Submission to Senate Inquiry into the

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

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About the Centre for Future Work

The Centre for Future Work is a research institute located at the Australia Institute (Australia's leading progressive think tank). We conduct and publish research into a range of labour market, employment, and related issues. We are independent and non-partisan. This submission synthesizes some of our previous research on wages, industrial relations, collective bargaining and insecure work. Please see our website at http://www.futurework.org.au/ to read our full reports.

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Introduction

The federal government's *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* (henceforth, Fair Work Amendment Bill) proposes sweeping changes to Australia's labour laws – further tilting the industrial relations playing field in favour of employers. Core features of the legislation include clarifying and expanding employer power to hire workers on a casual basis, giving them greater flexibility in the use of permanent part-time workers (adjusting hours up or down without penalty, much like casual workers), and allowing employers to exercise greater unilateral wage-fixing influence in enterprise agreement (EA)-making.

Several features of the legislation will clearly enhance the power of employers to hire workers on a just-in-time basis, suppress wages, and undermine terms and conditions:

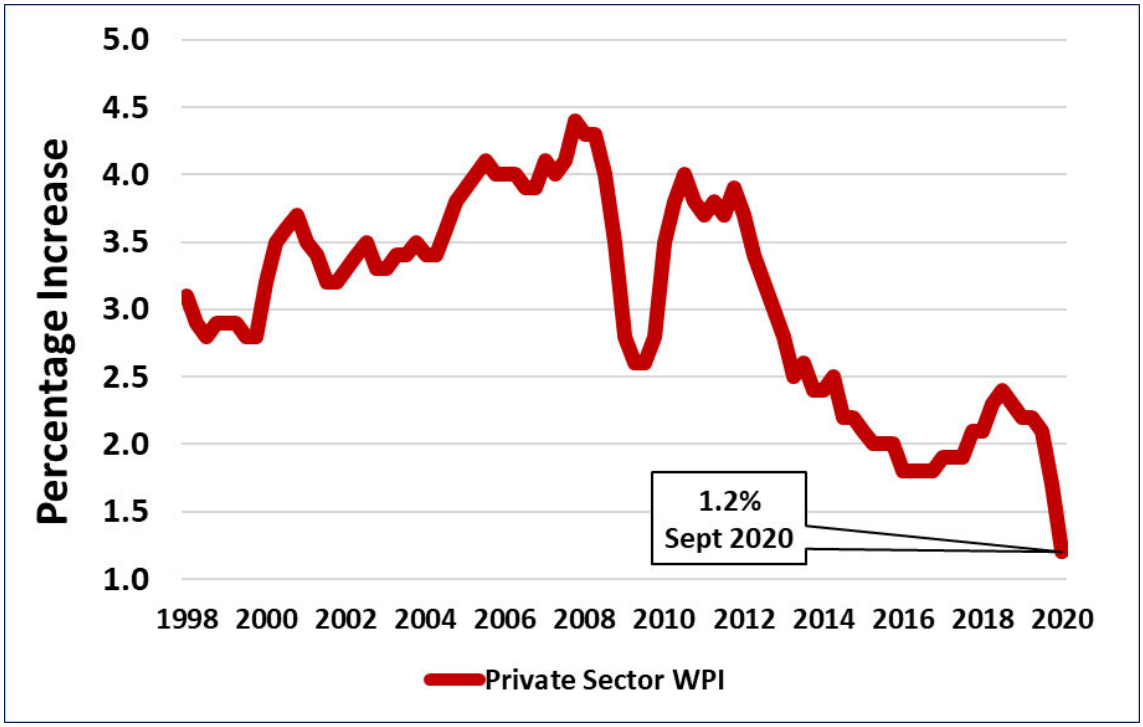
- Workers could be hired on a casual basis in virtually any position that employers 'deem' to be casual.
- Employers could effectively treat permanent part-time workers as if they were casual (with the power to adjust hours up or down without penalty).
- A major exemption to the existing 'Better Off Overall Test' (BOOT) would be implemented, allowing enterprise agreements (especially those implemented unilaterally by employers, without negotiation with any union) to contravene minimum standards of Modern Awards; that would pervert the purpose of collective bargaining, making enterprise agreements a mechanism for lowering (rather than raising) wages and standards.
- Employers' ability to implement greenfield agreements at new projects or businesses would be extended for up to 8 years, without input from or ratification by affected workers.

This submission reviews the major changes proposed by the Bill, showing that together they would constitute weakening of Australia's system of minimum wages and protections, and a further reorientation of the collective bargaining system away from its initial goals (of improving wages and standards for workers). An expanded employer-controlled definition of casual labour will suppress wages and expand insecure work. The outcome of proposed enterprise bargaining changes would create a situation reminiscent of the Work Choices regime of the late 2000s, whereby employers have more unilateral power to determine terms and conditions, wages can be locked in for very long periods of time (contrary to employers' calls for greater "flexibility"), and the scope for true workplace negotiations is compressed.

Record-Low Wages Growth

The Fair Work Amendment Bill has been introduced at an unprecedented moment in Australia's history. Before COVID hit, Australian wage growth had decelerated to the slowest sustained pace since the 1930s Depression – growing at an annual average rate of under 2% since 2015. Now, the COVID pandemic and resulting recession has brought wages to an utter standstill: wages grew just 0.1 per cent in the September quarter.[1]

Figure 1. Wage Increases in the Private Sector (year over year)



Data: Private sector Wage Price Index trend figures from ABS Wage Price Index, Australia (Cat. no. 6345.0), Table 1. Percentage change from corresponding quarter of previous year.

Figure 1 shows wage trends in Australia's private sector since 1998, using one main indicator: the Wage Price Index (WPI) measuring wage growth in the whole private sector.[2] From 1998 through 2008, annual private sector wages as measured by the WPI accelerated gradually from around 3-4% per cent per year – driven up by the strong labour market conditions associated with the booming resource industry at the time. WPI growth was shocked temporarily during the GFC, falling to only 2.6% in 2009; but it quickly recovered, as Australia's macroeconomy stabilised,[3] to resume pre-GFC average growth of around 4% by the end of 2010.

[1] ABS Wage Price Index. June quarter 2020 to September quarter 2020.
[2] The ABS' Wage Price Index is the most commonly-reported measure of wage growth in Australia's labour market.
[3] In large part thanks to a quick and effective fiscal stimulus package implemented by the Commonwealth government.

After fluctuating in the 3%– 4% range for years, a dramatic and lasting deceleration in wage growth took hold beginning around 2013. Wage growth fell by half, with private sector WPI plummeting to a low of around 1.8% in 2016 and 2017. After a modest rebound in 2018 (due largely to the Fair Work Commission's minimum wage increase), private sector wage growth continued to decelerate, plummeting to record-lows during the COVID recession to only 1.2% year over year as of the September quarter of 2020.

In real terms, relative to the ongoing increase in consumer prices, wages have gone backwards. The Consumer Price Index (CPI) increased 1.6% year over year as of the September quarter), exceeding private sector wage growth and causing a decline in real wages. Australia has not experienced such a sustained deceleration of both nominal and real wages in its entire post-war history.

There is wide consensus: wage growth must accelerate

Australia's unprecedented wage deceleration set in long-before COVID hit. This is why economists, commentators and political leaders across the spectrum have reached consensus: Australia's economy desperately needs stronger wage growth. The Governor of the Reserve Bank of Australia (RBA) Dr Philip Lowe announced on February 2 that inflation was well-below the Bank's target band of 2-3%, and that wage growth would have to be "materially higher" before current near-zero interest rates were increased.[4] In fact, the wage slowdown elicited concern from the RBA even before the pandemic, when Lowe identified the wages "crisis" as a major contributor to Australia's slowing economic growth.[5] The RBA has clearly indicated that a return to normal wage growth patterns is needed to fundamentally repair the economy, lifting spending, investment and growth.

Active wage-boosting policies are needed

Given the scale, severity and length of Australia's wage stagnation, we would not expect any significant rebound in wage growth without efforts to deliberately boost wages. Arguably this was already clear before the pandemic, when active wage policies (rather than "market forces") were already essential to lifting deteriorating wages growth. For instance, after two years of average WPI increases of below 2% between 2016 and 2017, the average WPI rose modestly to 2.19% in 2018. Some observers interpreted this small uptick as evidence that slowing wage growth had reached its lowest point, and would rebound. However, the Fair Work Commission implemented a 3.5% increase in the minimum wage the same year (effective 1st July 2018) which flowed to over 1/5th of all employees - the largest increase in the minimum wage since 2010.[6] That large minimum wage increase accounted for virtually all of the modest uptick in the

[4] See John Kehoe, "Wages is why the RBA will keep rates low for years", *Australian Financial Review,* 2 February 2020.
[5] See Stephen Long, "Reserve Bank boss Philip Lowe urges workers to push for pay rises", *ABC,* 29 June 2017.
[6] In 2010 the Fair Work Commission delivered a large increase to make up for a one-year freeze in the minimum wage the previous year (amidst the economic downturn associated with the global financial crisis).

WPI experienced in 2018.[7] In other words, without active wage-boosting measures in 2018, wages growth would have been near-zero before we even entered the COVID recession. Labour market and economic conditions are worse now. This means deliberate and wide-reaching wage-boosting policy efforts will be required to set Australia's COVID economic recovery on a more sustainable and inclusive trajectory.

The Bill will do the opposite of boosting wages, putting wage suppression forces in motion.

The crucial test for the Fair Work Amendment Bill amidst this unprecedented crisis in wages growth is, will it boost wages? We have found no evidence that the measures proposed will exert wage-boosting impacts. In fact, the Bill has exactly the wrong effect by opening additional pathways for employers to suppress wage growth. Wage-depressing measures proposed under the Bill include provisions confirming and expanding casual labour, the creation of below-Award agreements, 8-year wage-locked greenfield agreements, and reductions in permanent part-time worker loadings.

