Senate Standing Committees on Education and Employment

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022

QUESTION ON NOTICE
Date of hearing: 11 November 2022

Outcome: Workplace Relations

Department of Employment and Workplace Relations Question No. IQ22-000359

Senator Matt O'Sullivan provided in writing.

Gender Equity

Question

1. When the Government says that this bill proposes to tackle gender equity, is part of this goal aimed at reducing the gender pay gap?
2. What is the current gender pay gap?
3. By how much will this legislation reduce the gender pay gap?
4. How quickly do you anticipate the gender pay gap being reduced?
5. What modelling has the Department done which shows the impact this Bill will actually have on the gender pay gap?

Answer

The Government's expectation is that the current gender pay gap, calculated from average weekly ordinary full-time earnings, of 14.1 per cent[1] will reduce as a result of measures in the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (the Bill). The timing and amount of reduction will be dependent on the approach that independent parties, such as employers, unions, and the Fair Work Commission, take to the provisions. It is also difficult to isolate the impact of these measures from other factors, many of which are external to the Fair Work Act 2009, such as share of unpaid domestic labour, cultural and social norms, and discrimination.

As such, the outcome of workplace relations reforms are challenging to predict and model, due to assumptions that would need to be made about the behaviour and decisions of independent parties, as well as the interaction between various measures in the Bill. This is consistent with the approach for other recent Bills for which no economic modelling was conducted, such as the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021.

Measures in the Bill aimed at reducing the gender pay gap include:

- amending the objects of the Fair Work Act and the modern awards objective to include gender equality and job security
- amending the minimum wages objective to include "*the need to achieve gender equality, including by ensuring equal remuneration for work of equal or comparable value, eliminating gender based undervaluation of work and addressing the gender pay gap"*

[1] ABS, Average Weekly Earnings, May 2022

- amending the Fair Work Act to strengthen the equal remuneration provisions and ensure that gender-based undervaluation of work is addressed in modern award minimum wage variations
- creating two new expert panels in the Fair Work Commission, supported by a dedicated research unit, to inform and improve the Commission's capacity to assess pay equity claims and help address the workforce challenges in the care and community sector
- prohibiting pay secrecy clauses
- improving access to single and multi-employer agreements
- promoting gender equity in agreement making by ensuring that special measures to achieve equality are 'permitted content', so can be included in enterprise agreements.

The gender pay gap is persistent, complex, and influenced by several interrelated factors, for example:

- Women perform disproportionately more unpaid caring and domestic work – women are more likely than men to have more career interruptions and work reduced hours to perform unpaid caring and domestic work. [2]
- Industries and occupations are segregated with female-dominated sectors typically earning less – the majority of Australian employees work in industries dominated by one gender.[3]
- Women work fewer paid hours than men – as at May 2021, full-time non-managerial men worked more ordinary time hours per week (2.3 hours) than women.[4]
- There are inequities in education, work experience, and seniority – differing levels of qualifications, training, tenure, and experience contribute to a skills differential between men and women.[5]
- Discrimination remains – when the contribution of the above factors to the gender pay gap are taken into account and a gap still remains, gender discrimination may be the reason.[6]

The Fair Work Commission recently published a statement by President Ross titled 'Occupational segregation and gender undervaluation'.[7] The statement sets out the principles relating to gender undervaluation contained in the Aged Care Work Value Decision ([2022] FWCFB 200) [7]. These include:

- Work valuation is influenced by societal expectations and gendered assumptions.
- Undervaluation occurs when work value is assessed with gender-based assumptions.
    - Reasons for this include occupational segregation, weakness in job valuation methods and the implementation, and social norms, gender stereotypes, and historical legacies.
- Gender-based undervaluation in Australia has arisen from social norms and cultural assumptions, including about women's role as carers, engagement in unpaid caring labour, and under recognition of skills described as creative, nurturing, facilitating or caring skills in paid labour.
- Barriers to proper work value assessment have included:
    - Changes in regulatory frameworks for equal pay and equal remuneration applications and the interpretation of that framework.
    - Procedural requirements in wage-fixing principles that focussed on changes in work value and the interpretation of that requirement.

---

[2]Workplace Gender Equality Agency (WGEA), 2016 Unpaid care work and the labour market | WGEA
[3] WGEA, 2019 Gender segregation in Australia's workforce | WGEA
[4] ABS Employee Earnings and Hours, May 2021
[5] KPMG, 2022 She's Priced(less): The economics of the gender pay gap. Australian gender pay gap inequality | Economics - KPMG Australia (home kpmg)
[6] Ibid.
[7] Fair Work Commission, 4 November 2022, President's statement: Occupational segregation and gender undervaluation (fwc.gov.au)

    - Conceptual considerations including the subjective notion of skill and the 'invisibility' of skills when assessing work value in female-dominated industries and occupations.
- The approach taken to the assessment of work value by Australian industrial tribunals has been a barrier to the proper assessment of work value in female dominated industries.

Lower wages in gender-segregated industries are a key contributor to the gender pay gap. The President's statement reinforces the importance of measures in the Bill, including the equal remuneration and work value changes and the creation of two new Expert Panels, that will provide legal and structural support for the Fair Work Commission to better address gender-based undervaluation of work in female-dominated industries and occupations.

The rate and timing of wage changes, and influence on the gender pay gap, will be affected by multiple contingent factors such as:

- the uptake of bargaining and the coverage of agreements
- the success of applications for wage increases lodged with the Fair Work Commission
- the time taken to resolve cases by the Fair Work Commission
- the degree of undervaluation and gender segregation, and number of workers, in industries affected by successful applications, and
- the willingness of individuals to share their rates of pay with colleagues and the successful negotiation of individual pay rises.

Although timeframes for wages rises may vary based on these factors, any delay in the passage of the Bill will commensurately delay wage rises flowing from the amendments.

Senate Standing Committees on Education and Employment

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022

QUESTION ON NOTICE
Date of hearing: 11 November 2022

Outcome: Workplace Relations

Department of Employment and Workplace Relations Question No. IQ22-000358

Senator Matt O'Sullivan provided in writing.

Job Security

Question

1. Another objective of the Bill is to increase job security. What do you define as increasing job security?
2. What do you define as a "secure job"?
a. Does it need to be a full time job?
3. Do you believe that all part time jobs and all casual jobs are classified as "insecure"?
4. How many "secure jobs" do you think this legislation will create?
5. Where do you draw the line between what is a "secure" casual job and an "insecure" casual job?
6. Can you explain what impact this legislation will have on Australia's unemployment rate?
7. Unemployment was at a 48-year low when the Coalition left office in May 2022. Is the Government suggesting that this Bill will increase job security by driving this number even lower?
8. If unemployment increases, do you believe that the objective of increasing job security has been achieved?
9. Can you advise how this legislation will impact the number of full-time jobs in Australia?
10. Can you explain the impact this legislation will have on casual employment in Australia?
11. Do you expect this legislation to result in an increase in full time employment and a decrease in casual employment?
12. Has the Department commissioned any modelling which assesses how this legislation will increase job security?
13. Regarding the table that will show the difference between the powers of the FWO and ABCC - Part 18 addresses Bargaining Disputes. The Bill refers to scope that the FWC will have to make a "Intractable Bargaining Declaration". Can you please explain this, and in doing so also provide a definition of intractable, or is that be left to the discretion of the FWC?
14. We have heard testimony that this provision will unlock unilateral arbitration into enterprise bargaining for the first time. Employer groups have said that this is a retrograde step and will return us back to an arbitral-based regime – effectively taking away decision making from those who know their business best. Can you step through any safeguards that exist in this bill to prevent this?

