Fair Work Amendment ("Protecting Worker Entitlements") Bill 2023

ACTU Submission to the Senate Inquiry

ACTU Submission, 14 April 2023
ACTU D. No 20/2023

ACTU
australian council of trade unions

Introduction

The Australian Council of Trade Union (ACTU) is the peak trade union body in Australia, with 42 affiliated unions together representing over 1.7 million workers across all industries and occupations.

The ACTU welcomes the *Fair Work Amendment ("Protecting Worker Entitlements") Bill 2023* ("the **Bill**") introduced into Parliament on 29 March 2023. This short Bill contains six common sense measures which the ACTU supports and encourages the Parliament to promptly pass.

To better align the Bill with its stated policy intent, the ACTU recommends the following minor changes to the Bill:

(i) Amend the Bill (at proposed s.74(2)) to only require 8 weeks' notice to be given if the first type of Unpaid Parental Leave (UPL) being taken is flexible UPL.

(ii) Amend section 76(7) of the Act by requiring any extension of UPL to commence during the 24-month period starting on the date of birth of the child and allowing UPL to extend beyond that period.

(iii) Delete proposed s.116A. In the alternative, amend proposed s.116A to allow a state referral of power with respect to superannuation to have effect.

This submission also flags up priorities for further reform to ensure that migrant workers can enjoy their rights at work, and that workers do not suffer from super theft and earn super on every dollar earned.

1. Protection for Migrant Workers.

The Bill proposes to insert a new provision s.40B in the Act that provides that: "any effect of the *Migration Act* or an instrument made under that Act on the validity of a contract of employment, or the validity of a contract for services, is to be disregarded".

The ACTU welcomes this change. At present, a worker may not be covered by the *Fair Work Act* ("the **Act**") where their contract of employment (or contract for services) has been made void

because of a breach of the *Migration Act*.[1] The change removes a significant degree of uncertainty for those workers in our labour market facing the highest risk of exploitation.

The ACTU also supports the inclusion of the phrase "contract for services" given the General Protection provisions of the Act cover independent contractors as well as employees.

While this change reduces one barrier for migrant workers to enjoy the rights and protections under the Act, many significant barriers remain, particularly those identified by in the *Migrant Worker Taskforce report* (2019) making it still very unlikely that migrant workers will be effectively able to take action under the Act. Visa conditions that tie a worker to their employer make it very difficult to speak out. International students and working holiday makers have no incentive to take action against their employers, when their stay in the country is limited, there is no dedicated visa to allow them security of tenure to pursue their employer, and breach of their visa conditions might expose them to cancellation of their visa. In the case of employer-sponsored workers, action under the Act against their employer may lead directly to the cancellation of that employer's approval as a sponsor, and lead consequentially to the cancellation of their visa. And in the case of undocumented workers, exposure of their identity or place of work would lead to their interception by enforcement authorities.

The ACTU therefore urges the Government and Parliament to implement further changes including:

- Provide migrant workers with visa security by introducing whistleblower protections for workers reporting exploitation, and ensure workers reporting exploitation can apply for new visas in the future without penalty.
- Progress the idea of industry sponsorship of migrant workers rather than employer sponsorship, to remove a key driver of exploitation by allowing workers mobility between employers.

- Ensure that all workers have access to the Fair Entitlement Guarantee scheme (FEGs),[2] including all migrant workers and on all visa classes, e.g. bridging visas.

[1] See e.g. Australian Meat Holdings v. Kazi [2004] QCA 147; Smallwood v. Ergo Asia Pty Ltd [2014] FWC 964
[2] Current eligibility for FEGs requires that applicants are an Australian citizen or the holder of a permanent visa or special category visa that allows them to stay and work in Australia at the time their employment ended.

2. Unpaid Parental Leave

The Bill changes the Unpaid Parental Leave (UPL) provisions in the Act to be consistent with the recent changes to Paid Parental Leave (PPL) to make it more flexible and expand it to 26 weeks by 2026, as well as simplifying the section generally. The main changes will:

- Expand the number of "Flexible Unpaid Parental Leave" days available from 30 to 100 days (expanding out to 130 days by 2026 to align with the PPL changes).
- Remove restrictions on when those flexible days can be taken as long as taken "during the 24 months after the birth of the child" and up to 6 weeks before the expected date of birth.
- Remove limitations placed on the taking of concurrent leave (currently both parents can only be off together for a period of 8 weeks), as well as requirements around the consecutive nature of leave.
- Introduce a note on when it may "not be practical" to give the full amount of notice required to take UPL or flexible UPL, and
- Introduce gender neutral language throughout the section.

The ACTU welcomes these changes. They will make a positive contribution to better supporting parents to balance care and work, and in particular, drive shared parenting and gender equality, where Australia is a laggard by international standards.

The Bill requires that 10 weeks' notice needs to be given prior to the expected birth date of the child for UPL or for flexible UPL (s.72(2A)) if that leave is the first type of parental leave being taken. While that notice can be less in some circumstances[3], the default of 10 weeks is not an improvement on the current notice requirements in current s.74 and seems to cut against the intent of the changes to introduce more flexibility. The ACTU urges the Senate to consider a shorter period of notice.

Recommendation:

(i) Amend the Bill (at proposed s.74(2)) to only require 8 weeks' notice to be given if the first type of UPL being taken is flexible UPL.

[3] An employee can give less notice by agreement with the employer, or if it is not practicable to give 10 weeks and notice is then given as soon as practicable (proposed s.74(2)).

