The Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020: How it entrenches mining's 'permanent casual' rort

CFMEU
Mining & Energy

Submission by the CFMEU Mining and Energy Division to the Senate Education and Employment Legislation Committee

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Contents

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Introduction

The Bill removes rights and protections for mineworkers

1. The Mining and Energy Division has a deep connection with regional communities and workers. We are the principal trade union representing mineworkers and power station operators with over 22,000 members located around Australia. We have played a leading role in advocating for well-paid, secure and safe jobs that draw their workers from the local regional communities where the enterprises are based.

2. We have actively campaigned for permanent jobs and viable communities in towns as diverse as Moranbah and Blackwater in the Bowen Basin in Queensland; Collie in the South West of Western Australia; Singleton and Muswellbrook in the Hunter Valley, Gulgong and Lithgow in the Western District of New South Wales and Morwell in the Latrobe Valley of Victoria. What all of these towns have in common is that they are located in coal mining regions that depend heavily on the jobs and services that flow from the mining and energy sector.

The mining industry is central to this aspiration because it has historically been a key source of secure, well-paid jobs for regional Australia. However, the threat to decent mining jobs in regional Australia has been growing steadily because of the increased casualisation and exploitation of mineworkers, primarily through the misuse of labour hire by the big mining companies.

3. In defending decent jobs in regional Australia, we have not sat on our hands. We are the driving force behind the landmark *Williams v MacMahon Contracting, WorkPac v Skene* and *WorkPac v Rossato* legal cases that have challenged the mischaracterisation of permanent employees as 'casuals'. We will continue to mount our legal arguments in the High Court of Australia. Importantly, we will continue to campaign in local communities against the perverse notion that in Australia, in the 21st Century, it is acceptable for mining and labour hire multinationals to employ full-time workers as 'permanent casuals'.

4. In this respect, it is of great concern that the Omnibus Bill appears to take the side of big business and the labour hire companies over that of workers in regional communities. In fact, the Omnibus Bill provisions dealing with casual employment and agreement making appear to directly attack the important steps towards justice that mineworkers have obtained via the legal system in the face of an unrelenting effort by big business to wind back their job security and terms and conditions of employment.

5. In this submission we focus on two aspects of the Omnibus Bill. First, we comment on the provisions relating to the proposed definition of casual employment and casual conversion. Second, we examine the new proposed provisions that would seek to weaken the protections for workers in enterprise agreement making. At a time when mineworkers need intervention and support from their political representatives to reverse rampant casualisation and wage-cutting in their industry, these elements of the Bill would further erode their rights and protections at work.

Casual provisions in the Bill

Workers need employment 'truth in labelling'

6. The mischaracterisation of an employee with full-time hours in an on-going role as a casual employee – thereby depriving that employee of the benefits of permanent employment, such as job security, paid leave, redundancy and the like – warrants legislative intervention.

7. The 'permanent casual' mode of employment is endemic in the mining industry. It is principally promoted by the multinational mining companies as a way to cut wages and weaken workers' bargaining position. However, it is made possible by weak industrial laws and by the unscrupulous behaviour of labour hire companies.

8. These 'permanent casuals' routinely work to a fixed roster – such as a 7 on 7 off roster – that is set for 12 months in advance. It is common for these workers to work at the same mine site for years on end. They will normally be fully integrated in work crews so that they are indistinguishable from their workmates who are permanent employes. If engaged on a FIFO or DIDO basis, the flights and/or camp accommodation of the 'permanent casuals' will be arranged and paid for by their employer (or the mine operator).

9. Under these arrangements, there is plainly a *firm advance commitment to continuing work* – with that formulation being consistently applied by Courts over the past 20 years to describe the essence of casual employment.[1] However, the written employment contracts that apply to these workers describe an entirely different reality, one in which the employer describes the arrangement as 'casual' in the face of all the objective evidence to the contrary.

10. The situation that applied to Queensland mineworker Paul Skene is instructive as it is representative of thousands of other workers employed in accordance with the 'permanent casual' business model. In the landmark case of *WorkPac Pty Ltd* v *Skene*[2], the Full Federal Court of Australia was dealing with evidence that:

[1] *Hamzy* v *Tricon International Restaurants trading as KFC* [2001] FCA 1589, *Bernadino* v *Abbott* [2004] NSWSC 430, *Melrose Farm Pty Ltd trading as Milesaway Tours* v *Milward* [2008] WASCA 175, *Williams* v *Macmahon Mining Services Pty Ltd* [2010] FCA 1321.
[2] [2018] FCAFC 131.

a) Paul Skene[3] worked at the same coal mine for his employer (WorkPac) in Central Queensland from 20 July 2010 until 24 April 2012;[4]

b) For that entire period, Paul Skene worked – week in, week out – 7 x 12.5 hour shifts followed by 7 shifts off and thereafter the roster pattern repeated. That roster was fixed 12 months in advance;[5]

c) For that entire period, Paul Skene worked in the same crew as permanent employees of the mine owner.[6] That is, he did the same work and worked side by side with these permanent employees – but, was denied the benefits of permanent employment enjoyed by his workmates; and

d) For the entire period of his employment, Paul Skene was engaged on a FIFO arrangement. His flights and accommodation were covered by the mine owner. When rostered to work, he stayed in the same room in the employer provided accommodation. On his non work days, Paul Skene's personal belongings were stored in his allocated room.[7]

Paul Skene speaking about his time as a casual mine worker.