Answer

Job Security – meaning and Government commitments (Questions 1 – 5)

Secure, well-paid jobs are a fundamental part of Australia's social and economic fabric. Beyond enabling financial independence for individuals, fair pay and job security strengthens communities, promotes attractive careers, and contributes to broad-based prosperity. Consistent with OECD research[1], the Government reforms are designed to help improve key elements of overall job quality such as job security and earnings which are associated with:

- Financial freedom (e.g. the increased chance to be approved for a bank loan).
- Increased health outcomes (which the OECD has argued has a direct economic impact on public health expenditure).
- A stronger link between the employer and employee leading to higher staff retention, increased investment in education and training, and improved productivity.

Across the workforce, there are a substantial number of workers engaged in potentially insecure forms of work.

- 23.5 per cent of Australian employees are casual employees[2].
    - Departmental analysis of ABS data[3] shows that around 700,000 casual employees (30.7 per cent of casual employees) had regular working arrangements (guaranteed minimum hours each week and earnings or hours that don't vary each week). Of this group with regular working arrangements, nearly 2 in 3 (around 450 000) have been with their employer for 12 months or more. These employees are classified as casual employees even though they work regular and predictable hours.
    - Almost 70 per cent of casual employees (around 1.6 million employees) have irregular working arrangements where minimum hours are not guaranteed, and hours, earnings and income can vary from one pay period to the next.
- Close to 1 million workers (or 7.8 per cent of the workforce) are independent contractors, some of whom could be gig economy workers, and are not entitled to minimum pay and conditions.[4]
- 83.3 per cent of labour hire employees are full-time and 85.9 per cent are casual employees.[5]
- Around 30 per cent of fixed-term contractors had been with their employer for more than 2 years, with this form of work most prevalent in the Education and training, and Public administration and safety industries.[6]

While both genders are employed in less secure forms of work, they are not evenly split across them:

- Women are more likely to be employed on a casual or fixed-term basis (54.5 per cent and 58.3 per cent women respectively).[7]
- Men are more likely to be employed as an independent contractor or as a labour hire employee (69.3 per cent and 64.9 per cent men respectively).[8]

---

[1] OECD (2019), *Negotiating Our Way Up: Collective Bargaining in a Changing World of Work*

[2] ABS, *Labour Force, Detailed, August 2022*

[3] ABS, *Characteristics of Employment, August 2020*, unpublished TableBuilder. Note the latest available *Labour Force* data shows that there are 2.7 million casual employees as at August 2022. This analysis uses the *Characteristics of Employment* dataset as it allows for more detailed analysis of the casual employee cohorts. This dataset reports at August 2020 and shows 2.3 million casual employees.

[4] ABS, *Characteristics of Employment, August 2021*.

[5] ABS, *Characteristics of Employment, August 2020*.

[6] ABS, *Characteristics of Employment, August 2021*, unpublished TableBuilder.

[7] ABS, *Labour Force, Detailed, August 2022*; ABS, *Characteristics of Employment, August 2021*, unpublished TableBuilder.

[8] ABS, *Characteristics of Employment, August 2021*; ABS, *Characteristics of Employment, August 2020*.

This data demonstrates there are forms of insecure work in Australia's labour market with characteristics that have changed from their original intention, and change is required to promote secure jobs while maintaining a legitimate space for all forms of work including casuals, part-time, full-time and independent contracting.

Workplaces can have short term and unpredictable needs, and flexible forms of work are intended to allow employers to be able to meet these variable needs. Some employees also value the flexibility of these forms of work. However, the use of these types of employment should reflect the practical reality of the work.

Factors that contribute to improving job security include:

- certainty about future employment prospects
- predictability of hours and days of work
- appropriate pay and conditions, without risk of underpayment
- access to training and development opportunities
- ability to exercise workplace rights without fear of job loss
- access to entitlements such as paid leave that allow for rest, recreation and care without financial implications
- jobs that do not have unfair or discriminatory assumptions about the value of the work, and
- the ability to balance work and other responsibilities such as caring.

These job characteristics are not specific to full-time, permanent jobs and the relative value of these characteristics will vary dependent on individual preferences and circumstances including across different stages of work and personal lives.

There are a number of measures in the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (the Bill) aimed at increasing job security. These include:

- amending the object of the Fair Work Act to include job security
- amending the modern awards objective to include the need to promote secure work
- introducing a statutory limitation on the use of fixed term contracts beyond two years or two consecutive contracts (whichever is shorter), including renewals.

Including 'job security' in the object of the *Fair Work Act 2009* (Fair Work Act) and 'secure work' the modern awards objective will insert these considerations into the decision-making processes of the Fair Work Commission, where they will be considered alongside existing considerations. These existing considerations already include that the laws are flexible for businesses and promote productivity and economic growth. It will be open to the Commission to interpret and apply these terms in a way that would best achieve the object of the Fair Work Act. The addition of these considerations does not require the Commission to reach any specific conclusions and does not make the existing considerations any less important.

As is currently the case, the Commission will be informed by evidence and submissions from stakeholders as to the importance of certain factors relative to others based on the specific matter being determined. Job security will be just one of the factors the Commission must take into account when performing its functions and, like the other factors, is not expressly defined. In award variation proceedings, for example, the Commission will need to weigh the need to improve access to secure work against the likely impact of its decision on business, including on productivity, employment costs and regulatory burden.

The inappropriate use of fixed term contracts has become another form of insecure work, where some employees are hired on rolling fixed term contracts for the same position for the same employer, for what could be a permanent role. The proposed limits will address this misuse, while preserving the legitimate use of fixed term contracts in certain circumstances.

The Government has also indicated that the Bill is the first step of reforms to increase job security. Consistent with the Government's election commitments, further reforms will follow in 2023 including:

- legislating a fair, objective test to determine when a worker can be classified as casual
- ensuring that workers in labour hire or other employment arrangements receive no less pay than direct employees performing the same work, and
- extending the powers of the Fair Work Commission to set standards for workers in 'employee-like' forms of work, allowing it to better protect workers in new forms of work from exploitation and dangerous working conditions.

Economic data and modelling (Questions 4 – 12)

The workplace relations system is concerned with ensuring that the terms upon which work is performed are fair and equitable. Workplace standards should be as reflective as possible of both economic and social imperatives.

There are different measures of labour market success: high levels of employment; low levels of unemployment; sustainable real wages growth; a falling gender pay gap. Concepts such as 'full employment' assume a broader macroeconomic agenda, but do not address issues such as the quality or security of jobs.

Determinants of unemployment are varied, including the state of the economy, the size and nature of the working population, the rate of inflation, and the workplace relations environment. OECD research[9] suggests that countries with co-ordinated bargaining systems (including multi-employer bargaining) are linked with higher employment and lower unemployment than those dominated by single-enterprise bargaining.

While the Bill will make improvements to various aspects of the workplace relations system aimed at increasing job security, specific outcomes are dependent on the approach that independent parties, such as employers, unions, the Fair Work Commission, take to the provisions. For example, the expectation is that employers and bargaining representatives for the employees would bargain for increased productivity and increased wages, and the outcomes from these processes will be inherently individual to each bargain. As such, the outcome of workplace relations reforms are challenging to model, due to the assumptions that need to be made about the behaviour and decisions of independent parties, as well as the interaction between various measures in the Bill. It is also difficult to isolate the impact of these measures from other externalities, such as changes in the economic climate. This is consistent with the approach for other recent Bills for which no economic modelling was conducted, such as the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021.

