]

The amendment proposed in the Bill responds to concerns raised by unions over the first of those situations. Those concerns have existed since a Full Court of the Federal Court of

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[68] This is because both the good faith bargaining provisions (ss 228–229) and the definition of 'employee claim action' (s 409(1)) refer to bargaining or action in relation to a 'proposed agreement'. Simply opposing a variation would not seem to qualify. The employees in question would need to propose their own new agreement. Even then, they could not take protected action unless and until their employer agreed or was forced to start bargaining, because of s 437(2A).

[69] To take just one example of this latter situation, see *Re Kelly* [2019] FWCA 8563, concerning the termination of an agreement made by McDonald's in 2013. It is unclear whether the FWC has the power to retrospectively terminate a substandard agreement: see *Australian Concert & Entertainment Security Pty Ltd v Mapledoram* [2020] FWCFB 7032.

Australia held in *CEPU v Aurizon Operations Ltd*[70] that there is no public interest or other substantive bar to the termination of an enterprise agreement by the FWC while bargaining for a replacement agreement remains on foot. Since *Aurizon* there have been a handful of cases where employers have successfully applied for the termination of an existing enterprise agreement during highly contested collective bargaining negotiations – effectively using the agreement termination provisions to pursue bargaining objectives that have not been successful in negotiations.[71]

The hearing of these cases has operated as a contest between the competing bargaining claims of the employer and the employee bargaining representatives, where the FWC member in effect has been required to weigh those claims in the balance and effectively choose between them.[72]

Where an agreement termination is granted by the FWC, this substantially strengthens the hand of the employer in those contested negotiations. Employees then face an invidious choice – vote in favour of the new agreement proposed by the employer, regardless of the extent to which it is a reduction of previously won gains, or face reversion to the safety net in respect of the terms and conditions of their engagement. For employees who have made life decisions on the basis of the wages and conditions in the existing agreement, with families to support and mortgages to pay, this may be no choice at all.

Further, this impact of the agreement termination provisions is not fully evident from the handful of reported cases. *Aurizon* and the cases that have followed it have had a 'shadow effect' in bargaining. Employers need not even apply for termination of an agreement – they need only threaten to do so. The spectre of a potential application to the FWC may raise the stakes in bargaining enough for employees to capitulate. Hence the very threat of an agreement termination can effectively increase the power of employers in contested bargaining, without any direct cost to employers.

This use of the agreement termination provisions has only been a significant factor in bargaining for agreements under the FW Act since the *Aurizon* decision. The calibration of the collective bargaining regime, including the balance between the good faith bargaining provisions, the employees' right to strike and the employer right to lock out, all occurred in 2009 without consideration of the role that agreement terminations could play in strengthening employer bargaining power at the bargaining table. In our view, the FW Act is

[70] (2015) 233 FCR 301.

[71] See eg *CFMEU v Peabody Energy Australia PCI Mine Management Pty Ltd* [2016] FWCFB 3591; *AMWU v Griffin Coal Mining Co Pty Ltd* [2016] FWCFB 4620; *Re Murdoch University Enterprise Agreement 2014* [2017] FWCA 4472.

[72] For analysis of these cases, see Shae McCrystal, 'Termination of Enterprise Agreements under the Fair Work Act 2009 (Cth) and Final Offer Arbitration' (2018) 31 *Australian Journal of Labour Law* 131.

now unbalanced, with employers gifted significant bargaining strength with no concomitant balancing of the scales for employee bargaining power.

Restricting unilateral access to agreement termination applications is a necessary step in recalibrating the balance of power in bargaining. A three month delay, however, is not sufficient to achieve this. Collective bargaining processes where employees are appropriately represented, and where there are genuine disagreements between employers and employees, are rarely concluded within three months.

Instead of recalibrating bargaining power, this proposed change is likely to strengthen the hand of employers. Employers will now be able to threaten a 'deadline' on negotiations – of just three months post expiry date – with the threat of an agreement termination application on the table throughout.

To rebalance the FW Act's bargaining regime, *consideration must be given to the appropriate and necessary role of agreement termination in collective bargaining*.

If agreement termination is not simply to be used as a tool of bargaining power for employers, access to agreement termination during contested collective bargaining should be completely removed. If it is necessary for a mechanism to be available under the FW Act to resolve lengthy and protracted bargaining disputes, where there has been significant industrial action and where the parties have reached impasse with no likelihood of agreemen*t, the appropriate mechanism is arbitration, not agreement termination*.

If neither of these solutions is preferred, *at minimum* access to agreement termination should be delayed by at least 12 months after expiry, to allow for the processes of good faith bargaining and industrial action to operate before the FWC is called upon effectively to adjudicate between competing claims.

At the same time, however, it is vital that any restriction on the use or threat of unilateral applications to terminate an expired agreement not impede the power of the FWC to terminate an agreement which provides substandard pay and conditions. For such agreements, the amendment proposed by the Bill would provide employers with at least an extra three months in which they could enjoy the benefit of sub-award conditions.

Accordingly, even if the approaches we have suggested above to the restriction of termination applications in the context of ongoing bargaining are not accepted, it is vital that the FWC be empowered to waive the new three month limitation, where the agreement sets conditions that, taken overall, leave some employees worse off than under relevant awards. Alternatively, the limitation could be recast so that it does not operate as a general rule, but one that applies only where the FWC is persuaded that employees affected would suffer a reduction in their minimum entitlements if the agreement were terminated.

Part 9 – How the FWC may inform itself

As discussed above, the proposed new s 254AA would restrict the ability of employee associations or interested parties to intervene in agreement approval cases where they have not been a bargaining representative for an agreement, and to appeal approval decisions in such cases. This would have the effect of making it substantially harder to identify substandard agreements and to challenge the approval of small cohort agreements. Accordingly, it is a limitation we strongly oppose, at least in its current form. If the concern is with organisations seeking to disrupt or frustrate approval proceedings, without legitimate grounds or in pursuit of ulterior agendas, that is something that should be left to the FWC to manage. If its powers are considered to be lacking in that regard, they could be strengthened without resort to a blanket ban.

Part 10 – Time limits for determining certain applications

We see no problem in requiring the FWC to strive to approve a proposed agreement within a set period, provided it is not being encouraged or, worse, compelled to provide a tick to instruments that do not or may not meet the statutory criteria. There is no suggestion of either of those elements in the proposed new s 255AA. Accordingly we are comfortable with the change.

Part 11 – FWC functions

Proposed new s 254B provides that 'the FWC must perform its functions and exercise its powers under this Part in a manner that recognises the outcome of bargaining at the enterprise level'.

This proposed new section appears to assume that all enterprise agreements under the FW Act are the product of bargaining. This is simply not the case, for the reasons outlined earlier in this submission. The provision fails to recognise the real problem with the FW Act, which is not any failure of the part of the FWC to acknowledge the outcomes of bargained agreements. Rather, it is the failure to identify those agreements made without unions, bargaining or any kind of meaningful input from employees.

One of the crucial roles of the FWC in approving agreements is to verify that employees have given informed consent to non-union agreements where there has been no bargaining or negotiation. To protect the interests of these employees, the FWC should instead be *directed to perform its functions and exercise its powers in a manner that recognises the need to protect unrepresented workers*, particularly in respect of agreements where no employee bargaining representatives have been involved (or no bargaining representatives who were not otherwise employees of the employer).