[3] https://www.youtube.com/watch?v=Veh449Y1mFQ&t=13s
[4] *Skene* at [23].
[5] *Skene* at [24] – [25].
[6] *Skene* at [23].
[7] *Skene* at [24].

11. The Court's finding that there was a *firm advance commitment* to continuing work in those circumstances – and therefore Mr Skene was not a casual employee - was hardly surprising.[8] It was not surprising even though Paul Skene's written contract of employment used formulaic legal phrases describing his employment as 'casual'. The decision of the Federal Court in *Skene* was entirely consistent with the decisions of the Courts over the past 20 years, including a decision from 2010 concerning a Western Australian FIFO mineworker with an almost identical factual matrix.[9] Indeed, there are few work environments as inimical to the notion of irregular, intermittent and uncertain work patterns than mining operations that require a large FIFO workforce to work compressed roster patterns in order to facilitate 24/7 mining operations.

12. In essence, the *Skene* decision exposed a widespread scam or rort. It exposed the practice of employers seeking to avoid providing the benefits of permanent employment to its workforce by wrongly classifying workers as casuals when by all objective criteria they were not.[10] The rort is based on the assertion that the mere designation (or labelling) by an employer of a worker as a 'casual' makes them so. The Full Court of the Federal Court in *Skene* properly rejected the employer designation argument. Rather, the Court's finding was grounded in an examination of the reality and substance of the employment relationship between WorkPac and Paul Skene.

13. When the labour hire company WorkPac sought to overturn the unanimous determination in *Skene* they did not follow the usual course of an appeal to the High Court of Australia. Instead, they contrived a separate case involving another employee in the hope of obtaining a different result from a differently constituted Federal Court. In this effort they failed spectacularly, and the case of *WorkPac v Rossato*[11] now stands as the leading authority on the meaning of casual employment.

14. The proposed amendments to casual employment set out in the Omnibus Bill are at odds with the last 20 years of carefully considered Court authority. The amendments embrace employer designation – the proposition that you are a casual if your boss calls you one – and do not permit any examination of the real substance

[8] *Skene* at [172] – [173].
[9] *Williams* v *MacMahon Mining Services Pty Ltd* [2010] FCA 1321.
[10] *Skene* at [70].
[11] [2020] FCAFC 84

of the employer relationship. If enacted in its current form, the proposed definition of casual employment in the Omnibus Bill will result in the legitimation of the 'permanent casual' employment model, and will thereby undermine the living standards of thousands of workers in regional Australia by undoing the legal precedent established by the Courts.

15. The problems faced by 'permanent casuals' are well known. The absence of paid leave and job security makes it difficult for such employees to take a holiday or obtain credit to buy a house. Other impacts include:

a) Unsafe work practices because the lack of any job security means that workers are more reluctant to raise safety issues or report incidents for fear of losing their jobs;

b) The difficulty that 'permanent casuals' have with obtaining credit negatively impacts of business confidence, especially in the regions, and especially in respect of local housing markets and businesses that rely upon discretionary spending;

c) In local mining communities there is a huge disparity in pay between permanent mineworkers and 'permanent casual' mineworkers. We estimate that 'permanent casual' mineworkers are on average paid 30-40% less than permanent mineworkers even taking into account the casual loading, and after factoring in that the permanent casuals don't receive paid leave. A recent study conducted by Dr Stephen Whelan estimates that in three coal mining regions alone - the Hunter Valley (excluding Newcastle), the Mackay-Isaac-Whitsunday region and the Central Queensland region (centreing on the towns of Rockhampton and Gladstone) – the cumulative effect of the wage deficit faced by permanent casuals is in the order of $825 million per year.[12] This is $825 million that is not finding its way into the households and local communities in regional Australia, primarily as a result of legal sleight of hand.

16. Casual members of our union have repeatedly spoken out about the difficulties they face raising families and participating in community life as long-term 'permanent' mining casuals. Chad Stokes has been a mineworker in Central Queensland for over 10 years and casual labour hire for the last seven. As Chad and many others have

[12] *Wage Cutting Strategies in the Mining Industry: The Cost to Workers and Communities*. McKell Institute, March 2020, at page 5.

noted, mining companies simply don't take on permanent direct hires any more. He describes the common experience of casual mineworkers: can't get a loan for a house, can't take time off for family events or holidays, all the while being paid substantially less than the permanent worker next to you[13].

17. In 2018, the LNP majority on the House of Representatives Standing Committee on Industry, Innovation, Science and Resources issued a report called: "*Keep it in the regions: Mining and resources industry support for businesses in regional economies*". In this report the Committee expressed similar concerns to ours about the increased use of casual employment, especially casual labour hire, in regionally based industries.[14] The Committee found that such work practices could be damaging to local regional communities.[15] Recommendation 19[16] made by the Committee is set out below:

> Recommendation 19
>
> *The Committee recommends the Federal Government conduct a review into the use of casualised workforces and labour hire companies in the mining and other sectors with a view to amending the Fair Work Act 2009 (Cth) in order to prohibit the move towards replacing directly-employed, full time*

[13] https://www.youtube.com/watch?v=87-Kd_lEcpU
[14] See pages 155 – 156 of the Report.
[15] See pages 155 – 156 of the Report.
[16] See page 177 of the Report.

workers with 'permanent casual' employees, and other similar casualised employee types.

