BCA
Business Council of Australia

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

Submission to Senate Education and Employment Legislation Committee

November 2022

Contents

1. Overview

This is the submission of the Business Council of Australia (BCA) on the provisions of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (the Bill), as part of its consideration by the Senate Education and Employment Legislation Committee (the Committee).

The Bill was introduced to the Parliament on Thursday 27 October and referred by the Senate to the Committee on the same day. The BCA participated in a hearing of the Committee on Friday 4 November. Submissions to the Committee were due by Friday 11 November and the Committee's reporting date is Thursday 17 November. This timeframe is unorthodox for an inquiry of this nature and a bill of this size and complexity.

The Business Council of Australia stands for higher real wages, low unemployment and higher productivity driven by innovation and cooperative workplaces.

Australians deserve a system that lets them earn more and gives them access to new opportunities, particularly those in low paid and highly feminised sectors. To achieve this, the Government's Jobs and Skills summit agreed to five key changes to the workplace relations system:

- *"a simple, flexible and fair new framework that ensures all workers and businesses can negotiate in good faith for agreements that benefit them"*
- *"removing unnecessary limitations on access to single and multi-employer agreements"*
- *"allows businesses and workers who already negotiate enterprise-level agreements to continue to do so"*
- *"removes unnecessary complexity for workers and employers, including making the Better Off Overall Test simple, flexible and fair"*
- *"gives the Fair Work Commission the capacity to proactively help workers and businesses reach agreements that benefit them"*

At the Summit, it was agreed to get wages moving by encouraging more enterprise bargaining and fixing problems for low paid workers. However, the Bill adopts a different approach, by introducing a fundamental change to the bargaining system. Its impact will be to replace enterprise-based bargaining as the key element of the system with a new, untested system of multi-employer bargaining and arbitration.

As currently drafted, we do not believe the multi-employer bargaining changes in the Bill will solve Australia's slow wage growth challenge. In fact, they will add complexity and in sectors that already pay higher wages like mining it risks seeing them go backwards.

No case was made at the Summit, nor has any been since, to expand multi-employer bargaining across the whole economy in the manner proposed in the Bill.

As a result, the Bill requires dramatic change. The proposed changes in the Bill could produce a range of serious adverse consequences including delaying wage increases, slowing wage growth, hampering small businesses and opening the door to widespread industrial action.

In addition, there remains significant work to be done in simplifying awards to reduce complexity and promote wage growth. The Government must also make this commitment as a matter of urgency.

Measures to support in the Bill

The Bill includes some positive measures that should be supported, and which align with Summit outcomes:

- Reforms to the Better Off Overall Test in enterprise bargaining
- Measures to advance gender equity
- Measures to assist low paid workers

Areas requiring amendment in the Bill

The Bill will create four separate streams of bargaining:

1. "Single enterprise bargaining" (as currently exists)
2. "Supported bargaining" for "low paid" sectors (currently exists but will be expanded)
3. "Cooperative workplaces" (strictly voluntary, no protected industrial action)
4. "Single interest" multi-employer bargaining (currently exists but will be dramatically expanded to enable employers to be forced in, including where they have had single enterprise agreements. Existing restrictions that prevent competing businesses being forced to bargain together will be removed. Protected industrial action will also be available and unions will have veto powers over whether employees can agree)

Changes to multi-employer bargaining should have been limited to the "supported bargaining" stream rather than opening up the whole economy to the risk of "single interest" multi-employer bargaining. Prior to the Bill, the rationale for change had been to address the concerns of low paid workers, through this stream, together with improvements to awards.

The Bill in its current form will result in very serious unintended consequences. It does not reflect the agreed goals of the Summit and will not lead to higher wages or higher productivity. The worst of its consequences will be:

1. The subordination of single enterprise bargaining by the multi-employer system;
2. An inordinately complex multi-employer system that leads to more disputes, more uncertainty and more drawn-out processes; and
3. Lower wage growth through the imposition of "low ball" outcomes that are less than would be achieved in single enterprise agreements.

