BCA
Business Council of Australia

Submission on the provisions of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020

Submission to the Senate Legislation Committee on Employment and Education

February 2021

Contents

Overview

Why we urgently need change

Business, all sides of politics, unions and the community say they want a modern workplace relations system for Australia that is fair, easily understood, delivers secure work, creates more jobs, pays higher wages and puts in place strong sanctions for deliberate wrongdoing.

The Business Council of Australia believes on balance the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (**the Bill**) overall achieves these aims by delivering a simpler and more modern system.

The proposed amendments go to the heart of Australia's capacity to urgently replace jobs, urgently create jobs and put in place the conditions for higher wages over the next decade.

The package does this by removing some of the worst aspects of the system and reducing complexities and inflexibilities, particularly those preventing small business from hiring additional workers. The flaws in what has been a conflict-driven system have been one of the factors contributing to Australia's low rates of productivity.

The centrepiece of the changes restores the principal intent of the enterprise agreements system, which has been the cornerstone of delivering higher wages and higher productivity.

The Bill represents a sensible, middle ground that reflects the realities of modern workers and modern workplaces. It is neither revolutionary, nor extreme. It is the product of a detailed consultation process involving the government, business and unions that ran from June to October 2020.

We see this as a package and believe overall it will achieve the objectives we have outlined. We are ready to work with unions and all members of the Parliament to reach a sensible and achievable outcome that returns Australians to work, creates more jobs and delivers higher wages.

Restoring the enterprise agreement system

The Business Council, just like unions and the community, believes the enterprise bargaining process should be the centrepiece of Australia's workplace relations system.

The EA system has historically paid higher wages. From the early 1990s to 2010, the coverage of agreements grew to 43 per cent of employees (compared to 15 per cent on awards) and non-managerial employees on collective agreements were paid an hourly rate 65 per cent more than those on awards on average.[1] According to the most recently available data, this figure had fallen to 43 per cent in 2018.

The system is now so hamstrung by technicalities and complexities that it is in danger of collapse.

We believe these amendments represent the most practical and achievable way of saving the EA system.

Enterprise agreements enable business and workers to share success. They remain the best way to keep people in work and to enable businesses to grow and succeed so they can pay higher wages and employ additional workers. EAs remain the best way of being able to adapt to the future, harness technology and speed up Australia's recovery.

Workers on agreements earn more than those on awards. The decline in the number of agreements in recent years has been a key factor in Australia's low wage growth.

When the enterprise bargaining system was working well in the 1990s and 2000s, agreements were full substitutes for awards, not just awards with add-ons. This in turn led to strong productivity growth, stronger wage growth and falling unemployment.

Problems with the enterprise bargaining system are holding us back

Over many years, it has become too difficult to make new enterprise agreements because the system is too complicated and the Better Off Overall Test (BOOT) has lost the 'overall' element.

Many employers have found the system too difficult to navigate and make agreements quickly. Employees are often left waiting for years to receive the pay rises and better conditions they agreed to in bargaining.

Many businesses no longer use the system. They either:

- exit the system and revert to awards; or
- give up on a new agreement and continue with expired 'zombie' agreements; or
- are forced to settle for agreements that are sub-optimal, for both the both the business and its employees.

There are very real consequences of continuing with an underperforming enterprise bargaining system – millions of employees will continue to miss out on wage rises and will be locked into award terms.

Some of the worst examples of failures in the current system:

- McDonald's had a majority of its employees vote in favour of a new enterprise agreement in 2019, but a decision was made to withdraw from the approval process as the agreement was at risk of not being approved due to the Fair Work Commission's application of an overly prescriptive and technical compliance assessment. This means 105,000 employees have now reverted back into the award system. Many employees continue to be impacted because they can no longer work the hours they want, due to the Award's rostering inflexibility.
- Bunnings withdrew its proposed agreement after waiting almost a year for it to be approved, after a number of technical and hypothetical objections from a minority bargaining representative. Whilst Bunnings provided unilateral wage increases following the withdrawal of the agreement, tens of thousands of its employees were denied the changes to entitlements they had agreed on when they bargained for the new agreement.
- Kmart's proposed agreement was rejected by the Commission on the question of whether a tiny handful of casual employees should have voted in the ballot. It was finally approved by a Full Bench, but this meant that Kmart employees were left waiting a year for pay rises.
- Woolworths employees had to wait two years for an agreement to be made. This agreement is now simply all the award terms with a few small extras. It no longer gives employees the same rights as previous agreements to choose their rosters.

The Business Council strongly supports the proposed changes to enterprise bargaining, in particular the permanent changes to the application of the BOOT, which restore the "overall" element, in line with its original intention.

The changes will also:

- require the Fair Work Commission to give primacy to the views of the parties involved in negotiations;
- remove the capacity of people who are not part of negotiations to de-rail agreements; and
- scrap the requirement to consider hypothetical scenarios.

As a result, agreements can be approved within 21 days, speeding up the delivery of wage rises and other benefits to workers. The focus returns to co-operation between employers and employees – the

foundation of our industrial relations system – and incentivises more ambitious, win-win agreement making.

The reforms also end the situation where some workers have missed out on pay rises for years because the drawn-out process of making and approving enterprise agreements forces people to give up, walk away and fall back on awards or expired agreements.

It gives employers greater certainty to invest, grow and employ more people.

Bringing people together -The role of enterprise agreements

Collective bargaining is the best way to secure productivity and fairness through a simple process at the enterprise level.

The Business Council, just like unions and communities, believes in the role of collective bargaining.

We believe it has to allow employers and employees at the enterprise level to determine how that enterprise can be successful. And, in turn, allow people to share the benefits of improved productivity and success through higher wages and better conditions.

These reforms will enable the enterprise bargaining system to achieve its original ambition, where agreements were not comprised of add-ons to awards, but could be full substitutes for awards, as outlined by then Prime Minister Paul Keating in 1993:

> *"Let me describe the model of industrial relations we are working towards. It is a model which places primary emphasis on bargaining at the workplace level within a framework of minimum standards provided by arbitral tribunals. It is a model under which compulsorily arbitrated awards and arbitrated wage increases would be there only as a safety net.*
>
> *"...Over time the safety net would inevitably become simpler. We would have fewer awards, with fewer clauses*
>
> *... We need to find a way of extending the coverage of agreements from being add-ons to awards, as they sometimes are today, to being full substitutes for awards."* [1]

We believe the Bill's proposed changes to enterprise bargaining will put the ambition back in agreement making, returning to Hawke and Keating's original intention of a system that actively encourages employers and their teams to work together to make an enterprise successful and share in higher wages and better conditions.

Fixing casual employment

The Bill will introduce a clear definition of 'casual employee' to address the uncertainty created by recent court decisions, which have thrown thousands of existing casual employment arrangements into doubt. This uncertainty is jeopardising jobs and threatening the viability of many smaller businesses. Not fixing this problem is not an option.

The Bill will also introduce a new right for all casual employees to have a clear pathway to 'permanent' employment, if they wish.

It will give employees genuine freedom to determine their status, and business will have the certainty of a clear set of rules.

[1] Prime Minister Keating, speech to Australian Institute of Company Directors, 21 April 1993

Critical measures to improve our capacity to replace and create jobs

In addition, employers and unions identified several areas of the system that needed to be fixed to improve the nation's ability to replace jobs and create new, higher paying jobs.

Award simplification: The proposed changes will enable part-time employees with at least 16 hours per week to agree to work additional hours if they would like to (but still with penalty rates, when they apply. It will give extra hours to workers who want them. This will make part-time employment an alternative to casual employment.