Changes to the Act should also include provisions that guarantee that employees have a legal right to convert from casual to permanent employment after a set period of time.

18. Other than paying lip service to the notion of casual conversion, the proposed amendments contained in the Omnibus Bill are completely at odds with that recommendation.

Definition of casual employee

19. We support the idea that the *Fair Work Act 2009* should include a definition of casual employment.

20. However, the actual definition proposed in the Omnibus Bill is a massive step backwards for workers. It attempts to create the illusion that regard is had to prior legal authority by using the term "*fim advance commitment to continuing work*", but then guts the existing common law definition of any meaning or force. This is because the Omnibus Bill fixes the whole focus of characterising the nature of the employment relationship on the moment a worker signs a contract of employment. In other words, the written words of the contract are paramount and the objective circumstances surrounding the contract and what happens after the execution of the contract is not relevant at all. It is a form wilfull legal blindness that goes against the general trend of the Courts to look beyond contrivances and falsehoods to examine the true position of the contracting parties.

21. The definition included in the Omnibus Bill unquestionably permits employer designation in order to disguise and obscure the real nature of the employment relationship. There is simply no requirement in the proposed definition that the label applied to an employee corresponds to the truth of the employment arrangement. This is because the definition is narrowly fixed in time to the moment of consent to the written terms of the contract. The proposed definition does not permit any examination of the real substance of the employment relationship; nor does it cater for any changes to that relationship after the first employment contract is agreed. The Omnibus Bill makes this clear at 15A(4), which is set out below:

> *To avoid doubt, the question of whether a person is a casual employee of an employer is to be assessed on the basis of the offer of employment and the acceptance of that offer, not on the basis of any subsequent conduct of either party*.

22. The effect of the definition included in the Omnibus Bill is that employers, especially large mining and labour hire companies who have unlimited legal resources at their disposal, will simply redraft their standard employment contracts to include a formulaic disavowal of any firm advance commitment to continuing and indefinite work according to an agreed pattern of hours. This will be done despite all parties knowing – that is, the mine operator, the labour hire contractor and the worker – that the work being offered is long-term, predictable and the same in substance as that being performed by the permanent employees of the mine operator.

23. Given the power imbalance that exists at the point of hire, there will be little mutuality in these employment contracts. If the only work on offer is 'permanent casual' work and the worker needs the job, he or she will take it. In taking the offer, the mineworker will hope that over time they will be noticed by the mine operator and will be offered a permanent position on decent rates of pay, but as the use of labour hire is becoming increasingly hard-baked into the business model of most mine operators, those permanent employment opportunities are becoming increasingly thin on the ground.

24. Parliament must not allow itself to be the agent of further erosion of working conditions and standards. The opportunity exists to buttress and enhance the important steps towards justice for casual employees that the Courts have established via the common law. The public good demands that these gains must be built upon, and not fatally undermined in order to perpetuate an exploitative and dishonest business model.

25. The Explanatory Memorandum to the Omnibus Bill presents the definition proposed as the best of only three policy options. However, there is a fourth policy option. That is, the inclusion of a definition of a casual employment that is consistent with legal precedent and which would preclude the 'permanent casual' employment model. Such a definition would define casual employment as being irregular, intermittent and without a firm advance commitment to work. Importantly, it would also require consideration of the contract of employment in its broadest sense; that is, by reference to what the parties objectively knew and understood about the contract

when it was made; the written terms of the contract; and finally, how the contract was applied in practice.

26. In other words, the employment contract should reflect the reality of the employment relationship and not disguise it. There should be truth in labelling. However, the the Omnibus Bill legitimises false advertising in employment relationships.

Casual conversion

27. The provisions in the Omnibus Bill concerning casual conversion fail to offer a clear and straightforward pathway for those casual employees who may wish to convert to permanent employment. This is for two reasons.

28. First, the Omnibus Bill provides that an employer is not required to make an offer of conversion[17] and/or can refuse an employee initiated request for conversion on *reasonable business grounds*.[18] The Omnibus Bill provides non-exhaustive guidance as to what constitutes reasonable business grounds.[19] It is evident that the phrase reasonable business grounds is incredibly broad. An employer will be able to rely upon that exception to deprive their casual employees of the opportunity of conversion. For example, a labour hire company might refuse a request for casual conversion on the grounds that the contract with the client mining company does not 'guarantee' any placements from day to day, even though in practice, the provision of labour hire services to the mine site is regular and ongoing. The labour hire company could simply assert that this 'uncertainty' is an inherent feature of its business and that therefore, permanent employment is not appropriate on 'reasonable business grounds'.

29. Second, the Omnibus Bill fails to provide an adequate mechanism for resolving disputes about conversion. Unless agreed to by the parties, the Fair Work Commission is limited to conciliating any such dispute. This means there is no avenue, for example, of properly testing whether there were reasonable business grounds for the employer refusing to facilitate conversion.

30. It is evident that the casual conversation provisions in the Omnibus Bill fail to meet one of the objectives of the Bill, namely, to give regular casual employees a statutory pathway to ongoing employment by including a casual conversion entitlement in the

[17] Sections 66B – 66C of the Bill.
[18] Sections 66F – 66H of the Bill.
[19] Sections 66C & 66H of the Bill.