Together, the Bill's changes to workplace relations laws will exert additional downward pressure on already record-low wage growth. Expanding employer power to use both insecure work and low-wage enterprise agreements in conditions of labour oversupply will result in more insecure jobs and more downward pressure on wages (since workers' ability to demand higher wages and more stable jobs is severely undermined when they have little or no job security).

The priorities and strategies of the federal government have never been more clearly at odds with the efforts of the RBA to restore economic growth. And the destruction wrought by years of deliberate wage suppression has never been more evident.

[7] See Jim Stanford, "The Importance of Minimum Wages to Recent Australian Wage Trends", Briefing Note, Centre for Future Work, May 2019.

Expanding Employer Power to Use Casual Labour

The liberalisation of casual labour forms the cornerstone of the Fair Work Amendment Bill. A new definition of casual work combined with weak permanency conversion rights will constitute a substantial change to Australia's workplace relations system. The casual labour measures proposed negatively impact the terms and conditions of employment for the largest number of workers (both now, and in the future), more than any other measure in the Bill.

The primary motivation for the government's casual work changes seems to be to extinguish current jurisprudence regarding the definition of casual work – reached in two recent major court cases.[8] These Federal Court cases found that businesses that employ casuals on regular, stable and predictable schedules are liable to pay leave entitlements. Industry groups submitted that the decision would cost employers over $14 Billion in entitlements for long-term casuals.[9] To avoid court-ordered repayments, business lobbyists unleashed campaigns from 2019 to "resolve the definition issue".

Casual work is a core and growing feature of Australia's economy. Today, 2.6 million workers – one in every four employees – are defined as "casual". Casual work is characterised by a lack of predictability in rosters and tenure, and the denial of normal entitlements (such as sick pay, annual leave, and severance protections). While this is justified by the claim that casual workers receive extra pay ("casual loadings") to compensate loss of entitlements, this is not always the case. Most casuals are in fact worse off. One third receive no loadings, and most casuals are paid about the same as permanent workers doing the same jobs.[10] In industries with a high casual workforce, the effective premium is around 4-5%— rather than the presumed statutory loading of 25%. Employers often praise the virtues of "flexibility", claiming that casuals don't want permanent work. However, half of all casuals have worked regular shifts for one year or more.[11] Businesses are increasingly relying on casual labour to meet their medium- and long-term labour needs, all the while avoiding payment of the rights and entitlements afforded to permanent workers.

Any increase in the number of employees in casual work will negatively impact on individual earnings, and wider wage growth trends. The data confirm a clear correlation between casual work and poor compensation. Median weekly earnings for casual workers are much lower than for permanent workers – both part-time and full-time. At August 2019 — before the introduction of JobKeeper income supports which temporarily skewed median earnings data — the median weekly earnings of full-time employees in casual roles were 26% lower ($1080 per week) than for full-time employees in permanent roles ($1400 per week).[12] The difference in

[8] *WorkPac Pty Ltd v Skene [2018]* FCAFC 131. *WorkPac Pty Ltd v Rossato [2020]* FCAFC 84.
[9] See Paul O'Halloran & Michael Russell, "WorkPac vs Rossato - how employers can prepare for the outcome of the High Court decision", *Mondaq,* 1 December 2020.
[10] See Australian Council of Trade Unions, *The Myth of the Casual Wage Premium*, 2018.
[11] See ACTU (above).
[12] ABS (6333.0) Characteristics of Employment, Table 1c.1.

median weekly earnings for employees in part-time work was even greater, with casual workers earning only $390 per week (60% less) than permanent workers on $720 per week.

Expanding employer power to use insecure work in conditions of labour oversupply will result in more insecure jobs and more downward pressure on wages (since workers' ability to demand higher wages is undermined when they have little or no job security). The unemployment rate at the time of writing was 6.6%.[13] Unemployment has declined since the July COVID-era peak of 7.5%. But despite some recovery in employment, the unemployment rate does not tell the whole labour supply story. A more genuine measure of unutilised labour (including underemployed, lost participation, and "marginally attached" workers[14]) is around 20% of the potential labour force. The worrying expansion of insecure work in Australia is already associated with major economic and social consequences, including the slowest wage growth at any point since the Depression, undermined consumption spending, rising household financial instability, and rising inequality.

This section assesses the key components of casual work changes planned under the Fair Work Amendment Bill. These measures include the introduction of a new definition of casual work which will confirm employers' right to expand casual labour use, and permanency conversion entitlements that will be very difficult to access or enforce. Finally, the government's key claim that current laws are hindering employer confidence to hire casuals is critically examined. Employment data for the last 6 months shows a resurgence in casual job creation: indeed, since May Australia has experienced the fastest growth of casual job creation of any point in Australia's history.

A New Definition

To resolve the "definition issue", the federal government wants to reframe the legal definition of a casual worker decisively away from Federal Court's focus on the conduct of the employers during the course of employment. Instead, the Bill creates a new definition of casual work based on the conditions of the job offered at the commencement of employment.

To this end, the new Bill clarifies the definition of casual work in the most expansive way possible: a casual job is any position deemed casual by the employer, and accepted by the worker, for which there is no promise of regular continuing employment. The implications of such an expansive employer-controlled definition of casual work are accurately illustrated in the following passage from the children's story, Alice in Wonderland:

> *"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."*

[13] ABS Labour Force. Latest data available for December 2020.

[14] "Marginally attached" people are those who want to work but were not both actively seeking work and available to start within 4 weeks at time of survey. The ABS gather this data once per year. There were 1.1 million people in this category in February 2020. See Cat. No. 6226.0.

> *"The question is," said Alice, "whether you can make words mean so many different things."*
>
> *"The question is," said Humpty Dumpty, "which is to be master—that's all."*

Hence, the new casual definition empowers the employer to define "casual" as whatever job the employer (the "master") says it is. This authorises employers to be the gatekeepers of legal work entitlements, an obviously dangerous and conflicted role. The whole point of minimum labour standards is to protect workers against the effects of inappropriate employer behaviour, so allowing employers themselves to determine what is in appropriate and what is not clearly defeats the ultimate purpose of these standards.

The reality of the proposed definition will mean any job can be casual, so long as workers are desperate enough to accept it. This is because the COVID recession has increased the number of people seeking employment. COVID has deepened pre-pandemic labour market weakness, demonstrated by persistent high underutilisation, long-term youth unemployment, and record-low wages growth. Consequently, the COVID recession has exacerbated the power asymmetry between workers and employers – who have their pick of an oversupplied labour market. The new casual work definition thus fails to extend basic labour protections for workers who want and deserve access to permanent work, but who must navigate an increasingly unequal COVD-era labour market.

So-Called Pathways to Permanency

Offsetting this confirmation of employers' power to hire casual labour in any position it wants, the supposed trade-off in the Bill is a provision requiring employers to offer casuals permanent work if they have been employed for 12 months, with six months of continuous regular hours scheduling. However, employers' full control over rostering will make it very easy to vary hours and schedules to avoid meeting that high benchmark. They may also refuse to make an offer of permanent employment on so-called "reasonable grounds".

The government has defined "reasonable" in very broad terms, providing a wide berth for employers to avoid extending offers of permanent work. In practice, this allows employers to continue "business as usual" with regard to unrestricted casual labour use, including in circumstances that discriminate against workers for their age, gender, capabilities, caring commitments and more. For instance, a warehouse worker in Amazon Sydney's "fulfilment centre" was recently offered permanent work after 6 months of continuous casual work, and then had the offer rescinded when the employer found out she was pregnant.[15] Permanency conversion clauses are meaningless if employers retain all the gatekeeping power to both engage workers on a casual basis, and refuse offers of permanent work.

[15] See David Marin-Guzman, "Amazon withdrew job offer to casual 'because of pregnancy'", *Australian Financial Review,* 16 December 2020.

Worse still, should casuals meet the legal benchmarks and still not receive an offer of permanent employment, the legislation offers no rights to appeal a decision through the Fair Work Commission. In the absence of easy-access mechanisms to pursue grievances, workers' only real option is to resort to costly individual legal challenge.

Reducing Permanent Part-Time Worker Loadings and Hours Security

Another dimension of the federal government's proposed industrial relations changes would allow further flexibility in hours and rosters for permanent part-time workers. Employers in sectors assessed most-impacted by COVID would be allowed to change, without penalty, hours of work for permanent part-time workers, above a minimum schedule of 16 hours per week.[16] Only 16 hours will have to be paid according to normal permanent rates, while an additional 22 hours (comprising a working week of up to 38 hours) will no longer attract an overtime loading.

With 22 hours of ordinary-time labour up for grabs, employers will be able to regularly work these "part-timers" like full-timers — even as supervisors and managers. However, the workers will not have the security of regular hours or receive overtime compensation (beyond their basic schedule) for being at the employer's beck and call. It will also allow employers almost as much flexibility in adjusting work hours for permanent staff, as they already enjoy for casual staff – in essence representing a casualisation of part-time work – but without the casual loading costs that (in theory, anyway) are supposed to be paid to casual workers to compensate them for their insecurity in schedules.

Despite all the rhetoric about these IR changes being needed to support job creation, this deregulation of part-time working hours really means employers will be free to increase hours for *existing* workers in line with fluctuations in demand. That will free them from having to hire more people. The proposed changes also undermine existing rights to stable schedules for permanent part-time workers.