Compliance and enforcement: It is crucial that we create an environment that incentivises businesses to proactively monitor their compliance obligations. The proposed 'deferred litigation' process in the Bill will provide businesses with an incentive (i.e., avoiding litigation and penalties) to self-report unintentional underpayments and rectify them. This will help employers, especially small businesses, meet their obligations and ensure workers are not underpaid.

For deliberate and serious 'wage theft', higher civil sanctions will be introduced as well as a new criminal offence.

Greenfield agreements: New agreements for 'greenfields' major projects worth more than $500 million will now be able to run for a maximum of eight years rather than the current four years. This will inject more certainty into pay and conditions, making initial investment into major projects and job creation more attractive. Any such agreements must also provide for at least annual wage rises.

Recommended amendments to the Bill

This submission proposes seven targeted amendments to the Bill that will improve the workability of its measures and better enhance its benefits for business and workers, as follows:

1. Casual employees – The Bill currently requires employers to retrospectively assess the eligibility to convert of all existing casual employees within 6 months of the Bill's commencement. This requirement should be streamlined to require employers to instead notify employees of their new right to convert but only assess their eligibility when they request conversion.
2. Casual employees – The Bill currently requires employers to notify casual employees who do not qualify for conversion under the new rules. The Bill should be amended to remove the obligation on employers to notify employees of a right they don't have.
3. Modern awards – Amend the Bill to improve the ability for employers and employees to enter into 'simplified additional hours agreements' to work additional hours. Employees should also have the option to provide a 'standing consent' to work additional hours, rather than having to enter into a new agreement every time they work any such hours.
4. Modern awards – Remove the 16-hours per week requirement for employees to access 'flexible part-time work', or replace with an 8-hour minimum if there is to be such a limit. The new right for part-time workers to access additional hours should not be arbitrarily limited to those who work more than 16 hours.
5. Enterprise agreements – Amend the Bill to provide transitional arrangements for workers on terminated legacy agreements who earn above the award to preserve their above-award remuneration arrangements and prevent them falling straight back onto award terms.
6. Enterprise agreements – remove the requirement for the proposed transfer of business exemption to be 'at the employee's initiative', to enable employers to offer new opportunities to workers.

7. **Compliance and enforcement** – introduce an upper limit on the quantum of penalties calculated on the basis of the 'value of the benefit' of contraventions.

Getting this right for the future

The elements of this package represent a clear way forward. The package comprises carefully calibrated and incremental reforms that balance the interests of employers, employees and unions.

The Business Council strongly supports the broad objectives of the five elements of the Bill, all of which emerged from the consultation process as responses to problem areas that all parties agreed require fixes.

We urge swift passage of these elements by the Parliament.

If we fail to seize this historic moment for progress, transforming our economy to get people back to work and create new high-paying jobs becomes significantly more difficult.

We all have an obligation to get this right for today's workers and for future generations

It is crucial these reforms progress so we can get the system working and we can drive incentives for employees and employers to work together to make enterprises more successful.

The stakes are too high to miss out on this opportunity for reform.

If we fail to make these important changes to the system, we risk condemning Australia to the slow lane and missing out on opportunities.

We not only have to get unemployed people back to work, but we also need to reform the system so it is easier to work together to generate the new jobs and growth that Australia needs to be a more competitive, strong and productive economy post-COVID.

Summary of measures and safeguards – a quick guide to the amendments in the Bill

Award simplification

Flexible part-time work

What: Part-time employees with at least 16 hours per week can agree to work additional hours without overtime if they wish (but still with penalties rates, where applicable). It will apply to 12 awards in 'distressed' industries (Retail, Restaurants, Hospitality).

How will it help: Extra hours can be provided to workers who want them. Employers will be able to offer the extra hours to part-time workers rather than casuals. Part-time employment will become a viable alternative to casual employment.

What are the safeguards: Can only be done with the agreement of the employee. An employer cannot direct the employee to work the additional hours. Agreements must be in writing and an employee can cancel the arrangement at any time. Penalty rates will still apply (eg. if hours are worked on weekends).

Casual Employees

Definition of casual employee

What: The legislation will now include a definition of 'casual employee'. If someone has been employed for more than 12 months, works regular hours and has a 'firm advance commitment' to ongoing work then they are not a casual.

How will it help: Ends confusion around the legal status of casuals and deters misuse of casual work.

What are the safeguards: It will not be possible for an employer to simply deem workers 'casual'. The test is objective and therefore not open to manipulation.

Right to convert

What: If a casual has worked for 12 months, and the last six months have been a '*regular pattern of hours on an ongoing basis*', then the employer must offer them the right to convert to permanent status. If an employee opts not to convert, then they will continue to have the right to convert every six months afterwards.

How will it help: It gives employees a pathway to permanent work if they wish, and unlike existing conversion rights, where the onus is on the employee to request, the onus will now be on the employer to make the offer.

What are the safeguards: If the employer does not make the offer then they are breaching the Act and are subject to penalties. The new right to convert is enforceable as a workplace right under the General Protections provisions of the Act.

Disputes can be referred to the Fair Work Commission for conciliation, or arbitration by the agreement of the parties. This is the same disputes process that currently exists for conversion rights under awards.

The Bill specifically prohibits employers from changing the hours of an employee, terminating their employment or engaging in other conduct designed to avoid them converting.

There is no obligation to convert – it will be entirely a decision for the employee whether they wish to convert or remain casual.

Double dipping

What: The Bill will prevent employers having to pay employees twice for the same entitlement. Where a casual loading has been paid, it can be offset against any right to paid leave to which an employee is subsequently found to be entitled.

How will it help: it will make sure employees get what they are entitled to and save businesses from paying again for something they have already compensated their employee for.

What are the safeguards: The 'double dipping' offset provision only applies where an employee received a specified casual loading to begin with and this loading is sufficient to offset any paid leave entitlements. If it is not sufficient then the employer must pay the difference.

Compliance and enforcement

Deferred litigation process

What: Provides businesses with an incentive to self-report unintentional underpayments and rectify them without being subject to litigation or penalties.

How will it help: Will help employers, especially small businesses, meet their obligations and ensure workers are not underpaid. Where unintentional underpayments occur, they can be rectified in a more efficient manner. The focus will be on rectification rather than sanctions.

What are the safeguards:

- For deliberate and serious breaches, the maximum civil sanctions will be increased by 50 per cent.
- Civil sanctions will also be adjusted to also enable penalties to be calculated according to the benefit gained by an employer from underpayments. This will not apply to small business employers.
- New criminal sanctions will apply for the most serious breaches involving intentionally 'dishonest' and 'systematic' conduct.

Enterprise bargaining

Changes to the Better Off Overall Test (BOOT)

What: The 'overall' part of the test will be restored. The Fair Work Commission must assess all of the terms of an agreement holistically, including non-monetary benefits.

The BOOT will no longer apply to hypothetical scenarios, only those that are reasonably foreseeable at the time. For example, we will no longer have situations where the liquor licence allowance under the Retail Award was applied to the Officeworks EA, even though Officeworks has never sold liquor and never will.

The views of the parties (business, workers and unions) on what constitutes 'better off' will be given primacy by the Fair Work Commission. Non-parties will only be able to object to an agreement being approved in 'exceptional circumstances'.

The approval process will be fast-tracked – the Commission must approve agreements within 21 days.

How will it help: A simpler and quicker process for negotiating and approving agreements so workers don't miss out on pay rises or are forced back on to awards or expired agreements, as has increasingly occurred under the current system.

What are the safeguards: Existing procedural safeguards will remain – eg. employers will still be required to provide seven days for employees to consider an agreement before voting commences.

