



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

Submission by the Chamber of Commerce and Industry WA

5 February 2021

We believe in good business

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Introduction

1. The Chamber of Commerce and Industry of Western Australia (**CCIWA**) is the leading business association in Western Australia (WA) and has been the voice of business for over 130 years. CCIWA represents employer members from across all regions and industries in Western Australia, particularly small and medium enterprises. CCIWA is also a foundation member of the Australian Chamber of Commerce and Industry (**ACCI**).
2. CCIWA welcomes the opportunity to make a submission to the Senate Standing Committee on Education and Employment's (**the Committee**) inquiry into the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* (**the Bill**) having also participated in the Greenfields working group.
3. CCIWA supports the submission made by ACCI and makes the following comments based on our practical experience in assisting businesses navigate the *Fair Work Act 2009* (**FW Act**).
4. The COVID-19 pandemic has highlighted the weaknesses and inflexibilities within our industrial relations system as it struggled to accommodate the need for businesses to transform their operations to ensure their survival and maintain jobs:
 - 4.1. Modern awards failed to provide the flexibility to facilitate alternative work arrangements necessary to accommodate government restrictions, with limited capacity to obtain timely and meaningful variations through the Fair Work Commission (**FWC**).
 - 4.2. Prescriptive approval requirements prevented employers and employees from establishing flexible work arrangements through enterprise bargaining.
 - 4.3. Employers were focused on the liabilities associated with casual employment, at a time when we need to create more jobs.
 - 4.4. Our international reputation for industrial dispute within the construction sector discouraged investment in major projects, an important part of our post COVID-19 recovery.
5. Whilst the Bill provides for modest incremental improvements that will help address some of these issues, it does not address the full range of concerns raised by CCIWA and other employer associations in relation to the operation of the FW Act.
6. In its review of the workplace relations system, the Productivity Commission provided an extensive list of recommendations aimed at repairing the FW Act. With this Bill only scraping the surface of these recommendations, more work is needed to ensure that the FW Act meets the needs of employers and employees.

7. Given the above, CCIWA:
 - 7.1. supports providing greater certainty regarding the employment of casual employees;
 - 7.2. supports providing greater flexibility for those industries most affected by the COVID-19 pandemic. However, in the face of ongoing government restrictions to manage the spread of COVID-19 there is a need to provide all businesses with the scope to modify employment arrangements to adapt to these restrictions and preserve jobs;
 - 7.3. supports promoting the use of enterprise agreements by providing greater flexibility and making the system easier to navigate;
 - 7.4. supports the option of 'life of project' agreements, which will play a critical role in promoting greater investment in the construction of major resource and infrastructure projects within Australia;
 - 7.5. objects to increasing penalties for unintentional underpayment of entitlements without tackling the complexity of the award system.

Casual employment

Recommendation

That Schedule 1 of the Bill be passed, with the following amendments:

- casual conversion provisions be simplified to reduce the unnecessary administrative burden on employers;
- the casual conversion criteria for considering reasonable business grounds be based on probable rather than definitive outcomes.

Increased uncertainty in creating employment opportunities

8. The Federal Court decisions of *WorkPac Pty Ltd v Rossato*¹ and *WorkPac Pty Ltd v Skene*² have raised significant concerns for all employers regarding the employment of casual staff, irrespective of industry or size.
9. These decisions have opened the doors for claims to be made on behalf of casual workers seeking compensation for paid leave and other entitlements, despite having been paid a loading that already compensates for those entitlements.
10. The potential liability arising from double dipping claims has been estimated at between \$18 billion and \$39 billion dollars³, with the Australian Securities and Investment Commission (ASIC) recommending that “a provision or contingent liability may be required for ‘casual employees’ employed in circumstances that were not clearly covered by the decision”.⁴ This advice recognises the significant uncertainty in determining which employees may be affected by these decisions, with ASIC recommending that businesses set aside funds, even where there is not a clear liability.
11. At a time where employers should be encouraged to invest in growing their business and creating new jobs, they are instead being cautioned to do the opposite.

¹ [2020] FCAFC 84

² [2018] FCAFC 131

³ Explanatory Memorandum, pviii

⁴ ASIC. [COVID-19 implications for financial reporting and audit](#)

12. The size of the potential liability has prompted a growing number of claims by class actions law firms⁵, backed by financial institutions specialising in funding litigation. These entities profit substantially in the event of a successful claim, with the Federal Court recently intervening in a proposed settlement of an employment related claim that would have left the workers with less than half of the proposed settlement, after the deduction of legal fees and a 50 per cent payment to the litigation funder.⁶
13. The purpose of casual loading has been lost in this debate, which is paid to casual employees in lieu of paid leave and other permanent entitlements.
14. In establishing a 25 per cent casual loading for the manufacturing sector, now the benchmark for most industrial instruments, the then Australian Industrial Relations Commission (**AIRC**) factored into the loading consideration for *“paid leave; long service leave; and a component covering differential entitlement to notice of termination of employment and employment by the hour effects”*.⁷ In reaching this conclusion, the AIRC was persuaded by the union’s argument that *“the rate of pay be appropriately loaded to compensate casuals sufficiently to put them in the same financial position as permanent workers would be for working the same amount of time”*.⁸
15. Consequently, there is no merit in the view that casual employees should be eligible for the casual loading and also claim the entitlement it was designed to compensate for. It is a clear example of having your cake and eating it too.

Defining casual employment

16. A clear and concise definition is important in assisting employers and employees understand what casual employment is.
17. The absence of a definition within the FW Act has contributed to the current uncertainty regarding casual employment. As such we welcome the inclusion of a test which considers the nature of the employment relationship at the time of its commencement.
18. This provides the parties with certainty as to the status of the employment relationship, even if the nature of the relationship changes over time.
19. The concern that will be raised by unions is that the test may result in employees becoming trapped in casual employment. The Bill addresses this through the inclusion of casual conversion provisions, which provide employees with an opportunity to move to permanent employment.

⁵ *Adero Law* has currently filed class action claims against six businesses in relation to casual employees.

⁶ *Bywater v Appco Group Australia Pty Ltd* [2020] FCA 1877 (24 December 2020)

⁷ Print T4991 at 196

⁸ Ibid at 134

20. The casual conversion provisions also recognise that employers cannot force employees to move to permanent employment.
21. The aforementioned Federal Court decisions of Skene and Rossato put employers between a rock and a hard place. The decisions allow a casual employee to be deemed permanent based on their current working arrangements, despite the employer having no capacity to correct the issue where an employee does not wish to convert to permanent employment. This is a significant issue, with most employees preferring to remain casual due to the increased flexibility and the immediate benefit derived from the casual loading.
22. The Bill also provides that to be defined as casual there must be *"no firm advance commitment of continuing and indefinite work according to an agreed pattern of work when the offer of employment is made"*. In determining whether a casual position meets this definition, the Bill also sets out an exhaustive list of factors to be considered.
23. Overall, the test will be a subjective one, which unfortunately provides substantial scope for argument as to whether those factors have been met.
24. The definition therefore does not provide the same level of clarity provided through most modern awards and enterprise agreements, which define a casual employee as a person who is engaged and paid as such.
25. Whilst there is precedent for the adoption of a clearer and more concise definition of casual employment within the FW Act, CCIWA recognises that the definition proposed by the Bill represents an improvement to the current situation.

Casual conversion

26. CCIWA recognises that including casual conversion provisions within the FW Act is a relevant component in addressing the current issues concerning casual employment.
27. Casual conversion provisions have been a feature of award system for the past two decades, with the FWC having most recently incorporated model casual conversion provisions into most modern awards in 2017.
28. Whilst the Bill is based on these provisions, it imposes a significant level of additional administrative burden, particularly in determining which employees are eligible to be offered the right to elect to convert and notifying employees of the reasons why an offer may not be made.

29. In our experience, the overwhelming majority of employees who are offered the opportunity to convert to permanent employment choose not to do so, largely because they value the flexibility of casual employment and/or prefer the higher rate of pay. Employers will therefore be required to undertake a significant review of individual employees' employment arrangements for no discernible benefit.
30. A more efficient approach would be to:
 - 30.1. Rely on the casual information sheet to provide employees with the notification of their right to elect to convert to permanent employment; or
 - 30.2. In line with the modern award clauses, require the employer to provide all casual employees a notice of their right to elect to convert to permanent employment after 12 months employment.
31. In both circumstances the employer would then be required to either consent to the request, or refuse it based on reasonable business grounds.
32. The Bill also identifies criteria that may be considered in determining reasonable business grounds. The grounds are comprehensive but are based on definitive rather than probable outcomes. For example, one of the criteria is "*the employee's position **will** cease to exist within the next 12 months*". This requires the employer to know 12 months out what will occur. As demonstrated through the events of 2020, this is an impossible task. We recommend that the criteria be amended to replace the term "will" with "is likely to".