In its current form, the Bill will create a new system of multi-employer bargaining that will very quickly encroach upon and ultimately overwhelm single enterprise bargaining. Businesses will be able to be "roped in" to multi-employer bargaining against their will, even if they have a long history of successful single enterprise bargaining. Once they are roped in, it will be virtually impossible for them to get out. The greater difficulty in reaching agreement in multi-employer bargaining, combined with the ease of access to arbitration under the Bill, will mean that arbitrated outcomes will increasingly replace agreed outcomes. Over time, this will remove both the "enterprise" and the "bargaining" in the enterprise bargaining system.

The goal of reform should be to revive the single enterprise bargaining system, not introduce a new, complex and untested system that will replace it.

It is not correct to assert that multi-employer bargaining will generate superior wage outcomes to single enterprise bargaining and no case has been made to support this assertion in the context of Australia's IR system. In many cases, the result could be inferior outcomes, as multiple businesses in an industry are dragged into lower wage levels than would be achieved had they been free to continue with their own enterprise-based arrangements.

As such, the BCA cannot support the Bill in its current form. Without substantial amendments, or the removal of its most problematic elements, particularly Part 21 dealing with "single interest" multi-employer bargaining, it should not be passed by the Senate.

2. Summary of Recommendations

Whilst the Bill includes some positive elements, at this stage we do not believe, on balance, that it reflects an improvement of the existing Fair Work system. The risks of adverse consequences as a result of productivity-destroying multi-employer bargaining, increased industrial action and greater complexity have the capacity to cancel out any gains from other elements of the Bill. They may even drive wage growth backwards if implemented in their current form.

The BCA does not believe the Bill can be supported without amendments to address the following issues:

Amendments to address serious adverse consequences of the Bill

The elements of the Bill relating to arbitration, industrial action and "single interest" multi-employer bargaining (Parts 18, 19 and 21 of the Bill), both individually and, more importantly, when considered as a whole, will create significant adverse impacts for Australian businesses, their employees and the broader community. These impacts will, amongst other things, include lower wage growth, more strikes and the serious undermining of the system of enterprise-based bargaining.

Other amendments in the event those parts of the Bill are passed

If Parts 18, 19 and 21 of the Bill are to be passed, then at the very least they should be subject to the following amendments to reduce their negative impact. However, it should be noted that even if such amendments are made, the BCA does not believe they will be sufficient to make the Bill "acceptable". Nor do we believe they would be enough to prevent the adverse consequences of the Bill, particularly in relation to lower wage growth.

1. Protecting single enterprise bargaining from replacement by multi-employer bargaining:
    - The Bill as introduced does not provide adequate protection for businesses with a history of single enterprise agreements and/or who wish to pursue a new single enterprise agreement. They could be drawn into multi-employer bargaining once their existing single enterprise agreement expires, even if they don't want to be.
    - This is contrary to policy intent of the Government, as stated in the "Outcomes" statement of the Jobs and Skills Summit, which was to "*allow businesses and workers who already successfully negotiate enterprise-level agreements to continue to do so*".
    - The Bill must be amended to preserve the primacy of single enterprise bargaining. It must provide a clear pathway for those who currently have single enterprise agreements to retain them and enable those that wish to enter into them to not be captured by multi-enterprise arrangements.
2. Workplace democracy:
    - Remove the power of a union to veto employee votes to approve agreements.
    - Require any variation of a multi-employer agreement to add additional employers to require both the employer's agreement and a vote of employees.
3. Arbitration of bargaining:
    - Under the Bill, arbitration can be triggered by a unilateral application of one party to the Fair Work Commission, if agreement cannot be reached once an "intractable bargaining declaration" has been made by the FWC.
    - This process could be "gamed" by either party, who could refuse to reach agreement throughout the process in order to trigger arbitration by the FWC.

- No case has been made for these changes and the Bill should be amended to preserve the current rules regarding arbitration, which should be an avenue of last resort.