Greenfields agreements

What: New agreements for 'greenfields' major projects worth more than $500 million will now be able to run for a maximum of eight years (rather than the current four years).

A lower threshold of $250 million will apply on projects deemed by Government to be of national or regional significance, or significant for job creation.

How does it help: Will inject more certainty into pay and conditions, making initial investment into major projects and job creation more attractive.

What are the safeguards: It will be a matter for the parties to agree how long an agreement should run. Agreements do not have to run for the maximum eight years – they can run for as long as the parties wish. Agreements must provide a wage rise at least every year.

Casual employees

Definition of 'casual employee'

The Bill will introduce a definition of 'casual employee' into the Act for the first time. This is both necessary and desirable. It will solve the significant legal uncertainty that has arisen from recent court decisions[2], which ruled that employees designated as 'casuals' who worked long-term regular rosters were in fact 'permanent' employees.

Under this definition, it will no longer be possible for employers to deem workers 'casual' simply because they say they are and pay a casual loading, even though they work regular rosters. This could happen prior to the recent *Rossato* and *Skene* court decisions but will no longer be possible under the Bill.

The definition in the Bill is an objective test. The Bill sets out various factors that will comprise the test, such as whether the employee works 'regular hours' and has a 'firm advance commitment' to ongoing work.

Because it is an objective test, it will not be possible for an employer to simply assert that an employee is a 'casual' if they do not meet the test.

The *Rossato* and *Skene* decisions have effectively deemed one category of casual arrangements to be permanent, i.e. those in situations where an employee is employed on a 'regular and systematic' basis and also has a 'firm advance commitment' to future work, based on rostering arrangements set by the employer, and over which the employee has no effective influence. These decisions have created a high level of legal uncertainty that now requires a legislative solution. To not introduce such a solution would be to perpetuate the current uncertainty that has thrown thousands of existing employment arrangements into doubt. The proposed amendments will respect the Court's decisions in *Rossato* and *Skene* and provide the certainty that is now required.

Casual conversion rights

The Business Council supports the right of casual employees to opt to convert to permanent status in appropriate circumstances and the extension of this right through its inclusion in the National Employment Standards (**NES**), as is proposed in the Bill.

Under the Bill, the NES will include a right for casual employees to opt to convert to permanent status once they have worked for 12 months, with the final 6 months being a '*regular pattern of hours on an ongoing basis.*'[3]. The onus will be on the employer to offer conversion to eligible employees.

The right to convert in the Bill is largely based on existing conversion rights under awards and agreements. It goes further than existing rights in awards and agreements because:

1. It will now apply to all employees under the NES and be enforceable as a 'workplace right' under the Act;
2. It is based on the new objective definition of 'casual employee', which will remove doubt as to whether employees qualify for the right to convert;
3. It will also include a 'residual' right for employees to opt to convert to permanent status every 6 months, if they continue to work regular hours;

[2] *WorkPac v Skene* [2018] FCAFC 131; *WorkPac v Rossato* [2020] FCAFC 84
[3] Schedule 1, Clause 66B(1)(b)

4. It will introduce an onus onto employers to offer conversion to casual employees once they meet the eligibility criteria.

The new onus on employers to offer conversion will impose an additional administrative burden on employers with sizable casual cohorts. Whilst the Business Council supports the intent of the Bill, it should be amended to introduce appropriate transitional arrangements that will reduce this burden, without detracting from the rights of employees. The proposed transition arrangements are set out below.

The Bill provides that the new NES right will prevail over existing conversion rights in enterprise agreements and that employees who meet the new eligibility criteria must be offered conversion in accordance with the new NES right. A 6-month transition period will apply in which existing employees who are designated as 'casuals' will be eligible to convert under the new rules, even if they do not meet the new statutory definition of a 'casual employee'.[4]

Recommended amendment to the Bill – Remove the employer obligation to notify employees who do not have the right to convert

The Bill also includes an obligation on employers to notify each casual employee with 12 months service if they do not meet the criteria to convert. Employers must notify employees that they do not have the right to convert and outline the reasons why.[5]

This obligation applies an additional and unnecessary burden on employers and provides no benefit to employees, given that they are not eligible and will have already been informed of their rights through the Casual Employee Information Statement provided for in the Bill.

There is no precedent amongst other NES rights for employers to notify employees of rights that they don't have. There is also no equivalent provision under the standard casual conversion rights that typically apply under awards. As such, this provision should be removed from the Bill with no diminution of employee rights.

Employer rights to refuse requests to convert

The Bill will give employers the right to refuse a request to convert on '*reasonable grounds*'.[6] If no such grounds exist, then the employer must agree to the request.

The 'reasonable grounds' exemption will only arise in limited circumstances and the onus will be on the employer to justify the reason to say no. Such grounds could include that the employee's position is not likely to continue to exist; or it would not be possible to continue to employ the employee as a permanent; or that conversion would threaten the viability of the business.[7]

This concept is not new – it is based on very similar conversion rights under awards, which have always included a right for employers to refuse a conversion request on *'reasonable grounds'*. For example, the *General Retail Industry Award 2020* provides that:

> *Reasonable grounds for refusal include that:*
>
> > ***(i)*** *it would require a significant adjustment to the casual employee's hours of work in order for the employee to be engaged as a full-time or part-time employee in accordance with the provisions of this award –that is, the casual employee is not truly a regular casual employee as defined in clause 11.7(b);*

[4] Schedule 7, Clause 47; Explanatory memorandum, page 93
[5] Schedule 1, Clause 66C(3)-(4)
[6] Schedule 1, Clause 66H
[7] Schedule 1, Clause 66H(2)

> ***(ii)*** *it is known or reasonably foreseeable that the regular casual employee's position will cease to exist within the next 12 months;*
>
> ***(iii)*** *it is known or reasonably foreseeable that the hours of work which the regular casual employee is required to perform will be significantly reduced in the next 12 months; or*
>
> ***(iv)*** *it is known or reasonably foreseeable that there will be a significant change in the days and/or times at which the employee's hours of work are required to be performed in the next 12 months which cannot be accommodated within the days and/or hours during which the employee is available to work.*
>
> *For any ground of refusal to be reasonable, it must be based on facts which are known or reasonably foreseeable.*[8]

It is important to note that the Bill includes strong safeguards against abuse. It specifically prohibits employers from reducing or varying an employee's hours or work, or terminating their employment, in order to prevent them from having access to the new conversion rights in the Bill.[9] This is a civil penalty provisions that will be subject to the higher civil penalties that are also included in the Bill.

Right of review

The Bill provides that disputes over a refusal by an employer on 'reasonable grounds' can be referred to the Fair Work Commission for conciliation, or arbitration by agreement of the parties. This also reflects the position under existing award conversion rights. For example, the General Retail Industry Award 2020 provides that:

> *If the employee does not accept the employer's refusal, this will constitute a dispute that will be dealt with under the dispute resolution procedure in clause 36—Dispute resolution. Under that procedure, the employee or the employer may refer the matter to the Fair Work Commission if the dispute cannot be resolved at the workplace level.*[10]
>
> ....
>
> *The parties may agree on the process to be followed by the Fair Work Commission in dealing with the dispute, including mediation, conciliation and consent arbitration.*[11]

It should be noted that other NES rights that are subject to agreement by the employer do not provide for arbitration, or any other kind of dispute settling procedure. For example:

- The right to request flexible working arrangements contains no right of review in the event of a refusal by the employer.[12]
- The right to request an additional 12 months parental leave contains no right of review in the event of a refusal by the employer.[13]

If the casual conversion right was to provide for mandatory arbitration it would be the only right in the NES that did so.

