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Senate Select Committee on Job Security
Committee Secretariat
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CANBERRA ACT 2600

Dear Secretariat,

QUESTIONS ON NOTICE – PUBLIC HEARING 26 JULY 2021

1. Thank-you for the opportunity to appear before the Senate Select Committee on Job Security at the public hearing held on 26 July 2021.

2. Please see below responses to the questions on notice put to the Construction & General Division of the CFMMEU.

Question Number	Page	Exert
Question 1	Pg. 49	**Mr Buchan:** Firstly, on suicide in the resource sector, I'm happy to take something on notice. I refer to MATES in Construction, who I know have some recent research on the health, wellbeing and suicide rates. **CHAIR:** Yes, we've had a very good submission from MATES in Construction, Mr Buchan. It has been very helpful.

3. We note that Mates in Construction (MIC) have provided a written submission to the enquiry (Submission 80). That submission, notably, indicates that over 50% of all calls to the MATES 24/7 Helpline involve lack of job security.

4. In terms of health, wellbeing and suicide rates in the resource sector, local information from Mates in Construction WA (MICWA) shows that since June 2020 a total of 3293 site personnel working on two major iron ore projects in the Pilbara have participated in a 1-hour general suicide awareness training session conducted by MICWA. 420 of those trained requested further intervention by way of a follow up phone call from a MICWA field officer, 79 of which required further case management counselling.

5. Unfortunately, MICWA cannot accurately determine how many individuals are supported on a day-to-day basis. However, MICWA indicates that they know of at least 6 interventions by Applied Suicide Intervention Skills Training (ASIST) and Connector volunteers[1] at these two sites alone, since June 2020.

6. There has been 2 recorded suicides on these two projects alone since June 2020.

[1] Most site personal recognise ASIST and Connector trained individuals as persons they can trust and speak to, or to refer a mate to in order to seek mental health advice; the Connector volunteers are trained by MICWA

Question 2	Written from Senator Small	The CFMEU made a claim that a permanent employee costs 31% more than the headline salary figure, making them more expensive than 25% casual loading and implying that casuals are cheaper. Can the CFMEU substantiate that calculation please, as it seemingly ignores the fact that payroll tax, insurance costs etc still apply to casual employees in terms of the cost burden to the employer.

7. Senator Small has incorrected attributed statements to the CFMEU. The Senator appears to be referring to figures cited by the AMWU[2].

8. In terms of take-home wages, it is the CFMEU's experience that casual workers are often engaged as labour hire employees and are routinely paid at much lower take-home rates than permanent workers. That is, it is incorrect to assume that casual workers are actually receiving 25% more in take-home wages than permanent employees who perform the same work alongside them. Often this is because:

    a. labour hire arrangements are routinely used to undercut and avoid wage rates in enterprise agreements negotiated with unions; and

    b. workers in construction are notoriously susceptible to being engaged as "independent contractors" under sham contracting arrangements, which allows employers to avoid the costs associated with engaging them as employees. In these cases the workers are not only paid less than permanent workers, they are also often paid below minimum award wages.

9. It is also common for casuals to be paid a 'lump' or 'all-up' rate which is the same hourly rate of pay for each hour worked. Because of this, it is often not clear that the rate of pay actually includes a casual loading.

10. These common practices drive down wages and contribute to insecure employment.

Casual conversion

11. During the hearing on 26 July 2021, there was a short exchange between Senator Small and Mr Noonan relating to the issue of casual conversion. At the end of that exchange, Mr Noonan indicated that he would address contentions made by the Senator in writing. A copy of the full exchange is **"Attachment 1"** to this document.

12. Firstly, Senator Small made an assertion that Australia's IR laws were changed "to provide for [casual conversion] being a mandatory requirement across all employees in Australia as enshrined in the NES". In response, we note:

    a. the rights to casual conversion at ss.66B and 66F of the *Fair Work Act 2009* (**FW Act**) are qualified by ss.66C and 66H;

[2] See page 43 of transcript

b. ss.66C and 66H excuses employers from any requirement to make an offer if there are "reasonable grounds" not to make the offer, and the reasonable grounds are "based on facts that are known, or reasonable foreseeable" at the relevant time[3]; and

c. ss.66C and 66H are extraordinarily broadly drafted. For example, an employer could decline to offer conversion based on an assertion that it is 'reasonably foreseeable' that the employee's job will not exist in 12 months, or that their working hours will be significantly reduced or working patterns significantly changed within 12 month period[4]. It will not matter whether such forecasts ever come to pass.