4. Prevent competing businesses from being forced into the same multi-employer bargaining:
    - The Bill removes the existing "common interest" test that prevents competitors from engaging in "single interest" bargaining together.
    - The existing requirement that businesses operate "collaboratively rather than competitively" will be removed and replaced with a weakened test of "identifiable common interests" and "not contrary to the public interest".
    - The Bill must be amended to prevent competing businesses and those with no common interests from being forced to bargain together against their will.
    - Further, the existing requirement that businesses operate "cooperatively rather than competitively" should be retained.
    - The proposed "public interest" test should be amended to put the onus on unions to justify why it is in the public interest for competitors to be forced to bargain together.
5. Multi-employer bargaining in industries where it is not justified:
    - The Bill does not include any effective limits on the extent to which multi-employer bargaining could be extended to any parts of the economy, other the Construction sector, which is proposed to be exempted.
    - The Government's policy has always been that multi-employer bargaining would be targeted at workers who are "low paid" or have been "locked out" of bargaining.
    - This exemption for Construction should also extend to other industries that are higher paid, and/or already have a high level of single enterprise bargaining, such as mining. Other industries that are critical to the economy and/or have a high level of competition should also be excluded, such as Ports, Energy, Airlines, Retail and Banking.
6. Protecting small businesses from larger businesses in multi-employer bargaining:
    - The current exemption from "single interest" multi-employer authorisations for "small businesses" with less than 15 employees is inadequate. Businesses with 15 or more employees will risk being, at best, sidelined and, at worst, subject to abuses of market power by larger businesses if they are forced to bargain together.
    - At the very least, the "small business exemption" should be expanded to exempt businesses with less than 100 employees.

Amendments to other elements of the Bill

1. Replacement of the Australian Building and Construction Commission
    - Amend Part 3 of the Bill to provide that the Fair Work Ombudsman will have equivalent evidence-gathering powers, resources and maximum penalties to those of the ABCC.
2. Objects of the Act
    - Amend Part 4 of the Bill to remove "job security" as a new object, as the concept is too uncertain, and the likely consequences have not yet been properly considered.
3. Sexual harassment:
    - Amend Part 8 of the Bill to give employers the same standing as workers and unions to seek remedies to stop and prevent sexual harassment.

4. Fixed term contracts:
    - Part 10 of the Bill restricting fixed term contracts should not be passed.
    - In the event it is passed, it should be amended to provide an exemption for work relating to fixed term funding under commercial contracts, to reflect the exemption for fixed term funding under government contracts.
    - A further amendment should be made to allow employers to use fixed term contracts to align with the duration of an employee's visa, where necessary.
5. Requests for flexible work:
    - Amend Part 11 of the Bill to require the Fair Work Commission to first attempt to resolve matters by conciliation before it can arbitrate.
6. Termination of enterprise agreements after nominal expiry date:
    - Substantially amend Part 12 of the Bill to achieve a simpler and more balanced test, by requiring employers to retain employee remuneration where necessary.
7. "Supported bargaining":
    - Amend the definition of "low paid" to prevent this stream encroaching into workplaces or hgher paid workers where it is not appropriate.
    - Remove the ability for existing single enterprise agreements to be overridden or retrospectively invalidated.

The need for award simplification

Awards underpin enterprise agreements. Simplifying awards remains the great piece of "unfinished business" in the IR system that cannot continue to be ignored. This can and should be done without reducing the number of awards, nor their effectiveness.

Fixing the BOOT, as proposed under the Bill, is only one half of the equation to reinvigorate bargaining through making the system simpler and more accessible. For those workers whose conditions continue to be set by awards, simplification will enhance compliance and ensure that unnecessary complexity is removed.

The process of simplification should be manageable and incremental. The best place to start is with those awards that cover the greatest number of employees and which have the greatest potential to encourage bargaining, notably in the Retail, Hospitality and Fast Food sectors.

Whilst it will not be possible to include a process of award simplification in the Bill, we strongly encourage the Government to commit to such a process as a matter of priority as part of any agreements it may reach in relation to the passage of the Bill.

3. The context of the Bill – declining real wage growth, declining productivity and declining workplace bargaining

Productivity and real wages

The Summit agreed that there is an undeniable link between productivity growth and real wages growth. Productivity is also the most important determinant of wage growth.