Orders relating to casual loading amounts

33. As identified in this submission, the amendment to remove the risk of double dipping claims is essential in providing both employers and casual employees certainty over the status of their employment arrangement.
34. It is also an important factor in furthering the objective of the proposed casual conversion provisions. For employees to want to move to permanent employment there needs to be a benefit in doing so. Currently this is the entitlement to paid leave in exchange for the casual loading.
35. The decisions of Rossato and Skene discourage casual employees from converting to permanent employment. Put simply, why would an employee agree to a lower rate of pay in exchange for paid leave entitlement when they can keep the casual loading and lodge a claim against their employer at a later time?

Modern Awards

Recommendation

That Schedule 2 of the Bill be passed, with the following amendments:

- In line with Individual Flexibility Arrangements, a simplified additional hours arrangement may have effect where there has not been strict compliance with s168N and 168P;
- That s168(N)(1) be amended to provide that simplified additional hours agreements must identify the maximum number of additional hours.
- That s789GZK be amended to provide that a flexible work direction may also be issued in response to government restrictions arising from the management of COVID-19.

That the Government:

- Continue to engage with stakeholders on how modern award can be reformed to ensure they work in the best interests of employers and employees;
- Continue the ongoing operation of the JobKeeper flexibilities to allow all businesses to adapt and preserve jobs in the case of further government restrictions in response to the COVID-19 pandemic.

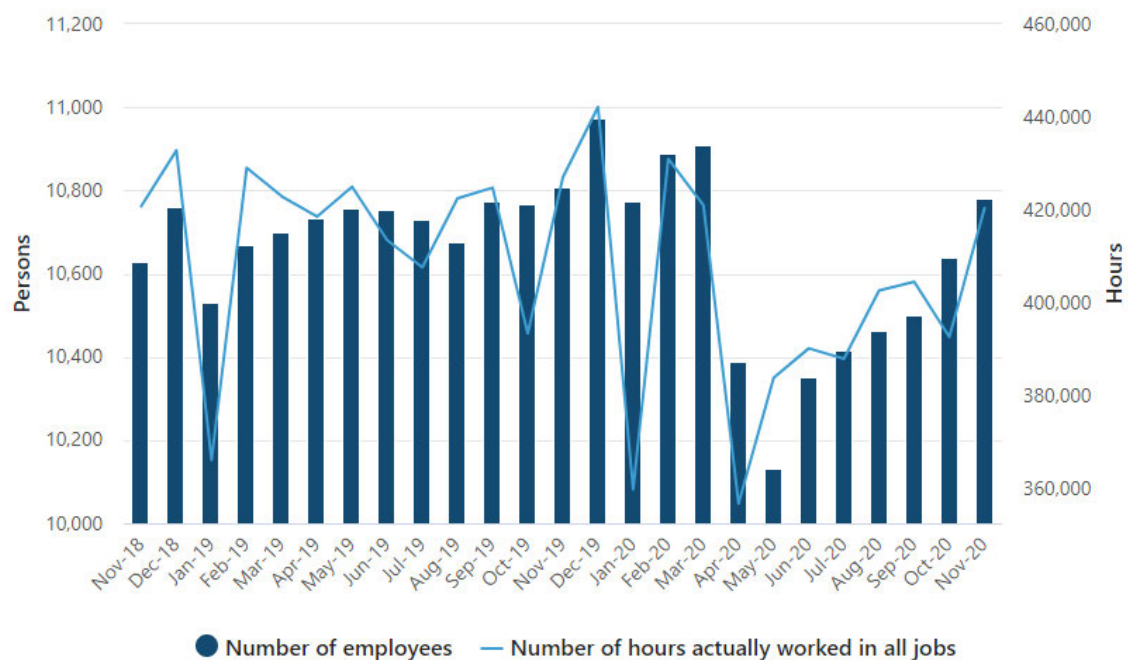
36. CCIWA supports the proposed changes to modern awards to provide those industries which are the most affected by the COVID-19 pandemic greater flexibility in managing their employees.
37. However, the amendments are a lost opportunity to consider the impact that modern awards have on curtailing workplace flexibility across all industries.
38. The COVID-19 pandemic has highlighted the need for businesses to be flexible and quickly adapt working arrangements to respond to challenges and opportunities. However, the need for flexibility is ongoing, with individual businesses requiring the ability to adapt in response to an ever-changing market, both to preserve the employment of their current employees but also to take advantage of opportunities that will increase jobs.
39. The need to repair modern awards was identified by the Productivity Commission as a key area of workplace relations reform. It found that their inflexibility is *"imposing costs for employers and employees"*.⁹ CCIWA recommends that the Government continue to engage with stakeholders on how modern awards can be reformed to ensure they work in the best interests of employers and employees.

⁹ Productivity Commission (2015) *Workplace Relations Framework - Volume 1*, p 339.

Additional hours for part time workers

40. The impact of COVID-19 displaced almost 76,000 full time jobs in the 12 months to December 2020. This was only partially offset through the creation of 12,000 new part time jobs.¹⁰
41. However, this only tells part of the story. The impact of the pandemic over the course of 2020 can be most dramatically seen in the graph below, which shows the significant decline in both the number of persons employed and hours worked.

Graph 1 – Number of employees and number of hours worked¹¹

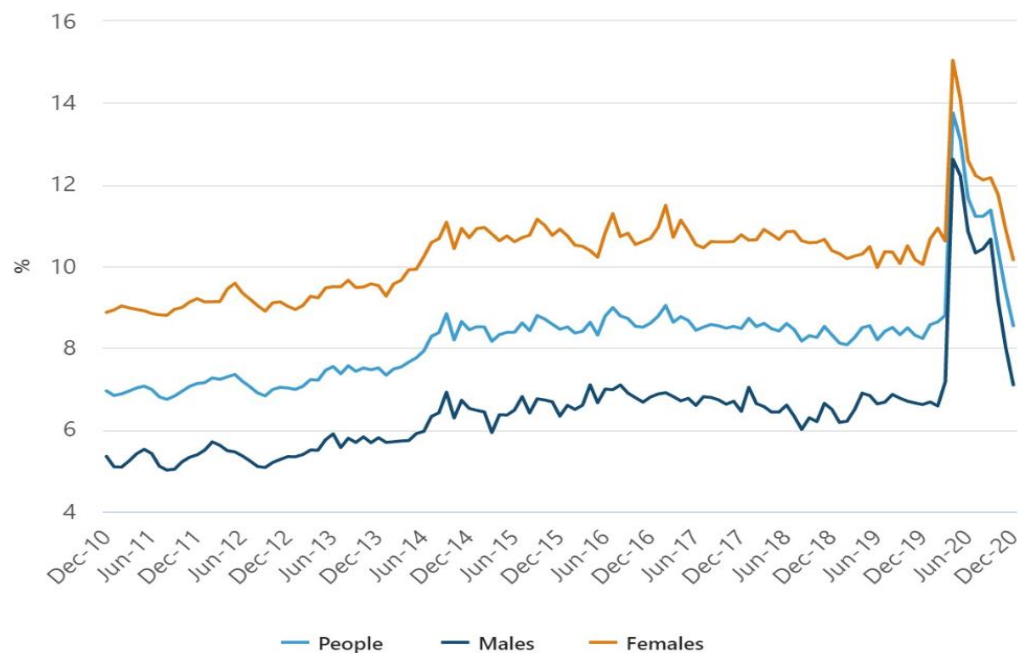


42. This is also reflected in the underemployment rate for December 2020 of 8.5 per cent for all employees, having reached a peak of 13.8 per cent in April 2020. For female employees the level of underemployment is substantially higher at 10.2 per cent currently, having reached peak of 15 per cent in April.