These part-time 'flexi' provisions will be available for application to hundreds of thousands of workers working under 12 Modern Awards which cover parts of the economy deemed worst hit by the pandemic. However, plans to grant the relevant minister powers to add other Awards to the list through regulation opens the possibility for these part-time flexi roles being implemented across the entire Modern Awards system. This new Ministerial power, in effect, overrides FWC Award-setting powers – a new and worrying development which mirrors the

[16] Proposed changes impact conditions within 12 Modern Awards: Business Equipment Award 2020, the Commercial Sales Award 2020, the Fast Food Industry Award 2010, the General Retail Industry Award 2020, the Hospitality Industry (General) Award 2020, the Meat Industry Award 2020, the Nursery Award 2020, the Pharmacy Industry Award 2020, the Restaurant Industry Award 2020, the Registered and Licensed Clubs Award 2010, the Seafood Processing Award 2020 and the Vehicle Repair, Services and Retail Award 2020.

diminishment of labour laws and institutions determining the definition of casual work and governing access to legal work entitlements.

Retail and Hospitality Awards

The Bill proposes to extend two COVID-19 JobKeeper flexibilities concerning duties and location of work for the "distressed" retail and hospitality sectors, for a further two years. The Retail and Hospitality Awards will also have classifications simplified, with the introduction of single "loaded rates". The introduction of loaded rates represents a return to the previous practice in particularly low-paid industries of 'rolling up' base rates to offset below-Award penalty and overtime rates specified in EAs. That practice was prevented by the FWC's more rigorous enforcement of the BOOT (starting with the Coles EA rejection in 2016) because it found thousands of employees were falling below Award minimums.

The direct cuts to wages and entitlements of retail and hospitality workers proposed by the Bill have been justified on the basis their sectors were still hard-hit by COVID. Reducing their wages would allow businesses to supposedly hire more workers. However, it is questionable to what extent the retail sector - the largest employing sector identified for special assistance under these measures – genuinely faces hiring pressures. The retail industry certainly suffered employment losses due to lockdowns and other health measures (total employment declining by 4.9% from February-May), but employment has increased over the whole period by 3.5%.[17] There were approximately 45,000 more people working in retail in November 2020, than *before* the pandemic. And retail has done better than all industries on average (total employment across the economy in December was still 0.7% lower than February pre-pandemic[18]).

Table 1. Retail Employment Losses (Feb-Nov 2020)

	Feb 2020 ('000)	May 2020 ('000)	% change: Feb-May	Nov 2020 ('000)	% change: Feb-Nov
Retail	1244.1	1182.9	-4.9%	1287.7	**+3.5%**
All Industries	13,006.9	12,156.2	-6.5%	12,877.9	-1.0%

Data: ABS (2020) Labour Force Australia, Detailed, author's calculations from Table 4, seasonally adjusted data.

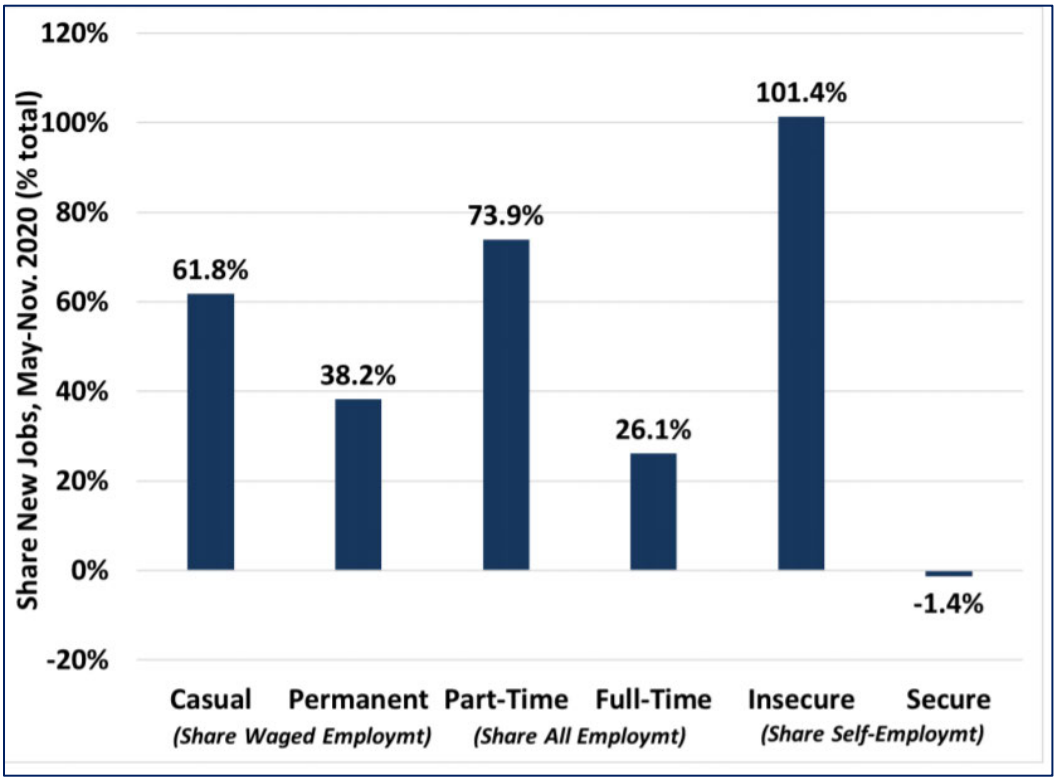
The COVID-Era Casuals Boom

The federal government claims this new expansive, open-ended, and employer-controlled definition of casual employment is critical to restoring employer confidence to hire casual staff – and, in turn, boost jobs growth as the economy recovers from the pandemic. But employment data show casual jobs have dominated the jobs recovery since the trough of employment in

[17] From February to November 2020.
[18] ABS Labour Force (6202.0), December 2020. Table 1.

May last year. Figure 2 shows the composition of jobs created from May to November as COVID lockdowns lifted. The graph shows the employment rebound according to three measures of job quality: casual or permanent (as share of employees), part-time or full-time (as share of all employment), and secure or insecure self-employment (as a share of total self-employed). Despite claims of businesses reluctant to employ workers in casual positions due to uncertainty about the legal status of casual work, casual jobs actually comprised the majority (60%) of all jobs created in the first 6 months of post-COVID recovery. 400,000 casual jobs were created from May-November: an average of 2200 new casual jobs per day. This constitutes the biggest expansion of casual employment in Australia's history. Conversely, less than 250,000 permanent jobs were created over the same time. The dramatic resurgence in casual job growth shows claims new hiring has been held back by legal "uncertainty" related to recent casual work definitions are not credible.

Figure 2. Three Measures of the Composition of Employment Recovery Since May 2020



Source: Calculations from ABS Labour Force, Table 1, and Labour Force, Detailed, Table EQ04. Seasonally adjusted data for part-time/full-time; original data for other series

Other measures attest to the deep insecurity of jobs created in the post-COVID recovery. Part-time work accounted for almost three-quarters of all new jobs, bringing the share of part-time work in total employment in Australia back up to record levels. The story is no better for the third measure of job quality in self-employment. Very insecure self-employed positions

(including own-account contractors and 'gigs') accounted for all of the rebound in self-employment last year.[19]

This employment data show how the pandemic has reinforced the dominance of insecure work in the overall labour market. Workers in insecure jobs lost work far more severely than those in standard, permanent positions (casuals lost work 8 times faster than those in permanent jobs).[20] Now, the post-pandemic rebound of employment has been dominated by casual jobs and other forms of insecure work. The Fair Work Amendment Bill's proposed liberalisation of casual work, and the further flexibilisation of part-time work (discussed below), will throw "fuel on the fire" of this worrying surge in low-quality insecure jobs in Australia's COVID recovery.

In sum, the Fair Work Amendment Bill plans to create a definition of casual work that grants employers free-reign to engage workers on a casual basis, easily avoiding low benchmarks for permanency conversion and payments of rights and entitlements associated with permanent work. The COVID-era casuals boom proves current laws are no hindrance to employers' confidence hiring workers on a casual basis. Employers continue to use casual work to meet their medium and long-term business needs. Rather than improving the quality and stability of new jobs to offset the unequal impacts of the pandemic, instead the government proposes to further liberalise casual work, retroactively removing legal entitlements of workers as determined by recent federal Court decisions, and reinforcing the growing dominance of insecure work in the labour market.

[19] We define insecure self-employment as positions that have no employees or are unincorporated, or both.
[20] For more on unequal labour market impacts of the pandemic, see Dan Nahum & Jim Stanford, *2020 Year-End Labour Market Review: Insecure Work and the Covid-19 Pandemic,* Briefing Paper, Centre for Future Work, December 2020.

Changes to Enterprise Bargaining

In addition to expanding insecure work, the Fair Work Amendment Bill proposes several important changes to Australia's enterprise bargaining laws. The effect of these changes will be to enhance the top-down power of employers to implement their own lower-wage enterprise agreements (EAs). These changes include:

- Introduction of a wide exemption to the Better Off Overall Test (BOOT), allowing agreements to undermine minimum standards outlined in Modern Awards;
- Extension of greenfield agreements for new projects or businesses for up to 8 years, without input or ratification by affected workers;
- To hasten the approval of lower-wage agreements, reduced scrutiny of agreements by the Fair Work Commission (FWC) through a variety of measures including weakening "genuine agreement" tests.