Part 12 – Transfer of business

The proposed amendment to s 311 addresses a matter originally raised by Qantas and addressed in the 2012 Review of the FW Act.[73] When the former 'transmission of business' provisions in the WR Act were redrafted as transfer of business provisions in the FW Act, the new legislation provided that there would be a transfer of business whenever an employee ceased working for one employer and within three months began performing the same or substantially the same work for another employer, if there was a relevant 'connection' between the first and second employers. Current section 311(6) provides that one of those kinds of connections arises when the new and old employers are associated entities (as defined by s 50AAA of the Corporations Act 2001 (Cth)) when the transferring employee takes up their new job.

This provision sensibly captures corporate restructuring arrangements, so that an employing enterprise which decides to restructure to create its own internal labour hire subsidiary, or to reorganise its labour force into different incorporated divisions, will continue to be bound by a current enterprise agreement covering transferring employees (subject to the provisions in ss 318–320 empowering the FWC to make other arrangements). Unfortunately, the provision also has the unintended consequence of catching situations when employees working in a large corporate group decide, of their own volition, to apply for positions in other entities within the group.

Proposed new s 311(1A) is clearly intended to address that unintended consequence, by providing that this situation (of an employee seeking a new job within a corporate group) will not be captured by the provisions. This reflects the 2012 Review's recommendations. A similar proposal was also included in two earlier Bills, though not adopted by Parliament.[74]

As it is presently drafted, however, the proposed new subsection is too wide, and would leave a significant gap for the avoidance of the intended operation of s 311. It could permit an employing enterprise planning a corporate restructure to seek expressions of interest from employees in moving to the new entity, and then to rely on the employees' own expressions of interest to avoid the application of s 311.

We propose that the new provision be renumbered to become s 311(7) and read as follows:

> 'However, there is not taken to be a connection for the purpose of subsection (6) if, before the termination of the employee's employment with the old employer, the

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[73] Ron McCallum, Michael Moore and John Edwards, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*, Australian Government, Canberra, 2012, pp 205–6.

[74] See Fair Work Amendment Bill 2014 (Cth) Sch 1 cl 54; Fair Work Amendment (Remaining 2014 Measures) Bill 2015 (Cth) Sch 1 cl 19. The first of those Bills was eventually passed as the Fair Work Amendment Act 2015 (Cth), though without this and many other of its original provisions.

> employee sought to become employed by the new employer entirely at the employee's initiative.'

This rewording would ensure that the exclusion applies only (as it is intended) to genuine cases of employees seeking personal career progression within complex corporate enterprises. It does that by adding the word 'entirely' to emphasise the need for the transfer to be employee-driven. But it also, more importantly, ensures that an employer cannot avoid the effect of the transfer of business provisions where the relevant connection is not simply that the old and new employer are associated entities, but that there is some form of transfer of assets within the meaning of subsection (3), or an outsourcing or insourcing process covered by subsections (4) or (5).

Part 13 – Cessation of agreements

We strongly support the sunsetting of pre-FW Act transitional agreements, as well as agreements made during the 'bridging period' in 2009 before the NES and modern awards took effect. It is well and truly time that a line is drawn under previous agreement-making regimes, some of which operated with few of the safeguards built into the current law. Employers have had well over a decade to make new agreements, or learn to live with the modern award safety net.

Schedule 4 – Greenfields agreements

Schedule 4 of the Bill would enable the creation of greenfields agreements for workers engaged in the construction of projects declared by the relevant Minister to be 'major projects'. Such agreements would be able to have a nominal expiry date of no later than eight years from commencement of the agreement, as opposed to the maximum of four currently allowed by s 186(5) of the FW Act. The FWC would need to be satisfied that the agreement provided for at least annual increases to the base rate of pay of each employee engaged under the agreement

The most significant purpose of a nominal expiry date in an enterprise agreement is to define the term in which the employees engaged under that agreement can take protected industrial action in support of their bargaining claims for a new agreement. Enterprise agreements can be varied, or replaced, before the expiration of their term, but there can be no protected industrial action before the passage of the nominal expiry date (ss 413(6), 417).

The primary impact of this proposed change would to restrict the right to strike of workers who are engaged in major construction projects for eight years, which is *twice* the length of time that other workers under the FW Act can be subject to this prohibition under an enterprise agreement. The impact of the amendments also needs to be understood against the backdrop of building and construction workers already being subject to restrictions on bargaining, sanctions for unlawful industrial action and enforcement practices that do not apply to other employees.[75]

The proposal would deny affected workers the ability to seek changes to the terms and conditions of their engagement for a prohibitively lengthy period and in a manner which raises serious concerns in respect of compliance with Australia's obligations as a Member of the ILO and a signatory to ILO Conventions 87 and 98 in respect of freedom of association and collective bargaining.[76]

Under the ILO's principles of freedom of association, restrictions on the right to strike during the currency of a collective agreement are generally permissible – although only in respect

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[75] See Building and Construction Industry (Improving Productivity) Act 2016 (Cth); Code for the Tendering and Performance of Building Work 2016 (Cth).

[76] See International Labour Conference, *Giving Globalisation a Human Face*, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part IB), Geneva, 2012, [124].

of the matters covered by that collective agreement,[77] a limitation not respected by the FW Act as it stands.[78]

Where such a greenfields agreement has been agreed between the employer and an employee organisation, the existence of the prohibition itself is not contrary to ILO standards per se. However, the fact that the prohibition is *double* the length of time that can be applied for other enterprise agreements creates significant concerns over how long access to protected industrial action has been restricted for these workers only. In addition, where access to the right to strike has been restricted during the currency of a collective agreement, the ILO's standards insist that access to arbitration be provided to resolve individual or collective grievances that arise over the life of the agreement concerning its interpretation or application.[79]

Of even greater concern are the provisions that allow for the creation of greenfields agreements *without* the agreement of an employee organisation.

Under FW Act s 182(4), the FWC can deem an agreement to be made between an employer and an employee organisation without the consent of that organisation. Taken in combination with the proposed amendment, this would allow for the creation of instruments (they are not 'agreements' in any meaningful sense) that govern the working conditions of employees for an eight year period, without either their consent or that of any union entitled to represent their interests.

Any such agreements created under these provisions would not constitute collective agreements for the purposes of ILO principles and would plainly impose an impermissible restriction on the right to strike of the workers concerned.

Further, and as already mentioned, the ILO principles on freedom of association require that where the right to strike of workers is restricted, they must be provided with access to alternative compensatory measures, including conciliation and mediation, leading to adequate, impartial and speedy arbitration procedures.[80]

We propose that, at the very least, employees and organisations covered by an agreement to which proposed new s 186(5)(b)(i) applies should have unilateral access to the FWC for the conciliation and, if necessary, arbitration of claims to vary the agreement, subject to the FWC being satisfied that it is not contrary to the public interest to deal with the dispute.

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[77] Ibid, [142].

[78] See Shae McCrystal, *The Right to Strike in Australia,* Federation Press, Sydney, 2010, p 245.

[79] International Labour Conference, *Giving Globalisation a Human Face*, above, [142].

[80] Ibid, [141].