¹⁰ ABS (Dec 2020) *Labour Force, Australia*. Seasonally adjusted data

¹¹ ABS (Jan 2021) *Weekly Payroll Jobs and Wages in Australia*. Week ending 2 January 2021. Original data

Graph 2 – Underemployment rate¹²



43. Consequently, not only do we have a higher proportion of employees who are underemployed compared to this time last year, but there is also a large group of workers who have lost working hours.
44. Most modern awards require a part time worker's start and finish times for each day they work to be fixed at the commencement of their employment, which can only be varied by written agreement. This limits the capacity for employers to offer part time employees additional hours of work without incurring overtime costs.
45. The proposed simplified additional hours agreement will help address this issue by allowing part time workers covered by an "identified" modern award to work additional hours to make up lost income without the employer incurring overtime costs. This amendment allows part time employees to pick up additional working hours that would otherwise be offered to casual employees or worked by the business owner themselves.
46. Despite its name, a simplified additional hours agreement must meet several conditions. Given that these provisions will largely be utilised by small and medium sized enterprises, there is significant potential that an agreement may be deemed invalid, despite the parties having genuinely agreed to the additional hours, because one of the technical requirements has not been met.¹³

¹² ABS (Dec 2020) [Labour Force, Australia](#). Seasonally adjusted data

¹³ Section 168(n)(2) of the Bill provides that a written record of an agreement must be made before the end of the first period of additional hours and where this is not complied with the arrangement is of no effect. In the example of a

47. By way of example, s168(n)(2) of the Bill provides that a written record of an agreement must be made before the end of the first period of additional hours and where this is not complied with the arrangement is of no effect. In the example of a restaurant, an employer may make an agreement with an employee to work an additional three hours because of an increase in the number of bookings for dinner. Because the night is busy, the manager doesn't record the agreement until the next morning, invalidating the arrangement.
48. To address this concern, we recommend that the Bill adopt the approach applied to Individual Flexibility Arrangements (**IFAs**), which provides that where the agreement does not meet the content or procedural requirements, it continues to have effect.¹⁴ This amendment will not displace the onus on the employer to demonstrate that, in the event of a dispute, an agreement was genuinely made.
49. A further concern arises from the requirement that a simplified additional hours agreement must identify the additional hours to be worked on a particular day. In industries such as retail and hospitality, the ability for an employer to guarantee additional hours is frequently contingent on customer demand, which will not always be known at the time the agreement is made. For example, a restaurant won't know the number of customers that may "walk in" without a booking or how long diners will stay. This limits the preparedness of employers to enter into these agreements, preferring instead to place greater reliance on casual employees.
50. To address this concern we recommend that s168(N)(1) be amended to provide that the agreement must specify the maximum number of additional agreed hours that may be worked.

JobKeeper flexibilities

51. The JobKeeper subsidy and the accompanying flexibilities incorporated into Part 6-4C of the FW Act, were a significant factor in helping Australian employers maintain jobs during the height of restrictions imposed by the federal and state government in response to the COVID-19 pandemic.

restaurant, an employer may make an agreement with an employee to work an additional three hours because of an increase number of bookings for dinner. Because the night is busy, the manager doesn't record the agreement until the next morning, invalidating the arrangement.

¹⁴ s145

52. As the JobKeeper scheme comes to an end in March 2021 so too do the flexibilities provided for in the FW Act. The flexibilities allow:
 - 52.1. for stand down directions to reduce an employee's hours or days of work if they can't be usefully employed because of the pandemic and/or government restrictions to slow its transmission;
 - 52.2. employers to issue reasonable directions to require an employee to perform alternative duties or work at a different location where it is necessary to maintain the employment of one or more employees; and/or
 - 52.3. agreement to be reached with an employee to change the employee's days and times of work.
53. The Bill will allow for those employers covered by the identified modern award to retain the capacity to issue directions to perform alternative duties or work at another location, as part of a strategy to assist in rebuilding the business.
54. However, these amendments appear to assume that the COVID-19 pandemic is over. Unfortunately, this is not the case. In response to recent outbreaks in Perth, Sydney, Brisbane and Adelaide, the respective State Governments have implemented control measures that have affected the operation of businesses in these areas.
55. We recommend that s789GZK be amended to provide that a flexible work direction may be issued to either assist in the revival of an employer's business or in response to government restrictions arising from the management of COVID-19.
56. For many of these businesses the JobKeeper flexibilities have been an essential tool in helping to preserve the jobs of their employees, and in the event of future restrictions these flexibilities will continue to be needed.
57. Consideration should therefore be given to preserving these flexibilities for businesses across all industries to allow businesses to adapt and preserve jobs in the case of further government restrictions in response to the COVID-19 pandemic.

Enterprise Agreements

Recommendation

That the following parts of Schedule 3 be passed:

- Part 1 – Objects;
- Part 2 – Notice of employee representational rights;
- Part 3 – Pre approval requirements;
- Part 4 – Voting requirements;
- Part 5 – Better off overall test;
- Part 6 – NES interaction terms;
- Part 7 – Variation of agreements to cover eligible franchisees;
- Part 9 – How the FWC may inform itself;
- Part 10 – Time limits for determining certain applications;
- Part 11 – FWC functions;
- Part 12 – Transfer of business

To improve the operation of the above parts, that the following amendments be made:

- Part 2 – that s174 of the FW Act provide greater flexibility in the content of the NERR.
- Part 3 – that s180(3)(c) specify that the employees' general knowledge and understanding of enterprise agreements be taken into consideration in considering whether the meaning and effect of an agreement has been properly explained.
- Part 9 – that for a bargaining representative to be heard in the approval of an enterprise agreement they must have been actively involved, or sought to be involved, in the negotiation of the enterprise agreement.

That the following parts of Schedule 3 be opposed:

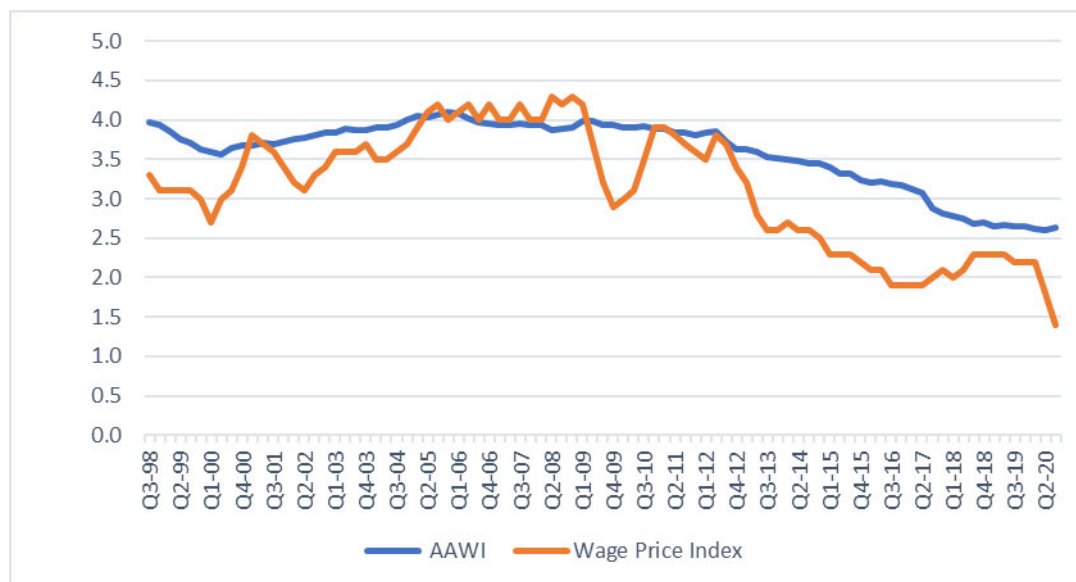
- Part 8 – Terminating agreements after the nominal expiry date. Alternatively, the provision should be amended to limit taking industrial action in the 3 months following the expiry of an enterprise agreement, to similarly facilitate negotiations.
- Part 13 – Cessation of instruments. Alternatively, a transitional provision should be included that preserves employees' entitlements as part of their contract of employment, where they are better off compared to the award.

58. Since its introduction in 1991, enterprise bargaining has become a significant tool in allowing workplaces to establish terms and conditions of employment that suit the enterprise.

59. A key premise for enterprise bargaining is an ability to depart from the rigid regulation of working arrangements prescribed by the award.