In many cases, the dispute settlement procedure that will apply to employees in relation to any disputes over this entitlement will be that which applies under any applicable award or enterprise agreement, which will apply to the exclusion of the NES review process.[14] This could include a right to mandatory arbitration, depending on the terms of the instrument.

[8] Clause 11.7(g)-(h)
[9] Schedule 1, Clause 66L(1)
[10] Clause 11.7(j)
[11] Clause 36.5
[12] Section 65 of the Act
[13] Section 76 of the Act
[14] Schedule 1, Clause 66M(2)

Recommended amendment to the Bill: 6-month transition period for existing employees

Under the Bill as drafted, the obligation on employers to inform all eligible employees of their right to convert[15] is subject to a 6-month transition period.[16]

The effect of this provision is that within 6 months of the Bill's commencement, employers will be required to:

- assess all existing casual employees against the new conversion criteria, instead of the new requirement in the Bill to assess employees after 12 months' employment;[17]
- notify existing employees who meet the criteria that they have the right to request conversion;[18]
- notify existing employees who do not meet the criteria that they do not have the right to convert;[19] and
- provide all existing employees with a Casual Employment Information Statement as soon as practicable after the 6-month transition period.[20]

For large employers, many of whom will have thousands of employees, this will also require them to undertake an assessment of every existing casual employee who may meet the criteria. This is likely to require a retrospective manual assessment of the hours worked by each individual employee. The criteria will now be 'regular pattern of hours on an ongoing basis' for the preceding 6 months. This may differ from the definitions that apply to existing casual conversion rights. It will mean that employers will be required to look backwards to the previous 6 months for each individual employee to determine whether they meet the test. It will be a significant red tape imposition on large employers, some of whom will have to undertake tens of thousands of retrospective manual calculations.

As a solution to this problem, the Business Council proposes that the obligation on employers in relation to existing employees could instead be satisfied by notifying employees of the new conversion right within the 6-month transition period. The notice would set out the new criteria of 6 months regular pattern of hours and invite employees to request conversion if they believe they qualify. The employer would then only need to conduct an assessment for individual employees who indicate they wish to convert. This will significantly alleviate the red tape burden currently in the Bill, without in any way diminishing the rights of employees to convert under the new rules.

Alternatively, the commencement of Subdivision B of Schedule 1 could be delayed by 6 months, which would give employers time to re-calibrate their arrangements in order to assess employee eligibility on a prospective basis moving forward, rather than the retrospective basis required under the Bill as currently drafted. During this transition period, existing conversion rights under any applicable awards, enterprise agreements, or contracts of employment would continue to apply.

Protecting businesses from double dipping

The legislation will address the problem of double payment that has arisen from the recent Court decisions. Specifically, in the *Skene* case the Court ruled that an employee found not to be a casual but who had received a casual loading in lieu of paid leave was also entitled to back payments for such paid leave over the course of their employment.

Under the Bill, where a casual worker has received a casual loading but is subsequently found to be a permanent employee and entitled to paid leave entitlements, then the loading they have received can

[15] Schedule 1, Clause 66B
[16] Schedule 7, Clause 47
[17] Explanatory memorandum, page 94
[18] Explanatory memorandum, page 94
[19] Explanatory memorandum, page 94
[20] Schedule 7, Clause 47(5)

be used to offset the paid leave they are owed by the employer. If the casual loading is not sufficient to satisfy these entitlements, then the employer must pay the difference.

It has always been understood that casual loading (typically 25% extra on top of the base rate) is paid in lieu of paid leave (i.e. annual leave and sick leave). If not for this amendment being made by the Bill, many businesses will have to pay again for something they have already compensated the employee for not having. The potential liability for business is significant – the Commonwealth Government has stated that that the figure is likely to be between $18 and $39 billion.[21]

This should not be considered a 'retrospective' provision, as the parties to casual employment arrangements prior to the *Skene* decision would have entered those arrangements on the basis that there could not be any entitlement to paid leave, given the that a casual loading was being paid. In practical terms, any such entitlement only 'crystallised' once the *Skene* decision had modified the previously understood definition of casual employment.

Modern awards

Flexible part-time work

The Bill includes amendments that will vary 12 identified awards in 'distressed sectors' (Retail, Hospitality, Fast Food and related sectors), to enable part-time employees to agree to work additional hours without overtime, subject to the employee working a minimum 16 hours per week, to be known as '*flexible part-time work*'. The Bill enables employees to enter into a '*simplified additional hours agreement*' to work '*additional agreed hours*'.[22]

Under the Bill, this can only be done by agreement in writing with the employee. It should be noted that the additional hours will still attract penalty rates (eg. if they are worked on weekends or public holidays), just not overtime.

These amendments will enable part-time work to become a viable alternative to casual employment for many businesses where it currently is not. Part-time employees will be able to agree to work additional hours without overtime, which will give employers the same flexibility in rostering as with casual workers. In many cases, part-time work is not a viable alternative to casual work due to the problems with existing award terms that impose undue restrictions or complexity on part-time arrangements. This has meant that many employees in the 'distressed sectors' have remained casual, even though their employer is willing to offer them part-time status.

A typical example of this complexity can be found in the part-time provisions of the General Retail Industry Award 2020, which are as follows:

> *12.1 A part-time employee is an employee who:*
>
> *a. works less than 38 hours per week; and*
>
> *b. has reasonably predictable hours of work.*
>
> *12.2 At the time of first being employed, the employer and the part-time employee will agree in writing, on a regular pattern of work, specifying at least:*
>
> - the hours worked each day;
> - which days of the week the employee will work;
> - the actual starting and finishing times of each day;
> - that any variation will be in writing;

[21] Regulatory Impact Statement to the Bill, page viii
[22] Schedule 2, Clause 168M

- minimum daily engagement is three hours; and
- the times of taking and the duration of meal breaks.

12.3 *Any agreement to vary the regular pattern of work will be made in writing before the variation occurs.*

The definition of a part-time employee in the award is problematic because it does not stipulate over what period the hours of a part-time employee may be averaged and is unclear as to whether more than 38 hours may be worked by agreement in a given week. If an employer wishes to offer extra hours at ordinary rates, this can only be done by formally altering the employee's 'regular' hours. It creates unnecessary complexity for both businesses and workers, together with huge scope for disputes about whether overtime is payable at certain times. As a result, it is easier for employers to employ staff as casuals.

The Bill will help address this problem by introducing a less complex system that can be better understood and is more likely to be utilised. However, its workability could be enhanced with two amendments, as follows:

1. Enabling employees to have the option to provide a 'standing consent' for additional hours; and
2. Modifying the minimum 16 hours per week requirement.

Each of these proposed amendments is spelt out below.

Recommended amendment to the Bill - Standing consent for flexible part-time work

The Bill requires that a separate simplified additional hours agreement must be entered into before the start of each agreed period of additional hours.[23] This will make such arrangements less attractive to business, with the result that additional hours are likely to instead be offered to casual employees. This defeats the purpose of this amendment.

The Bill should be amended to also give employees the option to provide a 'standing consent' to agree to additional hours without the need for a separate written agreement each time. Such provisions currently apply in certain enterprise agreements in the relevant 'distressed sectors'. The Bill should include similar provisions in the following terms:

- Employees must provide standing consent in writing; and
- Such consent would include details of the employee's availability; and
- The consent may be varied or revoked by the employee at any time and will take effect from the beginning of the next full roster cycle or as otherwise agreed.

The requirement in the Bill for the employer to keep appropriate records of all agreed additional hours[24] would continue to apply.