This section assesses key enterprise bargaining changes tabled under the Bill. Together, the proposals will expand the incidence of lower-wage non-union EAs, further restrict union representation, and reduce the effectiveness of the already weakened collective bargaining regime. This will lead to a significant increase in the number of employer-designed EAs that serve to reduce compensation and conditions, rather than improving them. Broadly, these changes signal a return to a pattern of EA-making reminiscent of the WorkChoices policies of the late 2000s.[21]

Exempting Agreements from the Better Off Overall Test

As the law now stands, enterprise agreements (EAs) cannot undercut minimum standards in industry Awards. This is known as the "better off overall test" – or BOOT. By enforcing the principle that no worker should go backwards under an EA, the BOOT enshrines the core purpose of collective bargaining as defined under the FW Act: namely, to improve on the "floor" established by minimum conditions in the Awards. However, deunionisation has eroded the presence of union representation in workplace collective bargaining, preventing workers from accessing independent representation needed for genuine pay negotiations. Further, Australia is one of the only countries in the world that allows employers to draw up collective agreements without the involvement of a union. In these low-bargaining-power circumstances, the BOOT acts as an important backstop against employers using their power to reduce wages through implementing their own lower quality EAs. By allowing the FWC to conduct assessments on the terms and conditions of employment outlined in employer-drafted EAs, the BOOT ensures minimum labour laws are observed for all workers covered by the agreement.

[21] 'WorkChoices' through this submission refers to the legislative amendments to the *Workplace Relations Act 1996*, which were in operation from 1996 to the introduction of the *Fair Work Act in 2009.*

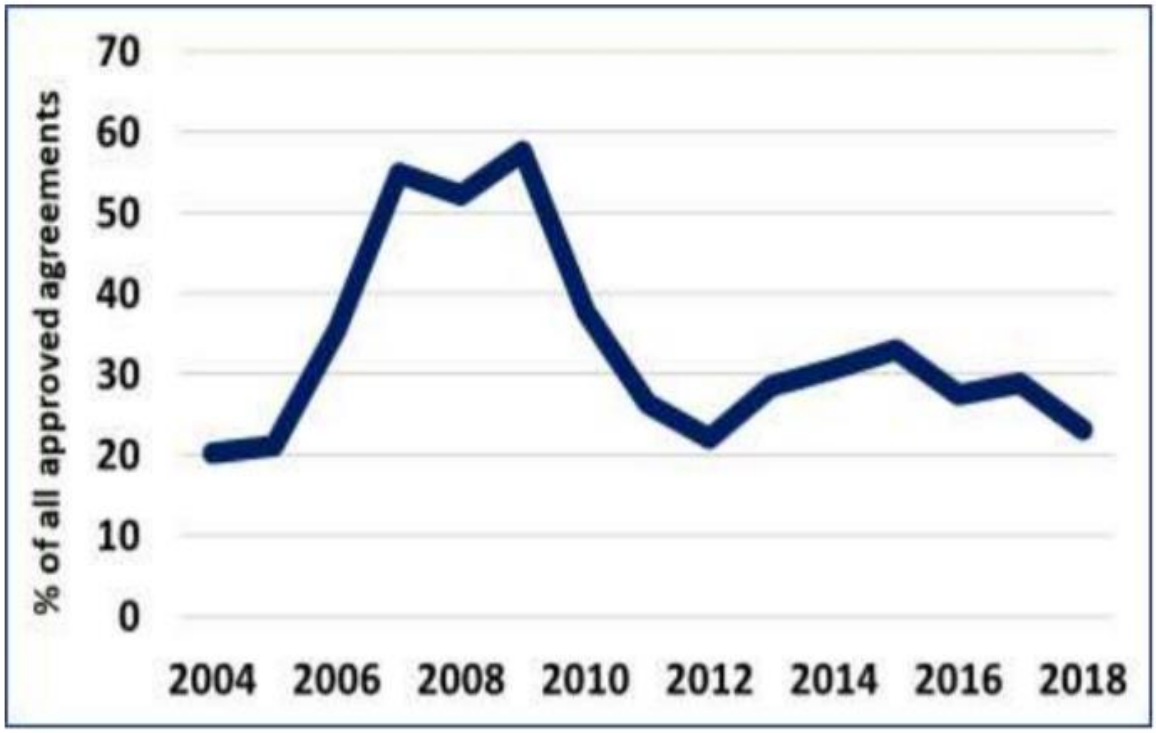
With wage stagnation undermining Australia's recovery from the COVID recession, growing job insecurity, and working poverty among vulnerable low-wage workers, protecting the integrity of the Award safety net clearly remains an important priority. But despite myriad economic and social reasons for retaining the BOOT, the new Bill proposes to dramatically weaken it by instructing, in certain circumstances, the Fair Work Commission (FWC) to approve agreements even if they fail the test.

Under the proposed BOOT changes, EAs can be exempted from the test, allowing the terms and conditions in agreements to fall below those in Awards. The exemption provisions will sunset after 24 months and any agreements approved under the new provisions will have a nominal expiry date of two years. However, under the FW Act, agreements continue in force until the FWC receives either an application for termination of the EA, or a replacement EA is negotiated and approved. This means any below-Award agreements approved within the two-year period could be in effect for much longer than the two years.

The BOOT will also be qualitatively changed, more loosely applied against only those workforce schedules currently in place (and not all employment models and rostering patterns available to employers), rather than guaranteeing at- or above-Award outcomes to each individual employee under the agreement (both current and prospective). As below-Award, non-BOOT compliant EAs are submitted to the FWC for approval, there will be a powerful impetus on the FWC to pass them under a parallel proposal to legislate the approval of all EAs within 21 days (discussed further below). To secure the passage of sub-par, low-quality agreements, the Fair Work Amendment Bill also builds on existing FW Act provisions allowing the FWC to approve agreements that do not comply with the BOOT where both parties agree and it is in the "public interest" to do so.

The last time EAs were allowed to evade minimum Award standards was under WorkChoices, when the "no disadvantage test" was removed entirely. Combined with the relaxation of requirements governing EA approvals, the result was a surge in non-union, low-wage EAs. Figure 3 shows this resulted in a large increase in non-union EAs being approved; they rose from 20% of all private sector EAs in 2004-05, to 55% in 2007, as employers took advantage of the opportunity to implement unilaterally-designed EAs that reduced labour costs, rather than lifting wages and conditions. Non-union EAs remained common, reaching almost 60% of all private sector EAs approved in 2009, until the FW Act was introduced and the BOOT was instated.

Figure 3. Non-Union EAs as Share of all Private Sector EAs



Data: Author's calculations from Workplace Agreements Database. Private sector EAs approved.

This temporary surge in substandard non-union agreements altered the stock of EAs, with a lasting negative influence on wage growth that is visible even today. Multiple cases have emerged of WorkChoices-era EAs operating in workplaces long after their expiry, paying below-Award rates for sustained periods of time – in some cases over 10 years later. For example, Merivale, a Sydney bar and restaurant group, was found in 2019 to be paying around 3000 staff up to 20% below Award wage rates under an expired 2007 non-union agreement.[22] Data on the number of now-expired EAs approved during the WorkChoices era yet still in use are unavailable. But the legacy of the WorkChoices era of expanded non-union below-Award agreement-making has certainly contributed to the continuing problem of wage stagnation: it supplanted more genuine collective bargaining processes, and even after they expired (without being renewed) these non-union "zombie" agreements fail to provide for further wage increases.

Even though the BOOT exemption is proposed in this Bill to last for a limited period of two years, the damage will be longer-lasting (similar to the experience after the WorkChoices period). This is because under the FW Act, agreements continue to rollover – potentially for years – until terminated or replaced. Most expired EAs do not contain wage increases after they

[22] D. Marin-Guzman, 'Merivale reviewing 'viability' of operations due to axing of Work Choices EBA', Australian Financial Review, 21 January 2019.

expire, though other EA provisions (including working conditions, paid time off, representation, and other matters) may stay in effect.

One moderately redeeming proposal under the Fair Work Amendment Bill is the forcible termination of all remaining "zombie" agreements from the WorkChoices period by 1 July 2022. However, even this measure gives employers the "green light" to continue paying thousands of workers on long-expired, below-Award EAs for a further 17 months. More importantly, any positive impact of terminating old below-Award WorkChoices EAs are offset by the Bill's impact in immediately replenishing the stock of below-Award EAs – reinstating the most damaging aspects of the WorkChoices period.

The decline in union workplace presence combined with insufficient workplace information provided by employers, government and regulators means many workers are not even aware they are being paid according to an EA (let alone understanding the terms and conditions of that EA). There exists no "trigger" within the enterprise bargaining system for agreement renegotiation. This means workers can be on the same pay rates originally outlined in an EA that has long-expired (even if they did not approve the agreement themselves).

By exempting EAs from the BOOT, allowing them to undercut Award minimums, and not repairing the collective bargaining system to support genuine employee representation and workplace bargaining, the government will set wage-suppressing forces similar to those that prevailed under WorkChoices in motion.

Reducing Scrutiny of Employer-Designed Agreements

Provisions in Australia allowing for unilateral employer-designed EAs to be drawn up and implemented without meaningful independent representation for workers are exceptional by international standards. Without organised and consistent representative structures through which workers can advance their claims and take action in support of them, non-union EAs are already subject to unilateral influence and manipulation by employers. The Fair Work Amendment Bill proposes to deepen employer wage-setting power by reducing scrutiny of those EAs submitted to the FWC for approval.

This section outlines the Fair Work Amendment Bill's proposals to weaken scrutiny of non-union EAs including: the introduction of legislation requiring the FWC to approve EAs within 21-days; blocking unions from extending representation to affected employees covered by agreements for which they are not covered, when their EA is submitted to the FWC; and weakening obligations on employers to demonstrate to the FWC their staff have genuinely agreed to the EA.

Legislating 21-Day Approvals

Alongside exempting EAs from the previous BOOT, the Fair Work Amendment Bill plans to legislate an approval timeline of 21-working days to "speed up" EA approvals at the FWC. These legislated approval deadlines – without proportionate increases in Fair Work Commission (FWC) resourcing to meet deadlines – represent a blunt reduction in scrutiny of the EA approval process, and will effectively pressure the FWC to pass more non-union, low-quality EAs.