60. The upside for employees is higher than average wage growth, as highlighted in the graph below.

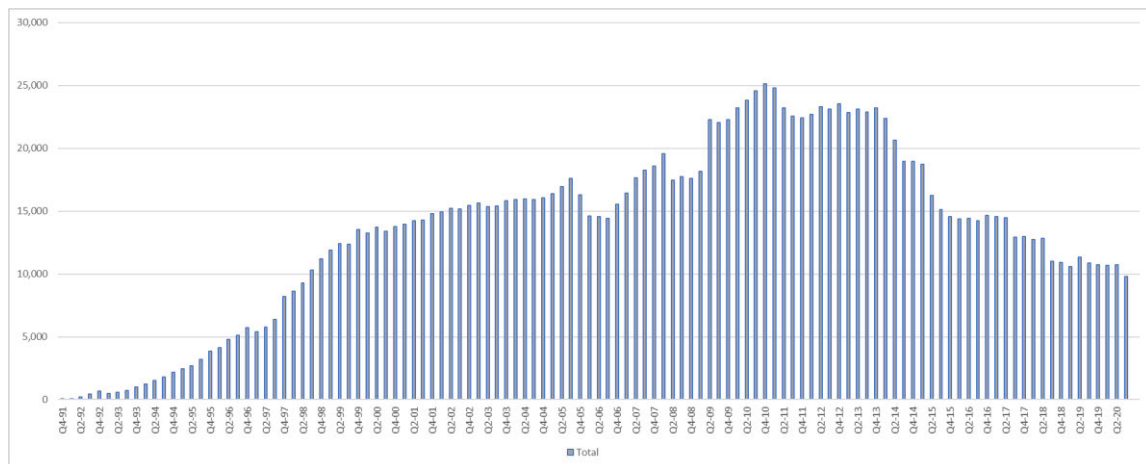
Graph 3 – Average annual wage increase (percent)¹⁵



61. The above graph shows that the average annual wage increase for all current agreements is generally higher than average wage growth, as measured by the Wage Price Index. It is also less susceptible to economic fluctuations providing greater certainty for employees regarding their future income.
62. Unions also value enterprise bargaining as a tool to demonstrate member relevance.
63. In recent years there has been a substantial decline in the number of enterprise agreements. As shown in the graph below, the number of current enterprise agreements has fallen sharply, from over 25,000 agreements in 2011 to only 9,800 agreements in late 2020.

¹⁵ Source – [Trends in Enterprise Bargaining Report](#) – Historical Trend Data – Current by Quarter and [Wage Price Index](#) - Seasonally adjusted percentage change from corresponding quarter (Australia) - Total hourly rates of pay excluding bonuses

Graph 4 – Number of enterprise agreements currently in operation¹⁶



64. The demise in the number of employers willing to enter into enterprise agreements is due to the decreased flexibility in the application of the Better Off Overall Test (BOOT), combined with the increased complexity of having an agreement approved.
65. The reason for the decline in enterprise agreements is that there are no significant benefits for an employer to enter into one, other than to minimise the risk of protected industrial action.

Objects

66. Central to enterprise bargaining is establishing terms and conditions of employment that meet the needs of the business and its employees.
67. Over recent years the FWC, largely as a result of Federal Court appeal decisions, has taken an increasingly prescriptive interpretation of the approval requirements for enterprise agreements. In doing so, these bodies have lost sight of a key objective of the FW Act, to provide *"a simple, flexible and fair framework that enables collective bargaining in good faith..."*¹⁷.
68. The amendment to the enterprise agreements objectives reinforces the central purpose of enterprise bargaining, and the need for the FWC and Federal Court to give priority to these objectives when considering approving an agreement.

¹⁶ *Trends in Enterprise Bargaining Report* – Historical trends data – current by quarter

¹⁷ s171(a)

Notice of Employee Representational Rights

69. An area of significant frustration for both employers and employees is the overly complex requirements to make an enterprise agreement.
70. This starts with the issuance of the Notice of Employee Representational Rights (**NERR**). The purpose of the NERR is to provide information to employees about their rights in relation to the negotiation of an enterprise agreement.
71. However, the way the FW Act is written provides that where the notice is not provided within the required timeframe, or not issued in the prescribed manner, an agreement cannot be approved.
72. This issue was partially addressed through the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017*, which provides the FWC with the flexibility to approve an agreement in the event of a minor procedural or technical error.¹⁸
73. Whilst this amendment was significant in giving the FWC greater discretion in approving an agreement, it has not reduced the complexity associated with making one in the first instance.
74. CCIWA welcomes the proposal to extend the timeframe for issuing the NERR to all employees to a maximum of 28 days, which will aid employers with a large workforce or where workers are located across multiple worksites. Employers will still be required to issue the document as soon as practicable, which in most circumstances will continue to be within the current 14 day timeframe.
75. However, the Bill does not address the issues arising from s 174(1A) of the FW Act, which provides that the NERR must:
 - 75.1. contain the content prescribed by the Regulations;
 - 75.2. not contain any other content; and
 - 75.3. be in the form prescribed by the Regulations.
76. This provision has resulted in a range of perverse outcomes. For example, the issuance of a NERR has been found invalid because additional documents were stapled to it¹⁹, it incorrectly cited the FWC by its predecessor name (Fair Work Australia)²⁰, or it directed employees to raise any questions with their manager rather than with the employer.²¹

¹⁸ s188(2)

¹⁹ *Peabody Moorvale Pty Ltd v CFMEU (2014) 242 IR*

²⁰ *Serco Australia Pty Ltd v United Voice and the Union of Christmas Island Workers [2015] FWCFB 5618*

²¹ *ALDI Foods Pty Ltd v SDA [2019] FCAFC 35*

77. To reduce the need to rely on the FWC's discretion to ignore minor deficiencies, we recommend that the Bill amend s174(1A) to provide that the NERR may be issued in a form other than that prescribed by the Regulations, provided that it does not contain any information which is inconsistent with the prescribed content.

Pre-approval and voting requirements

78. The pre-approval and voting requirements are a further source of significant frustration in making an enterprise agreement.
79. The FWC and Federal Court interpretation of the requirements for making an enterprise agreement, particularly in relation to explaining the agreement and determining which employees are eligible to vote, has made the process difficult to navigate and highly susceptible to legal challenge.
80. The proposed amendments to the pre-approval requirements under s180 (2) will significantly address this concern by providing greater flexibility in the approach taken by the employer to ensure that employees are given a fair and reasonable opportunity to decide whether to approve the agreement. The test still requires the FWC to be satisfied that the process was appropriate, but gives it discretion to consider the outcome.
81. The Explanatory Memorandum identifies that a purpose of these changes is to provide flexibility in the way the agreement is explained based on the employees' previous experience with enterprise agreements. It includes an illustrative example²² which identifies that in the case of a new agreement that is largely unchanged from the existing agreement, an appropriate explanation would be to provide a detailed explanation only of the changes.
82. However, the proposed s180(3)(c), which deals with the requirement to explain the terms and effects of the agreement in an appropriate manner, does not appear to reflect this. Given the level of disputation on this matter, we recommend that this clause be amended to include that the explanation take into account *"the employees' general knowledge and understanding of enterprise agreements"*.
83. The amendment to s181(1), to clarify which casual employees are eligible to vote for an enterprise agreement, is also welcomed. This is a matter that has been subject to significant disputation in the approval of agreements, with unions and other interveners arguing that either too many or too few casual employees were asked to vote on the agreement depending on which approach best suited their argument. By including a clear definition of eligible casuals, the Bill will remove the current confusion surrounding this matter.