- Productivity Commission analysis in 2020 concluded that *"almost all wage growth since Federation appears to be due to labour productivity growth"*.[1]
- Treasury analysis of company-level data in 2019 found *"productivity growth tends to be passed-through to workers in the form of higher wage growth, consistent with the idea that firms share rents with their workers"*.[2]
- Further Treasury analysis of company-level data in 2017 found *"more productive businesses pay higher average real wages"*; *"larger businesses are more productive and also pay higher real wages"*; and *"exporters and foreign owned businesses have higher real wages and are more productive"*.[3]

The slowdown in wages growth since the Global Financial Crisis reflects weak productivity growth since that time.

A key driver is weak investment growth, which is due to a range of factors such as the end of the resources investment boom; a slow recovery in confidence from the GFC; a growing services sector; a change in business strategies and low risk appetite; increased uncertainty driven by domestic/global issues and policies and technological change; a high tax and regulatory burden; and energy affordability and reliability.

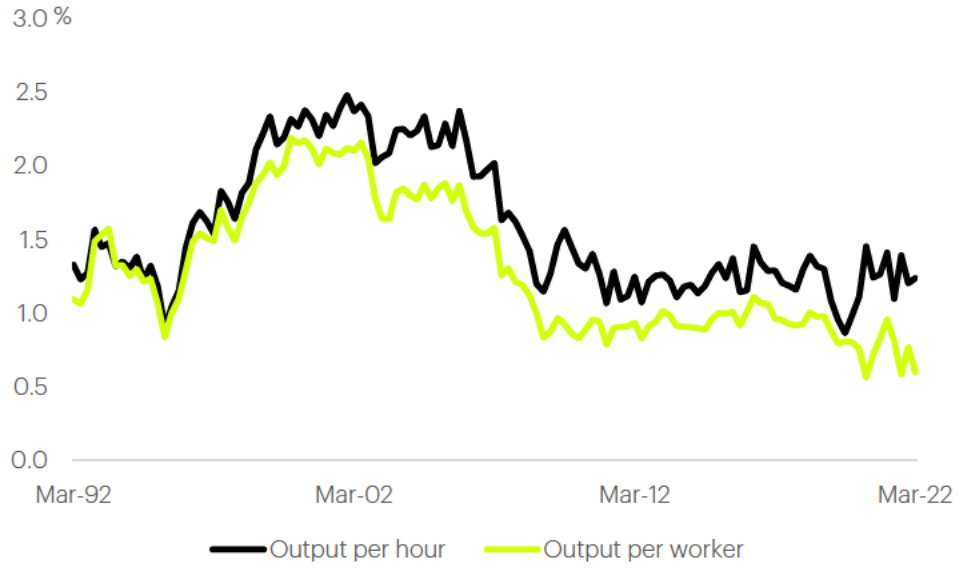
Long-run productivity growth is currently around 1.6 per cent a year, but this is above recent trends. Productivity growth averaged less than 0.5 a per cent a year the five years prior to the pandemic. Recent Productivity Commission analysis shows that last decade saw the slowest productivity growth in 60 years. It was also the slowest decade for incomes growth in 60 years. It is these productivity figures that are the most important influence in the relatively low wages growth Australia has experienced over the past decade.

Productivity is also about ingenuity and collaboration within workplaces, as well as adaptation to new technology and newer, more flexible ways of working. The industrial relations system needs to facilitate rather than impede these processes. The Bill in its current form will not achieve this.

[1] Productivity Commission 2020, *PC Productivity Insights: Australia's long term productivity experience*, Canberra, November.
[2] Andrews D, N Deutscher, J Hambur and D Hansell, 2019, *Wage Growth in Australia: Lessons from Longitudinal Microdata*, Treasury Working Paper, July.
[3] The Australian Government the Treasury, 2017, *Analysis of wage growth*, Canberra, November.

Declining productivity growth since the GFC

Figure 1 **Rolling 10-year average labour productivity growth rate, hours vs employment basis**



Source: ABS.

The decline of enterprise bargaining

An important contributing factor in the lower real wage growth of the past decade has also been the simultaneous decline in the enterprise bargaining system. As of June 2022:[4]

- The number of workers employed under "unexpired" agreements had fallen by over 500,000 in the previous two years;
- The coverage of "unexpired" agreements was around one million workers below the peak coverage of 2.6 million in March 2014; and
- The number of "unexpired" agreements was 11,053, which is 43% of the peak figure of 25,149 in December 2010.