NES.[20] The provisions appear to be just lip service. An employer that does not wish for its casual employees to convert to permanent employment will feel no compulsion to offer that choice. In combination with the weak definition of the casual employment, unscrupulous employers will lock in 'permanent casuals' to that employment model for years on end.

Orders relating to casual loading amounts

31. We do not support the notion of double dipping. However, the use of that term in relation to the employment practices engaged in by labour hire companies in the mining industry are deliberately misleading.

32. As explained above, in the mining industry, it is the permanent casuals that are being short-changed. They are working side by side and doing the same job as permanent mineworkers but are paid 30-40% less than their permanent counterparts and without the benefits of permanent employment. Commonly, permanent casuals are paid a 'lump' or 'all-up' rate of pay, which is the same hourly rate of pay for each hour worked. The means by which that amount has been calculated is often never properly explained. Consequently, it is not always clear that rate of pay actually includes a casual loading.

33. Our position is that an employee that has been found to be incorrectly and unlawfully classified as casual employee should not face the possibility that their unpaid entitlements could be reduced to zero. The Omnibus Bill allows for that possibility by providing the Court with the discretion to reduce such unpaid entitlements to zero on the basis that the ''court considers appropriate''.[21] In doing so, the Omnibus Bill is asking Parliament to endorse a path to forgive past breaches of industrial and employment law. It is providing a legal defence against financial penalty to corporations who have knowingly gamed the system and have been exposed.

34. The Omnibus Bill provides limited guidance by which any such decision would be made. This is a provision that cannot stand in its current form. An employee that has been unlawfully treated and paid as a casual employee should receive every cent that they are lawfully owed.

35. In relation to the potential impact on small business of claims based on the *Skene* and *Rossato* precedents there are three responses we would make:

[20] Page i of the EM.
[21] Section 545A of the Bill.

- First, as we have shown above, the circumstances of Paul Skene (and of Robert Rossato) are particular to the mining industry. The proportion of casual employees that would fit their precise circumstances are very small as a proportion of the entire workforce. Pronouncements that these precedents would affect a majority of casuals, or even a substantial minority, are simply political assertions designed to protect the interests of big mining and labour hire companies. This is why the class actions that have commenced based on the *Skene* and *Rossato* precedents are almost entirely focused on the mining industry.

- Second, it is far more likely that in the case of the 'mum and dad' small businesses the workers employed as casuals will be genuine casuals. They will be employees whose work patterns will be intermittent and irregular, based on the ebbs and flows of the business. The *Skene* and *Rossato* precedents will have no effect on these employees or their employers. The notion of thousands of casual sandwich hands or hairdressers joining in class actions to send their employers broke is an absurd proposition that only exists in the imaginations of big business lobbyists trying to protect the profits of their clients. If a worker is employed in accordance with a genuinely casual work arrangement, no business has anything to fear from the Federal Court precedents.

- Third, if the judgment is that small business needs to be protected from unconscionable claims arising from the Federal Court judgments, then do it directly and in a targeted fashion. Do not let the big business lobbyists conflate their interests with that of small business. The situations applying to WorkPac[22] and the operator of the local sandwich shop or salon are worlds apart. Big business engages in the 'permanent casual' rort on a mass scale to reduce the wages and conditions of 'casual' employees relative to permanent employees. These 'permanent casuals' are actually paid <u>less</u> than permanent employees. In small business – many of whom operate in the award system – casual employees get paid <u>more</u> than their permanent counterparts in recognition of their insecure work patterns – as the system intends.

[22] WorkPac claims to have over 13,000 employees in Australia.

Protections for workers in enterprise bargaining

The protective provisions of the *Fair Work Act*

40. When the *Fair Work Act* talks about "a balanced framework for cooperative and productive workplace relations"[23] a well functioning enterprise bargaining system is one of the primary avenues through which this balance can be achieved. It should achieve this through giving employees an opportunity to improve their terms and conditions of employment, while also giving employers a way to provide greater flexibility and enhanced productivity.[24] Central to this aim is the legislative objective of *"achieving fairness through an emphasis on enterprise-level collective bargaining"*[25] which is the primary way in which the *Fair Work Act* seeks to overcome the power imbalance that otherwise exists between between an employer and an employee bargaining alone.[26]

41. Unchecked, the power balance which brings about the benefits of enterprise bargaining to employers and employees alike is easily disturbed. It is in this context the protective provisions of the *Fair Work Act* play an important role in regulating the way in which agreements are made at the enterprise level, and subsequently considered by the Fair Work Commission. These protections are particularly important in protecting the interests of workers who do not have union representation in bargaining.

42. The protective provisions include the requirements that an employer take all reasonable steps to provide employees with the terms of the agreement they are being asked to vote on, and an explanation of those terms,[27] that the employer and employees genuinely agree to the terms,[28] and that, except in certain circumstances, all employees will be better off under the agreement than if they were covered by the relevant award.[29]

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[23] See s 3.
[24] *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77, [146] (*One Key*).
[25] Section 3.
[26] Ibid, [150].
[27] Sections 180(2), (5).
[28] Section 188.
[29] Section 186(2)(d).