Bargaining disputes (Question 13)

Amendments to the Fair Work Act under the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (the Bill) will empower the Fair Work Commission to resolve intractable bargaining disputes sooner, reduce the prospect of industrial action, and provide a strong incentive for parties to negotiate in good faith and reach agreements.

The Bill does not define 'intractable bargaining dispute' but provides a range of requirements and considerations the Fair Work Commission (FWC) must take into account when considering an intractable bargaining declaration. The Bill provides that, to make an intractable bargaining declaration, the FWC must be satisfied that:

[9] OECD (2019), *Negotiating Our Way Up: Collective Bargaining in a Changing World of Work.*

- it has dealt with the dispute under section 240 (application for the FWC to deal with a bargaining dispute);
- the applicant has participated in the FWC's processes – those processes would include, for example, private conciliation conference with the FWC;
- there is no reasonable prospect of agreement being reached if the FWC does not make the declaration; and
- it is reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives.

Government amendments to the Bill provide that, before the FWC makes an intractable bargaining declaration, it must be satisfied that the parties have bargained for a minimum period. The amendments provide a minimum bargaining period of the earlier of:

- six months after the nominal expiry date of the existing agreement, or the latest nominal expiry date where the proposed enterprise agreement is intended to replace multiple agreements; or
- three months after the first application was made under section 240 for the Fair Work Commission to deal with a dispute in relation to the proposed agreement.

The amendments will ensure that there were efforts to reach an agreement over a reasonable period of time before one party can seek to have the FWC arbitrate an intractable bargaining declaration.

Arbitration (Question 14)

There will continue to be a high bar set for access to arbitration to deal with bargaining disputes under the reforms. Under the changes, the FWC will be required to first issue an intractable bargaining declaration, being satisfied of all the elements specified above in answer to Question 13, including that there is no reasonable prospect of the bargaining parties reaching agreement.

If an intractable bargaining declaration is made, the FWC may specify a post-declaration negotiating period to provide the parties a further chance to finalise negotiations, if it considers it appropriate to do so. If the parties are still unable to reach an agreement, the FWC will make an intractable bargaining workplace determination to resolve any matters on which agreement had not been reached by the parties. The FWC must be constituted by a Full Bench to make an intractable bargaining determination.

It is anticipated that these changes will provide a strong incentive for parties to bargain reasonably and in good faith, reducing the time that it takes to finalise enterprise agreements and the likelihood of industrial action. Analysis undertaken by the department for the Regulation Impact Statement for the Bill indicates that wage outcomes for previous workplace determinations were around the Average Annualised Wage Increase in the respective year.

The department notes that the Productivity Commission's draft report, *Lifting productivity at Australia's container ports: between water, wharf and warehouse,* includes a draft recommendation to amend the *Fair Work Act 2009* to create a mandatory requirement for FWC intervention when certain thresholds in bargaining activity in the ports are reached. The draft recommendation specifies that the interventions should scale from FWC conciliation as a first step, to termination of bargaining and arbitration by the FWC for lengthy and intractable disputes.

Senate Standing Committees on Education and Employment

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022

QUESTION ON NOTICE
Date of hearing: 11 November 2022

Outcome: Workplace Relations

Department of Employment and Workplace Relations Question No. IQ22-000356

Senator Matt O'Sullivan provided in writing.

Schedule 30

Question

On Schedule 30 of the amendments to the bill, can you explain the policy rationale of this amendment, and explain what it is actually intended to do?
a. Why should a union representative have the ability to torpedo an agreement if there is noticeable support with the employees before it is put to a formal vote?
b. Will the amendment allow a union veto on any agreement?

Answer

Question a-b

Amendments to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (the Bill) provide that, before requesting employees to approve a multi-employer agreement by voting for it, the employer must obtain written agreement to the making of the request from each bargaining representative for the agreement that is an employee organisation. The change would also apply to certain variations of multi-employer agreements. The provisions only apply to multi-enterprise agreements, therefore there are no changes to single enterprise agreement rules in this regard.

The amendment is intended to ensure that genuine bargaining occurs between employers and their representatives and that employers do not rush multi-employer agreements to a vote before bargaining has been finalised.

There is no mechanism within the Fair Work Act to test employee support for an agreement before a vote. The only method to indicate employee support for an agreement in the Fair Work Act is a vote for an agreement. The vote also has the effect of “making the agreement”, which has impacts on other parts of the bargaining process such as the approval process.

The intention of the multi-employer bargaining streams is for groups of employers to be able to negotiate enterprise agreements with their employees, which has the benefit of combining resources to develop arrangements that can contribute to productivity improvements for employers and wage rises for employees. Allowing employers to put an agreement to a vote part-way through bargaining would dilute this advantage, reducing the effectiveness of the provisions. It may also lead to groups of employees agreeing to less beneficial agreements than other employees involved in the bargaining.

An important new feature for all of the multi-employer bargaining mechanisms is the ability for an employer to seek to join the bargain after it has been agreed and approved by the Fair Work Commission. The new arrangements will allow for the agreement to be put to

employees to vote without the need for bargaining process to be undertaken. Given the potential for the agreement to be extended to cover new employers and their employees without any bargaining or representation (the latter in the case of an application made with the consent of the employer only), it is particularly important that the original multi-employer agreement is the product of genuine bargaining and that employee organisations involved agreed to the agreement being put to a vote.

The department notes that the Bill also provides enhanced capacity for the Fair Work Commission to assist with bargaining disputes, including to allow a single bargaining representative to make an application to deal with a bargaining dispute. In addition, if bargaining becomes intractable, the Fair Work Commission would be able resolve a dispute under the new intractable bargaining declaration process.

Senate Standing Committees on Education and Employment

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022

QUESTION ON NOTICE
Date of hearing: 11 November 2022

Outcome: Workplace Relations

Department of Employment and Workplace Relations Question No. IQ22-000355

Senator Matt O'Sullivan provided in writing.

Schedule 119

Question

Regarding Schedule 119 of the amendments to bill, can you explain the policy rationale of this amendment and also explain what this amendment actually is intended to do?
a. The amendment here looks like it gives unions and any other group a free pass to coerce employers into accepting multi-employer agreements – do you agree?

Answer
See answer to IQ22-000363.

Senate Standing Committees on Education and Employment

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022

QUESTION ON NOTICE
Date of hearing: 11 November 2022

Outcome: Workplace Relations

Department of Employment and Workplace Relations Question No. IQ22-000364

Senator Matt O'Sullivan provided in writing.

