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Senate Education and Employment Legislation Committee

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

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Authorisation

This submission has been authorised by the NFAW Board

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

This submission is being made by The National Foundation for Australian Women (NFAW).

NFAW is dedicated to promoting and protecting the interests of Australian women, including intellectual, cultural, political, social, economic, legal, industrial and domestic spheres, and ensuring that the aims and ideals of the women's movement and its collective wisdom are handed on to new generations of women. NFAW is a feminist organisation, independent of party politics and working in partnership with other women's organisations.

The time that we have available for the preparation of submissions to the Inquiry is strictly limited. As a consequence we have had to be selective in our commentary. We do wish, however, to strongly commend the Government on the full package of measures addressing job security and gender equality (this includes the Supported Bargaining Stream and the Cooperative Bargaining Stream targeting small business).

Much of this package is, or should be, unproblematic, such as the prohibition of pay secrecy and the addition of breastfeeding, gender identity and intersex status into the anti-discrimination provisions in the FW Act to bring it into alignment with other Commonwealth anti-discrimination legislation.

However, we particularly want to note and welcome the package of amendments relating to equal remuneration. The provisions in this package fully implement the government's election commitments, but more than that they display a desire to see pay equity work for women. The provisions actively engage with the problem of how to make equal remuneration a functional part of the fair work system, and we are hopeful that they may prove much more effective than those which preceded them.

Recommendations

NFAW broadly supports passage of this Bill.

Recommendation 1
We recommend that the Committee establish the numbers and sectors being excluded from the proposed limits to be set on the extended use of fixed term contracts because that conduct is permitted under an existing modern award.

Recommendation 2
Part 10 of the Bill should be amended to direct the Commission to review the relevant provisions of each of those modern awards that would be exempted from coverage under this Part to confirm whether that award should continue to be excluded from this reform. Where appropriate, this consideration should be referred to the proposed Care and Community Sector Expert Panel.

Recommendation 3
We recommend that the Committee review the provisions of proposed subsections 333F(1)(a) and (c) to ensure that they cannot be used as grounds for the constructive exclusion of fixed term employees, with particular attention to the university sector.

Recommendation 4
If the Committee is unwilling to give low paid workers, especially those in grant-funded sectors, meaningful access to functional Supported or Cooperative Bargaining streams because of historical conduct in different sectors under a different system, it should amend the Bill to return them to the arbitrated paid rates awards of the 1970s and 80s, which enabled those locked out of industrial activity to receive more than minimum award rates.

Discussion

Key provisions that we wish to address are as follows.

Parts 5 and 6-- Equal Remuneration

In June 2017 the Senate Finance and Public Administration Committee tabled the report of an Inquiry into *Gender segregation in the workplace and its impact on women's economic equality*. The Inquiry assessed the dimensions and consequences of gender segregation in Australian workplaces and its relationship to pay equity.

NFAW provided a submission to that Inquiry and took part in consultations which followed relating to amendments the Fair Work Act (FW Act) required to make the equal remuneration provisions actually work. During that consultation we noted that the reasons for the low rate of applications for Equal Remuneration Orders (EROs) were cost, uncertainty, the time involved in pursuing cases, and the access of women to representation and support. We argued that the factors underpinning these causes include:

- the obscurity of the legislation, and the Fair Work Commission's (FWC) ongoing reinterpretation of its key elements
- constant reversion to the need for binary comparators in a gender segregated workforce
- the cost of work value assessments and the difficulty in ensuring that so-called 'soft skills' are appropriately valued by assessors and the FWC
- the need to make a threshold choice between proceeding through work value or equal remuneration routes
- the lack of an Equal Remuneration Principle and common agreement on its applicability
- the low levels of unionisation in female-dominated industries and occupations, caused partly by the tendency of feminised occupations to be found in smaller workplaces
- job insecurity in feminised occupations and concern about employer responses
- the grant-dependence of female dominated workforces such as those in health, social services, aged and child care. This dependence raises concerns among potential applicants that wage increases may need to be offset by job losses. Commissions have also taken the view that

achieving pay equity in these industries needs to be offset against the interest of services are affordable and accessible to the public.