43. The *Fair Work Act* contains certain flexibilities, too, to ensure that the framework established by the protective provisions allows for nuance and the particular circumstances which may arise at an individual enterprise. For example, the Fair Work Commission is empowered to accept undertakings to meet most concerns it may have as to whether an agreement has been genuinely agreed to or whether it passes the better off overall test (BOOT),[30] or dispense with the requirement altogether if there are exceptional circumstances and approval meets the public interest.[31] It is also able to excuse minor procedural or technical errors in relation to determining whether an agreement was genuinely agreed to,[32] make assumptions in relation to the BOOT,[33] and is called on to exercise its discretion in considering each of the requirements of an enterprise agreement in relation to the safety nets of the NES, the relevant modern award, and whether an agreement has not been genuinely agreed.[34]

44. Complaints about the complexity of the bargaining system are overstated, and ignore the fact that much of this complexity arises as a consequence of employers attempting to manipulate the enterprise bargaining process. Where genuine bargaining takes place, with a properly represented workforce and resulting in an agreement which builds on award conditions, complaints about the 'complexity' of the system are rare. Rather, the problems arise where fake bargaining takes place leading to the making of an agreement with a small and controlled cohort of employees, without union involvement, where issues about the capacity to provide informed consent, and the actual benefits of making the agreement, arise.

45. In short, complaints about the 'complexity' of the system identify the wrong problem. They fail to recognise the central role protective provisions play in preserving some semblance of the power balance that is required to facilitate an enterprise bargaining system. Instead of enhancing the protections for unrepresented employees during bargaining, the provisions of the Omnibus Bill seek to undo legal protections provided by the Fair Work Act and important legal precedents such as the Federal Court of Australia's decision in *One Key Workforce*.

[30] Section 190.
[31] Section 189.
[32] Section 188(2).
[33] Section 193(7),
[34] Section 186.

Issues around bargaining in the mining industry

46. One of the areas that existing protective provisions have failed to offer complete protection against is the advent of small cohort "bargaining", particularly within new labour hire companies.

47. Small cohort bargaining is the process where a new entity will engage a small number of employees (say, 2–5) and make a non-greenfields agreement, thereby avoiding the processes involved in making a greenfields agreement, including bargaining with a union. These employees tend to have no experience in bargaining, limited industry experience and are often casuals. In effect, it is employer-controlled agreement making which completely subverts the intention of collective bargaining.

48. Once an agreement of this kind is made and then approved by the Fair Work Commission, the employer will then employ significant numbers under the agreements, sometimes thousands,[35] with each of those employees being bound by the terms of the agreement until it is either terminated in accordance with the *Fair Work Act*, or replaced following the expiration of the agreement's term. Importantly, once an enterprise agreement is approved, the employees covered by the agreement are prevented from legally seeking to bargain for better terms and conditions for the entirety of its nominal term, normally 4 years.

49. These agreements tend to sit marginally above the relevant award (0.5 – 1%) and, in the black coal mining industry, sit well below the standard in the industry, driving pay and conditions down. Due to the increasing prevalence of labour hire in the industry, the impact of these kinds of agreements is widespread. Concerningly, it is not confined to new operators. Established entities like BHP have taken to using this practice to allow them to avoid applying established terms and conditions negotiated over decades to new employees, creating hugely disparate pay and conditions in the industry, often among the same workforce at the same site, doing the same work.[36]

[35] See, for example, *CFMMEU & ors v OS ACPM Pty Ltd & anor* [2020] FWCFB 6089.
[36] See, for example, ibid.

50. The Omnibus Bill does nothing to address this significant driver of downward pressure on wages in the industry. In contrast – it widens the loophole that promotes the subversion of the objects of collective bargaining under the guise of increasing the pace of enterprise bargaining. In an industry which has historically maintained well-paid, secure and safe jobs in regional communities, this loophole threatens the substainability of these communities and the legislature should be looking to close it, rather than widen it.

Undermining the purpose of collective bargaining – genuine agreement

51. One of the key ways the Omnibus Bill widens this legislative loophole is by loosening the requirements relating to the question of whether an agreement has been genuinely agreed to.

52. The *authenticity* of the consent or agreement of workers to the making of an enterprise agreement is of fundamental importance to the integrity of Australia's enterprise bargaining system. The current provisions of the *Fair Work Act* ensure that the employer must take *all* reasonable steps to provide employees with relevant information, including an explanation of the agreement and its effect, and to give them details of the vote.[37]

53. *All reasonable steps* has be painted as an onerous threshold by some, but this is a mischaracterisation. As a Full Bench of the Fair Work Commission has described it, it is *"a turn of phrase that means to take the steps that are reasonably required*" and that it *"does not mean that the person must take each and every conceivable step that might be reasonable"*.[38]

54. The purpose of requiring *all reasonable steps* to have been taken in, for example, explaining the terms of an agreement and their effect is to *"enable the relevant employees to cast an informed vote: to know what it is they are being asked to agree to and to enable them to understand how wages and working conditions might be affected by voting in favour of the agreement."*[39] Given the legally binding nature of what is being agreed to, not just of the voting cohort but of the future workforce, it is a reasonable requirement. The Omnibus Bill seeks, instead, to reach an end which gives employees a *"fair and reasonable opportunity to*

[37] Sections 180 and 188(1)(a)(i).
[38] *CFMMEU & ors v OS ACPM Pty Ltd & Anor* [2020] FWCFB 2434, [115].
[39] *One Key*, [115].

decide whether or not to approve proposed enterprise agreements".[40] The difference is nuanced, but significant.