Common Interests

Question

216DC When the FWC must approve a variation of a single interest employer agreement to add employer and employees
Approval of variation by the FWC
(1) If an application for the approval of a variation of a single interest employer agreement is made under section 216DA or 216DB, the FWC must approve the variation if the FWC is satisfied that:
(a) if the employers covered by the agreement and the employer that will be covered by the agreement carry on similar business activities under the same franchise—all of those employers are:
(i) franchisees of the same franchisor; or
(ii) related bodies corporate of the same franchisor; or
(iii) any combination of the above; and
(b) if paragraph (1)(a) does not apply—having regard to the following, it is appropriate to approve the variation:
(i) whether the employers covered by the agreement and the employer that will be covered by the agreement have clearly identifiable common interests;
(ii) whether it is not contrary to the public interest to approve the variation; and
(c) the employers, and any employee organisations, covered by the agreement have had an opportunity to express to the FWC their views (if any) on the application; and
(d) if the application is made under section 216DA (joint variation)—the variation has been genuinely agreed to by the affected employees in accordance with section 216DD; and
(e) if the application is made under section 216DB (application by employee organisation):
(i) the employer that will be covered by the agreement is not a small business employer; and
(ii) the affected employees are not covered by another enterprise agreement that has not passed its nominal 33 expiry date at the time that the FWC will approve the variation; and
(iii) a majority of the employees who are employed by the employer at a time determined by the FWC and who will be covered by the agreement want to be covered by the agreement.
Common interests
(2) For the purposes of subparagraph
(1)(b)(i), matters that may be relevant to determining whether the employers have a common interest include the following:
(a) geographical location;
(b) regulatory regime;
(c) the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises.
Majority support
(3) For the purposes of subparagraph
(1)(e)(iii), the FWC may work out whether a majority of employees want to be covered by the

agreement using any method the FWC considers appropriate.

1. Who can make an application under sections 216DA and sections 216DB of the Bill?
2. How many people are required to make an application?
3. Does it require both employees and employers to both agree?
4. Can you go through a situation where an employer would be compelled to bargain under this stream against their will?
5. Under the section “Common interests”, it lists three conditions for identifying a potential common interest – geographical location, the regulatory regime and the nature of the enterprise. Can you confirm that to satisfy the common interest test, it does not need to satisfy all three factors?
6. The legislation says that a common interest between two employers that could be compelled to bargain could be a geographical location. What do you mean by a geographical location?
7. Does this legislation set a distance limit when considering a shared geographical location as a common interest?
8. If two businesses are in the same shopping centre, would you agree they share the same geographical location?
9. So would a hardware store next to a hairdresser could be compelled to bargain together under the geographic location common interest test?
10. If two businesses are within 1km of each other, do they share a geographical location under the common interest test?

a. What about 2km, or maybe 5km?

11. Is there a distance limit for the geographical location test? Do the employers need to be in the same suburb?
12. Could two employers in the same Local Government Area share a common interest?

b. What about neighbouring LGAs?

13. Is there an actual limit on what defines a “geographical location” as a common interest?
14. Would the geographical test be applied differently in regional areas?
15. To make it clear though, under this legislation, there is nothing stopping the Fair Work Commission from ruling that two businesses in the same shopping centre have a common interest, even if their main activities are substantially different? Such as a hardware store and a hairdresser?
16. If you can’t explain how the “geographical location” test applies, how do you expect businesses to understand it?
17. Can you confirm that it is true that there is actually nothing in this legislation that makes the Fair Work Commission consider any other factor than geographical location when defining a common interest?
18. The next point is that a common interest could be the “nature of the enterprise”. Can you give an example of two businesses which would be considered having the same “nature”?
19. Would any two retail stores be considered as having the same “nature”?
20. A butcher and a newsagency are both retail stores. Would they be considered as having the same “nature”?
21. Would a tattoo parlour and a rural supply store be considered as having the same “nature”?
22. Would two businesses in the mining sector be considered as having the same nature? Even if their activities are substantially different?
23. Would a business which serves food on a mine site would be considered as having a similar nature to a business which transports raw materials from the mine site because they’re both part of the mining sector?
24. Is there a geographic limit on businesses being compelled to bargain together if they have the same “nature”?
25. So to make it clear, a hamburger store with 16 employees in Queensland and a hamburger store with 17 employees in Perth could be forced to bargain together under the common interest test because they have the same “nature”?

26. So there is actually nothing stopping a union from targeting every takeaway store and café in the country with more than 15 employees and dragging them onto an enterprise agreement if a majority of voting employees support it?
27. And there is nothing then stopping the employees of every takeaway store and café in the country from taking protected industrial action as part of these changes during the bargaining process?

Answer

1) An application under new section 216DA would be made by an employer. An application under new section 216DB would be made by an employee organisation that is covered by the relevant single interest employer agreement.

2) Only one person is required to make the application in each case.

3) An application under new section 216DA would require a majority of the relevant employees who cast a valid vote to have voted in favour of approving the variation (that would result in coverage by the agreement). An application under new section 216DB would require the Fair Work Commission to be satisfied that a majority of the relevant employees want to be covered by the agreement.

4) Where a majority of the employer's affected employees want to be covered by that single interest employer agreement, coverage of that agreement may only be extended to the employer if the following conditions are met:

a. The employers and any employee organisations covered by the agreement have had an opportunity to express their views on the application
b. The employer is in a franchise arrangement with the other employers covered by the agreement or the Fair Work Commission is satisfied that it is appropriate to approve the variation to extend coverage to the employer, having regard to whether the employers already covered by the agreement and the new employer have clearly identifiable common interests and whether it would contrary to the public interest to approve the variation to extend coverage to the employer
c. The employer is not a small business employer;
d. The employer is not covered by another enterprise agreement that has not passed its nominal expiry date
e. The employer and an employee organisation entitled to represented the industrial interests of one or more of the affected employees have not agreed in writing to bargain for a proposed single-enterprise agreement that would cover the employer and the affected employees (or substantially the same group of employees)
f. The variation must not result in extending the coverage of the agreement to employees in relation to general building and construction work
g. The employer is not specified in a supported bargaining authorisation in relation to any of the relevant employees

The Fair Work Commission may also refuse to approve the variation if the Fair Work Commission is satisfied that the employer is bargaining in good faith for an enterprise agreement that will cover the employer and substantially the same group of affected employees, the employer and affected employees have a history of effectively bargaining and less than six months have passed since the nominal expiry date of the previous agreement.

5) The matters listed under the section *Common interest employers* are not conditions or factors for identifying a common interest. Rather, they are a non-exhaustive list of matters

that may be relevant to determining whether the employers have clearly identifiable common interests. It is necessary that the Fair Work Commission is satisfied that the employers have clearly identifiable common interests.

6-14) Geographical location refers to the place in which businesses or organisations are located. Geographical location is a matter that may be relevant for determining whether employers have a clearly identifiable common interest.

The legislation does not prescribe further detail or any distance limits in relation to what is meant by "geographical location" because it is not necessary to do so. It is one matter that may be relevant and is up to the Fair Work Commission to consider all of the circumstances and evidence before it in order to make a decision about whether the employers have clearly identifiable common interests, which is one factor in the decision of whether it is appropriate for coverage of the agreement to be extended to the new employer.

15) If an application was made for a hardware store and a hairdresser, the person making the application would bear the burden of satisfying the Fair Work Commission that those employers have clearly identifiable common interests. The applicant might point to the geographical location of those employers if they were in the same shopping centre. However, without more, it seems unlikely that those employers have clearly identifiable common interests, particularly where employees in those businesses would otherwise be covered by different awards.

16) There is no "geographical location" test. It is a matter that may be relevant to determining whether the employers have clearly identifiable common interests.

17) On the contrary, the test that the Fair Work Commission must consider is whether the employers have clearly identifiable common interests. If they do have clearly identifiable common interests, the Fair Work Commission must also consider (amongst other factors) whether it would be contrary to the public interest for the employers to bargain together.

18) Examples might be two catholic schools in the same diocese, two community health care centres in the same local health district, two community-run kindergartens/preschools or two companies providing similar security services.

19-23) The nature of the enterprises is just one factor that the Fair Work Commission may consider when determining whether the employers have clearly identifiable common interests. However, without more, the fact that two businesses are engaged in substantially different activities would likely be a factor in favour of finding that the employers do not have clearly identifiable common interests and it seems unlikely that those employers would have clearly identifiable common interests, particularly where employees in those businesses would otherwise be covered by different awards.