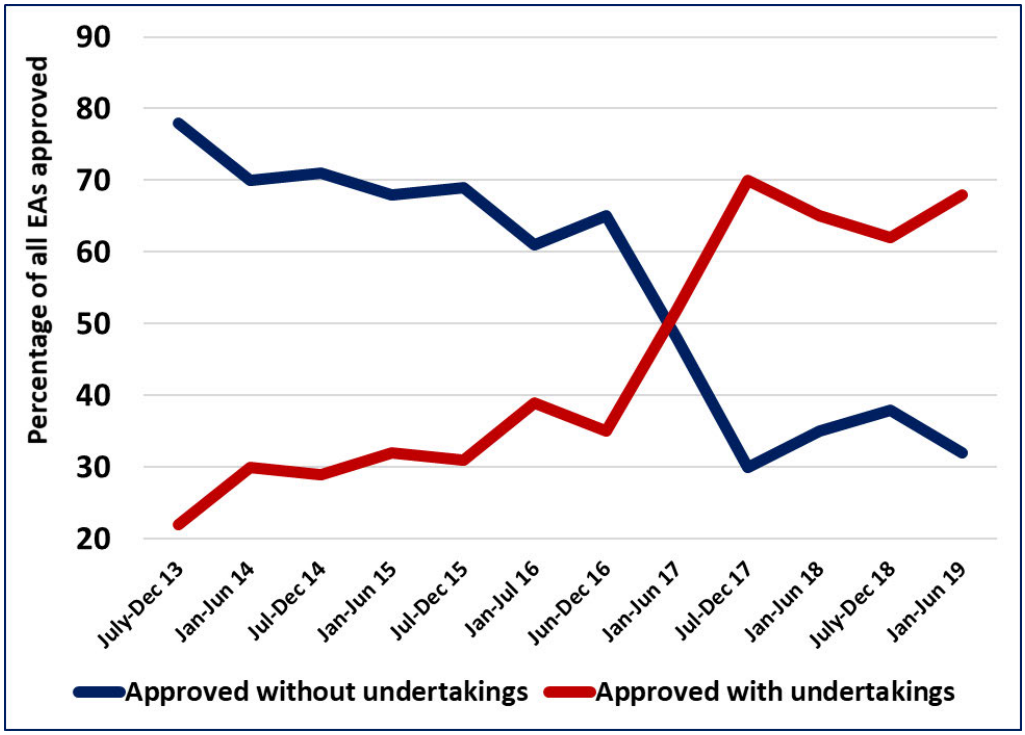
The federal government and business lobbyists have claimed that employers are abandoning enterprise bargaining because the FWC is taking too long to approve agreements.[23] BOOT assessments are regularly cited as the main culprit in the FWC's "overly technical approach" in agreement ratification, purportedly increasing transaction costs for employers in formulating EAs. But this is because of the time and attention required for the approval process, and because more deals have needed undertakings in order to comply with BOOT requirements. Undertakings are employer-written statements that an EA's non-compliance with some aspect of the FW Act will not result in any employee being worse off (as per the BOOT); these undertakings are then treated as clauses of the EA.

Approval times for EAs submitted to the FWC have indeed become longer in recent years. The median number of days taken by the FWC to approve agreements increased from 18 days in 2015/16 to 76 days in 2017/18.**[24]** But the timeliness of approvals is highly dependent on whether the FWC is satisfied the agreement clearly improves on the floor or not. This is reflected in the number of median days taken to approve clearly BOOT-compliant EAs (without undertakings) which was only 32 days in 2017/18, compared with 93 days for EAs with undertakings.**[25]**

Figure 4 shows EAs that require undertakings have become much more common since 2013, rising from 22% to 70% of all EAs approved in 2017, and remaining at a high level of 68% of all approved EAs with undertakings in 2019. EAs with undertakings clearly outnumber those EAs immediately deemed compliant with labour laws. EAs approved by the FWC without undertakings declined from 78% of all EAs in 2013 to only 32% in 2019. With more agreements "dancing at the margins" of minimum labour standards, the FWC has required careful, more time-consuming scrutiny to calculate offsets and obtain undertakings from employers submitting EAs that are not compliant with Awards.

[23] See AiG, *Enterprise Bargaining: Concurrent Session Paper,* Policy Influence Forum, 2018.
[24] Fair Work Commission, Annual Report 2017/18. Table 20.
[25] Fair Work Commission, Annual Report 2017/18. Table 21.

Figure 4. The Rise of FWC Agreements with Undertakings



Data: FWC Annual Report 2018–19.

Far from administrative inefficiency, longer FWC approval timelines reflect the pressures faced by underfunded labour regulators, confronted with a growing number of low-quality EAs. The Bill's planned 21-day timelines will force the FWC to abandon adequate assessment of EA quality, fast-tracking the approval of low-quality, low-wage, non-union EAs.

Blocking Unions from Contesting Sub-Par Agreements

Under current laws, the FWC has broad discretionary powers to receive submissions from unions during the approval of agreements given unions' knowledge of the industry in which the employer operates, and expertise in the underpinning Award.[26] By inserting new laws about how the FWC may inform itself (Section 254AA), the Fair Work Amendment Bill proposes to block union involvement or representation at the agreement approval stage, limiting involvement by any person or representative body (like a union) who was not a bargaining representative or immediately covered by the agreement. Understanding the damaging impacts of these proposed restrictions on genuine EA formation (including access to employee representation) requires first grasping the ease in which employers can already set terms and conditions of employment in EAs without union representation in Australia.

Non-union EA-making was first introduced in the form of "Enterprise Flexibility Agreements" in 1993, which allowed employers to unilaterally present EA proposals to employees for approval

[26] *Fair Work Act 2009* s.590.

without any need for bargaining to take place. However, unions were required to be notified by employers when agreements were being drawn up. Under the subsequent WorkChoices regime, notification mechanisms were abolished, clearing the way for employers to unilaterally create EAs without negotiating with any union, using a weaker "employee consent" model of EA approval.

Under the subsequent Fair Work Act (FW Act), collective bargaining rights for unions were strengthened, however the notification mechanism indicating that employers intended to create agreements was never reintroduced. To make matters worse, the FW Act introduced a very loose definition of "union agreement," one that no longer required unions to have a bargaining presence in order to be covered by an agreement.[27] The result of weak union representation rights and obligations under the FW Act means unions often can only identify new EAs when they reach the FWC for approval. Where unions identify sub-par employer agreements, including cases where prior existing EAs confer representation rights,[28] unions have invested in litigation to contest the approval of those EAs. Motives for union involvement in EA approval include when EAs are not BOOT compliant, where employers are implementing EAs that contain provisions below those in union EAs (such as the case of faux subsidiary companies being established with new EAs), and where employers have not obtained "genuine agreement" with the workforce. These interventions are an important method for unions to try to increase the terms and conditions of agreements.

The Fair Work Amendment Bill will further erode already weakened employee representation rights in Australia's IR law. Alongside proposals to exempt EAs from the BOOT (described above), these changes will allow employers to draw up EAs that undercut Awards and minimum standards with less scrutiny from both the FWC and relevant unions in the industry.

Weakening Genuine Agreement Pre-Approval Requirements

Weakening scrutiny and ratification processes applied to non-union agreements, and simultaneously weakening union representation and participation in EA-making, are complementary strategies that both expand employers' power to unilaterally set wages. To this end, the proposed legislation weakens existing laws requiring employers to provide sufficient evidence that they have explained the terms of agreement to their employees and obtained genuine agreement. Weakening these remaining protections is again purportedly justified on grounds that current laws are too prescriptive and complex, and are discouraging employers from accessing enterprise bargaining.[29]

[27] Union-covered agreements are those agreements whereby a union with at least one member in a relevant workplace has notified the FWC (after the EA is approved) that it wishes to be covered by it.
[28] Under common law, unions have the right to challenge the approval of a non-union EA at the FWC where an existing EA confers specific rights to them (such as consultation and dispute resolution rights).
[29] See Australian Government, *Proposed reforms to enterprise bargaining,* Fact Sheet, December 2020. Available at https://www.ag.gov.au/sites/default/files/2020-12/enterprise-agreements-overview_0.pdf

Current rules under the FW Act require the FWC to be satisfied that employers have obtained "genuine agreement" with their employees;[30] this is an especially vital protection for workers when no union has been involved in negotiating the agreement. Evidence that genuine agreement has been reached requires employers to demonstrate that they have taken reasonable steps to notify employees one week in advance that a vote will be conducted on a new agreement, to provide access to the proposed agreement, and to have taken "all reasonable steps" to explain all agreement terms to employees.[31] But even these modest requirements have been deemed too onerous by business lobbyists who claim current standards for proof of genuine agreement are "overly stringent" and should be relaxed.[32] Under the proposed changes , existing genuine agreement tests would be replaced with broader requirements on employers to "take reasonable steps to give employees a fair and reasonable opportunity to decide whether to approve the agreement".[33]

In sum, the Fair Work Amendment Bill proposes a suite of measures eroding protections for employees who have not received genuine representation or have limited bargaining power during settlement of an EA's terms and conditions. These protections constitute the "last line of defence" for the majority of private sector workers who are not represented by unions in collective bargaining. Current laws place minimal restrictions on employer-led EA-making, yet the Bill proposes still-weaker EA scrutiny by the FWC and unions. Less scrutiny of EAs, combined with the exemption from the BOOT, will see implementation of more sub-par, employer-designed EAs across Australian workplaces.