55. If legislated, the Omnibus Bill will lower the threshold so that all that is required are *some* steps that are reasonably capable of informing employees about the agreement, what it means, and how and when the vote will take place. In effect, it's telling employers to have a try, rather than try their best. Instead of actively seeking out employees with a view to ensuring they are capable of casting an informed vote, reasonable steps could be satisfied by, for example, the employer sending a single email, with that being taken to have given employees a fair and reasonable opportunity to decide. For a disengaged workforce with no familiarity with bargaining and no representation, the results are predictable. As long as a majority of the employees vote "yes" to the agreement, the rest doesn't matter to the employer, and would be unknown to the employees.

56. In that scenario, the resulting agreement will be so close to a unilateral process that it completely subverts the purpose of collective bargaining. It is the kind of employer controlled agreement making process which might exist without any regulation at all.

Undermining the purpose of collective bargaining – casual employees

57. The Omnibus Bill seeks to change who is to be requested to vote for the approval of an agreement to exclude casual employees except for those casual employees performing work during the access period, being the seven day period immediately before the vote is conducted. This amendment, in effect, gives employers the capacity to disenfranchise casual employees by virtue of a roster. This is a fundamental shift to the idea that employees employed at the time who will be covered by the agreement should be given the opportunity to vote for or against it being made.

58. Given the changes sought to casual employment in the Omnibus Bill more broadly, this means that an employee designated as a casual can be excluded from voting on their terms and conditions of employment by virtue of their roster alone. It creates a significant loophole for employers to manipulate the voting cohort so as to ensure a favourable result.

[40] Omnibus Bill, Schedule 3, Part 3, clause 8.

59. As has been observed by the Federal Court:

> *"[i]f it were possible for an employer to choose any employees it wishes, and to designate them as the employees in part of its single business with whom it wishes to make a collective agreement, the underlying purpose of promoting collective negotiation might be subverted."*[41]

Improving conditions through enterprise bargaining

60. Enterprise agreements sit alongside the NES and modern awards as the three ways that the *Fair Work Act* provides for terms and conditions of employment.[42] With the NES and modern awards establishing the safety net minimums, an enterprise agreement will traditionally seek to build on this minimum. An exception to this is that the conditions set out in modern awards are open to some modification, on the proviso that each award covered employee and, importantly, each prospective award covered employee would be better off under the agreement than if the award applied to them. This exception works to maintain the balance envisioned by agreement making under the *Fair Work Act* by ensuring that *every* worker will better off under the relevant agreement than if they were otherwise covered by the award.

61. The Omnibus Bill seeks to undermine that protection entirely, albeit for a limited time. We support the ACTU Submissions on this point, and don't seek to detract from the importance of this issue. However, our focus is on the longer lasting impacts which will arise as a consequence of other changes to the BOOT which aren't constrained to a limited period – in particular, to the addition of s 193(8).

62. Proposed s 193(8) stipulates relevant and irrelevant matters for the Fair Work Commission's consideration of the BOOT. While it is proposed that the satisfaction the Commission must reach for the purposes of s 193 is still that each award covered employee, and each prospective award covered employee must be better off under the agreement, s 193(8) actively prevents the Commission from having regard to rosters which are allowed under the agreement unless they are reasonably foreseeable. The current test allows the

[41] *CFMEU v Pilbara Iron Company* [201]] FCAFC 91; (2011) 194 FCR 269, [38].
[42] Section 5.

Fair Work Commission to make *"sensible predictions about the basis upon which prospective employees might be engaged"*[43] under the agreement for defined workplaces, but for an enterprise still in a development stage, or where the agreement permits employees to be engaged *"in a wider range of classifications, work locations and/ or roster patterns than the workforce existing as at the test time"* it does not.[44] The reason for this is that there is so much that is unknown about an enterprise in its early stages that it is impossible to make any sensible prediction based on the existing workforce. To ensure that no worker is worse off any scenario which is available under the agreement must be considered for the purposes of the BOOT.

63. This requirement is an important protection to ensure that a small number of employees cannot define terms that would be less beneficial for a future cohort of workers not yet engaged by the employer. This issue is highly relevant in mining because of the array of rosters and working patterns undertaken to meet the 24/7 production requirements of modern mines.

64. Take, for example, a labour hire company in the mining industry just starting out. It engages three employees, who all work full time hours, on dayshift, Monday to Friday, under the *Mining Industry Award 2020*. These three employees make an agreement with their employer. This agreement provides for an annual salary that is designed to leave them better off when compared to the rates they would otherwise receive under the *Mining Industry Award 2020*. It effectively incorporates all penalties and loadings that would otherwise be payable under the award based on that full time, Monday to Friday roster, and adds 5% to the total. There is no question that these employees will be better off under the agreement, and that will meet the concern of the revised BOOT.

65. But consider what happens where that agreement includes a coverage clause which extends to all employees of the employer, working in both the mining and black coal mining industry, working any pattern of work. It now covers, for example, workers that work permanent night shift, or so-called "weekend warriors", who condense full time hours into three shifts across Friday to Sunday. It covers casual workers. It also covers workers who would otherwise be covered by the *Black Coal Mining Industry Award 2010*, which offers significantly better terms and conditions of employment than are available under the *Mining*

[43] *Loaded Rates Agreements* [2018] FWCFB 3610, [103].
[44] Ibid.