Recommended amendment to the Bill - Remove the minimum 16 hours requirement

The Bill as introduced only allows for a simplified additional hours agreement to be made if the employee works at least 16 hours per week.[25] This is ostensibly intended to prevent abuse of the system through employers contriving to reduce employees' ordinary hours in order to then pay additional hours at the ordinary rate. However, the limit on 16 hours is unnecessary and will compromise the intent of the Bill to encourage part-time work as an alternative to casual work.

The concern to prevent abuse appears misconceived, as there is no financial benefit for an employer to reduce an employee's ordinary hours and then use flexible additional hours on an ongoing basis, as the hourly cost of the 'additional' hours is no different to the cost of rostering those hours as part of the

[23] Schedule 2, Clause 168N(1)(b)
[24] Schedule 2, Clause 168N(2)(c)
[25] Schedule 2, Clause 168M(1)(c)

employee's 'ordinary' hours. If anything, it would impose greater costs on the employer through the additional administrative burden and record-keeping obligations that will apply every time the employee worked 'additional' hours.

The benefits of additional flexible part-time work should ideally be available to all part-time employees, not just those who work more than 16 hours per week. A 16-hour roster may mean that an employee is working, for example, two 8-hour shifts or four 4-hour shifts per week. These employees will be able to be offered additional hours when they are available but others, for example those who work only three 4-hour shifts, will not be eligible.

Many employees in the 'distressed sectors' may not be able to work 16 hours per week on a regular basis due to factors such as school or university commitments, family commitments, work commitments in other jobs, or working hours restrictions for visa holders or school students. These employees should not be prohibited from working additional hours when they are available, for example during school or university holidays. In the Retail sector, many employees currently work rosters such as one 8-hour shift on a single day, or three 3-hour shifts or two 5-hour shifts per week. They would like the option of part-time status, and the capacity to work additional hours from time to time, but do not want to work more than 16 hours.

The Bill should be amended to either remove the 16-hour threshold or replace it with an 8-hour threshold that would benefit more part-time employees.

Enterprise agreements

The need for change

The reforms to enterprise agreement processes contained in the Bill are the most important element of the package and will have the most significant ongoing benefits. The Business Council strongly believes that effective collective bargaining is the best way to secure productivity and fairness, through a simple process at the enterprise level. It should enable employers and employees at the enterprise level to determine how that enterprise can be successful. In turn, it allows people to share the benefits of improved productivity and success through higher wages and better conditions.

Australia's system of enterprise bargaining previously achieved these goals. The goals of the system were best articulated by Prime Minister Keating when the system was first introduced in 1993:

> *"Let me describe the model of industrial relations we are working towards. It is a model which places primary emphasis on bargaining at the workplace level within a framework of minimum standards provided by arbitral tribunals. It is a model under which compulsorily arbitrated awards and arbitrated wage increases would be there only as a safety net.*
>
> *"...Over time the safety net would inevitably become simpler. We would have fewer awards, with fewer clauses*
>
> *... We need to find a way of extending the coverage of agreements from being add-ons to awards, as they sometimes are today, to being full substitutes for awards."*[26]

From the early 1990s to 2000s, Australia's system of enterprise bargaining was achieving these goals. The EA system has paid higher wages for the last 20 years. From the early 1990s to 2010, the coverage of agreements grew to 43% of ~~e~~employees (compared to 15% on awards) and non-managerial

[26] Prime Minister Keating, speech to Australian Institute of Company Directors, 21 April; 1993

employees on collective agreements were paid an hourly rate 65% more than those on awards on average. [27] According to the most recently available date, this figure had fallen to 43% in 2018.

When the current Act was introduced in 2009 it was intended to recapture the previous success of enterprise bargaining. However, in practice this has not been the case. Unfortunately, the problems with the Act at present, particularly the complexity of the BOOT, have made the enterprise bargaining system conflict-driven, slow and overly technical, with the result that the number of new agreements made has dramatically fallen.

The number of people employed under non-expired EAs peaked at around 2.6million in 2014, then dropped to a low of around 1.8 million people in late 2017. Wages growth under enterprise agreements is currently at a record low since enterprise bargaining was introduced. Since 2017, wage growth under agreements has been consistently below annual growth in award rates. This situation should be a catalyst for reform. Doing nothing and leave the system as it is would not be a responsible option.

How the system is broken – case studies

The problems with the current system have led to three types of sub-optimal outcomes for business. They either:

- Exit the system by terminating their agreement and reverting back to awards; or
- Give up on a new agreement and continue to operate on expired 'zombie' agreements; or
- Settle for a new agreement, but ones that are sub-optimal - for both the business and staff.

Some of the most prominent examples of these outcomes include:

1. **McDonald's** had a majority of its employees vote in favour of a new enterprise agreement in 2019, but a decision was made to withdraw from the approval process as the agreement was at risk of not being approved due to the Commission's application of an overly prescriptive and technical compliance assessment. This means 105,000 employees have now reverted back into the award system. Many employees continue to be impacted because they can no longer work the hours they want, due to the Award's rostering inflexibility.
2. **Bunnings** withdrew its proposed agreement after waiting almost a year for it to be approved, after a number of technical and hypothetical objections from a minority bargaining representative. Whilst Bunnings provided unilateral wage increases following the withdrawal of the agreement, tens of thousands of its employees were denied the changes to entitlements they had agreed on when they bargained for the new agreement.
3. **Kmart's** proposed agreement was rejected by the Commission on technical grounds involving the question of whether a tiny handful of casual employees should have voted in the ballot. It was finally approved by a Full Bench, but this meant that Kmart employees were left waiting a year for pay rises.
4. **Woolworths** employees had to wait two years for an agreement to be made. This agreement is now simply all the award terms with a few extras. It no longer gives employees the same rights as previous agreements to choose their roster.

[27] These figures are set out in detail in the Business Council paper "*The State of Enterprise Bargaining in Australia*", August 2019: https://www.bca.com.au/the_state_of_enterprise_bargaining_in_australia

The benefits of the Bill

The reforms in the Bill will again enable agreements to be a genuine alternative to awards. They will address the red tape and procedural issues that currently make enterprise bargaining prohibitive for businesses and have greatly diminished the benefits of agreements for employees.

The Bill will revive the enterprise bargaining system in several ways:

1. The BOOT will return to being assessed on an 'overall' basis - the Commission must assess all of the terms holistically, including non-monetary benefits.
2. The BOOT will no longer apply to hypothetical scenarios, only those that are reasonably foreseeable at the time.
3. The views of the parties (business, workers and unions) on what constitutes 'better off' must be given '*significant weight*' by the Commission. The existing, extremely wide, scope for non-parties or the Commission to second guess the position reached by the parties will be substantially reduced.
4. The obligation on the employer to 'explain' the agreement will be simplified to return to the original intent of the Act.
5. The approval process will be fast-tracked – the Commission must approve agreements within 21 days.
6. Non-parties will only be able to be heard by the Commission to object to an agreement being approved in *'exceptional circumstances'*. This will remove existing loopholes in the Act that have been gamed by non-parties to overturn agreements at the approval stage or frustrate the approval process.

The Bill will retain other existing procedural requirements and safeguards, for example the requirement for employers to provide a 7-day employee access period prior to employees voting on an agreement.

The key elements of these reforms are considered in detail below.

Fixing the Better Off Overall Test

Enterprise agreements are at the cornerstone of the industrial relations system, yet their use has been declining for many years. A key reason has been the mutation of the BOOT to remove the 'overall' component. The result is that many workers have missed out on pay rises for years because of the drawn-out process of making and approving enterprise agreements.

It should be strongly emphasised that the changes in the Bill are not introducing new concepts or changing the nature of the BOOT. They are simply returning it to its original intent in 2009, which in turn reflected the successful enterprise bargaining system established in the 1990s.