13. Because of this, it is somewhat misleading to refer to the requirements in the FW Act as 'mandatory'.

14. With respect to dispute resolution / enforceability, Senator Small referred Mr Noonan to s.66M of the Bill, which gives access to dispute processes in the Fair Work Commission. Section 66M:

    a. does not allow arbitration in FWC except with the consent of the employer. Any employer who does not wish to offer conversion will simply decline to consent to the matter being arbitrated; and

    b. can be displaced by either a fair work instrument (such as an enterprise agreement) or – more alarmingly – a common law contract or any other written agreement between an employer and employee (where is it likely that an employee will have little, or no, bargaining power).

15. Senator Small's references to access to the small claims jurisdiction of the Federal Circuit Court are not references to s.66M, but rather are references to s.548(1B) of the FW Act. This provision was inserted as a result of Senate amendments to the Omnibus Bill, and allows proceedings to be brought to the small claims jurisdiction of the Federal Circuit Court. Orders can be made in relation to whether or not a casual meets the qualifying requirements in ss.66B or 66F, and whether or not an employer has reasonable grounds not to make an order or refuse a request under ss.66C or 66H.

16. Critically, however, the court's ability to assess whether or not an employer has "reasonable grounds" to refuse or decline an offer of conversion is a matter that would involve an assessment of whether or not an employer's 'reasonably foreseeable' forecast is, indeed, reasonable or not. Determination of such matters would not be straightforward, and would likely require the cross-examination of evidence on topics that employers are likely to claim to be commercial-in-confidence. In a project-based industry such as construction, it would likely require evidence about upcoming projects and tendering processes. For employees of labour hire providers, it could require evidence about contractual arrangements between the labour hire provider and their clients. Employers of casual employees in project-based industries such as construction have an

[3] S.66C(2) sets out non-exhaustive examples of what may constitute reasonable grounds
[4] By reference to the non-exhaustive criteria set out in s.66C(2) and 66H(2)

obvious and likely insurmountable advantage with respect to the application of ss.66C and H; access to the small claims jurisdiction will not overcome this advantage.

17. It is also worth noting that access to the courts is not new; workers have never been prevented from taking to the courts issues involving the determination of their rights under the pre-existing casual conversion provisions in Awards (even prior to the recent Omnibus legislation). While the Small Claims jurisdiction is generally more accessible than the Federal Courts proper, it is not well placed to determine 'reasonableness' for the purposes of ss.66C or 66H where doing so will inevitably involve contested evidence. Mandatory access to FWC arbitral processes would be far more practical.

18. Another reason why access to the small claims jurisdiction is unlikely to be of practical utility include the likelihood that employers will simply elect to make a significant change to the days, time or hours of work performed by worker in order to avoid the conversions obligations, or will simply stop offering work to the individual concerned altogether. While s.66L provides that employers must not alter an employee's hours to avoid the effect of the conversion provisions, enforcing s.66L would require court proceedings which could not be dealt with in the small claims jurisdiction. Further - and as opposed to the general protections provisions in the FW Act - claims under s 66L would not confer on employees the common benefit of the reverse onus of proof in s.361, so that the burden would be on an employee to prove the employer's intent[5]. Enforcing s.66L is simply outside the reach of most casual workers.

19. It is also worth noting that the provisions relating to casual conversion that were recently inserted into the NES are less beneficial, overall, than the pre-existing conversion provisions in the building and construction industry awards. For example – and most significantly - workers will need to be engaged for twice as long before they qualify for the NES provisions (the conversion provisions in the *Building and Construction General On-Site Award* apply after 6 months)[6].

20. It is unsurprising that we are already seeing submissions being made by employer associations to the Fair Work Commission to amend existing award provisions to reduce them to the less beneficial NES entitlements. The government's amendments to the NES will only serve to further entrench insecure work.