24) See answer to question 17.

25) See answer to question 14.

26) The scenario provided is not expected to be possible having regard to the relevant safeguards set out in section 216DC, which include: the requirement for a majority of employees at each employer to support the application, the requirement to have clearly identifiable common interests, that the application is not contrary to the public interest, the interaction rules and the requirements around genuine agreement.

27) See answer to question 26.

Senate Standing Committees on Education and Employment

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022

QUESTION ON NOTICE
Date of hearing: 11 November 2022

Outcome: Workplace Relations

Department of Employment and Workplace Relations Question No. IQ22-000357

Senator Matt O'Sullivan provided in writing.

Wages

Question

The Government has said on numerous occasions that this legislation is all about getting wages moving and ensuring that Australians get a pay rise. In fact, the overview of the Bill in the Explanatory Memorandum states:
The Bill would amend the Fair Work Act 2009 (the FW Act) and related legislation to get wages moving, boost job security, tackle gender inequity and restore fairness and integrity to Fair Work institutions.
1. When do you expect wages to start increasing as a result of this legislation?
2. By how much do you expect wages to start moving as a result of this legislation?
3. How many Australians will see their wages increase as a result of this legislation?
4. Can you provide a figure around how much wages will increase by?
5. Can you give an approximate date range of when wages will start to increase? Will it be next year? The year after?
6. Can you give an approximate number of Australians whose wages will increase as a direct result of this legislation?
7. Does your aim of getting wages moving mean that this Bill will deliver wage increases above inflation?
8. Can you guarantee that wages will not decrease in real terms as a result of this Bill?
9. The overview says that this Bill will "get wages moving". If real wages move in a negative direction, will the Government still see this as the Bill's aims being reached?
10. Has you commissioned any modelling which assesses how this legislation will increase wages or are there any plans to do so?

Answer: Questions 1-10

The Bill is designed to address a number of the factors contributing to inadequate wage growth in Australia. Latest ABS data shows that over the year to June 2022, real wages decreased by 3.3 per cent and that over the 10 years to June 2022, real wages overall declined 0.7 per cent.[1]

Enterprise bargaining contributes to almost half of all aggregate wage growth in Australia, ahead of awards and individual arrangements, at 11 per cent and 41 per cent respectively.[2] However, fewer businesses are making new enterprise agreements or renegotiating them upon their expiry, and fewer workers are covered by them:

---

[1] ABS, *Wage Price Index, Australia*, June 2022 and ABS, *Consumer Price Index, Australia*, June 2022.
[2] ABS, *Wage-setting methods and wage growth in Australia*, 2018.

- as at 30 June 2022, only 15.3 per cent of employees were covered by a current (not expired) enterprise bargaining agreement, and
- the number of current (not expired) agreements has fallen by 56 per cent since the peak of bargaining – from 25,152 agreements as at 31 December 2010, to 11,053 as at 30 June 2022.[3]

In 2021, 23.0 per cent of employees were on awards, up from 15.2 per cent in 2010.[4] This is a 7.8 percentage point increase, or an increase of 51.3 per cent of employees on the legal minimum award payment between 2010 and 2021.

The changes to bargaining provisions proposed by the Bill have been designed to reinvigorate bargaining and ensure greater access for employers and employees to drive positive aggregate wage growth outcomes. They were informed by a range of international research and analysis, including from academics and organisations such as the Organisation for Economic Cooperation and Development (OECD) and the International Labour Organization (ILO). In addition, the proposed reforms are consistent with Australia's international obligations under the Fundamental ILO Convention on the *Right to Organise and Collective Bargaining (C098).*

Overall, employees who have their pay set by an enterprise agreement have average weekly earnings higher than award-reliant employees. However, the bargaining premium is not spread equally.[5] For example, the average bargaining premium for employees in the female dominated Health Care and Social Assistance industry is 19 per cent[6], though this will vary enterprise by enterprise.

OECD research[7] shows that countries that enable both single and multi-employer bargaining have lower wage inequality and higher employment, particularly for vulnerable groups such as women, and those in temporary or part-time work.

This is particularly important in Australia where men and women tend to be segregated into different occupations and industries. Women are more likely to be employed in low-paid industries which can have limited access to effective enterprise bargaining. This reflects the lower social and financial value given to traditionally 'female' jobs and why men are paid, on average, $263.90 more per week than women.[8]

The Bill also provides for gender equality and job security to be included as objects of the *Fair Work Act 2009*, for improvements to the statutory equal remuneration principle, and for the creation of two new expert panels in the Fair Work Commission to inform and improve the Fair Work Commission's capacity to assess pay equity claims and help address the workforce challenges in the care and community sector.

While the Bill will make improvements to various aspects of the wage-setting system, specific outcomes in any particular case, including the timing of decisions and actions that will flow through to wage outcomes are dependent on the approach that independent parties, such as employers, unions and the Fair Work Commission, take to the provisions. As such, the outcome of workplace relations reforms are challenging to predict and model, due to assumptions that would need to be made about the behaviour and decisions of independent parties, as well as the interaction between various measures in the Bill. It is also difficult to

---

[3] Departmental estimates using the Workplace Agreements Database and ABS, *Labour Force, Australia, Detailed*, August 2022.
[4] ABS, *Employee Earnings and Hours*.
[5] ABS, *Employee Earnings and Hours*.
[6] ABS, *Employee Earnings and Hours*.
[7] OECD (2019), *Negotiating Our Way Up: Collective Bargaining in a Changing World of Work*; OECD (2020), Can collective bargaining help close the gender wage gap for women in non-standard jobs?, *Policy Brief on Collective Bargaining and Gender.*
[8] ABS, *Average Weekly Earnings*.

isolate the impact of these measures from other externalities, such as changes in the economic climate. This is consistent with the approach for other recent Bills for which no economic modelling was conducted, such as the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021.

Ultimately, the success of the Bill in relation to wages will be reflected in a number of different indicators of the labour market, including measures of wages growth, employment and the gender pay gap.

Senate Standing Committees on Education and Employment

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022

QUESTION ON NOTICE
Date of hearing: 11 November 2022

Outcome: Workplace Relations

Department of Employment and Workplace Relations Question No. IQ22-000365

Senator Matt O'Sullivan provided in writing.

Strike action

Question

1. Can you confirm that this legislation not only encourages widespread strike action, but that it is actually a design feature of this legislation?
2. Do you really think encouraging widespread strike action and industrial chaos is really good for the economy?
3. Has the Department done any modelling on the impact of a massive increase in strike action on the economy?

Answer

1-3) There has been a large reduction in the rate of industrial disputation in Australia since the mid-1990s, and while the rate of days lost due to industrial action fluctuates for reasons including the number of agreements being bargained for, rates remain low compared to historic trends.

The reforms under the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (the Bill) are not expected to increase the rate of industrial action and include a range of safeguards to minimise the potential for industrial action:

- When issuing a Protected Action Ballot Order, the Fair Work Commission must direct parties into a mandatory conciliation conference, to occur concurrently with the ballot vote. A party that does not attend this conciliation will be unable to take protected industrial action resulting from the relevant protected action ballot.

- A minimum of 120 hours' notice will be required for industrial action in relation to multi-employer bargaining.