Schedule 5 – Compliance and enforcement

Introduction

In March 2019, the Migrant Workers' Taskforce handed down its final report.[81] This was soon followed by two consultation papers issued by the Attorney-General's Department (**Consultation Papers**).[82] Before this consultation process concluded, it was overtaken by the challenges presented by the COVID-19 pandemic and superseded by a dedicated working group established by the Australian Government. Nonetheless, the recommendations of the Migrant Workers' Taskforce, the issues canvassed in the Consultation Papers, and the submissions made to a host of previous or current government inquiries,[83] remain compelling and relevant. The pandemic has shown that upholding the safety net of minimum pay and conditions set for employees, and promoting widespread employer compliance, is not only important for individual workers, it is critical for ensuring that non-compliant employers do not gain an unfair competitive advantage. More generally, effective enforcement is essential for protecting the health and safety of the community and easing the burden that ultimately falls on the taxpayer.

The proposed amendments in Schedule 5 of the Bill build on the provisions of the Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 (Cth), in that both sets of reforms seek to enhance the 'compliance and enforcement framework to more effectively deter non-compliance with workplace laws' (Explanatory Memorandum, p iv). The Bill seeks to do this by further increasing the severity of civil penalties for discrete contraventions, introducing a

[81] Allan Fels and David Cousins, *Report of the Migrant Workers' Taskforce*, Australian Government, 2019.

[82] Attorney-General's Department, *Improving Protections of Employees' Wages and Entitlements: Strengthening Penalties for Non-compliance*, September 2019 (**Consultation Paper 1**); Attorney-General's Department, *Improving Protections of Employees' Wages and Entitlements: Further Strengthening the Civil Compliance and Enforcement Framework*, February 2020 (**Consultation Paper 2**).

[83] Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, Parliament of Australia, 2016; Forsyth, *Victorian Inquiry into Labour Hire and Insecure Work*, above; Senate Economics References Committee, *Superbad – Wage Theft and Noncompliance of the Superannuation Guarantee,* Parliament of Australia*, 2017*; *Corporate Avoidance of the Fair Work Act 2009*, above; *Black Economy Taskforce - Final Report*, Australian Government, 2017; Queensland Parliamentary Committee, Education, Employment and Small Business Committee, *Fair Day's Pay for a Fair Day's Work? Exposing the True Cost of Wage Theft in Queensland*, Report No 9, 56th Parliament of Queensland, 2018; Senate Education and Employment References Committee, *Wage Theft? What Wage Theft?! The Exploitation of General and Specialist Cleaners Working in Retail Chains for Contracting or Subcontracting Cleaning Companies,* Parliament of Australia, 2018; Tony Beech, *Inquiry into Wage Theft in Western Australia – Final Report*, Parliament of Western Australia, 2019; Senate Standing Committees on Economics, Inquiry into the Unlawful Underpayment of Employees' Remuneration, Commonwealth Parliament, 2020 (due to report by 24 June 2021).

criminal offence for dishonest and systematic underpayment and enhancing avenues for redress when wage underpayment does occur.

There is some evidence to suggest that a drastic increase in sanctions may make some difference to compliance behaviour by projecting a serious threat and triggering a shift in social norms.[84] However, the weight of empirical evidence suggests that for harsher sanctions to 'make a dent in the wage theft crisis',[85] there is a need to increase the perceived risk of detection.[86] To achieve this, it is necessary to ensure that the relevant regulators are sufficiently resourced, and non-state actors, such as unions, employer associations and lead firms, have the necessary supports and incentives to actively identify and pursue contraventions.[87]

Overall, the proposed amendments to the FW Act, and related amendments to the Building and Construction Industry (Improving Productivity) Act 2016 (Cth),[88] represent a step in the right direction. Nonetheless, there remains room for more far-reaching reform in this area – an issue to which we return at the end of this submission.

Part 1 – Orders relating to civil remedy provisions

The proposed amendments to s 546(2) have the effect of increasing the maximum penalties for 'remuneration-related contraventions' and introducing a new 'value of the benefit' penalty for corporate wrongdoers (other than small business employers). In many respects, this is broadly consistent with the recommendations of the Migrant Workers' Taskforce, and other inquiries.

The Taskforce's Final Report noted that while the gravity of the contraventions was often as serious as in other areas of business law, such as consumer, competition and corporation

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[84] Daniel J Galvin, 'Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance' (2016) 14 *Perspectives on Politics* 324; Christine Parker and Vibeke Nielsen, 'Deterrence and the Impact of Calculative Thinking on Business Compliance with Competition and Consumer Regulation' (2011) 56 *The Antitrust Bulletin* 377; Eric Tucker et al, 'Carrying Little Sticks: Is There a "Deterrence Gap" in Employment Standards Enforcement in Ontario, Canada?' (2019) 35 *International Journal of Comparative Labour Law* 1.

[85] Nicole Hallett, 'The Problem of Wage Theft' (2018) 37 *Yale Law and Policy Review* 108.

[86] Mirko Bagaric, 'Jailing Bosses for Wage "Theft" No Payback for Dudded Workers', *The Australian*, 2 August 2019.

[87] For further discussion of this issue, see Tess Hardy, 'Digging into Deterrence: An Examination of Deterrence-Based Theories and Evidence in Employment Standards Enforcement' (2021) *International Journal of Comparative Labour Law and Industrial Relations* (forthcoming).

[88] We are broadly supportive of the amendments to the building industry legislation, to the extent that they are generally directed towards strengthening the compliance and enforcement framework in relation to remuneration-related contraventions. Our submission, however, focuses on the FW Act.

law, the low level of penalties in the FW Act did not reflect the severity of the breaches or the magnitude of the underpayments. The Final Report concluded that penalties should be brought more into line with those of consumer law.[89]

However, there are at least two differences between the proposed changes to the civil penalty regime of the FW Act and that which applies in the consumer law context. The first, and most obvious, difference is that under the new s 546(2) there is no capacity for the court to set the maximum penalty with direct reference to the company's turnover.[90]

The second, and less evident, difference is that it may be very difficult accurately and definitively to calculate the value of the benefit obtained in the context of a remuneration-related contravention. Under the proposed s 546A, the 'value of the benefit' is said to be the 'amount of remuneration that employees of the body corporate would have received, retained or been entitled to if the contravention had not occurred.' On its face, this appears to be relatively straightforward, particularly if interest is excluded from the calculations.[91] However, in practice, it may be very challenging for an applicant, and ultimately the court, to arrive at a value. This will be especially true if the total underpayment amount is substantial, if employment records are missing, if legal or factual issues are in dispute (such as the relevant classification level or hours worked by the relevant employee), or if a claim has been brought with respect to a discrete subset of employees but other employees outside the claim have been affected by the unlawful conduct. The challenges of accurate quantification of large claims can be illustrated by reference to the underpayment recently admitted by Woolworths. When the matter first came to light, the retailer had initially admitted to an underpayment of up to $300 million. However, at least one law firm believed that Woolworths had substantially understated the wages owed, which on their estimates exceeded $600 million.[92] More than 12 months on, the total amount of the underpayment appears to remain uncertain.[93]

Another potential drawback of the new 'value of benefit' penalty is that, under proposed s 546(3A), the court must order that the entire penalty be paid to the Commonwealth. No other person or organisation can apply to the court to have all or some of the 'value of

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[89] Migrant Workers' Taskforce Report, above, pp 86, 88.