A decline in enterprise agreement coverage and a resultant increase in award coverage has direct consequences for wage outcomes. The average worker under an "unexpired" enterprise agreement earns around $100 more per day than the average workers whose wages are set by an award.[5]

If the coverage of enterprise agreements can be restored to its previous level this will have a tangible impact on wage growth. However, it must be borne in mind that the decline in agreement coverage represents a decline in single enterprise agreement coverage. It is not correct to assume that this gap could, or should, be filled by an expansion of multi-employer agreements. For reasons outlined in this submission, an expansion of multi-employer bargaining at the expense of a revival of single enterprise bargaining will lead to lower wage outcomes than the single enterprise system would deliver. There is a clear risk that the Bill as currently drafted does not maintain the primacy of single enterprise agreements (that will pay higher wages) and a risk that the single enterprise stream could be subsumed by an expanded multi-enterprise stream. This would be detrimental to the interests of both business and workers.

[4] Australian Government, Department of Employment and Workplace Relations "*Trends in Enterprise Bargaining*" Report, June Quarter 2022: https://www.dewr.gov.au/enterprise-agreements-data/resources/trends-federal-enterprise-bargaining-june-quarter-2022
[5] ABS, Employee Earnings and Hours, Australia, May 2021

The optimal approach to industrial relations reform

The BCA acknowledges the need to repair the current *Fair Work Act* framework to provide improved settings to drive stronger wage growth. In pursuit of this goal, the BCA has in recent years engaged with successive governments and the union movement to attempt to find agreed positions wherever possible to create "win-win" outcomes for business, workers and the broader economy. Based on this experience, the BCA believes the best form of IR amendments are those which:

1. Are workable solutions to clearly identified problems;
2. Include tangible benefits for businesses;
3. Include tangible benefits for workers; and
4. Make the system less complex and more user-friendly than before.

A further critical element in the success of IR reform is that it should be the product of a consultation process that is detailed and considered. Based on the BCA's recent experience, we believe that the best process for IR reform is one in which:

1. There is agreement on the nature of the problem that needs to be addressed;
2. All interested parties have an opportunity to provide input; and
3. Solutions are developed that take account of the legitimate views of all parties.

It is only when a process like this is followed that reforms will have broad acceptance and legitimacy. Such a process also leads to a better-quality outcome, as legislation that has been the subject of a consultation and evaluation will invariably be better drafted and not give rise to loopholes or unintended consequences.

Any proposed legislation should be assessed according to these criteria. Some of the changes in the Bill meet these criteria, whereas others do not. For example, the changes to the Better Off Overall Test and enterprise bargaining processes reflect a process of engagement between business, unions and governments over the past two years. The solutions in the Bill represent a balanced outcome that meets the above criteria.

Similarly, the elements of the Bill relating to sexual harassment build on the detailed work undertaken by the *Respect@Work* report of 2020 and the various consultation processes that have followed this report.

In each of these areas, the Senate can be confident that the measures in the Bill are the product of considered processes that are likely to lead to beneficial changes with broad acceptance.

Other measures in the Bill, most notably those relating to the expansion of multi-employer bargaining in Part 21, would have benefited from a similar process.

4. Measures in the Bill

Enterprise bargaining amendments

The BCA is supportive of the amendments in Parts 16 and 14 of the Bill, which deal with reform of the Better Off Overall Test and enterprise agreement approval. On their own, they would be a significant catalyst to revive bargaining and drive stronger wage growth. However, when combined with other elements of the Bill, they are likely to be rendered ineffective, as a result of the weakening of single enterprise bargaining due to the growth of multi-employer bargaining and arbitrated outcomes.