- Protected Action Ballots in relation to multi-enterprise agreements are to be conducted on an employer-by-employer basis. This will ensure that access to protected industrial action is limited to workplaces who have indicated majority support and will reduce the likelihood of industrial action across multiple sites.

- Bargaining in the single interest and supported bargaining streams will be subject to the existing good faith bargaining requirements, and the Fair Work Commission will be provided greater capacity to resolve bargaining disputes.

The existing prohibition on an employer paying an employee, or an employee receiving payment, when industrial action happens is being retained; along with the existing rules in relation to unprotected industrial action.

In addition, employers will continue to have the ability to apply to the Fair Work Commission to suspend or terminate protected industrial action on a range of grounds, including threatening to endanger the life, personal safety, health or welfare of the population or part of it; causing significant damage to the Australian economy or an important part of it; or when the action is protracted and is causing, or is threatening to cause, significant economic harm to the employer or employees who will be covered by the agreement.

The Bill also provides enhanced capacity for the Fair Work Commission to assist with bargaining disputes, including to resolve disputes under the new intractable bargaining declaration process. Improving the ability for the Fair Work Commission to be actively involved in the bargaining process and to arbitrate intractable disputes will assist the parties to focus on achieving outcomes and reduce the potential for industrial action.

As the reforms are not expected to increase the rate of industrial action, no modelling was done on the impact of a massive increase in strike action on the economy. This is consistent with the approach for other recent Bills for which no economic modelling was conducted, such as the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021.

Senate Standing Committees on Education and Employment

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022

QUESTION ON NOTICE
Date of hearing: 11 November 2022

Outcome: Workplace Relations

Department of Employment and Workplace Relations Question No. IQ22-000363

Senator Matt O'Sullivan provided in writing.

Amendment

Question

(2AA) In applying paragraph 186(2)(b), the FWC must disregard anything done, and the effect of anything done, by a person other than one of the employers who bargained for the agreement, that is authorised by or under this Act (including protected industrial action).

1. What is the effect of this new section?
2. What does the definition of "coercion" is section 186 of the Act include?
3. So "coercion" does not include taking industrial action or threatening to take industrial action?
4. Is proposing to take industrial action which would financially cripple a small or family business in order to get an employer to sign an enterprise agreement permitted?
5. So, the effect of this amendment is actually to make it explicitly clear that anything done by an employee or their union done under the umbrella of industrial action is permitted when negotiating an agreement?
6. So the Government is effectively telling Australians that to get what you want in the workplace is to threaten industrial action? Is the Government concerned that this could backfire?
7. Does the Government really think this amendment is a good way to get Australians to start their own business and hire Australian workers?

Answer

1) Section 186(2)(b) of the *Fair Work Act 2009* (FW Act) currently provides that for a multi-enterprise agreement, the Fair Work Commission (FWC) must be satisfied that:

- the agreement has been genuinely agreed to by each employer covered by the agreement; and
- no person coerced, or threatened to coerce, any of the employers to make the agreement.

The effect of new s 186(2AA) is to provide, for the avoidance of doubt, that for new multi-enterprise agreements (cooperative workplace agreements, supported bargaining agreements and single interest employer agreements), in applying s 186(2)(b), the FWC must disregard anything done by a person other than one of the employers who bargained for the agreement if the thing done is authorised by or under the FW Act.

For example, when the FWC considers whether an employer has genuinely agreed to the agreement, the employer having been specified on a supported bargaining authorisation (on application by an employee organisation), and any protected industrial action taken in

relation to the agreement could not be taken into account (being lawful actions under the FW Act). The fact that the employer has requested its employees to vote to approve the agreement could be taken into consideration as evidence that the agreement has been genuinely agreed by the employer. Similarly, any unprotected industrial action taken by employees could be taken into account to determine whether any person coerced or threatened to coerce any of the employers.

2) Coercion is not defined in section 186 or elsewhere in the FW Act. The term is used in other parts of the FW Act, for example, in section 343 which is contained in Part 3-1 (General Protections). The term 'coercion' is generally understood in the FW Act context to involve conduct that is intended to negate choice and that is unlawful or illegitimate (see, e.g., *Esso Australia Pty Ltd v Australian Workers' Union* [2016] FCAFC 72).

3) The term 'coercion', in isolation, can include taking industrial action or threatening to take industrial action. The FW Act accordingly seeks to distinguish protected industrial action from unprotected industrial action in this context. For example, the prohibition on taking action against a person with intent to coerce the person or a third party to exercise a workplace right does not apply to protected industrial action (see subsection 343(2)).

To date, it has not been necessary to include a similar qualification concerning protected industrial action in relation to paragraph 188(2)(b) because the provision only applies to multi-enterprise agreements and it has not been possible to take protected industrial action in support of claims for a multi-enterprise agreement.

Under the current framework, employees and employers can only take protected industrial action when they are negotiating for a proposed enterprise agreement. Protected industrial action can only occur when certain conditions are met, including that the nominal expiry date of an existing agreement has passed, bargaining for a new enterprise agreement has commenced, a protected action ballot order has been approved by the Fair Work Commission, and a majority of eligible employees have supported the action through a secret ballot. There is also a prohibition on an employer paying an employee, or an employee receiving payment, when industrial action happens. Unprotected industrial action is not permitted and may be stopped or prevented by the Fair Work Commission and the Courts.

The Bill seeks to introduce limited rights to take protected industrial action when bargaining for supported bargaining agreements (noting that this right already exists for single interest employer agreements made under the current single interest authorisation process). Accordingly, new subsection 186(2AA) is intended to clarify, for the avoidance of any doubt, that if employees take protected industrial action (i.e. industrial action that is authorised under the FW Act), then such action cannot be considered by the FWC in determining whether the agreement has been genuinely agreed to by an employer. By contrast, unprotected industrial action could be taken into account.

4) Importantly, small businesses are exempt from being brought within the single interest stream without their consent.
Under the FW Act, protected industrial action is able to be taken by both employees and employers when bargaining for certain types of agreements and subject to strict safeguards and requirements having been met, including oversight by the FWC.

The right to take protected industrial action in the supported bargaining and single interest streams would be subject to a new requirement to attend an FWC conference during the protected action ballot period and providing a minimum of 120 hours' notice. These are significant additional safeguards.

The safeguards in Division 6 of Part 3-3 of the FW Act have been retained and allow the FWC to suspend or terminate protected industrial action in some circumstances, including on the basis of significant economic harm to an employer and any of the employees that would be covered by the agreement.

5) No, this is not accurate. The effect of the amendment is to clarify that if an employee or union has taken or organised protected industrial action, then the FWC cannot have regard to that action in determining whether an employer has genuinely agreed to a multi-enterprise agreement. If that were not the case then enterprise agreements that have been voted upon, 'made' and submitted for approval may not be capable of being approved by the FWC as a result of employees having taken protected industrial action in relation to the agreement. By contrast, the FWC can have regard to unprotected industrial action (which is not authorised under the FW Act).

6) The ability to take industrial action is a long standing provision within Australian workplace relations laws. The ability to take industrial action is regarded as a right under international conventions. It is important to note that Australia has significant limitations on the ability of workers to take industrial action. In addition to these existing limitations the Government is requiring the parties to attend a conciliation conference before industrial action can take place with the express purpose of seeing whether the parties can resolve or narrow the disputes in issue.

As under the current FW Act, protected industrial action is able to be taken by both employees and employers when bargaining for certain types of agreements and subject to strict safeguards and requirements having been met, including oversight by the FWC.