8-year Greenfields Agreements Without Input from Affected Workers

Making a mockery of claims about the need to increase "flexibility" in industrial relations, the Fair Work Amendment Bill would allow employers to fix wages in agreements at major new projects for up to 8 years – double the time now currently allowed for EAs.[34] These new project agreements are called "greenfields". Combined with existing FWC greenfields powers allowing the Commission to impose greenfields following 6 months of negotiation with the relevant union(s), new 8-year, wage-locked EAs could be developed by employers, symbolically "negotiated" for 6 months (with no genuine aim to reach agreement), then be approved by the FWC and implemented before any workers start on the job (thus denying them any input into the process). Moreover, under the revised BOOT provisions, those greenfield agreements could

[30] Fair Work Act 2009 s.188(1).
[31] Fair Work Act 2009 s.180.
[32] See Australian Mines and Metals Association, *Pathway to Productivity: The Resources and Energy Industry's Workplace Priorities for the 46th Australian Parliament*, August 2019.
[33] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, Schedule 3, Part 3—Pre-approval requirements. Subsection 180(2).
[34] At present the FW Act requires all agreements (including greenfields) to include a nominal expiry date that is no longer than 4 years after the FWC has approved the agreement.

conceivably undercut minimum Award conditions, inflicting inferior compensation and employee representation on tens of thousands of workers.

Greenfield agreements are most common in capital-intensive industries like construction, transportation, and mining, but can apply in any part of the economy. Greenfields are also the only remaining bargaining instrument under the FW Act that requires unions in the relevant industry to participate in their negotiation. However, significant pressure has been exerted by business lobbyists since 2009 to abolish union participation and mandate bargaining limits on greenfields. In 2015, the FW Act was changed (in the Fair Work Amendment Act 2015) to impose maximum 6-month negotiation periods. This provision allows employers to then seek FWC approval of greenfields agreements even if they do not secure agreement from unions (after the prescribed bargaining period).

Before the COVID pandemic, business lobbyists demanded "whole of life" greenfields agreements: in which the terms of EAs would be extended to the entire productive life of a new facility or enterprise.[35] While the Fair Work Amendment Bill rightfully walks back from this extreme proposal, there remain several related problems with the new proposal that will create powerful levers for businesses to suppress wages in EAs. Alongside government plans to force the FWC to pass agreements within 21 days, and to exempt agreements from the BOOT on "public interest" grounds (language that could certainly apply to major government-funded infrastructure projects), employers will be able to submit greenfields before project commencement that pay below Award wages, and which have not been voted upon by the workers who will be covered by the agreement. Employers have well-rehearsed these "seed agreement" strategies. Agreement is obtained for deals with inferior conditions compared to union agreements within the same firm or sector, through targeted votes among smaller, non-representative groups of workers (often in artificially-constructed subsidiary firms). Once agreement is obtained, employers then expand the workforce hired under that weaker agreement.

Moreover, under current greenfields-making rules, two or more employers can negotiate a multi-enterprise greenfields agreement; extended to an 8-year context, this would create the potential for employers to band across locations or even entire industries to fix wages for extended periods and diminish democratic bargaining rights for large numbers of workers.

By allowing employers to lock in greenfields for 8 years, the government will incentivise and accelerate the implementation of non-democratic, low-wage "seed agreements". By no longer subjecting greenfields to normal renegotiation rules that apply to other expired agreements, Australia walks further away from its obligations under international labour law conventions to guarantee the rights of workers to collectively bargain their pay and conditions. But since greenfields receive unique treatment under the FW Act as a separate class of agreement, the Bill marks an insidious move to repurpose greenfields as instruments to increase employer

[35] See *Workplace Express*, 'Employers seek broader application of life-of-project deals', 22 October 2019.

wage-fixing power. It exposes a glaring contradiction in the government's IR agenda. Fixing agreements for many years is clearly at odds with a supposed concern for "greater flexibility"; but where greenfields are concerned, the government is explicitly promoting the elimination of flexibility.

Why the Bill Will Create More Non-Union EAs – And Why That's Bad for Wages

The key purported benefit to employees of the tabled Fair Work Amendment Bill's enterprise bargaining changes are better wage outcomes and conditions through increased access to enterprise bargaining.[36] But one clear outcome of the Bill will be an acceleration of EAs written unilaterally by employers, without negotiation with any union. These non-union EAs will be favoured for several reasons if the Bill is passed: EAs will be exempted from the current Better Off Overall Test, employer-designed EAs will be subject to less scrutiny at the Fair Work Commission, and employers will have less stringent tests to ensure their proposed EAs are genuinely approved by affected workers. All of these changes will lead to a significant increase in employer-designed EAs that *reduce* compensation and conditions, not boost them – signalling a return to the WorkChoices pattern of EA-making.

The Bill's plan to liberalise and accelerate non-union EA-making will have three distinct negative impacts on wage growth in Australia – compared to wages negotiated through a genuine collective bargaining process. This section provides empirical evidence regarding each of these three effects.

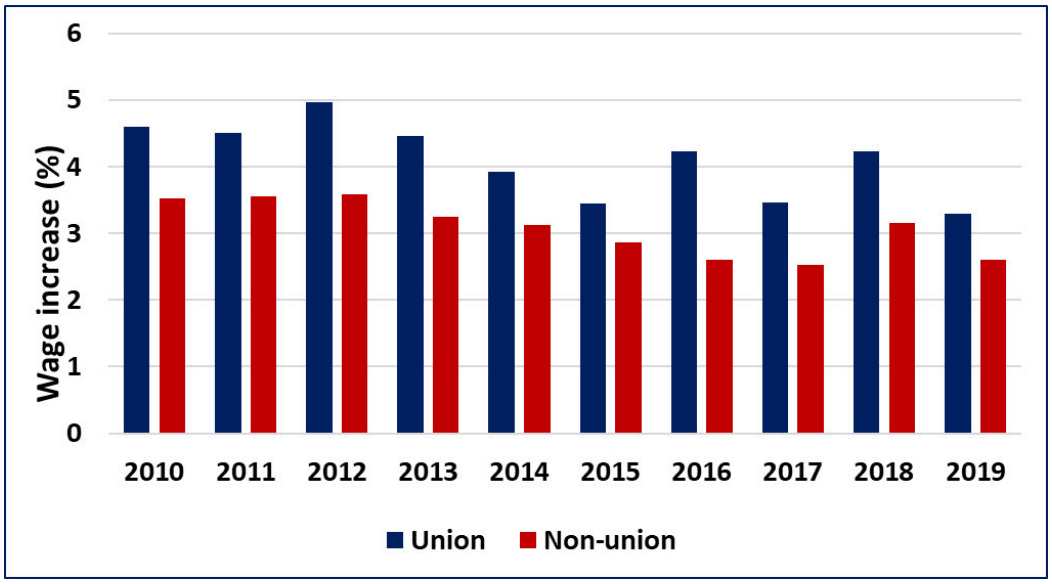
1. Non-Union Agreements Deliver Lower Wage Increases

Wage increases in non-union EAs are consistently lower than for EAs negotiated with union involvement. On average, wage increases in non-union EAs approved in the private sector were 1-percentage-point lower than for union-covered agreements since 2010 (see Figure 5). The non-union EA wage disadvantage was 0.7-percentage-points in 2019.

Since the majority (66%) of the current EA stock consists of union agreements,[37] any increase in the number of lower-wage non-union EAs would increase their proportion within the total EA stock, reducing rather than lifting wages and conditions delivered through EAs overall. Agreements data shows union representation is critical to achieving higher wage gains in EAs – the very advantage of EAs that the federal government has extolled as justification for the Bill.

[36] See Australian Government, *Proposed reforms to enterprise bargaining,* Fact Sheet, December 2020. Available at https://www.ag.gov.au/sites/default/files/2020-12/enterprise-agreements-overview_0.pdf
[37] Includes both private and public sector agreements.

Figure 5. Average Wage Increases in Approved Union and Non-Union Private Sector Agreements



Data: Workplace Agreements Database (WAD). Average annual wage increases (AAWI) for agreements approved. Private sector quantifiable agreements only.

2. Many Non-Union Agreements Deliver No Specified Wage Increased at All

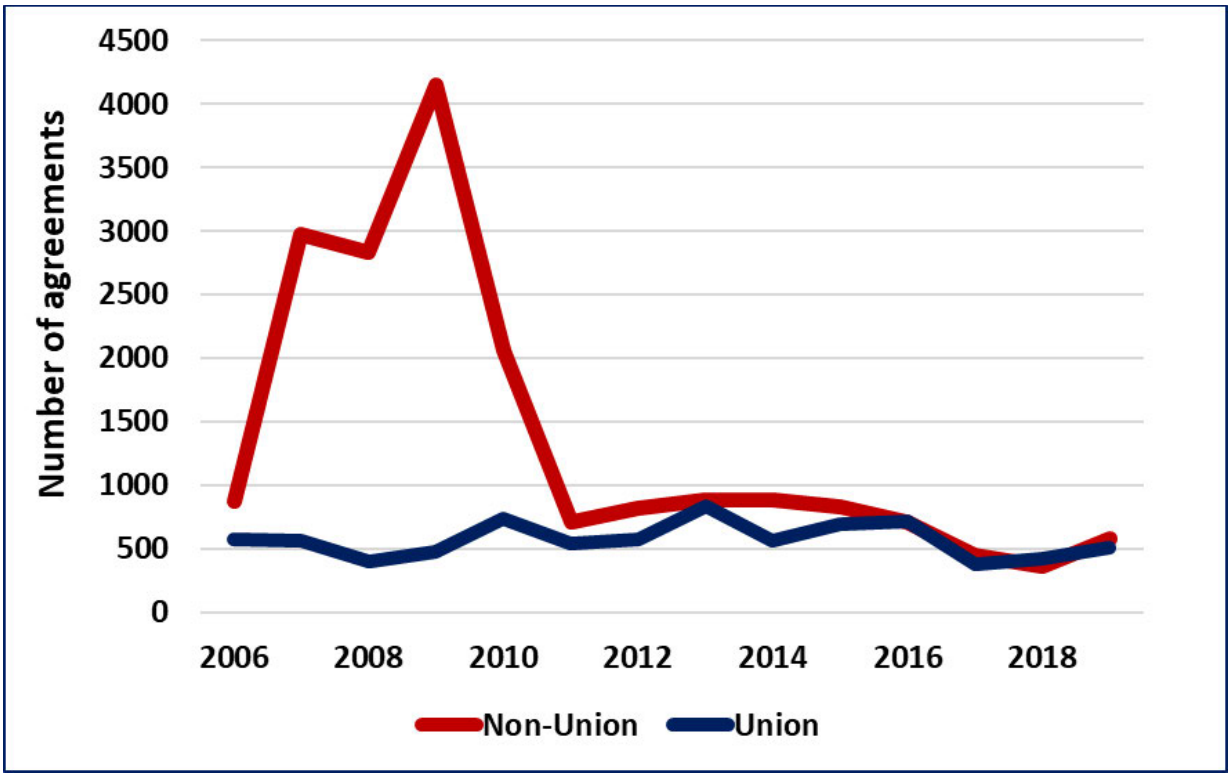
Importantly, the wages data presented in Figure 5 above are only for those EAs that had quantifiable wage increases written into their provisions. The shocking reality is thousands of non-union EAs do not mandate *any* increase in wages at all, instead linking wage increases to non-legislated measures like CPI, minimum wage decisions by the FWC, or entirely to employer discretion.[38] Figure 6 shows that the number of non-union EAs with non-quantifiable increases that were approved surged from around 850 in 2006, to over 4000 in 2009. The surge in non-union EAs without quantifiable wage increases corresponds with the operation of the WorkChoices legislation implemented by the Howard government in 2006, which abolished the former "no disadvantage test" requiring EAs to exceed minimum conditions in Awards. WorkChoices thus transformed EAs into tools for employers to escape minimum standards – precisely the same strategy that will be allowed by the Fair Work Amendment Bill.