[5] While the general protections provisions in Part 3-1 of the FW Act are available in these circumstances, such proceedings are expensive and complicated, and also could not be dealt with in the small claims jurisdiction of the courts.
[6] See cl14.8 of the Award

ATTACHMENT 1 – Exchange regarding casual conversion

[Starting at page 44 of transcript]

Senator SMALL: *Thanks, Chair. G'day, fellas. I've got my camera off because my connection is a bit dodgy. In terms of casual conversion, obviously we changed Australia's IR laws earlier this year to provide for that being a mandatory requirement across all employees in Australia as enshrined in the NES. Do you think that that will have any impact on the sorts of issues you're discussing today?*

Mr McCartney: *Not really. I'll give you an example now of a six-month changeover for probation. They bring you in at five months. This is happening in the mining industry right now. They pull you in at five months and say, 'Look, we're not a hundred per cent sure whether or not you're fitting in. We'd like to give you a go, but we're not quite ready to make you permanent. If you're prepared to sign another six months of probation, we'll keep you on.' That's got a very familiar ring to it around most industries that I work in.*

Senator SMALL: *But I mean—*

Mr Noonan: *Senator, can I—*

Senator SMALL: *Just to clarify there: the casual conversion is after 12 months in any case, and the resources industry is squealing for people, so it doesn't, on the face of it, make any sense that they would be doing anything other than trying to secure a workforce. Can you give me some colour around that?*

Mr McCartney: *Most of the time the mining companies will use a lot of contract labour, right? That's contractors working for BHP, Rio Tinto—they're all there—doing the bulk of the project and mechanical work on the job. Most of those people are made and kept casual, and are also working exactly how Chris is working now, and his story is about that. So, yes, they might put on a minimum amount of permanent workers, but they will surround them with precarious workers so that they can get the outcomes they want.*

Mr Noonan: *Senator, can I just clarify something. I think you described the government's legislation as providing a mandatory right for workers. There's nothing mandatory about it; it's the right to request. The employer doesn't have to consider or give any reasons, and if the request for conversion is not accepted by the employer, there is no right for the employer to take the matter further. The legislation that the government has passed, in fact, is worse than some awards and agreements which currently exist, and we've now got a situation where employers are going to the commission seeking to alter existing awards to downgrade the rights of casual workers to convert to the lower standard that's been created by the government's casual conversion provisions.*

Senator SMALL: *I just need to correct the record in that that is not true. Where an employee disagrees with their employer around the circumstances in which an employer can lawfully refuse such a conversion request—because it is rightly described as a right, and there are limited circumstances in the Fair Work Act where that can be refused—if there's a disagreement, obviously the first step would be a discussion between the two. The next escalation is that they may agree to arbitration between the case. In the event that no agreement to arbitrate is reached, a claim can be brought into the small claims tribunal of the Federal Circuit Court, which, as you know, is a no-cost, self-represented jurisdiction. Then, finally, there is obviously a capacity to bring action to the Federal Court in the event of a full-blown escalation and appeal. That is the process, and I think it's important to note that these reforms don't even affect the last possible sense until 27 September. So there is some time to go until we see what actually translates in the lived experience in Australian workplaces. I just needed to point out that this was carefully considered, and, whilst others may have a different view on whether it goes far enough, to say that there is simply no recourse for an employee is not true.*

Mr Noonan: *Senator, are you suggesting that the Federal Circuit Court has got the power to arbitrate the issue of casual employment—*

Senator SMALL: *I'm suggesting that, in 66M of the Fair Work Act, jurisdiction was given to the small claims tribunal of the Federal Circuit Court to make a determination as to a dispute around casual conversion, yes.*

Mr Noonan: *And you're saying that they can make a mandatory decision that binds an employer in relation to a right to request?*

Senator SMALL: *Yes, such that an employee and employer are aggrieved by whatever determination is made, their next right of appeal would be to the Federal Court.*

Mr Noonan: *If the employer agrees, okay.*

Mr McCartney: *What if the employer just says, 'Sorry, mate, you're not working out, your six months are up'?*

Senator SMALL: *Under a probation arrangement?*

Mr McCartney: *Yes.*

Senator SMALL: *That's a completely separate question.*

Mr McCartney: *That's what they're going to do. You don't live in the world we live in.*

CHAIR: *Senator Small, do you have another question you'd like to ask?*

Senator SMALL: *I think the tea leaves are pretty clear here. I'll rest thanks, Chair.*

CHAIR: *You are welcome to ask a further question if you wish.*

Mr Noonan: *I think we might address your contention in writing, Senator.*

CHAIR: *If you could, that would be of assistance, Mr Noonan. That would be helpful for the committee.*

Senator SMALL: *You can put whatever you like in writing, but the law is clear. I would refer you to 66M of the Fair Work Act when you do correspond on that matter. But, yes, I will rest.*

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