²² Page 40

Better off overall test

84. The current application of the BOOT has stifled innovation and flexibility within enterprise agreements and is a significant disincentive to bargaining. This is not only an issue for employers seeking to establish terms and conditions of employment that meet the needs of the enterprise, but also employees who are unable to negotiate improved conditions in exchange for greater flexibilities or entitlements that improve their work/life balance.
85. A significant barrier to improved flexibility is the FWC's consideration of hypothetical working arrangements that are unlikely to ever occur in practice. The approach severely limits the capacity for employers and employees to agree to provisions which are different to the award standard.
86. This has been a significant factor in the declining use of enterprise agreements, and places Australian businesses at a significant disadvantage in seeking to adapt to the changing requirements of work arising from the impact of COVID-19.
87. The proposed amendment to the BOOT is sensible, and will require the FWC to only have regard to the work arrangements that currently apply to employees covered by the agreement, or that are reasonably foreseeable by the employer. This will remove the need for the FWC to consider "what if" scenarios to situations that will never apply.
88. In considering future work patterns, it is critical that the test be based on those work arrangements that are reasonably foreseeable by the employer, as they are best placed to make this assessment. However, we anticipate that this will not require the FWC to simply take the employers' word for it, but will be a matter which is subject to some scrutiny.
89. The Bill will continue to require that all employees are better off, which will require detailed consideration of the impact of the agreement on each individual worker.
90. Clarification that the BOOT requires consideration of both monetary and non-monetary provisions is also a welcome amendment. Non-monetary benefits have a value to employees that come at a cost to employers. The current focus on monetary entitlements discourages employers from considering non-monetary entitlements sought by employees, because they are perceived to have no value under the BOOT. Ultimately this disadvantages employees, particularly female, indigenous and migrant workers seeking greater flexibility to accommodate caring, cultural or religious needs.

Interaction with the National Employment Standards

91. In considering whether an agreement contains a provision which is inconsistent with the National Employment Standards (**NES**) the FWC is also prone to consider hypothetical examples which are unlikely to arise in practice.
92. This has resulted in unnecessary delays to the approval of an agreement by requiring the employer to provide an undertaking to address a scenario that is unlikely to arise.
93. In seeking unnecessary undertakings, the FWC erodes the confidence and trust that the employer has built up with the employees in negotiating the enterprise agreement. The requirement for undertakings often raises concerns by employees that the employer and relevant union (where involved) have misrepresented the effect of the agreement.
94. The FWC ongoing concern about the interaction between enterprise agreements and the NES has resulted in it seeking a generic undertaking that:
"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 e greater benefit, the NES provision will apply to the extent of the inconsistency".
where agreements do not already contain a similar clause.
95. The inclusion of a model term to this effect reinforces the existing requirement that a term of an agreement which is inconsistent with the NES has no effect, whilst reducing the time and complexity associated with approving an agreement.

Role of third parties in approval process

96. The process of having an enterprise agreement approved by the FWC can be disrupted/sabotaged by unions, particularly in industries such as construction and electrical contracting, where the relevant unions commonly monitor agreement applications and file largely template objections to them.
97. Most unions adopt a scatter gun approach to these challenges, alleging a broad range of failures in terms of the process for making an agreement and its compliance with the BOOT with no, or little, understanding of the agreement or the process used to make it. Generally, the unions were not involved in the bargaining process and either have no members covered by the proposed agreement, or their members choose not to seek their assistance.

98. These challenges appear to be based on a desire to limit the number of non-union agreements within an industry, with little concern for the interests of the employees covered by the agreement. Rather, their intervention puts at risk pay increases and other employee benefits provided by the agreement.
99. The interventions rarely serve any benefit other than to delay the process for the approval of an agreement, with the FWC being suitably qualified to inquire into and assess whether an agreement meets the requirements for approval without the assistance of third parties.
100. To address this issue, the Bill proposes the inclusion of a new clause which provides that, except in exceptional circumstances, the FWC may inform itself in relation to an agreement based on information that is publicly available and by hearing from the:
- 100.1. employer;
 - 100.2. employees;
 - 100.3. bargaining representative; or
 - 100.4. relevant Minister.
101. At their core, enterprise agreements are about the employer and employees who will be covered by the agreement. As such the FWC should give primacy to their views, and those directly involved in representing them. Consequently, a union that was involved in the negotiation of an enterprise agreement should have the right to be heard.
102. This amendment will preserve that right, but limit the capacity of those who have no direct interest in the matter seeking to disrupt the process. This goes some way to reducing the potential for parties who were not involved in the negotiation of the agreement to disrupt the approval process.
103. However, to achieve this objective we recommend that the ability for bargaining representatives to be heard is limited to those parties which were actively involved, or sought to be involved, in the negotiation of the enterprise agreement.
104. The basis for this amendment rests with the definition of bargaining representative. Section 176(1)(b) of the FW Act provides that a union is a bargaining representative for an enterprise agreement where it has at least one employee as a member.²³ Consequently the Bill will still allow a union to intervene if it can establish it has at least one member, even though the union chose not to be involved²⁴ in the negotiations and/or the member did not seek their involvement.

²³ Unless the employee(s) has appointed another person in writing as the bargaining representative).

²⁴ In enterprises where the number of union members is perceived to be low, many unions will opt not to represent their members, unless the employees are able to recruit more members.

Time limitations for approval

105. CCIWA supports establishing a 21-day time frame for the approval of enterprise agreements.
106. The FWC has identified that the average time for the approval of an enterprise agreement without undertakings has fallen to 17 days.²⁵ Despite this the FWC continues to identify that parties can expect to wait up to four months to have their agreement approved. This represents a significant delay to the implementation of the agreement, including pay increases for employees.
107. The proposed improvement to the approval process means that the 21-day timeframe will be achievable for the vast majority of agreements, with the Bill also allowing the FWC to take a longer period in exceptional circumstances.

Termination of EA after nominal expiry date

108. Section 225 of the FW Act currently allows for an employer, employee(s) or relevant union covered by an enterprise agreement to apply to the FWC to terminate it after it has passed its nominal expiry date.
109. The Bill seeks to amend this provision to restrict applications to terminate an agreement until at least three months after the nominal expiry date.
110. The explanatory memorandum identifies that this provision is intended to address concerns that *"unions consider this to often be a bargaining tactic used by employers to force employees to agree to terms and conditions they would not otherwise agree to, when faced with reverting to the relevant modern award/s under which they would be worse off"*.²⁶
111. In short, the intent of this amendment is to provide a three month bargaining window to allow for negotiations to occur without the risk of the employer applying coercive bargaining pressure.
112. The unions' concern relates to a small handful of applications in which employers have sought to terminate an existing agreement during the renegotiation of an enterprise agreement. However, the approval of such applications is subject to the FWC determining that the termination of the agreement is not contrary to the public interest, taking into account the views of the employees, relevant union and employer. This requires a substantial hearing to consider the impact of the decision on the employees before making any such order.²⁷

²⁵ Fair Work Commission (2020) *Annual Report – Access to Justice*, p6.

²⁶ p lxxii

²⁷ In the case of *Murdoch University* [2017] FWCA 4472 (29 August 2017) this involved an eleven day hearing.

113. This is in stark contrast to the requirements for taking protected industrial action, which can also commence immediately after the nominal expiry of an enterprise agreement. Taking industrial action is not subject to a public interest test, nor does it consider the impact of the proposed action on the business or its clients. Last financial year a total of 696 protected action ballot orders applications were made by unions.²⁸
114. The sole objective of taking protected industrial action is as a bargaining tactic to force employers to agree to terms and conditions that they would not otherwise agree to. Unions' concerns over the termination of enterprise agreements are hypocritical given their approach to taking industrial action.
115. CCIWA does not believe that there is any basis for amending the existing provisions for terminating an enterprise agreement, noting that in the vast majority of circumstances, these applications are not related to the re-negotiation of an enterprise agreement.
116. Alternatively, we propose that the Bill be amended to also restrict taking protected industrial action until three months after the nominal expiry date of the agreement. This would further the intent of this provision by providing a three-month period in which productive negotiations can occur without either party seeking to apply coercive bargaining strategies.

117. *Cessation of pre-reform instruments*

118. There is a longstanding convention that industrial instruments made under superseded legislation will continue to operate under the incoming act. The reason for this approach is threefold — to:
- 118.1. prevent unnecessary disruption to businesses' operations;
 - 118.2. protect employee entitlements; and
 - 118.3. avoid industrial disputation.
119. At the time the FW Act was introduced, Parliament upheld this convention notwithstanding the then Labor Government's concerns about the requirements for approving agreements made under the previous *Workplace Relations Act 1996*.
120. Nothing has changed since the introduction of the FW Act to require a review of this approach, with employees and/or unions²⁹ able to apply to the FWC to unilaterally terminate agreements which have passed their nominal expiry date. This approach continues to be used by unions where they believe the modern award provides employees with overall better entitlement.

²⁸ Fair Work Commission (2020) *Annual Report – Access to Justice* p63.

²⁹ Either as a party to the agreement or on behalf of affected employees.