Industry Award, including increased pay, leave entitlements and safety protections.

66. Currently, under the BOOT, the Commission must be satisfied that every worker who can be engaged under that agreement will be better off if it applied to them than the relevant award. Where an agreement contemplates the employment of different types of employees doing different kinds of work based on different rosters, this is entirely appropriate. Proposed s 193(8)(a) reverses this important protection, actively preventing the Fair Work Commission from considering patterns and kinds of work, and types of employment, where they are not reasonably foreseeable at test time, even where that consideration would otherwise be deemed appropriate by the Commission. It's an extraordinary restriction to place on an independent tribunal responsible for maintaining a safety net minimum of terms and conditions of employers.

67. Under this proposal, if that same labour hire company has no contract to provide weekend or night work, currently engages no casuals, or doesn't work in the black coal industry, the Fair Work Commission is restricted from considering the availability of these positions under the agreement – it can only consider the lot of workers and kinds of work currently employed, or those which are reasonably foreseeable.

68. The net impact of this change could leave workers worse off by tens of thousands of dollars, potentially altering the casual loading, industry specific rates, and penalties for working weekends or at night, all of which have otherwise been carefully crafted based on the particular industry covered by each modern award. That agreement will then be binding on all future employees even if, a month after the agreement is made, that labour hire company starts to engage thousands of workers under different patterns, kinds or types of work. Those conditions remain in place for up to four years, or longer if the agreement is not terminated or replaced.

69. While framed as a solution to the complexities encountered by employers, this proposed amendment completely ignores the purpose this protection currently serves, and that a solution is already available to employers. That is, to make an agreement limited in scope to cover their existing workforce.

70. Removing the protections necessary to ensure workers remain better off is an unacceptable and unnecessary proposal to a perceived problem which has arisen entirely because of the approach taken by employers to agreement making. There is nothing which requires an employer to make agreements with broad coverage that are binding on possible future workforces, and it is open to them to bargain for scope, coverage and patterns of work which align with their current workforce. Not only is it open to them, it should be seen as incumbent on employers to act in a way that ensures that employees of the kind who are bound by an agreement have had a say in its making.

Restrictions on discretion of the FWC

71. The Mining and Energy Division has a long history of ensuring that the continuing gains of one of Australia's most prosperous industries flow onto workers and their communities through advocating for well-paid, secure and safe jobs. This is primarily done through enterprise bargaining, dispute resolution and our involvement in the award modernisation process. However, the advent of employer controlled agreement making has meant that we have had to find new ways to continue this advocacy.

72. In the current context of agreement making, this is through seeking to assist the Fair Work Commission in the consideration of applications for the approval of enterprise agreements under s 590 of the *Fair Work Act*. This section provides that the Commission may *"inform itself in relation to any matter in any manner it considers appropriate."* It is an important discretion which leaves it open to the Commission to determine if they could be assisted by further information in making their decision.

73. In the context of agreement making where employees are unrepresented and absent from the approval process, this discretion is particularly important. By taking into account a perspective independent of the employer – being the author and proponent of an agreement – the Commission can, and often is, assisted in balancing out the views of a party with a significant commercial interest in the proposed agreement being approved by hearing from an intervener. As identified by the Enterprise Agreement National Practice Leader at the Fair Work Commission, Deputy President Masson:

> *By permitting the CFMEU to make submissions, lead any evidence which it does have and to cross-examine witnesses, the FWC can properly inform itself in relation to matters which have been raised and satisfy itself that the requirements for the approval of the Proposed Agreement have been fully met. If, as [the applicants] assert, the CFMEU's concerns are without merit then this will be established by [the applicants] in the Commission's consideration of this Application.*[45]

74. In the last two years, the Fair Work Commission has exercised its discretion to hear from the Mining and Energy Division on almost every occasion. In those instances, only 7% of cases (2 of 29) were determined without any change arising as a consequence of our input. [46] The rest of these applications were either discontinued, dismissed, or approved with undertakings.

75. While elements of the approval process for enterprise agreements may be characterised by some as technicalities or unnecessary complexities, there are very real implications for workers of removing the requirement for robust consultation and scrutiny regarding enterprise agreements. Beyond the headline items of working hours and pay rates are many conditions and entitlements that make a big difference to workers but may not be well understood: like accident pay, shift penalties, access to leave, rostering, equipment, notice and termination provisions.

76. The Omnibus Bill seeks to remove the Fair Work Commission's discretion to hear from a third party, effectively mandating wilful blindness to input that has a demonstrated capacity to assist in this process. The only justification presented

[45] *Ausdrill Limited* [2018] FWC 444, [13].