The Bill will not change the actual definition of the BOOT but will change the way in which it is applied in order to once again reflect the *overall* aspect of the test.

Following the 2016 *Coles* decision[28], the BOOT is now being applied on a stricter basis to identify individual employees who do not pass the test and apply a purely quantitative approach that does not consider qualitative factors or the judgement made by the parties on what they consider constitutes 'better off'. It is now effectively a 'BOT' that has lost the element of 'Overall'. Where employees agree to trade-offs in bargaining on the basis of their judgement of the overall benefits, those benefits can be undone on the basis of a 'line-by-line' audit in which the Commission substitutes its own judgement.

This rigid application of the test often means that award terms must be carried into the enterprise agreement, with little scope for trade-offs. The purpose of the BOOT assessment process should be to give effect to the preferences of the parties, as expressed in the bargained outcome.

[28] *Hart v Coles Supermarkets and Bi Lo* [2016] FWCFB 2887

The current approach has led to some businesses abandoning new agreements. For example, as part of its submission in support of the (ultimately withdrawn) 2019 Bunnings enterprise agreement, the company provided detailed evidence to demonstrate that 98% of staff would be demonstrably better off, due to ordinary hourly rates that were 14 to 23% higher than the award. The company provided further commitments designed to ensure that the remaining 2% of employees could not be worse off after each 12-week roster period. However, the agreement remained unapproved for 11 months after lodgement, at which point it was withdrawn.

Dealing with hypothetical employees and scenarios

This amendment will remove the scope for the BOOT to be applied to hypothetical scenarios that are not contemplated by the parties. Since it was first introduced in 2009, the BOOT has mutated into a form which has required every conceivable scenario to be considered, even those at are completely fanciful. For example, employers have been required to provide undertakings to provide an additional week's annual leave for 7-day continuous shift workers, even though they have never engaged such workers and have no intention to do so. In another example, the Commission required Officeworks to provide undertakings that it would apply the liquor licence allowance under the General Retail Industry Award, even though Officeworks has never sold liquor and never will.

The employees who vote on the agreement know how the enterprise operates. They are best placed to judge whether a proposed agreement will be appropriate for any possible future changes in working arrangements. Their judgement is reflected in the bargained outcome. The amendments in the Bill will restore the original intent of the Act, which was to give priority to the terms of agreements reached by the parties.

Explaining the agreement

The Bill includes necessary refinements to the obligation on employers to explain a proposed agreement to employees. This obligation has existed since the 1990s, however the 2009 Act[29] includes an obligation to explain the 'effect' of the agreement on employees. This obligation has been made inordinately onerous following various decisions by the Commission and the Federal Court. This approach now imposes unrealistic obligations on employers. The test is applied not by assessing the steps actually taken by the employer but can instead be based on speculation by a Court or the Commission about the knowledge of the employees who received the explanation.

The standard has also been applied inconsistently, with a higher standard applied when agreements that did not have a union as a bargaining representative are challenged by non-party unions. Such challenges typically involve the non-party union and the Commission second-guessing the views of the employees. Importantly, such challenges do not require evidence to be put from the actual employees themselves. The onus should be on the party objecting to the approval to demonstrate that any purported shortcomings in the explanation led to a demonstrable disadvantage to the employees that in turn affected their vote.

The amendments in the Bill will restore balance to what is now an increasingly unworkable provision. They will still allow scope for the Commission to make an informed assessment of the adequacy of an explanation where it is genuinely appropriate to do so.

[29] section 180(5)

Intervention at the approval stage

The Bill will introduce an amendment to limit the intervention of non-parties (i.e. those other than the employer, the employees or bargaining representatives) in the Commission at the approval stage unless there are 'exceptional circumstances'.[30]

Interventions by non-parties take advantage of the broad scope to challenge agreements under the 'genuine agreement' and 'explanation of the agreement' grounds in the Act. They often involve an assertion of what employees ought to have understood the agreement to be, or claims that employees were unable to make an informed choice in voting on an agreement. In many cases, unions making these submissions may not have had any contact with the employees in question and there is no requirement for any evidence to be called from any actual employees.

Unions have always had standing to challenge the approval of non-union agreements. However, this standing has increasingly been used (including by unregistered unions) to overturn agreements on purely technical grounds. Such technical grounds in many cases do not require a consideration of the views or preferences of the actual parties to the agreement.

Objectors should face a higher bar in persuading the Commission to invalidate an employee vote in which they were not bargaining representatives. This is particularly so given that the Notice of Employee Representational Rights provides that any employee may appoint a bargaining representative (or, if they are a member of a union, the right to avail themselves of their union's assistance as a default bargaining representative). Where this right is not exercised, the starting point for the Commission should be that employees have freely chosen to not be represented and that their views, as expressed in the bargained outcome and the vote, should be given primacy in the absence of exceptional circumstances.

In one example in the Resources sector, during the course of bargaining for BHP's *BMA Rail Enterprise Agreement 2018*[31] one employee nominated a CFMMEU official in their personal capacity as their bargaining representative:

- The employee never notified the business that they sought to be, or considered themselves, represented by the CFMMEU itself;
- The bargaining representative attended no bargaining meetings;
- Between the employee vote and the Commission approval, the employee who nominated the bargaining representative left the business; and
- The bargaining representative then sought to challenge the approval, under the auspices of the CFMMEU.

In another example in the Construction sector, the construction division of the CFMMEU objected to the approval of an agreement in which it was not a bargaining representative, citing various technical grounds, including that the agreement was not adequately 'explained'. In this particular case:[32]

- 100% of employees voted for the agreement and the application for approval of the agreement was made in March 2019. The union was not a bargaining representative for the agreement but filed a notice objecting to its approval in May 2019.
- The CFMMEU's intervention was not as a result of any concerns raised by a worker. It was a result of the union's usual practice of monitoring applications for agreement approvals on the Commission's web site and objecting to the approval of any 'non-union' agreement in the construction sector wherever possible.
- The union objected to the agreement on several grounds - technical BOOT grounds; that the employer had failed to adequately 'explain' the agreement; and that the employer failed to

[30] Schedule 3, Clause 254AA
[31] [2019] FWCA 5747
[32] CFMEU v AKN Pty Ltd T/A Aitkin Crane Services [2020] FWCFB 3438

provide sufficient copies or access to award terms included in the agreement. The union produced no evidence from employees to the effect that they were disadvantaged by this, nor was it required to.

- During the course of bargaining, there had been 6 separate meetings with employees that explained the proposed agreement and 12 different versions had been provided to employees.
- The agreement was approved by the Commission in December 2019[33], which rejected all of the union's grounds for objection.
- The union filed an appeal of the approval decision 56 days after the decision was made., and 35 days after the usual 21-day deadline for appeals. This was not because it was alerted to any concerns about the agreement by a worker, but because the relevant staff member was absent on sick leave and another staff member 'happened to look at' the Commission web site and notice the decision.
- The union was nonetheless still able to appeal the decision. It was represented by senior counsel at the appeal and the business also incurred additional legal costs in defending the appeal;
- The union submitted six separate grounds of appeal, but then 'abandoned most of its earlier grounds' prior to the appeal hearing an introduced a new ground that it had not raised at first instance.
- On appeal. the union argued the technical ground that Commission's decision to include undertakings in the agreement had, in fact, 'substantially changed' the agreement and was therefore invalid. The appeal decision found that the changes did nothing more than 'increase the quantum of benefits payable under the Agreement'.
- The decision to reject the union's appeal was finally made in July 2020, 16 months after the employees had voted to approve it, and 6 months after the initial approval decision in December 2019.