121. The basis for the proposed sunset provisions is the false assumption that all individual and collective agreements made prior to 1 January 2010 provide for entitlements that are overall less beneficial than those contained in the modern awards. In CCIWA's experience, many of the pre-FW Act agreements that continue to remain in operation are in higher paying industries such as manufacturing, resources, and engineering.
122. In these sectors, the effect of the sunset provision would be that employees' terms and conditions of employment would revert to the overall lesser entitlements within the relevant modern award, resulting in loss of pay and entitlements.
123. This issue was recognised by the WA Government in 2002 when it introduced sunset provisions for the then state Workplace Agreements.³⁰ To address the concern of employees being disadvantaged because of the cessation of their workplace agreement, the *Labour Relations Reform Act 2002 (WA)* provided that the terms and conditions from the agreement formed part of the employees' contract of employment and that the employee received the greater of:
- 123.1. the entitlements arising under their contract of employment; or
 - 123.2. the entitlements under the award, calculated at the relevant award rate of pay;
- whichever was the greater when assessed on a yearly basis.³¹
124. CCIWA recommends that if a sunset provision is introduced into the FW Act, a similar offset provision is incorporated into the Bill. This would allow employees whose entitlements are overall better than the modern award to preserve their existing terms and conditions of employment.

Transfer of Business

125. The Bill addresses an ongoing issue with the FW Act transfer of business provisions. These provide that when an employee voluntarily transfers between associated entities, the enterprise agreement that currently applies to the employee will continue to cover the employee with the new employer, unless the FWC issues an order to the contrary.
126. This issue was highlighted in the 2012 review of the FW Act, which identified that:
- Yet it does appear to the Panel that when employees voluntarily seek to transfer from one associated entity to another, they should be employed under the terms and conditions to which they would be subject as an employee of the 'new employer'. Of course, as has been shown above, in these instances the parties can apply to FWA under*

³⁰ Noting that this was one of the few examples where a government has departed from the standard convention of preserving the operation of agreements made under previous legislation.

³¹ *Labour Relations Reform Act 2002 (WA)* Section 31

s.318 for an order that the existing terms and conditions of employment of the transferring employee will not govern her or his employment with the new employer.

The question for the Panel is whether it is necessary to require the parties to apply to FWA on every occasion an employee voluntarily seeks to transfer to a similar position in a related entity. We believe it would be preferable to spare both parties the time and expense of making such an application. This could be achieved by amending s. 311(6). Such an amendment is unlikely to increase the risks of employees having their terms and conditions of employment diminished through transfers to associated entities.³²

127. Unfortunately, the situation remains that where an employee wants to voluntarily transfer from one associated entity to another, the employer must make an individual application to the FWC for an order that the industrial instrument of the entity they will be transferring to will apply. This acts as a barrier for those employees wanting to transfer between associated entities, by making the process of engaging them more complex.
128. It ultimately disadvantages employees who may be looking to transfer to an associated organisation because of promotional opportunities, the chance to acquire new skills, or to relocate to another part of the country. The proposed amendment will remove this barrier.

³² McCallum, R, Moore, M and Edwards, J (2012) *Towards more productive and equitable workplaces - an evaluation of the Fair Work legislation*, p206

Greenfield Agreements

Recommendation

That Schedule 4 of the Bill be passed.

Importance of major resource projects to the Australian economy

129. Major projects in the resource and infrastructure sector provide well-paying job opportunities for employees during the construction phase, in addition to long term benefit to the economy as a whole once they become operational.
130. The construction sector alone accounts for 8 per cent of the nation's gross domestic product and is critical in the development of Australia's resource sector which accounts for a further 11 per cent of the national economy.³³
131. Approximately \$35 billion in capital expenditure was invested in the resources sector in 2019-20 nationally, accounting for around 30 per cent of capital expenditure across all industries.³⁴ However, the COVID-19 pandemic coincided with delayed investment decisions of more than \$60 billion in major projects, the impact of which is likely to be apparent in the medium to long term.³⁵
132. Deferred investment decisions, such as on the \$16 billion Scarborough gas project, mean a deferment in the creation of new jobs which will contribute to Australia's economic recovery.
133. The jobs and spending generated by the construction and operational phases of major resource projects flow to other sectors of the economy. This was highlighted by the Reserve Bank of Australia, which identified that the \$400 billion investment³⁶ which occurred during the 'resources investment boom' between 2003-2012:
 - 133.1. increased the population by approximately 1 per cent;
 - 133.2. increased employment by 3 per cent through an increase in demand;
 - 133.3. lowered the unemployment rate by 1.25 percentage points;
 - 133.4. increased real wages by approximately 6 per cent;
 - 133.5. increased the tax base; and

³³ Reserve Bank of Australia (7 January 2021) [Composition of the Australian Economy – Snapshot](#).

³⁴ ABS (Sept 2020) [Private New Capital Expenditure and Expected Expenditure, Australia](#).

³⁵ Ibid

³⁶ Raynor, V. and Bishop, J. 2013 [Industry Dimensions of the Resource Boom: An Input-Output Analysis](#), RBA Research.

133.6. increased household disposable income by 13 per cent".³⁷

134. Investment in the resources sector also provides state and federal governments income from royalties and grants, which is essential in allowing governments to invest in infrastructure and provide services that benefit the whole population.

Challenges in attracting investment

135. The benefits to the economy from our resources sector can only be realised through significant business investment in developing the infrastructure required to support these operations.
136. The presence of suitable mineral or petroleum resources does not guarantee that investment will occur. There are multiple factors considered when assessing the viability of potential resource projects, many of which relate to Government policy. This had led to a focus by many governments globally to *"introduce new mining laws"* which are *"motivated by a desire to encourage greater mining investment..."*.³⁸
137. Consequently, Australia is in a competitive international environment seeking investment in major resources projects, in which respective State and Federal Governments have a significant ability to influence investment outcomes.
138. A key factor in assessing the viability of a major resource project is the ability to mitigate the level of risk associated with it.
139. One of these risks is the inability to negotiate terms and conditions of employment for the life of the project, and the risk of industrial action occurring mid project.
140. This issue has been recognised by the Productivity Commission which observed that *"even if employees do not actually use this leverage [taking industrial action], the ex-ante risk of it raises investor risk and may add to project cost"*.³⁹
141. The reality of this risk has been realised in several major resource projects with the Gorgon, Ichthys, Curtis Island and Pluto LNG projects all subject to applications for protected industrial action during the mid-project negotiations of enterprise agreements.

³⁷ Downes, P., Hanslow, K. and Tulip P. 2014, The Effect of the Mining Boom on the Australian Economy, RBA Research and Tulip, P (2014) The effect of the mining boom on the Australian economy. Reserve Bank of Australia. Bulletin December Quarter 2014.

³⁸ Mitchell, P (2009) Taxation and Investment issues in mining, published in Advancing the EITI in the Mining Sector. Extractive Industries Transparency Initiative. Available: <https://www.oecd.org/site/devaao10/44282904.pdf>

³⁹ Productivity Commission, Review of the Workplace Relations Framework, Final Report, p.689.

142. The uncertainty around cost and timing that occurs when major projects are disrupted through potential industrial action significantly damages Australia's reputation and attractiveness as an investment destination for new major projects and diminishes our ability to bring further job-creating projects to our country.
143. The option for greenfield agreements that operate for the duration of a major project will help address this risk and provide certainty for potential investors.

Government's proposed reforms

144. The Bill allows employers and unions to negotiate greenfield agreements which can operate for up to 8 years, during the construction of major projects.
145. The amendments reflect a compromise position. They take into account the need to provide greater certainty in establishing terms and conditions of employment for the duration of a major project, whilst restricting this option to greenfield agreements and establishing a requirement for guaranteed wage increases.
146. Enterprise agreements are currently the preferred means of regulating terms and conditions of employment during the construction of a major project.
147. Often, site specific terms and conditions of employment are negotiated during the planning phase of a new project, which may be implemented by contractors operating on that site through a range of instruments, including:
- 147.1. a project specific greenfield agreement made with the relevant union(s);
 - 147.2. a project specific enterprise agreement made with existing employees;
 - 147.3. using the flexibility provisions within an existing enterprise agreement that applies to the businesses generally.
148. In limiting the option of life of project arrangements only to greenfield agreements, the Government has given unions a controlling vote in determining if an agreement is made and for how long the agreement applies.
149. Section 187(5) of the FW Act requires a greenfield agreement to be made with the relevant union or unions that, taken as a group, represent the majority of the employees who will be covered by the agreement.⁴⁰

⁴⁰ The only exception to this is the limited capacity for an employer to seek the approval of a greenfield agreements where agreement has not been reached after 6 months negotiations. Under this provision the FWC must be satisfied that the agreement provides for pay and conditions consistent with the prevailing industry standard. This would require a comparison of the employment conditions against those contained in other greenfield agreements previously agreed to by the relevant union. It is further noted that no agreements have been made under this provision since it was introduced in 2015.