[46] See FWC Matter numbers: AG2018/5692; AG2018/1902; AG2018/6858; AG2019/127; AG2019/261; AG2019/439; AG2019/1191; AG2019/1674; AG2019/2029; AG2019/2247; AG2019/3805; AG2019/4616; AG2019/4774; AG2020/317; AG2020/415; *Corestaff QLD Pty Ltd* [2019] FWC 8247; *Trustee for LCR Mining Group Trust T/A LCR Mining Group Trust* [2020] FWC 451; *The Go2 People Australia Pty Ltd* [2019] FWC 8505; *CFMMEU v Ditchfield Mining Services Pty Ltd* [2019] FWCFB 4022; *CFMMEU & Ors v OS ACPM Pty Ltd & Anor* [2020] FWCFB 6089; *CFMMEU v Karijini Rail Pty Ltd* [2020] FWCFB 958; *Downer EDI Mining – Blasting Services Pty Ltd* [2019] FWCA 4245; *Application by CoreStaff NSW Pty Ltd T/A CoreStaff NSW* [2019] FWCA 4403; *Doorn-Djil Yoordaning Mining and Construction Pty Ltd* [2019] FWCA 8508; *Application by PIMS Mining (NSW) Pty Ltd* [2020] FWCA 2189; *Sedgman Operations Employment Services Pty Ltd* [2020] FWCA 1016; *MACA Mining Pty Ltd Bluff Coal Mine Enterprise Agreement 2018* [2019] FWCA 1761; *Spotless Central Queensland Coal Facilities Management Enterprise Agreement 2018* [2019] FWCA 5890.

for this is that intervention by parties not involved in bargaining for the agreement causes delay.[47]

77. Any time saved by constraining the Fair Work Commission's capacity to inform itself in any way it considers appropriate is hardly justified if the outcome is that the Commission is effectively hamstrung from performing its statutory obligations in a manner which is consistent with its obligations under s 577. The prioritisation of speed at the expense of an outcome which would otherwise be fair, just and transparent, is an extraordinary re-prioritisation of the way in which the Commission is to perform its functions. It represents an embrace of employer complaints at the expense of a sensible diagnosis of the relevant issues, and will lead to adverse outcomes for workers as agreements slip through the system that should never have been approved.[48]

Broken promises

Mineworkers have been let down by inaction

78. The widespread replacement of permanent jobs by casual labour hire jobs in the mining industry has been gathering pace for a decade. The issues are well known and understood in mining regions. As Cr Anne Baker, Mayor of coal-rich Isaac Regional Council puts it:

> *"Over my time, I've seen the industry go from an 8 hour shift, five days a week, permanent positions, to a 12 hour shift 7 days a week, to a high proportion of casual positions. There is a direct negative impact to our coal producing communities. What I know about casualisation is that it absolutely undermines the ability for our region to grow. It removes*

[47] Explanatory Memorandum, Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, lxxiv – lxxv.

[48] See for example, the case of *CFMEU v Civil, Energy & Mining Services Pty Ltd T/A CEM Services Pty Ltd* [2014] FWCFB 5708. In this matter, the agreement which was to apply to labour hire employees in the coal mining industry was approved without the CFMEU knowing of its existence. None of the coal mine employees to be covered by the agreement voted on it. The only people who voted on the agreement were the office staff of the employer. The human resources manager made a declaration that she was the employees bargaining representative and signed the agreement on behalf of employees. The agreement contained numerous reductions in award conditions, even though the company statutory declaration claimed that the agreement passed the BOOT. The agreement was quashed on appeal and the union requested that the conduct of the employer (namely, the numerous false declarations) be referred to the Federal Police for investigation. Nothing came of this request.

people's basic right to be able to borrow money to purchase a home… What is needed for the stability of our resource regions and for our families that choose to work and live in this community are permanent jobs with permanent shirts on mine sites."[49]

79. Our members and workers across the industry have been buoyed by our Union's successes in the Federal Court to clarify the law and stamp out the toxic 'permanent casual' work model in mining. They have been equally disappointed at the failure of their political representatives to follow through with decent legislative solutions.

80. After employers launched their 'double-dipping' scare campaign following the *Rossato* Federal Court decision, we launched our "Protect Casual Miners" campaign. It included TV ads in mining regions to explain the rights that had been won in court and what was at stake if employers were successful in their calls for the Federal Government to overturn rights for casual miners. Thousands of mineworkers, their families and community members contacted their local Federal MPs and Senators to explain their concerns and ask them to stand up for the rights of mineworkers to secure jobs.

81. In response to our campaign some MPs, including Dawson MP George Christensen[50] and Queensland Senator Matt Canavan claimed in the media and in correspondence to constituents that they had fixed the issue. On the

[49] https://www.youtube.com/watch?v=ip1bfscJXxQ&t=19s
[50] Media release 22 October 2020

campaign trail in Central Queensland during the Queensland state election, Prime Minister Scott Morrison said he understood the issue in mining[51]:

> *"Casualisation… is an important issue. And I know in the mining industry and the mining services industry, I know it's an important issue and we've listened to that. And we need to get certainty. We need to get resolution here... It is an important issue. People should have security in their employment, particularly, particularly when they're basically acting as a full time employee. Casuals will always have a role in the workforce, always have. But when they're fair dinkum casuals and when people are fair dinkum full time employed, the system needs to reflect that."*

82. But the contents of the Omnibus Bill show that rather than addressing the casualisation issue for workers, they are instead legalising the continued exploitation of casuals by certain employers. With an unfair definition of casual which overturns the WorkPac decisions, with weak casual conversion provisions and with the removal of bargaining protections, mineworkers have been let down by those that claim to support them.

83. In their interests, we are opposed to the passage of the the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* in its current form and we will continue to campaign for the permanent, secure jobs our mining sector should be expected and required by law to provide Australian workers.

[51] Transcript of media conference, Rockhampton, 14 October 2020