The right to take protected industrial action in the supported bargaining and single interest streams will be subject to a new requirement to attend an FWC conference during the protected action ballot period and providing a minimum of 120 hours' notice.

The safeguards in Division 6 of Part 3 of the FW Act have been retained and allow the FWC to suspend or terminate protected industrial action in certain circumstances.

Lowering the threshold for the FWC to arbitrate outcomes is intended to deal with intractable bargaining disputes and provide a safeguard against increased disputation and industrial action.

Overall, the changes to the framework are intended to encourage bargaining for enterprise agreements in order to boost both wages and productivity.

7) As indicated above, the effect of new subsection 186(2AA) is to clarify that in determining whether an employer has genuinely agreed to a new multi-enterprise agreement, and that there has not been any coercion, the FWC is to disregard actions taken by, for example, employees and unions that are authorised under the FW Act. This includes protected industrial action, where all of the requirements in the FW Act for taking such action have been met, but not unprotected industrial action. It is an avoidance of doubt provision which is consequential upon the extension of the right to take protected industrial action in relation to certain multi-enterprise agreements.

Senate Standing Committees on Education and Employment

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022

QUESTION ON NOTICE
Date of hearing: 11 November 2022

Outcome: Workplace Relations

Department of Employment and Workplace Relations Question No. IQ22-000362

Senator Matt O'Sullivan provided in writing.

Original legislation

Question

Requirement relating to representation for cooperative workplace agreement (not greenfields)
(2A) If the agreement is a cooperative workplace agreement that is not a greenfields agreement, the FWC must be satisfied that at least some of the employees covered by the agreement were represented by an employee organisation in relation to bargaining for the agreement. The FWC must disregard any employee organisation excluded for the purposes of the agreement by an order under section 178C (regardless of how recently the order was made)
1. When it says the FWC must be satisfied that at least some of the employees are represented by a union, how many does this mean?
2. What is the minimum number? Would it require more than one?

Answer

The provision referred to was inserted by Item 647 of the Bill. For clarity, the second sentence is no longer a part of the Bill following the Government's amendments to the Bill (Item 120 refers). However, subsection 186(2A) still requires the Fair Work Commission to be satisfied that at least some of the employees are represented by a registered organisation. In each case, having regard to the particular circumstances and evidence before it, the Fair Work Commission would need to be satisfied that at least some of the employees are represented by an employee organisation. In all circumstances, it would require that more than one of the employees in question is represented by an employee organisation.

Senate Standing Committees on Education and Employment

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022

QUESTION ON NOTICE
Date of hearing: 11 November 2022

Outcome: Workplace Relations

Department of Employment and Workplace Relations Question No. IQ22-000361

Senator Matt O'Sullivan provided in writing.

Section 186 of the Fair Work Act

Question

1. Can the Government please go through section 186 of the Fair Work Act? What is the purpose of this part of the Act?
2. Section 186 2(b) of the Act in its current form is below:

(2) The FWC must be satisfied that:
(b) if the agreement is a multi-enterprise agreement:
(i) the agreement has been genuinely agreed to by each employer covered by the agreement; and
(ii) no person coerced, or threatened to coerce, any of the employers to make the agreement;
Can you please advise what the changes are to section 186 in this Bill?

Answer
All references to sections in this answer are to sections of the Fair Work Act 2009.

1) The purpose of section 186 is to set out requirements that, if satisfied, will result in the Fair Work Commission (FWC) approving an enterprise agreement. An enterprise agreement that has been 'made' in accordance with section 182 is required to be approved by the FWC before it can have legal effect.

The objects of Part 2-4 are set out in section 171 and include *"to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits"*, and *"to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements, including through… ensuring that applications to the FWC for approval of enterprise agreements are dealt with without delay"*. Section 186 cannot be considered in isolation from other provisions. However, broadly, Subdivision B of Division 4 of Part 2-4 sets out key requirements for FWC approval of an enterprise agreement.

2) The changes made to section 186 of the FW Act by the Bill, including Government amendments to the Bill, are as follows.

- Item 508 of the Bill would amend note 1 to s 186(2) so that it would state: *"For provisions dealing with determining whether an enterprise agreement has been genuinely agreed to by employees, see section 188"*.
- Item 119 of the Government amendments would insert new s 186(2AA), which concerns genuine agreement by employers to a multi-enterprise agreement and would provide that *"[i]n applying paragraph 186(2)(b), the FWC must disregard anything done, and the effect of anything done, by a person other than one of the*

employers who bargained for the agreement, that is authorised by or under this Act (including protected industrial action)".

- Item 647 of the Bill as amended by Item 120 of the Government amendments would insert new s 186(2A) to provide that *"[i]f the agreement is a cooperative workplace agreement that is not a greenfields agreement, the FWC must be satisfied that at least some of the employees covered by the agreement were represented by an employee organisation in relation to bargaining for the agreement."*
- Item 128 of the Government amendments would insert (among other amendments) a new s 186(2B), which would provide that "[*i]f the agreement is a multi-enterprise agreement that is not a greenfields agreement, the FWC must be satisfied that the agreement does not cover employees in relation to general building and construction work"*.
- Item 465 of the Bill would amend notes 1 and 2 to s 186(6) to remove references to s 65(5).

Senate Standing Committees on Education and Employment

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022

QUESTION ON NOTICE
Date of hearing: 11 November 2022

Outcome: Workplace Relations

Department of Employment and Workplace Relations Question No. IQ22-000360

Senator Matt O'Sullivan provided in writing.

ABCC

Question

1. This Bill will abolish the Australian Building and Construction Commission, the organisation which keeps law and order on Australia's building sites. Is the Department aware of the report by Ernst & Young from April 2022 which shows that the abolition of the Australian Building and Construction Commission could see a decline in economic activity in the Australian economy of $47.5 billion by 2030?
2. Is the Government considering amendments to the legislation or additional taxpayer funded assistance which will help offset the potential $47.5 billion hit to the economy?
3. I note that this report contained a very stark warning about price rises across the board.

"Construction-related industries such as manufacturing and the services industry are likely to be adversely impacted by higher construction costs if the ABCC was abolished. The manufacturing industry is a major user of construction services for capital and infrastructure, which would be more costly if the ABCC was abolished. Further, the services industry, which predominately comprises financial services, public administration, healthcare, education, and defence, would also face additional cost increases. Financial services and public administration require large amounts of floorspace to house staff, healthcare relies on the construction and maintenance of hospitals, clinics, and aged care homes, education requires large-scale schools and facilities, and defence is dependent on the construction of facilities and bases. The cost of these construction-intensive functions would face inflationary pressures if the ABCC was abolished. For key parts of Australia's defence and care economies, this is estimated to come at significant cost to taxpayers."

This report has said there will be higher costs in construction, manufacturing, financial services, public administration, healthcare, education and defence as a result of the abolition of the ABCC.

Is the Government considering amendments to the legislation which will help offset these higher costs for Australians?

4. I note this report also found:

"Based on the existing and forecast public infrastructure pipeline and the estimated cost impacts derived from the industry survey, the potential cost to taxpayers if the ABCC was abolished could be in the order of $9.5 billion by 2029. This estimated cost is likely to rise should more Commonwealth-funded projects be announced over this period."

Is the Government considering amendments to the legislation which will help offset this cost to taxpayers?

5. Did the Department ever mention to the Government that the report found:

"Infrastructure and capital investments could become riskier as the cost of construction and potential for delays rises. If the ABCC is abolished there could be an estimated reduction in investment of $45.6 billion by 2030."