150. Consequently, agreement needs to be reached with the relevant unions on the duration of an agreement, the amount of any wage increases, the scope of work that will be covered by the agreement, and the range of employment matters that can be subject to dispute settlement procedures within the agreement.
151. Since the introduction of greenfield agreements, unions have demonstrated their capacity to negotiate agreements favourable to themselves and their members. Consequently, there is no need for the imposition of additional restrictions for making life of project greenfield agreements. This includes the requirement that life of project greenfield agreements provide for an annual increase to employees' base rates of pay. Despite this provision being unnecessary, we do not oppose it given that it reflects the current practice for greenfield agreements in this sector.
152. A commonly cited reason for not extending the duration of greenfield agreements is that it is difficult to forecast wage increases beyond four years, so this may over time result in wages below market conditions. These concerns are not valid, given that:
- 152.1. The Bill does not require the quantum of the increase to be fixed. This allows the parties to negotiate a mechanism for increasing rates of pay that meet their respective needs. This might include linking wage increases to average wage growth or market trends;
- 152.2. The employees engaged on major construction projects are extremely well paid skilled workers who have high job mobility. This requires major projects to offer highly competitive terms and conditions of employment to attract and retain suitably skilled workers.
153. By way of example, the terms and conditions for onshore construction of the Ichthys project outside of Darwin provided trades staff with an annual income in excess of \$200,000 per annum⁴¹ with:
- 153.1. an hourly tradesperson rate of \$57 per hour (compared to \$23.76 under the relevant award⁴²) based on an average of 36 hours per week over a 3 week on, 1 week off cycle;
- 153.2. A standard workday comprising of 10 hours per day, paid at:
- a) Ordinary time for the first 8 hours Monday to Friday and time and a half for the following two hours;
 - b) Time and a half for the first two hours on a Saturday and double time thereafter;

⁴¹ As at 31 October 2018 based on *EnerMech Pty Ltd Ichthys Onshore Construction Enterprise Agreement 2019* (AG2019/1445).

⁴² Based on a Tradesperson (CW3) rate under the Building and Construction General On-Site Award 2010 [MA000020] as at 1 July 2019. Rate includes Special Allowance and Industry Allowance which is payable to all employees covered by the award.

c) Double time on a Sunday.

153.3. A tool allowance of \$53 per week;

153.4. A tradesperson allowance of \$109.55 per week;

153.5. A daily travel allowance of \$55 per day; and

153.6. A location allowance of \$4 per hour.

154. There is a common view that life of project agreements should be limited to the construction phase of major projects. CCIWA supports this view, but recommends this definition should include the various completion and handover functions that occur during the final phases of construction work relating to commissioning and testing.

155. This takes into account that there is no uniformly understood definition of what constitutes construction work, which can result in potential confusion at the later stages of a project as it transitions from construction through to commissioning work. This amendment would allow the parties to agree on a scope that reflects the intention of the Bill, whilst reducing the potential for future disputation as to whether particular tasks undertaken by an employee constitute construction or commissioning work and the impact it may have on whether they are covered by the agreement.

Compliance and Enforcement

Recommendation

That Schedule 4 of the Bill be opposed.

That the Parliament take meaningful steps to address the underlying issues associated with underpayment of entitlements by:

- reducing the complexity of modern awards, which is the primary cause of unintentional underpayments; and
- reviewing the level of resources available to the FWO to detect and prosecute deliberate underpayment of entitlements.

Understanding why underpayments occur

157. *"The vast majority of employers ... understand and either comply, or attempt to comply, with their legal obligations".*⁴³

158. This was the conclusion reached by former Chief Commissioner Beech in his inquiry into underpayment of employee entitlements, in which he also identified that:

*"... it is important to draw a clear distinction between an employer's deliberate and systematic non-compliance with the workplace obligations towards its workers on the one hand, and genuine mistakes and oversights which are likely to be corrected upon their discovery on the other, because the responses to, or sanctions arising from, the underpayment will differ according to the circumstances."*⁴⁴

159. As part of CCIWA's role in assisting employers comply with their employment obligations, it is our experience that unintended underpayment generally occurs because:

159.1. An employer is not aware of their obligations. Small and medium sized enterprises (**SMEs**) frequently experience difficulties in determining which awards may apply to their workforce, reading and understanding those awards, and keeping up to date with changes.

159.2. The complexity of the industrial relations system is *"confusing even for those who work in employment relations"*.⁴⁵ The Australian Payroll Association has identified that 89% of payroll managers are unsure how to determine entitlements in real world situations *"because they were unsure of how to interpret the wording of the awards and legislations"*.⁴⁶

⁴³ Beech, T (2019) *Inquiry into Wage Theft in Western Australia*, p7.

⁴⁴ Ibid, p22

⁴⁵ Ibid, p57.

⁴⁶ Pho, P (3 October 2019). *A whopping 90% of payroll managers find laws confusing and contradictory. new study shows.* SmartCompany

- 159.3. Administrative mistakes are made when establishing and updating payroll systems, because of the complexity of the industrial relations system.
- 159.4. There are disputed interpretations of award and legislative provisions. This issue also stems from the complexity of the industrial relations system which facilitates significant disagreement over the interpretation of provisions, in which both parties have well-reasoned and defensible arguments for their respective position.⁴⁷
160. Employers do not take their compliance obligations lightly, but despite their best efforts, errors sometimes occur.
161. Even businesses which specialise in representing workers in industrial relations matters are not immune from this. In 2018 the law firm Maurice Blackburn underpaid around 400 part time employees \$1 million as a result of not paying overtime for additional hours work as required by its enterprise agreement.⁴⁸ For a law firm that specialises in representing workers and unions to have difficulty interpreting their own enterprise agreement highlights the difficulty faced by employers in complying with Australia's overly complex industrial relations system.
162. Likewise, state and federal public sector agencies have also inadvertently underpaid staff, including:
- 162.1. the WA Department of Education, which underpaid 27,000 casual cleaners and gardeners an estimated \$4.9 million since 1983 as a result of miscalculated pay rates;⁴⁹
- 162.2. the National Library of Australia, which underpaid 106 casual staff over \$250,000 as a result of not correctly applying weekend and public holiday shift loadings;⁵⁰
- 162.3. the Australian Broadcasting Commission, which underpaid over 1,800 casual staff \$11.9 million after it did not correctly calculate their wage rates to properly account for allowances, penalties and overtime rates;⁵¹
- 162.4. the WA state owned enterprise, Western Power, which underpaid 2,200 workers an estimated \$8 million in incorrectly calculating entitlements for employees on individual flexibility agreements;⁵²

⁴⁸ Ferguson, A, (29 July 2018) *Maurice Blackburn's \$1 million pay muck up short changes 400 staff* Sydney Morning Herald.

⁴⁹ Perth Now (28 November 2019) *WA Education Department to back pay \$4.9m owed to short-changed casual workers*.

⁵⁰ Fair Work Ombudsman (November 2020) *Media Statement - National Library signs Enforceable Undertaking*.

⁵¹ Fair Work Ombudsman (June 2019). *Media Statement - ABC signs enforceable undertaking*.

⁵² Western Power (September 2020) *Media Statement - Western Power enters into Enforceable Undertaking*.

162.5. allegations that the Australian Federal Police, Department of Home Affairs and the Department of Finance underpaid superannuation contributions due to not considering accommodation and hardship allowances for overseas postings when calculating superannuation contributions;⁵³

162.6. allegations that the NT Government underpaid 50,000 public servants an estimated \$20 million in superannuation payment.⁵⁴

163. To address unintended underpayment of entitlements it is necessary to consider options that address the causes of the problem. The Productivity Commission recommended simplifying modern awards with a strong focus on ensuring that they are easy to understand, promote increased employment, and consider the needs of employees and employers.⁵⁵

Increased penalties won't improve compliance

164. Increasing the penalties for unintentional underpayment of entitlements will not improve compliance, unless action is taken to first address the causes of unintentional underpayment.