There have been numerous examples in the Retail sector of an unregistered union, the Retail and Fast Food Workers Union (**RAFFWU**) using similar tactics to frustrate agreements made with registered unions and endorsed by employees. This has had a major negative impact on the efficiency of the bargaining system in this sector. The impact of the gaming of the approval process by RAFFWU is illustrated in the following comparison of the time taken to approve agreements that were subject to objections by RAFFWU and those that were not:

[33] [2020] FWCA 8474

Agreement approval processes involving RAFFWU

Business	Employees covered	RAFFWU members	Days taken to approve agreement
Woolworths Supermarkets	110,000	80	190
McDonald's	105,000	19	105 (withdrawn)
Coles Supermarkets	84,000	250	53
Kmart	37,000	2	342
Bunnings	37,000	11	311 (withdrawn)
KFC	37,000	4	176
Hungry Jacks	16,000	2	357
Big W	15,000	6	169
Super Retail Group	10,000	Not known	424
Officeworks	6,000	8	88
Average (excluding withdrawn agreements)			225

Agreement approval processes not involving RAFFWU

Business	Days taken to approve agreement
H&M	32
Dan Murphy's	28
BBQs Galore	21
BWS	15
Costco	132
Coles Meat 2018	40
Fantastic Furniture	153
Just Group	27
Average	56

Legacy agreements

Recommended amendment to the Bill – transitional arrangements for employees on legacy agreements

The Bill will amend the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* to provide that all agreements made prior to the commencement of the *Fair Work Act 2009* that are still in effect ('legacy agreements') will terminate on 30 June 2022.[34] The Business Council supports the phasing out of expired legacy agreements and the policy objective of ensuring that such agreements can no longer operate to lawfully undercut current minimum award conditions.

The Bill, however, does not contemplate situations in which a legacy agreement provides more favourable terms than the relevant award.[35] Under the Bill as currently drafted, if a new enterprise agreement is not made prior to 1 July 2022, then the employees will fall straight onto the relevant award as soon as the legacy agreement terminates.

As such, employers will be at risk of breaching award terms where those terms are not specifically provided for, eg. where the legacy agreement pays the employee a single 'loaded rate' in lieu of certain award entitlements. This liability will arise from 1 July 2022, regardless of whether the employee is paid over the award.

It is highly desirable for the Bill to include appropriate transitional arrangements to deal with the termination of legacy agreements where employees are paid above the award. Two precedents exist for such arrangements:

- under Western Australian industrial relations legislation when previous forms of workplace agreements were abolished in the state's IR system in 2002[36]; and
- in modern awards when they were first introduced, which allowed for monetary obligations under the award to be 'absorbed' into over-award payments.[37]

The proposed amendment will also be consistent with the general practice that is agreed to by large employers and unions in applications to the Commission to terminate legacy agreements, which typically include an arrangement to the effect that *"employees who are receiving remuneration or terms greater than what is provided by the (legacy) agreement will continue to have those arrangements recognised following the move."*[38]

The Bill should be amended to provide appropriate transitional arrangements, modelled on those in the WA legislation, as follows:

- Where an employee is subject to a terminated legacy agreement, the terms of the agreement are deemed to operate as terms of the employee's contract of employment from 1 July 2022;
- The employee's contract of employment will be enforceable as a workplace right under the Act;
- Where the employee's remuneration is overall higher than that required by the award (calculated on an annual basis), the excess amount can be used to offset any award terms that were not provided for under the contract of employment;

[34] Schedule 3, Clause 20A
[35] The Explanatory Memorandum makes no mention of this possibility
[36] *Labour Relations Reform Act 2002* (WA)
[37] A 'standard absorption clause' was included in all modern awards, which provided, inter alia, that *"The monetary obligations imposed on employers by this award may be absorbed into overaward payments..."*. See, for example, the Fair Work Commission decision on the standard absorption clause in the 4 yearly review of modern awards: [2015] FWCFB 6656: https://www.fwc.gov.au/documents/decisionssigned/html/2015fwcfb6656.htm
[38] *"Telstra hangs up on zombie AWAs"*, Workplace Express, 5 February 2021

- If the employee's remuneration is not greater that the award, then the employer is liable for any shortfalls that arise following the termination of the agreement; and
- Employers will not be permitted to reduce an employee's remuneration below that which was being paid under the terminated agreement.

These transitional arrangements would continue to apply to employees until such time as they freely enter into a new contract of employment with the employer, or a new enterprise agreement applies to them. They would also cease to apply from any time at which the employee's remuneration falls below the relevant award.

Transfer of Business

A further reform in the Bill is an amendment to the Transfer of Business rules under the Act to address a clear and unintended problem with the current rules that has been substantially exacerbated by COVID-19. This reform is strongly supported.

Transfer of Business rules under the Act provide that the industrial instruments covering employees of a business automatically transfer to another business that acquires the assets of the business and re-employs its staff. For transfers between associated entities within businesses, the existing rules provide that if an employee is 'transferred' from one entity to an associated entity to perform the same or similar work, the industrial instruments covering the employee will automatically transfer to the associated entity, even without a transfer of assets.

This has strongly inhibited the re-structure of businesses and the transfer of stood down employees into new jobs in the COVID-19 environment. For example, Wesfarmers could not transfer 5,000 stood down employees of Target to Kmart or Bunnings in response to increased demand. Whilst the Fair Work Commission can grant exemptions, such an outcome is not assured and the process itself is often not commercially feasible, or able to be done in a timely way.

The Bill will provide an exemption to the transfer of business rules where an employee transfers their employment to a related entity 'at the employee's initiative'.

Recommended amendment to the Bill – remove the requirement for an exempt transfer to be 'at the employee's initiative'

The Bill requires that transfers between related entities must be in circumstances where '*the employee sought to become employed by the new employer at the employee's initiative*'[39] in order to qualify for the exemption. This requirement is superfluous and adds an additional level of complexity.

It is likely to lead to situations in which a business and employee contrive a situation where the employee purportedly 'initiates' the transfer, notwithstanding that both parties are in full agreement and the business may have first proposed the transfer. For example, if an opportunity is advertised or otherwise brought to the attention of an employee, arguably the subsequent transfer is not 'at the employee's initiative'. Equally, if one site is closed and opportunities arise at another site within the business, this is also unlikely to qualify.

One typical example is stood down employees transferring between Kmart and Bunnings, as cited above. Other typical examples would involve an employer offering a promotion to another part of their business. In all such cases, employees freely accept the offer.

As an alternative to the proposed drafting in the Bill, the Business Council proposes that the requirement for the transfer to be 'at the employee's initiative' be removed from the Bill. Alternatively, it

[39] Schedule 3, Clause 62(1A)(b)

could be amended to simply require that '*the employee has agreed to the transfer and accepted an offer of employment by the new employer*'.

Greenfields Agreements

The Bill will enable certain types of greenfields agreements to run for longer than the current limit of four years. New agreements for major projects worth more than $500 million will now be able to run for a maximum of eight years. A lower threshold of $250 million will apply on projects deemed by the responsible Minister to be of national or regional significance, or significant for job creation.[40] It will be a matter for the parties to agree how long an agreement should run.

These amendments are strongly supported. They will achieve commercial certainty for investors in major projects by enabling agreements to run for the life of a project. The Bill also requires that such agreements must provide for wage rises at least annually.

Under the current four year maximum, uncertainty and potential delays are factored into the risk matrix by both clients and head contractors. Such problems are incorporated into the costing and tendering arrangements for the project prior to commencement. Each project is therefore more complex, costly and difficult to deliver than otherwise. This in turn has a cumulative impact on the overall level of new infrastructure activity that can be undertaken in times of key demand, such as in the immediate post-COVID-19 period.