The Provisions of Part 5 and the Supported Bargaining provisions in Part 20 of this Bill address the full range of our concerns.

- The provision requiring the FWC to consider gender equity when performing functions or exercising its powers under the FW Act, including when setting conditions in modern awards and reviewing minimum wages, makes the provision it replaces workable by clarifying that the FWC's consideration of work value reasons must be free of assumptions based on gender and must include consideration of whether historically the work being assessed has been undervalued because of such assumptions -- and is made operational by additional provisions discussed below enabling the Commission to inquire into equal remuneration and to act on its findings by making an ERO.

- Item 354 would address a number of the factors driving the cost, uncertainty and time involved in pursuing pay equity, by clarifying that undervaluation and equal remuneration matters can be considered together; that equal remuneration cases may take into account historical undervaluation of women's skills; that work value comparisons can be made in a gender segregated workforce without the need for a male comparator; and that the Commission is not required to find that there is gender-based discrimination in order to establish that work has been undervalued. Previous cases have been mired for years in technical deliberations relating to these matters.

- Part 6 would amend the FW Act to provide for the constitution of an Expert Panels within the FWC to exercise certain functions in relation to pay equity. Experience in with expert equal pay panels in state jurisdictions, and with panels that are not expert in the federal jurisdiction, clearly indicates that expert panels are likely to experience fewer problems in interpreting the equal remuneration provisions of the FW Act and less likely to find the evaluation of skills in feminised sectors problematic. When reporting to the NSW government on the findings of the 1996 Pay Equity Taskforce, Justice Glynn underlined the need for gender neutral assessment of traditionally female work to give adequate weight to factors such as 'dexterity, nurturing, inter-personal skills and service delivery'. NFAW strongly welcomes this provision and the underpinning requirement that there be at least two Expert Panel members or other FWC members who have knowledge of, or experience in, gender pay equity and / or anti-discrimination.

- Two Expert Panels are provided for in the Bill in addition to that directly addressing pay equity. These are Care and Community Sector Expert Panel and an Expert Panel for Pay Equity in the Care and Community Sector. The 'Care and Community Sector' includes but is not limited to the aged care, early childhood education and care and disability care sectors. Having specialist expertise in work and skills evaluation in the care sector as well as the classification structures and employment conditions set by awards in the female-dominated care economy is a welcome and long overdue measure.

  Modern awards in feminised industries were negotiated against the background of 15 years of enterprise bargaining that had focussed on the award stripping exercise that was AWAs, and

enterprise agreements based on trading employer-oriented flexibilities for minimal wage increases. The legacy of bargaining 'meant that those in female-dominated industries came to award modernisation negotiations with far poorer working time arrangements in place and a greater reliance on their award safety net to set the terms and conditions of their employment'.[1] The 'modernised' awards that emerged feature 'significant and gendered differences in working time minima for workers in feminised industries.' Management of these awards by a specialist Expert Panel has potential to make a significant contribution to both gender equity and the professionalisation of the sector.

- Under item 357 the FWC would be required to make an ERO following an application by an employee, an employee organisation, or the Sex Discrimination Commissioner if it is satisfied that there is not equal remuneration for work of equal or comparable value. The discretion not to make such an order will only apply If the FWC was considering making an ERO on its own initiative. This provision addresses the previous reluctance of the Commission to act on an application for an ERO if the claim is not specifically endorsed by the government of the day, as noted by the Aged Care Royal Commission (2021, Vol 3A, p 416). It also means that equal remuneration considerations in provisions on setting conditions in modern awards and reviewing minimum wages (noted above) could of themselves eventually drive EROs without the need for a third-party application.

- There is scope for the President of the Commission to give a direction under section 582 requiring that a matter that is relevant to a function of an Expert Panel for pay equity, an Expert Panel for the Care and Community Sector or an Expert Panel for pay equity in the Care and Community Sector be investigated and reported on, and that report published. Such an investigation could result in an ERO. When read in conjunction with the provisions introduced under Item 357, this measure would further open the scope for the Commission, acting through its specialist Panels, to identify and address entrenched gender pay gaps. Funding has been made available in the 2022-23 Budget for both the Panels and a research unit to provide support for Commission-initiated inquiries as well as other cases. This measure in conjunction with the Supported Bargaining provisions considered below, addresses our concerns about the access of women in non-unionised sectors to EROs.