165. In his second reading speech, the Minister for Industrial Relations identified that one of the objectives of the compliance and enforcement amendments is to help businesses comply with the law.⁵⁶

166. The Bill does not achieve this. It simply increases the penalties for inadvertently breaching an industrial relations system that even government entities struggle to comply with.

Increased penalties for unintentional breaches unwarranted

167. The Bill seeks to increase the base fines for unintentional underpayment of remuneration by 50%, increasing the maximum penalty for:

167.1. an individual from \$13,200 to \$19,800; and

167.2. a body corporate from \$66,600 to \$90,900.

168. The Explanatory Memorandum seeks to justify the change on the basis that the penalties that can be awarded under the FW Act are low compared to penalties that can be sought by the Australian Competition and Consumer Commission and Australian Securities and Investment Commission.

⁵³ The Canberra Times (23 September 2019) [Public service employers could face hefty bill for unpaid superannuation](#).

⁵⁴ ABC News (5 December 2019) [NT politicians overpaid, public servants ripped off in superannuation bungle](#).

⁵⁵ Productivity Commission (2015) *Workplace Relations Framework – Productivity Commission Inquiry Report, Vol 1*, Recommendation 8.3.

⁵⁶ Hansard – House of Representatives (9 December 2020) [Fair Work Amendment \(Supporting Australia's Jobs and Economic Recovery\) Bill 2020 - Second Reading Speech](#) p10

169. This argument ignores that in the case of underpayment claims, the court will generally issue an order that:
- 169.1. fines the employer in relation to the relevant breaches of the FW Act;
 - 169.2. requires the employer to pay compensation for the amount that the affected employee(s) were underpaid; and
 - 169.3. requires the employer to pay interest on the amount which was underpaid.
170. Underpayment claims are therefore unlike some other forms of offences where only a penalty is issued. Consequently, the cost to the employer of a successful underpayment claim will always be higher than the value of the underpayment.
171. This is distinct from penalties attributable to industrial action, right of entry and freedom of association contraventions where fines are often considered a business expense. An exasperated Federal Court has expressed ongoing concern over this approach. In a case involving multiple coercion and right of entry breaches by officials of the then Construction, Forestry, Mining and Energy Union (**CFMEU**), Justice Flick succinctly identified that its conduct was part of a *“continuing commitment on the part of the CFMEU to pursue its industrial objectives by unlawful means and a continuing commitment to pay such penalties as are imposed as but the cost of doing business”*.⁵⁷
172. As demonstrated above, an ineffective penalties regime can facilitate non-compliance where the benefit of the value derived from the breach outweighs the cost of the penalty.
173. However, the combination of compensation and penalty orders means this is not the case with respect to underpayment claims.

What benefit is derived from underpayments

174. The Bill includes a new penalty option for businesses with more than 15 employees, based on the value of the benefit obtained from a remuneration-related contravention. For unintentional underpayments the Court would be required to base the penalty on either two times the benefit obtained by the employer or \$90,900, whichever is the higher.⁵⁸
175. The Bill defines “benefit obtained” as the amount of remuneration that the employees would have received if the contravention had not occurred.

⁵⁷ *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The BKH Contractors Case) (No 2) [2018] FCA 1563 (18 October 2018)*

⁵⁸ For a serious contravention the maximum penalty would be based on the higher of 3 times the benefit derived or \$660,000

176. The provision is based on a mistaken perception that an employer derives a benefit from an unintended underpayment of entitlement. Rather, the opposite is the case. In addition to the risk of substantial fines, allegations of underpayment of wages have a significant cost to the employer in terms of:
- 176.1. legal representation;
 - 176.2. auditing of time and wages records;
 - 176.3. loss of reputation with clients, employees, and the public at large;
 - 176.4. reduced employee morale and increased staff turnover.
177. Penalties for non-compliance are intended to:
- 177.1. act as a punishment proportionate to the offence;
 - 177.2. provide a deterrence, both to the person concerned and as a general deterrence to others who might be likely to offend; and
 - 177.3. promote rehabilitation.⁵⁹
178. The proposed amendments threaten to disrupt the first principal, because they would mean a large or medium sized business faces higher penalties for unintentional underpayment of entitlements than a smaller business which has knowingly engaged in a serious contravention.
179. For example, in the case of the ABC's underpayment, \$11.98 million was back paid to 1,823 employees (an average of \$6,500 per employee).⁶⁰ Under the proposed amendments, the ABC would face a maximum penalty of \$23.96 million, in addition to the \$11.98 million compensation paid to the affected employees. In contrast, a small business which had knowingly underpaid its two employees \$30,000 each, would face a maximum penalty of \$660,000 under the serious contravention provisions.
180. Basing the maximum penalty on the overall value of the contravention, rather than the gravity of the offence in terms of the impact on individual employees and level of intent, will result in a penalty system that is no longer proportionate.

Criminalisation of underpayments

181. Despite having a robust legal system, there will always be a proportion of the population who deliberately choose to ignore their legal obligations and act in an unlawful manner.

⁵⁹ *Australian Building and Construction Commissioner v Construction, Forestry, Mining & Energy Union (No 2)* (2010) 199 IR 373

⁶⁰ Fair Work Ombudsman (19 June 2019). [*Enforceable Undertaking – Australian Broadcasting Corporation*](#).

182. This occurs across all aspects of society, including a small proportion of employers who engage in deliberate and systematic underpayment of employee entitlements.
183. CCIWA does not condone the actions of those employers who deliberately and systematically underpay employment entitlements. There should be an appropriate proactive compliance regime in place to detect and address such behaviour.
184. The Beech Review identifies that *"the lack of detection of non-compliance and of enforcement is in my view a significant factor"* and that there is *"little evidence that the threat of significant penalties has been any deterrent at all."*⁶¹ That is, the size of the potential penalty has limited effect in deterring underpayment because the perceived risk of being detected and prosecuted is low.
185. In considering the issue of deliberate underpayment of entitlements, significant attention has been given to increasing penalty levels in the belief that if the stick is made large enough, those entities that would have otherwise acted unlawfully will do otherwise.
186. The Bill seeks to create this stick through the proposed criminal offence, but it does not address the issue of whether the FWO has the resources necessary to effectively wield it. Despite Parliament amending the FW Act to include serious contravention penalties for deliberate and systematic underpayment of entitlements in 2017, there has only been one successful prosecution under these provisions.⁶²
187. Beech further identifies that visits from an industrial inspector are the most practical means for detecting deliberate and systematic underpayments, and that this needs to be combined with appropriate enforcement activities that publicly demonstrate that there are consequences for such actions.
188. The existing legislation provides the FWO with an extensive range of tools to undertake compliance and enforcement activities, and the agency has demonstrated its willingness to utilise these provisions. However, it is well understood that the FWO's resources are limited, resulting in some employees not being adequately supported in enforcing their entitlements.

⁶¹ Ibid, pp68-69

⁶² *Fair Work Ombudsman v Tac Pham Pty Ltd & Anor* [2020] FCCA 3036 (12 November 2020)

189. This issue was highlighted in a submission to the Beech Review⁶³ in which a chef was found by the WA Industrial Magistrates Court to have been deliberately underpaid approximately \$45,000, which the employer was ordered to pay in addition to a total penalty of over \$295,000.⁶⁴ Despite the employee first raising the matter with the FWO, who unsuccessfully attempted to mediate the matter with the employer, enforcement was left to the employee who needed to engage a private law firm to prosecute his claim.⁶⁵ This reflects the unfortunate reality that the FWO currently does not have the capacity to take enforcement action in all situations where there has been deliberate and systematic underpayment of entitlements.
190. Instead of introducing a new form of penalty for underpayment, CCIWA recommends that the Government consider the level of resources provided to the FWO in undertaking its role and how effectively those resources are utilised.

⁶³ Ibid, pp 29-31

⁶⁴ *Shiva Kandel v Rul's Pty Ltd t/as Raj Mahal and another* [2018] WAIC 00400. The penalty was split between the employing entity and its director who were ordered to pay \$245,864 and \$49,176 respectively.

⁶⁵ It is noted that the law firm represented the employee on a pro-bono basis. Elsewise the employee would have incurred substantial costs in pursuing the claim.