The FW Act was then introduced in 2009, strengthening the role of unions in bargaining, and, importantly, restoring the principle that EAs must match or exceed minimum conditions outlined in Modern Awards (enforced through the Better Off Overall Test). Consequently, the

[38] The federal government's most recent review into EAs with non-quantifiable agreements at December 2015 found 2% of non-quantifiable EAs linked wage increases to performance reviews, 9% to CPI increases, and 26% to annual wage reviews by the FWC. 14% had inconsistent increases due to multiple employee classifications across single EAs. The largest number of non-quantifiable EAs (49% of all) were due to "other reasons". "Other reasons" include wage increases based entirely on employer discretion, funding arrangements, or where the mechanism for calculating wage increases is unclear. See Department of Employment, *Non-quantifiable wage increases in federal enterprise agreements*, 2016.

number of non-union EAs without quantifiable increases approved by the FWC dramatically declined, halving to around 2000 in 2010, and falling again to an average of less than 700 to 2019. Non-quantifiable wage increase provisions are much less common in union EAs, and their number remained largely steady over the same period. These data confirm that non-quantifiable wage agreements are largely a phenomenon of employer-centric, non-union EA-making.

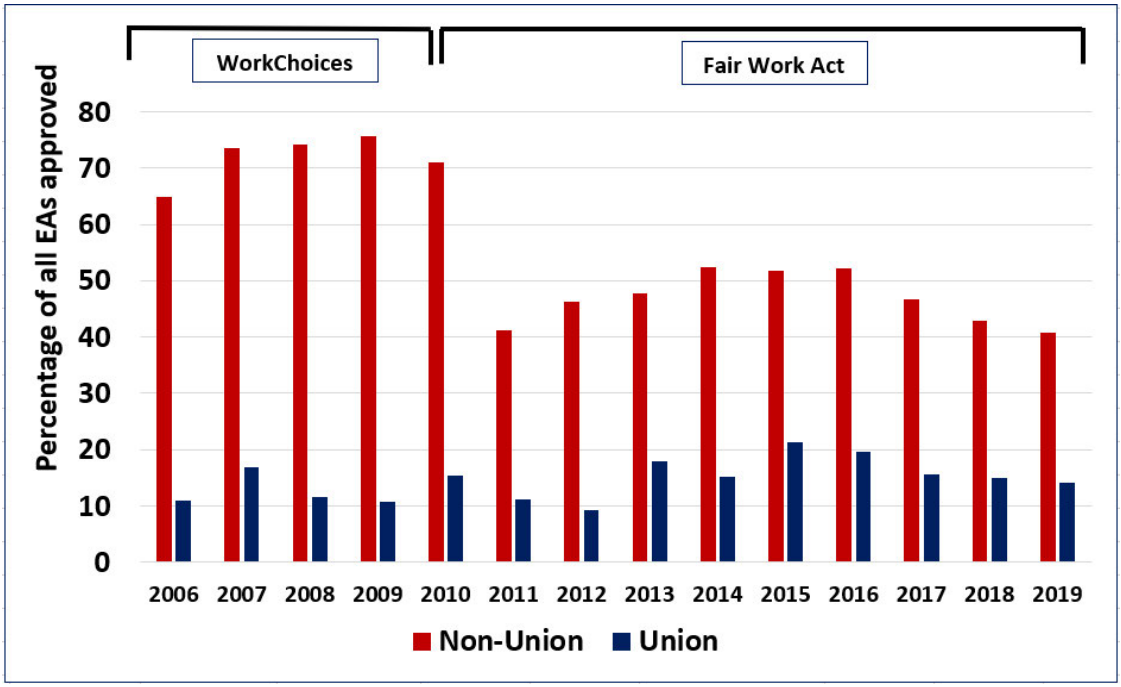
Figure 6. Number of Agreements Approved Without Quantifiable Wage Increases



Data. WAD. Private sector only.

Before introduction of the FW Act and the BOOT, between 2007–10 a startling 72% of non-union EAs (on average) did not specify quantifiable wage increases. Under the BOOT, the non-quantifiable share of all non-union EAs then declined to less than half (47%) of all non-union EAs approved from 2011–19. There has been a modest decline in non-quantifiable wage provisions in non-union EAs approved since 2016.

Figure 7. Proportion of Agreements Approved Without Quantifiable Wage Increases



Data: WAD. Private sector only.

The impact of the two IR policy frameworks on EA trends is clear. Before the FW Act and BOOT existed, there were significantly more non-union EAs, the majority of which had no quantifiable wage increases written into their conditions. After the FW Act and BOOT were introduced, fewer non-union EAs were created, and a slight majority of those agreements had quantifiable wage increases.

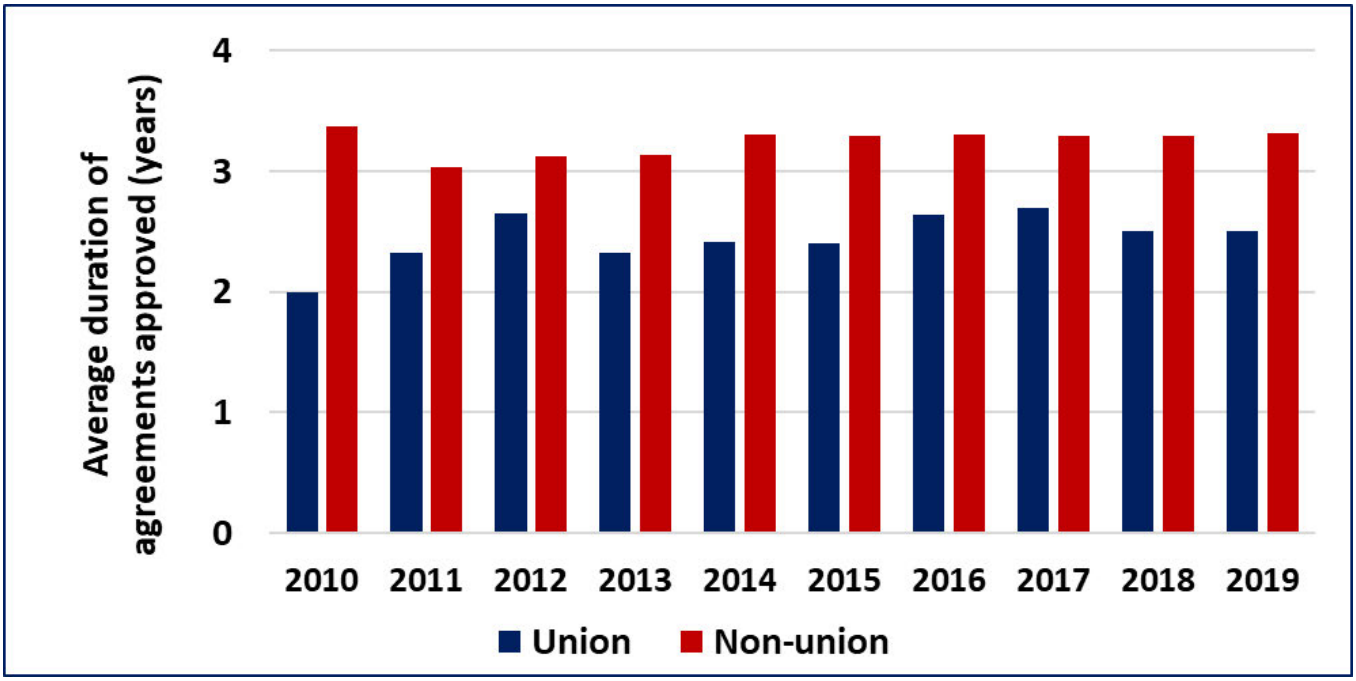
The federal government's Fair Work Amendment Bill would plunge enterprise bargaining decisively back into the pre-FW-Act world. Australia's IR policy history demonstrates that if the measures pass, we can expect both an increase in the number of non-union agreements, *and* a renewed dominance of agreements without any specified wage increases at all.