Better Off Overall Test

Applying the BOOT

Part 16 of the Bill will introduce new provisions in relation to "Applying the better off overall test". These will not change the BOOT itself but will improve the way it is applied:[6]

- A "global assessment" that takes into account terms that are "more beneficial" and those that are "less beneficial" than the relevant award terms
- The Fair Work Commission must "give consideration" to any views of the employer, employees and bargaining representatives on the BOOT
- The FWC must give "primary consideration" to any common view of the employer and a bargaining representative that is a registered union on the BOOT (this excludes "unregistered" unions)
- FWC may only have regard to *"patterns or kinds of work or types of employment"* that are *"reasonably foreseeable at the test time"*
- If a class of employees would be better off overall then the FWC is entitled to assume that any employee in that class is also better off, in the absence of any evidence to the contrary
- The requirement to consider "prospective employees" is also removed

Remediation where employees are not better off

Under the amendments, the FWC may address situations where employees are subsequently not better off, if employees subsequently engage in *"other patterns or kinds or work, or other types of employment"* which were not considered at the test time.[7]

The FWC can then vary the agreement or accept undertakings to address the defect. In doing so, it must apply the BOOT compared to the award as it was at the original test time.[8]

Recommendation: These amendments substantially address the very significant problems with the BOOT that have been identified by both business and unions as a major flaw in the bargaining system. They should be passed by the Senate.

[6] s.193A
[7] s.227(2)
[8] s.227B

Enterprise bargaining reforms

Simplifying the enterprise agreement approval process

Part 14 of the Bill will replace the existing "genuine agreement" requirements in section 188 with a "statement of principles" that is intended to be not as technical or prescriptive and will enable to the Fair Work Commission to exercise discretion as to whether processes were reasonable in the circumstances.

The "statement of principles" will be a legislative instrument issued by the FWC and set out in general terms the requirements that must be met, which will include:[9]

(a) informing employees of the commencement of bargaining
(b) informing employees of representation rights
(c) reasonable opportunity for employees to consider the agreement
(d) explaining the terms of the agreement
(e) "reasonable opportunity" for employees to vote "in a free and informed manner"

The FWC will be able to disregard *"minor procedural or technical errors"* relating to process requirements such as issuing the Notice of Employee Representation Rights and the timing of the employee voting period.[10]

"Permitted matters" in agreements

One change will be made in the Bill to the range of "permitted matters" that can be included in enterprise agreements. – "special measures to achieve equality" such employment targets will be permitted.[11] They will be permitted if:

> *"the term has the purpose of achieving substantive equality for employees or prospective employees who have a particular attribute or a particular kind of attribute..."*

Minor variations to enterprise agreements

Part 17 of the Bill will give the FWC expanded powers to vary agreements to correct or amend *"errors, defects or irregularities"* in agreements.[12] It currently has this power to deal with *"ambiguity or uncertainty."*

Recommendation: The changes to enterprise agreement approval processes are likely to be a major improvement on the current flawed system. They should be passed by the Senate.

Unions may initiate bargaining where a previous agreement applied

Part 15 of the Bill will introduce a further amendment to bargaining rules that will give unions a new right to unilaterally initiate bargaining (for single enterprise agreements) where a previous agreement expired within the last 5 years.[13]

It is unclear why this particular amendment has been included. There is no apparent policy reason why the usual processes for initiating bargaining should not also apply in this scenario. The BCA does not support this amendment.

[9] s.188B
[10] s.188(5)
[11] s172A
[12] s.218A
[13] s.173(2A)

Multi-employer bargaining

The most significant and the most concerning elements of the Bill are in Part 21, which will introduce a substantial expansion of multi-employer bargaining. This expansion will go well beyond any policy measures previously foreshadowed by the Government in this regard. A number of these measures will be highly damaging to business and will have the effect of suppressing wage growth. As such, they cannot be supported.

The Bill will provide for three distinct streams of multi-employer bargaining, as follows:

- "Single interest employer" agreements
- "Cooperative workplaces" agreements
- "Supported bargaining" agreements

Each of these streams are considered below.