Part 8 -- Prohibiting sexual harassment in connection with work

We have noted in our submission to the Senate Legal and Constitutional Affairs Legislation Committee's Inquiry into the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 that section 789FF(1)(b)(ii) of the FW Act only applies where the worker has been sexually harassed 'at work'. In that submission we cited the view of the Australian Discrimination Law Experts Group (ADLEG) that:

> the limitation contained in proposed s 789FD(2A) that the worker must be sexually harassed 'at work' will limit the capacity of these orders to address sexual harassment for workers. This is so because social media used outside working hours is a major avenue for bullying

[1] Charlesworth, S and Heron, A (2012) 'New Australian Working Time Minimum Standards: Reproducing the Same Old Gendered Architecture?', *Journal of Industrial Relations*, 54(2), pp 164-181, p. 4 <doi:10.1177/0022185612437840>

> and harassment. Sexual harassment is also likely to occur at informal functions attended with work colleagues… If a worker engages in unwelcome conduct of a sexual nature by posting or sending materials to a co-worker but outside of work hours, and they are received by the co-worker when they are not at work or performing work, this would not satisfy the 'at work' requirement.

The ADLEG Group recommended amendments to reflect the 'in connection to work' threshold instead of an 'at work' threshold to ensure that the proposed amendments that would specifically apply the existing anti-bullying jurisdiction of the FWC to sexual harassment would apply as broadly as the SDA currently does.

We supported this proposal and note with pleasure that it has been taken up in this Bill.

Part 10 -- Fixed term contracts

The Minister noted in the Second Reading Speech introducing the Bill that the number of workers on fixed term contracts has increased by over 50 per cent since 1998, that more than half of these are women, and that more than 40 per cent of fixed term employees have been with their employer for two or more years. NFAW has long sought and welcomes provision to limit the use of fixed term contracts for the same role beyond two years or two consecutive contracts, whichever is shorter, including renewals.

However, we note that the provision is framed to preserve the indefinite recycling of fixed-term contracts where that practice is permitted under a modern award (new subsection 141A(2)). The argument is that these arrangements have been determined by the FWC in the past to be appropriate and necessary to achieve the modern awards objective in these sectors, and the Bill should not seek to displace these.

We have referred above to research showing that those in female-dominated industries came to award modernisation negotiations with far poorer working time arrangements in place and a greater reliance on their award safety net to set the terms and conditions of their employment' (Charlesworth and Heron 2012, 4) – and that as a consequence the 'modernised' awards that emerged feature 'significant and gendered differences in working time minima for workers in feminised industries.' *This provision would appear to specifically exempt a large proportion of the majority population of women covered by fixed term contracts from the benefit of this reform*.

NFAW assumes that the Department of Employment and Workplace Relations has compiled a list of those awards that would be exempt from this provision under new subsection 141A(2). We would recommend that the Committee acquire a copy of this list in order to establish the numbers and sectors being excluded from the proposed reform. We further recommend that at the very least this Part of the Bill should be amended to direct the Commission to review the relevant provisions of each of those modern awards that would be exempted from coverage to confirm whether that award should continue to be excluded from this reform – noting that there is already an additional provision applying to all employers setting out a range of practical circumstances in which they would be exempt from the reforms (proposed section 333F).

- The circumstances set out in new section 333F would enable an employer to enter into a contract of employment with an employee that is for longer than two years or that contains more than one option for renewal in a range of circumstances specific to the employer's operations but probably characteristic of the industry in which the employer operates. Most of these circumstances appear to us to be reasonable and unlikely to be exploited as a wholesale exemption.

We would, however, draw the Committee's attention to two

> 333F(1)(a) the employee has specialised skills that the employer does not have, but needs, to complete a specific task;
>
> 333F(1)(c) the employer needs additional workers to do essential work during a peak period, such as for fruit picking or other seasonal work;

We question whether the 'specialised skills for a specific task' exemption and the 'essential work during a peak period' exemption are not open to abuse in, for example, the higher education sector (which may already in fact be excluded under the broad 'modern award' exemption). We draw the Committee's attention to the conduct of the universities when they were required under the provisions of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (the FW SAJER Act) to write to their long-term regular casual employees about casual conversion. According to a subsequent survey conducted by the NTEU, six months after the deadline for the conversion letter less than two percent of casual staff had been found to meet the requirements to be converted to permanency, and as few as 1% of casual staff had actually been converted to permanent roles. At the University of Newcastle, for example, five of 2,300 casual staff had been converted to full-time work.