The high proportion of non-union EAs approved without predictable, specified wage increases is a startling indicator of the dangers of unilateral employer power in EA-making. Without an organised and consistent representative structure through which workers can advance their claims and take action in support of them, non-union EAs are subject to unilateral influence and manipulation by employers. In practice employers can dictate the terms of the EA when there is no process through which genuine negotiation can occur. Without a BOOT in place to backstop the process and ensure that at least prevailing minimum standards are respected, EAs become a tool for reducing wages and conditions – rather than increasing them.

3. Non-Union EAs Lock in Lower Wages Over Longer Time Periods

In addition to lower (or no) wage increases, non-union EAs also lock in those inferior wage outcomes for longer periods of time compared with union-covered EAs. The average duration for non-union EAs in 2019 was 3.3 years, compared with 2.5 years for union EAs. Approved non-union EAs have had longer average duration than union EAs every year since 2010 (see Figure 8). This indicates a clear employer preference for longer agreements to lock in (low) wages and reduce contract renewal costs.

Figure 8. Average Duration of Private Sector EAs Approved



Data: WAD. Figures are for average duration of EAs approved in the private sector each year.

In sum, the Fair Work Amendment Bill will accelerate non-union EA-making, undermining wage growth in Australia compared with existing collective bargaining laws in three specific ways: First, wage increases under non-union EAs are consistently and significantly lower than in EAs negotiated with union involvement. Second, many non-union EAs do not specify any wage increases at all. Third, non-union EAs tend to have significantly longer nominal terms than union-negotiated EAs, locking in their inferior terms for extended periods.

Together, these measures are likely to expand the number of non-union EAs, weaken standards in agreements, permit evasion of Award minimums, and diminish union representation in bargaining. More “flexibility” for employers to create non-union EAs that undercut Award minimums may preserve (or even expand) private sector EA coverage. But from the perspective of workers this would be futile. The limited amount of genuine bargaining activity that remains in Australia’s collective bargaining system would only be stifled, further undermining already-

weak wages growth. If the government's aim really is to rebuild collective *bargaining* and lift wages and conditions, a very different direction is required in reforming Australia's IR laws.

Wage Theft & Compliance Regimes

Wage theft and other forms of unlawful non-payment or underpayment of workers' wages and entitlements by employers is a major problem in Australia. While wage theft is not new in Australian workplace relations, it has increased in severity in recent years. The Fair Work Amendment Bill introduces national legislation imposing criminal sanctions in the most serious instances of deliberate underpayment with imprisonment and criminal fines for systematic breaches of wage laws. These laws will likely override existing wage theft laws in Victoria and Queensland.[39] This means, to the extent that federal laws proposed cover the same subject matter, state-based schemes will not apply. For instance, Victorian or Queensland wage inspectorates presently administering wage law compliance would no longer cover national system employees.[40]

In the absence of effective action from the Commonwealth government (which retains industrial relations powers), states have attempted to fill some gaps in compliance activities through the introduction of new laws criminalising wage theft. These campaigns have raised awareness among the business community and workers about the existence and severity of wage theft, with new criminal punishments for breaking labour laws.

On paper, subjecting employers engaging in wage theft to severe criminal punishment under criminal law would constitute a major deterrent. However, research evidence suggests that for criminal sanctions to impose real shifts in business underpayment practices, there must be an increase in perceived risk of detection.[41] To achieve this, regulators must be adequately resourced to administer compliance, and key workplace actors (employers, employer groups, and unions) supported to actively identify and pursue breaches. However, the Bill has not provided sufficient additional resourcing or revitalised the regulatory infrastructure to identify and pursue cases of wage theft at the level of the workplace.

Other compliance provisions proposed by the Bill, such as preventing employers from advertising jobs below minimum wage, are also in stark contradiction with measures in the *same* Bill allowing the creation of enterprise agreements that undercut Award minimums.

[39] Section 26 amendments in the Bill seeks to expressly override state criminal laws.
[40] See Melissa Kennedy, 'Structural Tensions between State and Federal Criminal Laws for the Underpayments of Wages and Other Labour Entitlements', conference paper delivered to AIRAANZ 2021.
[41] See Tess Hardy, John Howe and Melissa Kennedy, 'Criminal Liability for 'Wage Theft': An Analysis of Key Conceptual Issues' (2021) 47(1) *Monash University Law Review* (Forthcoming), with citations to various empirical studies on compliance.

But most importantly, by focusing compliance on criminal law, the Bill does not address the structural reasons for wage theft. These include the proliferation of new business models (including franchising, sub-contracting and labour-hire use) which have worked to fragment firm operations, decrease firm size and decrease employee bargaining power. To make matters worse, industrial relations changes run parallel to changes in the organisation of businesses, such as weakening of minimum labour laws and protections, the collapse in collective bargaining coverage, and harsh anti-union laws (like right of entry restrictions).

Recommendations

The overall impact of the Bill will be to undermine workers bargaining power, extend insecure work, and weaken wage growth. Australia needs the opposite. Therefore, this Bill should be rejected. Here are some proposals that would reform IR in a more genuine manner.

Preventing the creation of new pathways for wage suppression through EA-making requires rejection of the proposed Bill. The Bill will increase the number of lower-wage non-union agreements in proportion to higher-wage union-negotiated agreements, undermine the capacity of EAs to boost wages, and exact a powerful downward pressure on Australia's already-weak wage trajectory.

Making Jobs More Secure

A framework of casual labour deployment based entirely on whatever the employer offers at time of engagement, and which an employee "agrees" to, fails to counteract deepening precarious labour market trends. People desperate for paid work are compelled to accept the terms and conditions of jobs that employers offer.

Instead, the Australian employment relations system should work to reduce insecure work, including a clear and fair definition of casual worker (based on the original purpose and understanding of this concept: namely, to labour which is mobilized to meet irregular and temporary needs) and stronger rights to convert to permanent employment. But strengthening labour laws to improve job quality will only get us so far. Government must commit to expanding the amount of paid work available across the economy using fiscal expansion and direct public sector employment to boost the availability of good jobs for everyone who needs one.

Compliance

Transferring compliance to criminal law will not be affective in itself. Effective workplace-based compliance systems informed by well-funded, workplace-rooted regulation are required. Decades of harsh anti-union laws have undermined unions' traditional role in ensuring pay and working conditions are compliant with EAs, Awards, and National Employment Standards. The

authority of unions to play a larger role in compliance inspection should be restored, particularly in light of repeated revelations of widespread sub-Award conditions and wage theft across Australia.

Collective Bargaining

Allowing employers to create EAs that undermine Award minimums may increase the number of EAs in effect. But this would clearly make wage outcomes worse, not better. It also perverts the purpose of collective bargaining: sidelining genuine bargaining processes, and reducing employees to spectators of employer-controlled EA-making.

If the government's aim really is to rebuild collective *bargaining* and lift wages and conditions, a very different direction is required in reforming Australia's IR laws. The following measures would make some progress toward revitalising a more authentic collective bargaining regime in Australia, arresting wage stagnation, and supporting an inclusive economic recovery from the COVID recession:

- *Retain the Better Off Overall Test:* combined with growing job insecurity, and working poverty among vulnerable low-wage workers, the importance of protecting the integrity of the Award safety net remains strong. The existing BOOT should remain in place.
- *Conversion or phase-out of non-union agreements:* The legitimacy of collective bargaining would be improved by phasing out or converting non-union EAs into authentic agreements, rooted in democratic representation for affected workers and actual negotiations on their behalf. This could be achieved by introducing a simple notification system alerting the FWC and relevant unions of agreement expiry; provision of institutional supports to allow unions to initiate consultations with affected employees and negotiations with employers; and FWC resourcing to provide bargaining facilitation services to achieve more genuine agreements.
- *Genuine review and approval of agreements:* Instead of weakening already modest requirements on employers to obtain consent from employees for their proposed EAs, "genuine agreement" practices should be strengthened to require employers to engage in negotiations with a workforce genuinely representative of who will be covered by the EA.
- *Allow multi-employer and sectoral bargaining:* Rebuilding a viable collective bargaining system will require Australia to evolve beyond the current highly decentralised enterprise-level bargaining system which fails to cover the majority of workers. Multi-employer and sectoral bargaining arrangements can resolve deepening labour market power imbalances created by trends such as contracting out, corporate franchising, and the expansion of small firms, re-aggregating workers across sectors or industries, and allowing them to fairly bargain for pay increases and other improvements. Sectoral bargaining systems operate in many advanced economies, demonstrating wide

economic and social benefits including higher wages, job security, greater income equality, and increased productivity.[42]

- *Relax harsh restrictions on union activity:* Australia's restrictions on normal union activity undermine collective bargaining, curtailing unions' capacity to reach and represent workers. These restrictions (including 24-hour notice periods, and strict limits on entry) have also undermined the important role of unions in ensuring pay and working conditions are compliant with the current agreement and minimum labour laws. Unions should have their compliance inspection role restored. Australia's uniquely harsh restrictions on industrial action should also be relaxed to enable workers to take collective action to support their economic and social interests.

These changes would restore the ability of the collective bargaining system to lift wages at a time when Australia's economy sorely needs it. After 8 years of real wage stagnation, Australia's recovery from the COVID recession requires wage-boosting measures to kick-start workers' incomes, repair living standards, prevent deflation, and secure inclusive economic growth. Support for faster wage growth should be a key component of a longer-term, sustained strategy for inclusive economic recovery, including expanded public investment, increased spending power for workers to lift aggregate demand, and improved labour and social standards.

[42] See Organization for Economic Cooperation and Development, *Negotiating Our Way Up: Collective Bargaining in A Changing World of Work*, November 2019.