[90] Compare s 45AF of the Competition and Consumer Act 2010 (Cth), which prohibits the making of a contract etc containing a cartel provision. This section provides for maximum fines not exceeding the greater of the following: $10 million; three times the value of the benefit obtained from the offence; or 10% of the annual turnover of the corporation and related corporations.

[91] The Explanatory Memorandum states (at [344]) that 'the term "remuneration" is intended to be read beneficially'. However, it then goes on to note that this term 'does not include non-remuneration amounts such as interest on amounts of remuneration that would have been earned from a bank had the contravention not occurred'.

[92] See 'Woolworths vows to defend class action', *Workplace Express*, 2 December 2019.

[93] See 'Woolworths wage theft blows out, flags redundancies', *New Daily,* 23 June 2020.

benefit' penalty paid to them, as would otherwise be possible under s 546(3). It is unclear why this statutory limitation has been imposed, given that providing courts with the discretion to make orders under s 546(3) is intended to encourage persons and organisations, such as trade unions, community legal centres and private practitioners, to 'police the relevant legislation'.[94] Logan J noted in a recent judgment:

> Public resources allocated to police the [FW Act] are limited. The financial ability of an individual worker to police a perceived contravention of the [FW Act] is also in most cases limited. Workers, collectively, via a trade union, are thereby better equipped to do this. The policing by trade unions of compliance with industrial laws is a longstanding, legitimate role of trade unions. This does not just serve the interests of the particular workers concerned, or the trade union. It serves the national interest.[95]

An additional uncertainty raised by the proposed 'value of benefit' penalty is whether, and to what extent, it applies to persons other than the direct employer. The Explanatory Memorandum (at para 343) suggests that the 'new "value of the benefit" penalty is only available in relation to primary contraveners who are employers, and does not extend to accessories (see section 550)'. However, the confinement of the 'value of benefit' penalty to direct employers appears to represent an unnecessarily narrow reading of the statutory provision. Rather, in our view, there is a viable argument that, under s 550(1), a person who is 'involved in' a contravention of a remuneration-related provision is taken to have contravened that provision. This would mean that a third party body corporate (other than a small business employer) found to be 'involved in' a remuneration-related contravention under s 550 may be exposed to the new 'value of benefit' penalty, notwithstanding statements in the Explanatory Memorandum to the contrary.[96]

As noted above, increasing the maximum penalties available under the FW Act is significant and welcome. However, the new provisions add an extra layer of complexity to the unenviable task of calculating the maximum penalty when making submissions, conducting settlement discussions and/or determining orders.

To identify the relevant maximum pecuniary penalty under the scheme proposed in the Bill, it is necessary first to ascertain the relevant penalty units that attach to the relevant contravention by cross-referencing the table in s 539(2) of the FW Act. The next step is to

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[94] See *Vehicle Builders' Employees' Federation of Australia v General Motors-Holden Pty Ltd* (1977) 32 FLR 100 at 113; *Finance Sector Union of Australia v Australia & New Zealand Banking Group Limited* (2002) 52 AILR 4-663 at [16]; *Retail and Fast Food Workers Union Inc v Tantex Holdings Pty Ltd (No 2)* [2020] FCA 1644 at [62].

[95] *Retail and Fast Food Workers Union Inc v Tantex Holdings Pty Ltd (No 2)* [2020] FCA 1644 at [66].

[96] The same reasoning explains why 'accessories' may be liable under s 545 to pay compensation for losses caused by the contravention in which they are found to be involved. In this instance too, the Explanatory Memorandum for the Fair Work Bill 2008 had wrongly suggested (at [2177]) such orders could not be made: see *Creighton & Stewart's Labour Law*, above, [19.47].

consider whether the contravention is 'remuneration-related' or not (or a combination of the two); whether the respondent is an individual, a 'small business employer' or a body corporate (other than a small business employer); whether the contravention is likely to be characterised as serious (s 557A); and to what extent the grouping provisions will apply to contraventions arising out of a single course of conduct under s 557, the application of which is noted in s 546A(3). The final step is to consider which maximum penalty – that calculated with reference to penalty units or the value of the benefit obtained – is the greater. This complicated exercise may mean that applicants are less inclined to pursue penalties, particularly where they are without the benefit of legal representation.

While we generally support the changes proposed by the Bill, we recommend that once they have been bedded down, a formal review of the penalty regime be undertaken in the future to assess whether further clarification or simplification is required.

Part 1 of the Bill also proposes to amend s 545(2) so as to provide the courts with an express power to make an adverse publicity order. We are strongly in support of this change, given that adverse publicity orders may not only fulfil the denunciatory aim of sentencing, they assist in amplifying the deterrence effects of litigation. Individual wrongdoers may be especially sensitive to shaming strategies, and large or listed firms may be especially concerned about the risk of reputational harm. Negative publicity can lead to a drop in consumer confidence, a reduction in market share and a decline in equity value.[97] It may also open the corporation up to further litigation via class actions.

It is notable, however, that the proposed amendment does not include banning orders or director disqualification orders – both of which were canvassed in the Consultation Papers. Banning orders and/or director disqualification orders arguably deliver dual regulatory benefits – they act not only as a deterrent, but also have the capacity to play a protective role in weeding out rogue employers and/or repeat offenders.[98] Such orders may also have long-term consequences, and a greater deterrent effect, given that a disqualification order can operate as a 'black mark' on a person's public record.[99] These types of orders are especially critical in the absence of a licensing or registration scheme. The Human Rights Compatibility Statement for the Bill acknowledges (at p cxii) that director disqualification addresses 'the need to adequately safeguard workers and others against those found to have dishonestly and systematically exploited employees' in breach of the FW Act. Disqualification orders are also said to provide a 'preventative remedy that specifically targets the problem of individuals' serious, repeated misconduct'. However, this sanction is currently only available where the individual has been convicted of a criminal offence under

[97] Arie Freiberg, *Regulation in Australia,* Federation Press, Sydney, 2017, p 412.

[98] Michelle Welsh, 'Civil Penalty Orders: Assessing the Appropriate Length and Quantum of Disqualification and Pecuniary Penalty Orders' (2008) 31 *Australian Bar Review* 96.

[99] Freiberg, above, p 409.

the proposed Part 7 of Schedule 5 (see below).[100] There is no capacity for a court to make orders in relation to a civil remedy contravention, even where the contravention may be characterised as serious under s 557A. This is a major shortcoming of the legislation which we strongly recommend be rectified.

One last note with respect to Part 1 relates to the absence of any sentencing principles. The Final Report of the Australian Law Reform Commission (**ALRC**) into Corporate Criminal Responsibility recommended that to maintain 'principled coherence and consistency in the assessment of penalties for corporations', a statutory provision should be enacted which sets out the factors that the court should consider when making a civil penalty order in respect of a corporation. Many of the factors identified by the ALRC reflect the principles that the courts currently apply in penalty proceedings under the FW Act, such as the nature and circumstances of the contravention, the specific and general deterrent effects of any court order and whether the corporation has previously been found to have engaged in any related or similar conduct.[101] However, there are a number of other factors – which the ALRC highlights – that are not routinely or directly taken into account by courts on the basis of the general sentencing principles, such as:

(a) whether the corporation had a corporate culture conducive to compliance at the time of the contravention;

(b) the extent to which the contravention or its consequences ought to have been foreseen by the corporation;

(c) the degree of voluntary cooperation with authorities, including whether the contravention was self-reported;

(d) the effect of the penalty on third parties; and

(e) any measures that the corporation has taken to reduce the likelihood of committing a subsequent contravention, including any internal investigation into the causes of

[100] In particular, a conviction under the proposed offence relating to underpayments will lead to automatic disqualification of a person from managing corporations as a result of the operation of s 206B(1)(b)(ii) of the Corporations Act 2001 (Cth).