The maximum eight year term will be relevant to certain extremely large projects but is unlikely to be widely used, as the history of greenfields agreements shows that most have had a term that is well within four years:

1. The 2017 Review of Greenfields Agreements found the average duration of greenfields agreements up to June 2017 was 2.8 years.[41]
2. The most recently available data for 'in term' greenfields agreements was 3.3 years.[42]
3. The Productivity Commission Review in 2015 found that two-thirds of greenfields agreements were in the construction industry and that almost half of all projects in this sector are for less than two years.[43]

Whilst this data shows that the new provisions are unlikely to be used extensively, they will be of significant benefit where they are used.

It is also important that the power of the Minister to deem projects above $250m eligible for extended greenfields agreements be used in a way that defines such projects with sufficient clarity. In the absence of such clarity, the provisions of the Bill may give rise to disputes over whether a particular 'project' or parts of the project quality. For example, whether a 'project' means the entire project as a whole being delivered by the head contractor, or a broader project undertaken by a client with several components with separate head contractors. Or whether 'construction' encompasses the definitions of 'civil construction', 'general building and construction', 'metal and engineering construction', as set out in the *Building and Construction General On=site Award*.

[40] Schedule 4, Clause 23B(4)
[41] Department of Jobs and Small Business, "Greenfields Agreements Review", 27 November 2017, p.12
[42] Attorney-General's Department "*Trends in Federal Enterprise Bargaining Report*", September Quarter 2020, p. 19
[43] Productivity Commission, "*Workplace Relations Framework*" Inquiry Report 2015, pp. 711-712

Compliance and Enforcement

The Bill will make several changes to the compliance and enforcement regime under the Act. Most notably, it will introduce the following amendments:

1. A 'deferred litigation process' to encourage businesses to self-report underpayments and rectify them without penalty;
2. Increased civil penalties; and
3. Criminal sanctions will be introduced, for the most serious breaches involving intentionally 'dishonest' and 'systematic' conduct.

Each of these amendments are considered in turn below.

'Deferred litigation process'

This reform is strongly supported. It will provide an incentive for businesses to self-report underpayments and rectify them in a timely manner, where those underpayments were not intentional. In these situations, the system should be focussed on fixing the problem cooperatively, rather than a punitive approach in all cases.

Business needs a system that recognises that most breaches by employers are not 'wage theft' but inadvertent errors. Many, if not most, of these errors are the result of complexities within the system. At present, the Fair Work Ombudsman does not exercise discretion in response to self-reporting. It adopts a policy of *'a breach is a breach'*[44] in dealing with voluntary disclosures of inadvertent breaches by employers. Companies that self-report due to inadvertent errors are in the same position as companies who commit deliberate or reckless breaches. As a result, businesses are less willing to self-report and their focus is less on rectification and more on 'lawyering up' to defend themselves.

It is crucial that we create an environment that incentivises businesses to proactively monitor their compliance obligations and rectify any problems in the timely way. This should be supported by an enhanced FWO advisory system which can provide authoritative guidance to employees on which they can rely, and be immune from sanctions if that advice is subsequently found to be incorrect.

The detail of the proposed 'deferred legislation' process is not spelt out in the Bill.[45] Instead, the arrangements will be developed by the FWO and implemented via FWO policy. The Business Council proposes that the process include the following elements to enable it to be workable and to encourage its use:

1. The employer must satisfy certain criteria that the breaches were inadvertent; that it has taken proactive steps to commence remedial action; and has self-reported to the FWO in a timely manner.
2. The employer must satisfy the FWO that it is taking steps to introduce improved systems and other measures as required to prevent recurrences.
3. The FWO will have discretion to invoke 'deferred prosecution' status, which can be revoked at any time if new evidence emerges that the criteria in points 1 and 2 were not met or are no longer being met.
4. 'Deferred prosecution' status will require the employer to take all reasonable steps to, among other things, compensate affected employees (current and former) in a timely manner, including

[44] Sandra Parker, speech to 2019 AiG Annual National Policy Influence Reform Conference, 3 June 2019.
[45] Schedule 5, Clause 41

paying interest on underpayments; cooperating with employee representatives as appropriate; and agreeing to reasonable requests for information by the FWO.

5. Employer compliance with obligations under point 3 may be monitored by the FWO to the extent the FWO deems necessary, taking into account the size and complexity of the underpayments and the steps the employer is taking. In some cases, a 'light touch' approach with very limited oversight may be sufficient.
6. Obligations of the employer to be spelt out in a Deed of Proactive Compliance with the FWO.
7. Employer obligations to not include a contrition payment if the criteria in points 1, 3 and 4 continue to be met. This condition could be time-limited, during which sanctions would not be pursued, provided the time limit to rectify breaches is complied with as far as is practicable. Contrition payments should no longer be the 'default' position of the FWO, as is currently the case.

Increased civil penalties

Recommended amendment – include an upper limit on civil penalties

The Bill includes provisions to enable civil penalties to be calculated in accordance to the '*value of the benefit gained*'.[46] This can be up to two times the value of the benefit for most contraventions and three times the value for 'serious' contraventions, as defined in the Act.[47]

The Business Council supports this concept in-principle. However, the Bill should be amended to include an upper limit on the quantum of such penalties. The absence of such a limit creates the potential for extraordinarily large penalties for large employers merely by virtue of their relative size, which may not reflect their relative level of culpability. Such penalties could conceivably be more damaging to a business than the proposed criminal sanctions, which will apply to more serious conduct. This could act as a disincentive to larger employers proactively disclosing compliance problems where they have led to large underpayments. Further, or alternatively, the Bill should be amended to require that in applying such sanctions, a court must take into account the employer's conduct in providing remediation for the underpayment.

Criminal sanctions

The Bill will introduce stronger penalties, including criminal sanctions, for the most serious breaches involving intentionally '*dishonest*' and '*systematic*' conduct.[48]

The Business Council does not oppose the principle of criminal sanctions for deliberate breaches of the most serious kind. However, any such sanctions must be proportionate and must be applied in a manner consistent with established criminal law principles, and must be limited to serious and intentional breaches only. There should also be no possibility of 'double jeopardy' for businesses who are subject to a criminal penalty to also be exposed to a civil penalty for the same conduct, or vice versa.

The Bill also includes provisions to exclude the operation of State 'wage theft' laws.[49] This is strongly supported. It would be highly anomalous for there to be parallel Commonwealth and State enforcement regimes in which a State regime co-exists with that of the Commonwealth but applies only to breaches that attract criminal sanctions.

[46] Schedule 5, Clause 546A
[47] Schedule 5, Clause 546(2)
[48] Schedule 5, Clause 46, proposed section 324B(1)
[49] Schedule 4, Clause 43

In any case, it is highly unlikely that the States that have enacted 'wage theft' legislation (Victorian and Queensland) have the power to legislate in this area, given their referral of Industrial Relations powers to the Commonwealth and the fact that the *Fair Work Act* 'covers the field' in relation to *'providing for the establishment or enforcement of terms and conditions of employment'* [50] and *'providing for rights and remedies connected with conduct that adversely affects an employee in his or her employment.'* [51] The provisions of the Bill will put this beyond doubt and ensure that there is a single national system of enforcement for breaches of workplace laws.

[50] section 26(2)(b)(ii) of the *Fair Work Act 2009* (Cwth)

BUSINESS COUNCIL OF AUSTRALIA

42/120 Collins Street Melbourne 3000 www.bca.com.au

[51] section 26(2)(b)(vi) of the *Fair Work Act 2009* (Cwth)

BCA
Business Council of Australia

Thank you.