The underlying reasons for the mass ineligibility of more than a third of the university workforce for casual conversion are unclear. The unions say that universities rely on an insecure workforce as part of a business model imposed on them by the underfunding of the sector.[2] The universities say that they do not want to undermine the tenure system.[3] Whatever the drivers of the current levels of casualisation, the technical reasons are that universities can always pre-emptively refuse conversions on the grounds that they do not know whether particular courses will continue to be taught, and/or that trimester-based teaching does not fit the 'ongoing and regular pattern of hours' called for under the FW SAJER Act.

We question whether proposed subsections 333F(1)(a) and (c) would not offer universities similar grounds for the constructive exclusion of the great majority of their employees who are on fixed terms contracts from the provisions of this Bill (assuming their modern awards does not already exempt them from coverage). We recommend that the Committee review the provisions to ensure that they cannot be used as grounds for the constructive exclusion of their fixed term employees. Where appropriate, this consideration should be referred to the proposed Care and Community Sector Expert Panel.

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[2] Senate Economics References Committee (2022), *Systemic, sustained and shameful: Unlawful underpayment of employees' remuneration*, pp 83ff https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024434/toc_pdf/Systemic,sustainedandshameful.pdf;fileType=application%2Fpdf

[3] Ibid.

The compliance arrangements under the provision appear reasonable and workable (to the extent that employees on fixed term contracts would ever be willing to take their employer through a workplace dispute resolution mechanism and on to the Commission).

Recommendations 1 – 3

We recommend that the Committee establish the numbers and sectors being excluded from the proposed limits to be set on the extended use of fixed term contracts because that conduct is permitted under an existing modern award.

Part 10 of the Bill should be amended to direct the Commission to review the relevant provisions of each of those modern awards that would be exempted from coverage under this Part to confirm whether that award should continue to be excluded from this reform. Where appropriate, this consideration should be referred to the proposed Care and Community Sector Expert Panel.

We recommend that the Committee review the provisions of proposed subsections 333F(1)(a) and (c) to ensure that they cannot be used as grounds for the constructive exclusion of fixed term employees, with particular attention to the university sector.

Part 11 — Flexible work

These provisions would do what can be done to make the flexible working time arrangements under the FW Act work. That is, they would legislate arrangements taken from the Commission's model award to specify processes and considerations to be applied by employers in response to requests for working time flexibilities. The grounds for asking for these flexibilities have also been appropriately amended to specify 'family and domestic violence' rather than the more restricted 'violence from a member of the employee's family'. Dispute resolution processes are put in place including escalation from workplace dispute resolution mechanisms to arbitration, and a civil penalty has been associated with refusing to implement an order of the Commission.

The proposed processes and considerations applying to employer decision-making are not unreasonable: the requirement that employers consult employees and then respond in writing within 21 days recognises that employers genuinely trying to accommodate applications for flexibility may have to examine their options and consult other employees whose timetables might be affected. Nevertheless, it will constitute a considerable delay for applicants who have used up their domestic violence or carer's leave because of an ongoing legal or medical situation. Proposed section 65(A)(6) makes some effort to encourage employers to offer a substantive reply to an application but may still be met with a minimalist response.

There appears to be a typographical error in the note at line 27 on page 129 of the Bill.

Overall, we welcome these amendments for what they can do, while acknowledging that they are framed by a significant imbalance of power between female employees (who are most likely to make such applications and who tend to be in lower paid, less secure jobs) and their employers. Few

applicants are likely to take an employer's refusal to their workplace dispute resolution processes much less to the Commission. It would be desirable to have data from the Commission annual report on how many of these matters are brought before it.