[101] ALRC, *Corporate Criminal Responsibility – Final Report,* ALRC Report 136, 2020, Recommendation 11. In many penalty proceedings brought under the FW Act, courts have regard to the factors originally identified by Mowbray J in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 at [26]–[59], and adopted by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14 at [14]. See also *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [(2008) 165 FCR 560; *Fair Work Ombudsman v NSH North Pty Ltd* (2017) 275 IR 148.

> the contravention, internal disciplinary action, and measures to implement or improve a compliance program.[102]

This non-exhaustive list of factors is designed to promote transparency and consistency, while not unduly limiting judicial discretion. Clearly, the court is permitted to take into account other relevant considerations beyond those expressly listed in determining the appropriate penalty. However, a key purpose of explicitly referring to certain factors in the legislation itself – especially factors such as the measures that the corporation has taken to repair harm and prevent future contraventions – is to incentivise good corporate behaviour in the wake of wrongdoing.[103] In our view, allowing the courts to consider explicitly whether the contravention was self-reported by the corporation in making its sentencing decision is more critical, and more compelling, than the published litigation policy of the relevant regulator (see proposed s 682(1)(d) of the Bill).

Part 2 – Small claims procedure

Part 2 of Schedule 5 makes a number of substantial amendments to the scope and procedure of the small claims jurisdiction of the FW Act. According to the Explanatory Memorandum (p iv), the proposed provisions are designed to enable employees 'to recover their entitlements more easily, quickly and cost-effectively through the small claims process'.

First, proposed s 548(2)(a) raises the cap on claims from $20,000 to $50,000. This is a positive, and relatively uncontentious, change. Second, proposed subsections 548(10)–(11) provide that a claimant may recover the costs of any filing fees associated with the commencement of the small claims proceeding. Again, this is a small, but constructive, shift. Finally, and most notably, proposed ss 548A–548E provide for the Federal Circuit Court or a magistrates court to refer small claims matters to the FWC for conciliation and, if the parties consent, arbitration.

Taken together, the proposed amendments are an undoubted improvement on the current system, which has been perceived as slow, costly and unresponsive. However, in overhauling the wage recovery system, it is not entirely obvious why a referral model has been selected over other possible options. For example, there appears to be no constitutional reason as to why a small claim could not be lodged with the FWC in the first instance, as is currently possible for contraventions of the 'general protections' in Part 3-1 of the Act, under ss 365 and 372.

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[102] See also ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders,* Report No 103, 2006; New South Wales Law Reform Commission, *Sentencing: Corporate Offenders,* Report No 102, 2003.

[103] Caron Beaton-Wells and Brent Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context,* Cambridge University Press, 2011, p 500.

In our view, there are several reasons why initiating small claims in the FWC, or at least giving applicants that option, would be preferable. First, it reduces confusion for applicants and minimises some of the problems faced by unrepresented litigants accessing the court system, which was identified by the Migrant Workers' Taskforce as a 'difficult and overwhelming prospect' for many employees, especially those from a non-English speaking background or with limited literacy skills.[104]

Second, many underpayment issues tend to arise in the context of an unfair dismissal or general protections claim (such as a failure to pay termination and/or redundancy entitlements in full). It makes sense for such matters to be heard together, and for the FWC to be authorised to deal with all of these matters via conciliation and, if needed, consent arbitration.

The filing fees are generally lower in the tribunal system, as compared to the court system. For instance, the current filing fee for a small claims proceeding brought in the Federal Circuit Court is $245 (for claims less than $10,000) or $400 (for claims between $10,000 and $20,000). In comparison, the current filing fee for a general protections matter in the FWC is $74.50. It is likely that a lower filing fee is far more appealing to an unrepresented litigant than providing a court-based mechanism for recovery of the filing fee upon conclusion of the matter (which is a more convoluted and uncertain process).

Allowing the initiation of a small claim in the FWC would also have the benefit of streamlining representation rights and reduce confusion over who has rights of standing. This is especially important for industrial associations. Under the current small claims provisions, it is not clear that industrial associations have standing to initiate claims on behalf of others. Further, in order to represent individual claimants in the small claims jurisdiction, industrial associations are required to seek the leave of the court (FW Act s 548(8)–(9); Fair Work Regulations 2009 cl 4.01(3)–(4)). In comparison, for general protections matters in the FWC, it is clear (at least in relation to dismissal disputes) that applications under s 365 can be initiated not only by the person affected, but also by an industrial association entitled to represent their interests. Under s 596, industrial associations are not required to seek formal leave to appear in the FWC, whereas lawyers and paid agents can only make an application or submission with the permission of the Commission.

If an underpayment claim was initiated in the FWC and ultimately proceeded to consent arbitration, it would be possible for any order made by the tribunal to be binding on the parties, with recourse to a court only being necessary in the event of non-compliance.[105] If,

[104] Migrant Workers' Taskforce Report, above, p 94.

[105] This is the case for existing enforcement processes under the general protections in Part 3-1, under which the obligation to comply with any FWC order is a civil remedy provision: see eg FW Act s 369(3).

however, it is the case that small claims are initiated in the court (before being referred to the FWC), the problems of enforcing settlement agreements emerging from conciliation, or arbitration orders made by the Commission, are somewhat eased by the proposed s 548C(5), which allows a court to make consent orders following conciliation, and s 548E, which permits a court to enforce an arbitration order. Another advantage of resolving pay-related matters via conciliation conducted by the FWC, as compared to dispute resolution or mediation overseen by the FWO, is that the employee is armed with some additional leverage. In particular, a proposed note to the new s 548C makes clear that parties to the proceedings bear their own costs in relation to the conciliation, but that a party that 'unreasonably refuses to participate in a matter before the FWC' may face an order for costs under s 570(2)(c).[106] The risk of adverse cost consequences may lead some of the more reluctant or evasive respondents to participate in conciliation and/or arbitration, where they might not otherwise be inclined to do so.

Apart from these procedural points, there remain some uncertainties about the operation the small claims jurisdiction that should be addressed in order to allow for efficient and effective redress, regardless of whether the claim is initiated in the court or the Commission in the first instance.

First, it is unclear whether a claimant can use s 548 for a claim for compensation against a person who was involved in the relevant contravention but who is not the direct employer, as would ordinarily be possible under s 550.[107] It is not uncommon for small claims to be brought against an employer on the brink, or in the midst, of business collapse. Unless the claimant can pursue involved third parties – such as key managers, directors or advisers – the proceeding is likely to be futile and the claimant may walk away empty-handed.

Second, the evidentiary presumption that applies under s 557C where an employer has failed to make or keep employment records, or to provide payslips, can only apply to small claims proceedings if they can be characterised as 'proceedings relating to a contravention by an employer of a civil remedy provision'. Again, it would be helpful to make it clear this is

[106] This might seem to be contradicted by the proposed amendment to Note 1 to s 570(1) (see item 12 of Sch 5 to the Bill), which suggests that costs in a small claim proceeding 'are limited to any filing fees paid to the court by the party that applied for the small claims order'. Presumably, the Note is referring only to costs ordered under the proposed new s 548(10), as opposed to s 570(2). It might helpful, however, to clarify the position.