And

"Output in the construction industry could fall by around $35.4 billion by 2030 as higher

construction costs makes fewer projects possible, and capital is reallocated to other economic activities."
Is the Government considering amendments to the legislation which will help offset this cost to taxpayers?
6. Can the Government guarantee that there will be no economic impact to the construction sector as a result of the ABCC being abolished?
7. Can the Government guarantee that there will be no increase in strike action as a result of the ABCC being abolished?

Answer

Questions 1 to 5

The Department of Employment and Workplace Relations is aware of the Ernst & Young report: *'The costs of abolishing the Australian Building and Construction Commission'* (the Report) commissioned by Master Builders Australia and published in April 2022.

The department notes that the study involved 49 survey participants and that the "profile of participants indicate that respondents are likely in business management and operations roles or workplace and industrial relations management roles" and that "employees of construction companies were not covered by this survey".

The department also notes that an assessment of the Ernst and Young report was undertaken by Dr Phillip Toner, Honorary Senior Research Fellow, Department of Political Economy at the University of Sydney. Dr Toner's University of Sydney staff profile notes that he has undertaken research for a wide range of organisations including the OECD, International Labour Organization, World Bank, European Union, Australian Chamber of Commerce and Industry, Master Builders Association and several unions. He is widely published including in the Cambridge Journal of Economics; Journal of Industrial Relations; The Economic and Labour Relations Review; and Australian Bulletin of Labour and Labour & Industry.

Dr Toner's assessment of the Report includes the following findings:

> "The list of qualifications and exclusions regarding the analysis and use of the report stated at the beginning and throughout the report undermines its standing in attempting to influence public policy. There are two key disclaimers. First, the report represents solely the 'interests' of the MBA and so does not have regard to other evidence that contradicts these interests. Second, the modelled outcomes are contingent 'on the collection of assumptions as agreed with the Client'. That is, the assumptions critical for modelling which, forms the core of the report, were determined by the MBA and not based on objective data or accepted economic theory".

In relation to the survey methodology, Dr Toner's assessment states:

> "To determine the effect of abolishing the ABCC EY surveyed 49 people engaged in the construction industry and asked them to estimate the effect of 'industrial disputes' on construction productivity and output. This methodology for data collection is utterly unacceptable".
>
> …
>
> "First, the survey response size is small. Second, no indication is given of the size of the population from which the same is drawn and how representative the same is of this population. Third no indication is given of the survey response rate, that is, what

> proportion of those surveyed actually responded to the survey and how the characteristics of those who responded differed from those who did not. Without meeting these minimum conditions no confidence can be placed on the validity or reliability of the data and no inferences can be drawn to the population from which it was drawn. In simple terms, data from Industry Survey cannot be taken to represent the views of industry and is equivalent to 'anecdotal evidence'"
> …
>
> "Given these limitations and the admitted absence of any statistical 'power' in the survey it is illicit to claim, as the report does, that the Industry Survey provides 'a sound basis for this report' in terms of the survey data informing the subsequent economic modelling exercise".

In relation to the impact on productivity, the department notes the following findings of Dr Toner:

> "The fundamental assertion and finding of the EY report is that the ABCC has had a positive effect on aggregate construction industry productivity and that, conversely, its abolition will lower productivity, increase costs and lower construction output and adversely affect GDP. This claim is not consistent with ABS National Accounts labour productivity statistics. Over the 7 years immediately before and during the tenure of the ABCC, 2015-2021, productivity fell by 6.3%. Over the preceding 7 years, 2008-2014, productivity increased by 25.6%".
>
> "In sum, Industry Survey and other information used to derive output and productivity effects of industrial disputes and the impact of the ABCC in the EY report are not statistically valid and therefore are not suitable as inputs for estimating either direct effects on construction industry or the wider economy".

The department notes that data from the Productivity Commission shows that labour productivity in the construction industry has declined in recent years:

- minus 2.4 per cent in 2017-18
- minus 2.6 per cent in 2018-19
- minus 2.6 per cent in 2019-20.

Finally, the department notes that the Ernst and Young report is dated April 2022, which is prior to the October 2022 Budget and the introduction of the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (the Bill), which together made clear the Government's proposed approach to regulating the building and construction industry. This includes that the Fair Work Ombudsman (FWO) is to be provided $69.9 million over four years from 2022-23 including 80 additional staff to regulate the Fair Work Act in the commercial building and construction industry, noting the FWO already regulates the residential building and construction sector.

For the above reasons, the department did not provide advice to Government about measures in response to the Ernst and Young Report.

Question 6

The Government's position is that abolition of the Australian Building and Construction Commission and the other measures included in the Secure Jobs, Better Pay Bill would have a positive impact on the economy. The Government's view is that the rules imposed on building and construction workers and their representatives by the *Building and Construction Industry (Improving Productivity) Act 2016* (BCI(IP) Act) are unfair and unnecessary.

Implementing the Government's policy would be achieved by removing arrangements imposed on workers and their representatives in the commercial building and construction sector by the BCI(IP) Act that do not apply to other industries. For example, if a person does not comply with an Australian Building and Construction Commission examination notice issued under the BCI(IP) Act, the person could face six months jail.

The Bill would ensure workplace relations in the commercial building and construction industry is solely regulated by the Fair Work Act, noting the Fair Work Ombudsman has the power to regulate the Fair Work Act in the industry and already regulates the residential building and construction sector. The Bill would also establish the National Construction Industry Forum as a statutory body to constructively address issues such as productivity and culture in the building and construction industry.

With these factors in mind, the Government believes the abolition of the Australian Building and Construction Commission would result in less adversarial workplace relationships in the building and construction industry. The Government's view is that reducing conflict would lead to more cooperative, productive relations between employees and employers and better outcomes for the economy.

Question 7

The department notes data from the Australian Bureau of Statistics shows there has been a large reduction in the rate of industrial disputation since the mid-1990s, with the rate of working days lost remaining low compared to historic trends. The latest data shows the construction industry accounted for 7.3 working days lost per 1,000 employees in comparison to 19.3 for all industries (over the year to the June quarter 2022).

Industrial disputes are cyclical and may occur for a number of reasons. This includes the number of expiring enterprise agreements during a particular quarter. However, it should be noted that employees and employers are not required to take action industrial action as a result of an agreement expiring.

Under the current framework, employees and employers can only take protected industrial action when they are negotiating for a proposed enterprise agreement. Protected industrial action can only occur when certain conditions are met, including that the nominal expiry date of an existing agreement has passed, bargaining for a new enterprise agreement has commenced, a protected action ballot order has been approved by the Fair Work Commission, and a majority of eligible employees have supported the action through a secret ballot. There is also a prohibition on an employer paying an employee, or an employee receiving payment, when industrial action happens. Unprotected industrial action is not permitted and may be stopped or prevented by the Fair Work Commission and the Courts.

The Bill provides enhanced dispute resolution powers to the Fair Work Commission, which will enable it to settle disputes during bargaining and help to avoid industrial action. In addition, when issuing a Protected Action Ballot Order, the Fair Work Commission must direct parties into a mandatory conciliation conference, to occur concurrently with the ballot vote. A party that does not attend this conciliation will be unable to take protected industrial action resulting from the relevant protected action ballot.

As mentioned in response to Questions 1 to 5, the Fair Work Ombudsman is being provided $69.9 million over four years from 2022-23 including 80 additional staff to regulate the Fair Work Act in the commercial building and construction industry. These resources will ensure that there is no shortfall in the regulation of workplace relations in the industry.