Part 20 — Supported Bargaining

When enterprise bargaining was introduced in the 1990s, the then government argued that it would enable workers to increase their earnings by agreeing to additional flexibilities and efficiencies at the workplace level. Awards were to provide a fallback and a benchmark for testing agreements. Earnings under awards were to be minimum rates and the Commission was directed to keep them minimal in order to encourage the spread of bargaining and the efficiencies associated with it.

In theory all workplaces could bargain; in practice, as a number of women's organisations noted at the time, bargaining did not work well if at all for small, low or non-unionised workplaces or workplaces in grant-dependent sectors that form the foundation of our national social infrastructure. The reasons for this were obvious at the time and remain obvious. The consequence was the entrenching of the gender pay gap, and the current severe and ongoing workforce shortages experienced by employers in the care sector.

The current Low-paid Bargaining Stream was intended to assist employees in low-paid industries to access the benefits of enterprise bargaining. However, the provision was caught up in employer concerns grounded in industry-level bargaining under the previous award ambit-based system, and was therefore hedged round with onerous criteria for accessing the stream. The consequence has been that the low-paid bargaining stream as it is currently configured is non-functional, with only four applications for a Low Paid Authorisation having been made and only one granted, and with no multi-employer agreements ever having been made under the stream.

The Bill proposes to remove unnecessary limitations on access to the low-paid bargaining stream (renamed the supported bargaining stream). Under the Bill, the Commission would be required to make a Supported Bargaining Authorisation only if it is satisfied that it is appropriate when considering a number of factors. Apart from reasonable operational considerations, these include

(i) the prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector); **and**
(ii) (ii) whether the employers have clearly identifiable common interests.

Examples of common interests are:

(a) a geographical location;
(b) the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises;
(c) being substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory.

Once bargainers have been given access to the supported bargaining stream, they may take protected industrial action after due process has been followed, and there are a number of powers available to the Commission to facilitate an agreement, including, eventually, arbitration.

Briefly, while we are strongly supportive of the powers available to the Commission to facilitate a final agreement in the supported bargaining sector, we are less certain about whether the entry gates are still too high. Much will depend on the approach taken by the Commission to applying the criteria for access to the stream. In the past this approach has been so conservative that no agreements could ever be made.

We exhort the Committee to distinguish between the experience of women in the caring sector who have been locked out of bargaining since the system changed in the 1990s, and deliberately inflated fears grounded in industry-led wage initiatives in the manufacturing and mining sectors under the previous award-based system of the 1970s and 80s. There are profound differences between the two systems, not least of which are the careful constraints on access to protected bargaining in the current system, which did not exist under old system. The assumption that these systems and circumstances are comparable is profoundly misleading and profoundly unjust to women in the sectors that form the foundation of our national social infrastructure.

We remind the Committee that most OECD countries use multi-employer bargaining. A 2019 OECD report found that such arrangements play an important role in preventing inequalities, and that countries with these arrangements tended to have higher employment, lower unemployment, lower wage inequality and more co-operative industrial relations than countries with single-employer bargaining systems like Australia.

The same observation also applies to the Cooperative Workplaces Bargaining Stream, which targets small businesses where women in the retail and hospitality sector have also been unable to get enterprise agreements and will, under the Bill, continue to be barred both from taking protected industrial action and from accessing the intractable bargaining orders that make Commission arbitration possible.

The current industrial relations system privileges bargaining. The consequence of this design is that it disadvantages those who are locked out of bargaining because of their industrial circumstances—which in turn arise from gender-segregated employment grounded in longstanding cultural norms and responsibilities. If the Committee is unwilling to give low paid workers, especially those in grant-funded sectors, meaningful access to functional Supported or Cooperative Bargaining streams because of historical conduct in different sectors under a different system, it should amend the Bill return them to the arbitrated paid rates awards of the 1970s and 80s, which enabled those locked out of industrial activity to receive more than minimum award rates.

Recommendation 4

If the Committee is unwilling to give low paid workers, especially those in grant-funded sectors, meaningful access to functional Supported or Cooperative Bargaining streams because of historical conduct in different sectors under a different system, it should amend the Bill to return them to the arbitrated paid rates awards of the 1970s and 80s, which enabled those locked out of industrial activity to receive more than minimum award rates.