[107] For suggestions that s 550 does not apply, see eg *Beer v Limb* [2012] FMCA 494 at [24]–[25]; *Devonshire v Magellan Powertronics Pty Ltd* [2013] FMCA 2017 at [85]. With respect, we do not believe the reasoning in these decisions is necessarily correct, but the point is certainly not free of doubt. The powers of an eligible State court will necessarily be more limited, because of the terms of s 545(3): see *Mildren v Gabbusch* [2014] SAIRC 15 at [47], [53].

the case, to avoid any possible argument to the contrary.[108] This presumption is critical for many underpayment claims, especially when applicants are dealing with an evasive respondent. It is even more important in a small claims context where the applicant is less likely to have access to legal representation.

While conciliation and arbitration of small claims via the FWC offers the opportunity for a quick and binding resolution of pay-related matters, it is also important to underline some of the risks of alternative dispute resolution in the context of statutory entitlements. For a start, the private nature of the conciliation process[109] means that it may do little in terms of developing and legitimising norms of workplace practice beyond the individual employer.[110] By providing only for recovery of backpay, it is arguable that this redress mechanism fails to provide any specific or general deterrence, given that employers may not face an economic incentive to comply with the law, either now or into the future. Instead, 'employers have essentially been provided a no-interest loan by its workforce'.[111] This problem is potentially exacerbated by the fact that there are no provisions of the Bill which would prevent a repeat offender from participating in a string of conciliations, and no obvious way in which the court or the FWC could alert the FWO to a firm that requires an additional level of scrutiny or investigation.[112]

In addition, conciliated outcomes may be flexible and speedy, but may also result in settlements that fall below the legal minimum. This poses the risk of undermining the integrity of the system.[113] The Queensland Wage Theft Inquiry has previously criticised the FWO's internal mediation process on the basis that it 'does not reflect a fair or just system

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[108] The reasoning adopted in the cases cited in the preceding footnote might suggest that small claims proceedings cannot be characterised in that way, although again we are not persuaded that is necessarily how s 548 should be interpreted.

[109] The proposed s 548C(3) of the Bill would effectively override s 592(3) of the FW Act and require the conciliation to be held in private.

[110] Joellen Riley, 'Workplace Dispute Resolution under the Fair Work Act: Is There a Role for Private Alternative Dispute Resolution Providers?' (2009) 20 *Alternative Dispute Resolution Journal* 236; Tess Hardy, 'It's Oh So Quiet? Employee Voice and the Enforcement of Employment Standards Regulation in Australia' in Alan Bogg and Tonia Novitz (eds)*, Voices at Work: Continuity and Change in the Common Law World*, Oxford University Press, 2014, p 249.

[111] David Weil, 'Creating a Strategic Enforcement Approach to Address Wage Theft: One Academic's Journey in Organizational Change' (2018) 60 *Journal of Industrial Relations* 437 at 442.

[112] Under proposed s 548B(3), the court is only required to take into account the following factors in determining whether to refer the matter to conciliation by the FWC: (a) the stage the proceedings have reached since the commencement of the proceedings; (b) the complexity of the matter in dispute, including question of law that might arise; and (c) whether conciliation would be effective in resolving the matters in dispute in the proceeding.

[113] Leah Vosko, John Grundy and Mark Thomas, 'Challenging New Governance: Evaluating New Approaches to Employment Standards Enforcement in Common Law Jurisdictions' (2016) 37 *Economic and Industrial Democracy* 373.

for workers who are only trying to recover what they are legally and duly owed'.[114] It is arguable that proposed new ss 548C(9) and 548D(7), which provide that the FWC must not facilitate an outcome as part of the conciliation or arbitration that would be inconsistent with the FW Act, or a fair work instrument, may potentially shield vulnerable applicants from agreeing to, or accepting, especially poor outcomes.

However, this is likely to be a difficult provision to apply in practice. First, it is frequently the case that underpayment claims give rise to a contested dispute over factual matters (such as hours worked), as opposed to a dispute over legal questions (such as whether the NES applies to the employee). It may be challenging for a tribunal member to satisfy themselves that the outcome is fully consistent with the relevant legal standard without quantifying the claim – which is often a burdensome and resource-intensive exercise. Ultimately, the Explanatory Memorandum notes (at para 364) that these new sections are not intended to 'affect the parties' ability to come to a genuine agreement outside the FWC conciliation process or court process'. This suggests that the desire for industrial settlements may sometimes trump the need to ensure that such a settlement accurately reflects the relevant legal entitlements.

Part 3 – Prohibiting employment advertisements with pay rate less than the national minimum wage

Part 3 of Schedule 5 introduces a new provision which expressly prohibits employers from advertising jobs with pay rates below the relevant national minimum wage or special national minimum wage. The provision broadly reflects a recommendation of the Migrant Workers' Taskforce, and is an important extension of other provisions dealing with misrepresentation in employment. However, it is worth noting that Recommendation 4 of the Taskforce's Final Report prohibited 'persons from advertising jobs with pay rates that would breach the [FW Act]'. This is more expansive than the proposed provision, which does not prohibit job advertisements that publish pay rates below the relevant base rates of pay in an award or enterprise agreement.

Part 4 – Compliance notices, infringement notices and enforceable undertakings

Part 4 of Schedule 5 increases the maximum penalties that: apply for failing to comply with a compliance notice; or can be imposed under an infringement notice. Proposed s 715(2A) codifies the factors that the FWO may take into account in deciding whether to accept an enforceable undertaking (albeit this list is non-exhaustive). While these changes are welcome in one sense, they do not directly reflect the recommendations of the Migrant Workers' Taskforce. For example, Recommendation 8 of the Taskforce's Final Report recommends that the model provisions relating to enforceable undertakings contained in

[114] Queensland Wage Theft Inquiry, above, p 128.

the Regulatory Powers (Standard Provisions) Act 2014 (Cth) be adopted. Under the model provisions, there is no requirement for the FWO to form a reasonable belief that a contravention has occurred before accepting an undertaking. Removing this statutory requirement would allow the FWO to use enforceable undertakings in a more flexible, and potentially more effective, manner. For instance, there would be no legislative barrier to the FWO entering into an enforceable undertaking with a third party firm (beyond the direct employer), if the firm was willing to commit to the terms of the undertaking.

There is also room for enhancing the scope and operation of compliance notices and infringement notices, beyond simply increasing the penalty which attaches to such notices. For instance, it would seem appropriate for the FWO to be empowered to issue compliance notices in relation to all civil remedy provisions of the FW Act. Administrative sanctions offer many advantages over formal enforcement processes – not least of which is their expediency and efficiency in recovering backpay and sanctioning the wrongdoer. The empirical research suggests that fines – even when modest – can act as important vehicles for delivering deterrence and there is scope for their expansion and an increase in their use.[115]

Part 5 – Sham arrangements

Part 5 of Schedule 5 proposes to increase the maximum penalties that apply to contraventions of the sham contracting provisions. Again, we support this change, but believe that it could, and should, be taken a step further. There seems to be no obvious reason as to why sham contracting arrangements – which are often knowing and systematic by their very nature – should not attract the penalties which attach to 'serious contraventions' under s 557A.