The Bill proposes that UPL must "end during the 24-month period starting on the date of birth of the child" (proposed ss.71(3-5)). However, with the changes proposed, it appears that this might effectively cap unpaid leave entitlements in circumstances where an employee has a pattern of work and leave that would otherwise exceed 24 months. For example, an employee could take an initial period of flexible UPL, at, say, 2 days a week for 26 weeks (52 days in total) after the birth of a child, then take their remaining entitlement of UPL in a 42-week block, then successfully extend it by a further 52 weeks as per s.76 of the Act. The employee is therefore seeking to take this pattern of work and leave over a 120-week or 28-month period. However, this scenario is blocked by 2.76(7) which prevents any extension of UPL beyond the 24-month period. This is neither flexible nor fair.

Recommendation:

(ii) Amend section 76(7) of the Act by requiring any extension of UPL to commence during the 24-month period starting on the date of birth of the child and allowing that UPL to extend beyond that period.

3. Superannuation and the National Employment Standards (NES)

The Bill inserts the right to be paid superannuation into the National Employment Standards (NES). While the right exists within modern awards and many collective agreements, including it within the NES will cover a wider group of employees and elevate the importance of this entitlement.

Almost three million workers lose an average of $1,700 in super annually, or close to $5 billion in total each year according to estimates by Industry Super Australia.[4] Yet less than 15 percent of unpaid super is recovered by the ATO according to the Australian National Audit Office.[5] Including the right to super in the NES, to better equip employees and their representatives to recover unpaid super is a helpful measure to help address this crisis of non-payment.

The changes state that they will not apply to employees who are “national system employees” only because of a state referral of powers (s.116A), presumably on constitutional grounds. This means a significant number of employees will miss out on this protection.

[4] Industry Super Australia (28 October 2021), Unpaid Super: End the $4.7 billion a year rip off.
[5] Australian National Audit Office (28 April 2022), Addressing Superannuation Guarantee Non-Compliance: https://www.anao.gov.au/work/performance-audit/addressing-superannuation-guarantee-non-compliance

This exclusion is unhelpful for two reasons. Firstly, there is already a clear constitutional basis for the Commonwealth to legislate with regards to superannuation. The *Superannuation Guarantee Charge (Administration) Act 1992*, which is where the NES entitlement is derived from, (s.116B) relies on the taxation head of power in the Constitution. Secondly, should a state make such a referral in future, proposed s.116B would then need to be amended to give effect to that referral. At the moment this serves as a block, regardless of the content of state referral, cutting against the policy intent of the change to make the right universal.

Recommendation:

(iii) Delete proposed s.116A. In the alternative, amend proposed s.116A to allow a state referral of power with respect to superannuation to have effect.

Enshrining superannuation in the NES is a key plank in a series of reforms necessary to prevent superannuation theft and ensure workers have the rights and ability to recover their savings. A highly effective way to ensure superannuation theft is prevented is to ensure it is paid at the same time as wages, currently required only quarterly by the *Superannuation Guarantee (Administration) Act 1992.* Research from Industry Super Australia shows that paying superannuation at the same time as wages would have outsized benefits in particular for women.[6] Workers should also have a quicker, simpler and more accessible way for employees to recover unpaid wages and superannuation.

Enshrining superannuation in the NES is also an important step in recognising that the payment is an industrial right, is deferred wages, and should be treated consistently with other entitlements. In order for superannuation to be truly universal, superannuation should be paid on all wages, not just ordinary time earnings and be paid to all workers including those under 18 and employed in the gig economy. Further inconsistencies arise noting that superannuation is not paid on workers' compensation payments, indirect long service leave payments, and even payments of parental leave are not superannuable. In order for superannuation to achieve its originating objective of being a universal workplace right, it should be paid to all workers and on all wages earned. As the Government is separately progressing legislating the Objective of Superannuation, marking these opportunities for reform to ensure all workers retire with dignity is critical.

[6] Industry Super Australia, 2023, *Super Solution*, Melbourne

4. Workplace determinations

This proposed change resolves an ambiguity in the Act by clarify (at proposed s.278(1A)) that where an enterprise agreement applies in relation to "particular employment" and a workplace determination covers the employee in relation to "same employment", then the enterprise agreement ceases to apply and can never do so again. This is a helpful change, especially given the likely increase in workplace determinations under the new bargaining changes that come into operation shortly.

5. Employee authorised deductions.

The Bill introduces a small common sense change regarding employee authorised deductions.

Currently, any authorisation must be for a specified amount. The changes would now permit authorisations for multiple deductions as "varied from time to time" (proposed s.324(a)(ii)). This would remove the need to update authorisations every time a third-party, e.g. a health fund, increased its fees. Protections to ensure that deductions are principally for the employee's benefit (s.324(1)(a)) and are reasonable and not directly or indirectly for the benefit of the employer or a party related to the employer (ss.325(1) & s.326(1)) remain. The proposed change also contains transitional provisions that would mean existing authorisations compliant with the proposed changes continue to be valid authorisations. The effect of these modest changes will reduce red tape for the parties, and particularly for employers.

6. Coal mining long service leave scheme

The recent Independent Review of the Coal Mining Industry (Long Service Leave Funding) Scheme found that casual workers in the industry are treated less favourably than permanent employees with regard to the accrual of Long Service Leave because:

- the casual loading is not included in the definition of eligible wages, and
- the method of calculating casual employees' working hours does not fairly reflect actual hours worked.[7]

[7] KPMG (8 December 2021), *Enhancing Certainty and fairness: Independent Review of the Coal Mining Industry (Long Service Leave Funding) Scheme*; https://www.dewr.gov.au/independent-review-coal-lsl-scheme/resources/enhancing-certainty-and-fairness-report-coal-lsl-review

The ACTU strongly supports the proposed changes in this Bill which overcome these inequities for casual workers in the industry and will ensure that casual employees in the industry have the same access to long service leave entitlement as their permanent counterparts.

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