In addition, a host of inquiries, including the Productivity Commission Inquiry into the Workplace Relations Framework, have recommended that the 'recklessness' defence under s 357(2) of the FW Act is too generous, and should be narrowed to a test of 'reasonableness'.[116] This amendment to the sham contracting provisions is long overdue. We strongly suggest it be added to the Bill.

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[115] See, eg, Rebecca Casey et al, 'Using Tickets in Employment Standards Inspections: Deterrence as Effective Enforcement in Ontario, Canada' (2018) 29 *Economic and Labour Relations Review* 245.

[116] McCallum, Moore and Edwards, above, pp 242–3; Productivity Commission, *Workplace Relations Framework*, Inquiry Report No 76, 2015, pp 813–5; Queensland Wage Theft Inquiry, pp 166–9; Natalie James, *Report of the Inquiry into the Victorian On-Demand Workforce*, Victorian Government, Melbourne, 2020, pp 205–6.

Part 6 – Functions of the ABC Commissioner and the Fair Work Ombudsman

Part 6 of Schedule 5 effectively requires the ABC Commissioner and the FWO to publish information relating to when they will commence, or defer commencing, proceedings. It is notable that proposed s 682(1)(3) makes no mention of whether the FWO need also publish information about when it will commence, or defer commencing, criminal prosecutions, even though immunity policies and/or deferred prosecution agreement schemes often provide an important regulatory lever in this context. In our view, this should be rectified to reflect the fact that both the ABCC and the FWO will be empowered to initiate criminal prosecutions under the Bill.

Part 7 – Criminalising underpayments

Proposed new s 324B of the Bill makes it a criminal offence for an employer to engage in a dishonest and systematic pattern of underpaying one or more employees. The maximum penalty for an individual offender is imprisonment of up to 4 years or 5,000 penalty units, or both. For a corporation, the maximum penalty is 25,000 penalty units.[117]

The proposed criminal offence is said by the Human Rights Compatibility Statement (pp cxvii–cxviii) to be intended to 'implement the Government's commitment to further deter the most egregious and persistent kinds of underpayments'. This amendment broadly corresponds with the recommendation of the Migrant Workers' Taskforce – which found that criminal sanctions should be introduced to address the 'most serious forms of exploitation' – that is, where the 'conduct is clear, deliberate and systematic'.[118] The Explanatory Memorandum (para 407) explains that this offence does not 'apply to one-off underpayments, genuine mistakes or miscalculations, as the conduct must be intentional, dishonest and systematic'.

It also reflects some of the key findings of the ALRC Report on Corporate Criminal Responsibility, which confirms that a criminal offence is warranted where: there is a need for denunciation and condemnation of the conduct; the imposition of the stigma attached to criminal offending is appropriate; the deterrent characteristics of a civil penalty would be

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[117] This is somewhat lower than the criminal penalties which are available under other business laws for corporate wrongdoing. For example, s 45AF of the *Competition and Consumer Act 2010* (Cth) provides that a person other than a body corporate may be punishable on conviction by a term not exceeding 10 years or a fine not exceeding 2,000 penalty units, or both. See also s 536D of the FW Act, which makes it a criminal offence to give, receive or solicit a corrupting benefit. Under Division 2 of Part 3-7, an individual convicted of this offence may face imprisonment of up to 10 years or 5000 penalty units, or both.

[118] Migrant Workers' Taskforce Report, above, pp 87–8.

insufficient; it is justified by the level of potential harm that may occur; and it is otherwise in the public interest to prosecute the corporation itself for the conduct.[119]

However, we have some concerns about a number of features of the new offence. For example, the line between conduct which constitutes a serious contravention under s 557A, and dishonest and systematic underpayment under s 324B, is not entirely clear. A 'principled rationale'[120] for distinguishing between conduct subject to a civil penalty and conduct constituting a criminal offence appears to be largely absent.[121]

The new federal offence in s 324B is clearly intended to override State or Territory laws that criminalise underpayment or record-keeping failures by national system employers in relation to their employees.[122] Introducing a federal criminal offence for dishonest and systematic underpayment is, in many respects, a timely development, in that it avoids some of the messy constitutional questions raised by State laws in this area.[123] While federal intervention in this space provides a neater solution, it is also framed in narrower terms than the relevant State laws. For example, the criminal offence under proposed s 324B of the Bill only applies to an employer who has engaged in dishonest and systematic underpayment. In comparison, the *Wage Theft Act 2020* (Vic) creates multiple criminal offences. In addition, to an offence relating to dishonest underpayment, the Victorian legislation also makes it offence to falsify, or fail to keep, employee entitlement records with a view to dishonestly obtaining a financial advantage.[124] The corporate attribution principles under the Victorian Act are also arguably wider than those that apply under the FW Act (such as s 793) and relevant parts of the Criminal Code Act 1995 (Cth) (such as Part 2.6). The Victorian legislation also incorporates a due diligence defence, which broadly reflects Part 2.5 of the Criminal Code, and potentially guards against counterproductive liability avoidance which may make it harder to detect the wrongdoing in the first place., and harder to bring a prosecution in the long run.[125]

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[119] ALRC, *Corporate Criminal Responsibility – Final Report*, p 178 (Recommendation 2). For further discussion of the ALRC Report, and the regulatory issues raised by criminal sanctions in the context of employment standards enforcement, see Tess Hardy, John Howe and Melissa Kennedy, 'Criminal Liability for 'Wage Theft': A Regulatory Panacea?' (2021) *Monash University Law Review* (forthcoming).

[120] ALRC, *Corporate Criminal Responsibility – Final Report*, [3.12].

[121] See generally Jennifer Collins, 'Exploitation at Work: Beyond a "Criminalization" or Regulatory Alternatives Dichotomy' in Alan Bogg et al (eds), *Criminality at Work,* Oxford University Press, 2020, p 97 at p 110.

[122] See proposed subsections 26(2)(da) and (2)(db). See also Explanatory Memorandum, para 404.

[123] See Wage Theft Act 2020 (Vic); Criminal Code and Other Legislation (Wage Theft) Amendment Act 2020 (Qld).

[124] Wage Theft Act 2020 (Vic) ss 7, 8.

[125] For further discussion of these issues, see Hardy, Howe and Kennedy, above.

The fact that the federal offence is more limited in scope than State provisions, and has some overlap with civil remedy provisions relating to serious contraventions under the FW Act, may make enforcement of this criminal offence more difficult and/or less appealing.[126] This may ultimately reduce the regulatory value of this offence provision. Previous research on the deterrence effects of criminal sanctions suggests that it is enforcement – not enactment – which is essential to delivering deterrence and curbing non-compliance.[127] As Lee and Smith observe:

> Creating or enhancing penalties on the books will also do little to deter wage theft if agencies lack the resources or political will to engage in enforcement or if employers fail to understand how to comply.[128]

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[126] The ALRC found that, over a five year period, ASIC appears to have lodged 8 criminal proceedings (as opposed to 64 civil proceedings in this same period). The ACCC has lodged 6 criminal prosecutions (as compared to 122 civil penalty proceedings): ALRC, *Corporate Criminal Responsibility – Final Report*, [3.101].

[127] Christine Parker, 'Criminal Cartel Sanctions and Compliance: The Gap between Rhetoric and Reality' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement,* Hart, 2011, p 239; Mirko Bagaric, Theo Alexander and Athula Pathinayake, 'The Fallacy of General Deterrence and the Futility of Imprisoning Offenders for Tax Fraud' (2011) 26 *Australian Tax Forum* 511.

[128] Jennifer Lee and Annie Smith, 'Regulating Wage Theft' (2019) 94 *Washington Law Review* 759 at 762.

Schedule 6 – The Fair Work Commission

We support the proposals in Schedule 6 to expand the FWC's powers and discretions in various ways, subject to one concern.

Proposed new s 587A would allow a Full Bench of the FWC to order that applicants who have previously had an 'unmeritorious' application dismissed under the amended s 587 be required to seek the permission of a presidential member of the FWC before being allowed to make applications of a specified kind. That seems to us to be a sensible power for the FWC to have in dealing with vexatious litigants.

However, as the new provision is drafted, it provides no criteria either for making such an order, or for determining its scope. The Explanatory Memorandum refers (at para 472) to 'applicants who demonstrate a pattern of initiating unmeritorious proceedings'. But there is no hint in the legislation that any such pattern must either exist or be foreseeable. We suggest that there be at least *some* precondition for the making an order, whether it concern the perceived likelihood of further unmeritorious applications, or perhaps a perceived necessity to ensure the fair and efficient conduct of the FWC's business.

Missed opportunities

Without labouring the point, one of the most disappointing features of the Bill is that there are so many pressing issues about the design and operation of the FW Act and other forms of federal labour regulation that are not addressed. Without attempting to be comprehensive, these include the following:

- There have been longstanding difficulties in determining whether certain workers should be classified as employees, so as to attract the operation of the labour protections in the FW Act and other statutes. Some of those issues have been helpfully addressed by a recent report commissioned by the Victorian Government into the treatment of 'on-demand' work, including in the burgeoning gig economy. Many of the cogent recommendations in that report are directed to the Commonwealth.[129] There are also concerns about the prevalence and legal status of unpaid internships, especially when undertaken outside formal education or training programmes.[130]

- The Bill does not have regard to, or address, the recommendations set out in the ground-breaking *Respect@Work* report by the Australian Human Rights Commission, which was published in March 2020. The federal government is yet to provide a comprehensive response to its 55 recommendations, despite having commissioned the review. The report includes key recommendations that relate to reviewing and reforming the FW Act to ensure it 'play[s] a stronger role in the regulation of workplace sexual harassment'.[131] As evidence set out in the report highlights, the prevalence of sexual harassment in Australian workplaces has a profound impact on business efficiency and productivity. Implementing some or all of the recommendations in the *Respect@Work* report would promote the stated policy aims of the current Bill.

- The Bill does not incorporate many of the recommendations made in previous inquiries on unlawful underpayment and worker exploitation. For example, there is no express provision which extends liability to non-employing firms in labour hire arrangements and supply chain networks.[132] Also absent from the Bill is any

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[129] See *Inquiry into the Victorian On-Demand Workforce*, above.

[130] See eg Andrew Stewart and Rosemary Owens, *Experience or Exploitation? The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia*, Fair Work Ombudsman, Melbourne, 2013; Andrew Stewart, Damian Oliver, Paula McDonald and Anne Hewitt, 'The Nature and Prevalence of Unlawful Unpaid Work Experience in Australia' (2018) 31 *Australian Journal of Labour Law* 156.

[131] Australian Human Rights Commission, *Respect@Work,* 2020, p 120. See specifically recommendations 28–34.

[132] See, eg, Migrant Workers' Task Report, above, Recommendation 11.

requirement to pay wages into bank accounts to improve transparency and enforceability.[133] To address the inherent difficulties of enforcing superannuation guarantee entitlements, and easing the burden on the ATO, the guarantee should be added to the National Employment Standards of the FW Act.[134] This is not addressed in the Bill. The Fair Entitlements Guarantee continues to exclude temporary migrant workers and does not permit unpaid superannuation to be recovered.[135] Again, this should be addressed. There continues to be no licensing or registration scheme at the federal level for labour hire arrangements.[136] There is also an urgent need to clarify the way in which sanctions imposed under the FW Act will affect the rights and obligations of visa workers and employers who seek to engage them.[137] The Bill is noticeably silent with respect to a range of measures designed to protect temporary migrant workers from the most egregious forms of exploitation.

- The Bill does not do enough to promote greater management-labour cooperation at a workplace level. Research has strongly demonstrated the value of expert third party assistance in helping businesses overcome the adversarialism that has long been the default mode for Australian industrial relations.[138] It would be useful if the government translated its recent recognition of the value of cooperation in this field[139] into much-needed support for the FWC's work in this area.[140]

- The Bill shows no interest in bringing Australian law and practice into compliance with Australia's obligations under relevant international labour standards – especially in relation to collective bargaining and protected industrial action.

More generally, the Bill does little to address broader challenges of the kinds mentioned during this submission, including wage stagnation,[141] insecurity of work, and inequalities in

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[133] Black Economy Taskforce Final Report, above, Recommendation 3.2.

[134] Queensland Wage Theft Inquiry Final Report, above, Recommendation 13.

[135] Queensland Wage Theft Inquiry Final Report, above, Recommendation 9.

[136] Migrant Workers' Taskforce Report, above, Recommendation 14.

[137] See eg Migrant Workers' Taskforce Report, above, Recommendations 19–21.

[138] See Mark Bray, Johanna Macneil and Andrew Stewart, *Cooperation at Work: How Tribunals Can Help Transform Workplaces*, Federation Press, Sydney, 2017.

[139] See eg Prime Minister (Scott Morrison), Address, National Press Club, 26 May 2020.

[140] See Fair Work Commission, 'Cooperative Workplaces', https://www.fwc.gov.au/disputes-at-work/cooperative-workplaces, accessed 4 February 2021. Compare Attorney-General's Department, *Cooperative Workplaces – How can Australia Capture Productivity Improvements from More Harmonious Workplace Relations*, Commonwealth, Canberra, 2019, a discussion paper that sees cooperation in almost exclusively unitarist terms, as opposed to the 'pluralist collaboration' that may hold greater prospects for success: see Mark Bray, Johanna Macneil and Andrew Stewart, 'The Cure for Workplace Strife', *Australian Financial Review*, 4 December 2019.

[141] See Andrew Stewart, Jim Stanford and Tess Hardy (eds), *The Wages Crisis in Australia: What It is and What to Do About It*, University of Adelaide Press, Adelaide, 2018.

the labour market. Indeed many of the key proposals in the Bill may exacerbate those problems, not solve them – although the compliance and enforcement reforms are a clear exception in that regard. The Bill can also be criticised for attempting to shift much of the burden associated with the recovery from the pandemic onto workers,[142] at a time when the share of national income going to profits rather than labour is continuing to rise.[143] There is much in the Bill that could be improved – and many proposals that we believe should be rejected.

[142] See Eugene Schofield-Georgeson, 'Industrial Legislation in Australia, 2020' (2021) *Journal of Industrial Relations* (forthcoming).

[143] See M Wade, 'Pandemic legacy: wage earners have never collected a smaller share of the economy', *Sydney Morning Herald*, 5 December 2020; G Hutchens, 'Why company profits have jumped in Australia during COVID-19 while workers are taking home less', *ABC News*, 3 September 2020.