The need to protect single-enterprise bargaining

The primacy of single enterprise bargaining is the centrepiece of the industrial relations framework established by the Fair Work Act. This is reflected in the objects of the Act, which include:

> *"Achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action"*[14]

and

> *"to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits"*[15]

The primacy of single enterprise bargaining is also noted in the Outcomes Statement of the Jobs and Skills Summit, which foreshadowed reforms to the Act that:

> *"allows businesses and workers who already successfully negotiate enterprise-level agreements to continue to do so"*

The Bill in its current form significantly compromises this principle. The single greatest flaw in the Bill is that it fails to provide a clear pathway for single-enterprise bargaining for those who wish to either commence or continue with single enterprise agreements. Instead, the system of single enterprise bargaining risks being progressively subsumed by the expansion of the "single interest" multi-employer stream. This will not only overturn the principles embodied in the objects of the Act but will also act to overturn many settled and successful industrial arrangements within thousands of businesses. These arrangements have been agreed by businesses and workers and in many cases adapted and refined over many "generations" of agreements in order to suit their needs. These arrangements have delivered higher productivity and higher wage growth than generic industry-wide arrangements such as awards. There can be no policy justification for putting at risk such arrangements simply for the sake of expanding multi-employer bargaining.

The BCA strongly opposes the expansion of multi-employer bargaining in this form. Ultimately, its impact will be the opposite of that claimed by its supporters. Rather than generating higher wages, it will have the effect of lowering wage outcomes to generic "low ball" levels, assuming agreement can even be reached. The sheer number of representatives involved in bargaining will diminish the prospect of agreements being reached.

Where agreement cannot be reached, as is highly likely, it will lead to more industrial action and the resultant damage to the Australian community. Finally, given that the process of bargaining will be so complex and contested, it will invariably lead to a dramatic increase in arbitrated outcomes, which can never hope to produce

[14] Objects of the Act, section 3(f) (emphasis added)
[15] Objects of Part 2-4 of the Act (Enterprise Agreements), section 171(a) (emphasis added)

the same productivity and wage benefits as would be achieved by genuine agreements at the single enterprise level.

The likely proliferation of arbitrated outcomes will serve to create a series of "pseudo-awards" across industries, which will exist as another layer on top of existing awards. This will effectively undo the impact of the award modernisation process. Unlike modern awards, it will not be possible for businesses, workers or unions to seek better outcomes through bargaining for a single enterprise agreement to replace the pseudo-award, as the Bill specifically prohibits this.[16]

The need to protect the concept of a "single enterprise"

It is important that there be no change to the ability of single enterprise agreements to apply to a particular component of a business. This Bill does not achieve this.

Many BCA members are large corporate groups with a number of separate and autonomous business units within them. These have operated successfully under separate agreements that are adapted to the specific needs of a distinct group company, or a geographic or operationally distinct part of the business. Many other corporations have very diverse individual businesses within their corporate structure. These are the result of geographic differences, different brands or marketplaces, or past acquisitions or expansions.

Where a business establishes a new project or undertaking, it is often done with new workplace arrangements to meet the distinct needs of the new business. It is essential that business has the ability to establish new entities, particularly as this is where innovation can occur, without having that structure undermined by it being forced into multi-employer bargaining, either with other components of the business or with unrelated businesses. Such an outcome would put serious limits on the ability of a business to establish new enterprises or initiatives. The result will be that competition will be limited, innovation held back and the result in the long term will be lower wage growth as businesses will be less productive.

One of the most significant flaws in Part 21 of the Bill is that it does not include any protection for existing single enterprise agreements within an individual business. It would enable them to be progressively subsumed into a single interest authorisation as soon as each agreement expires. If a multi-employer authorisation is expressed to cover certain classifications of workers who are employed by the employer, then they will be automatically roped once their existing agreement expires. Any subsequent six month "grace period" would not apply.[17] This would needlessly undo existing arrangements for hundreds of businesses and thousands of workers.

The problem in this regard arises from the references in the Bill to multi-employer authorisations applying by "employer". For large businesses, a single "employer" could be someone with tens of thousands of employees and dozens of existing (single enterprise) agreements. If the power for unions to instigate the roping in of employers is to remain in the Bill, it must be constrained to prevent entire employers being captured in this way.

Recommendation: The Bill should be amended to provide that a majority support determination cannot simply specify employees of "the employer" at large but must specify:

1. employees of the specified employer; and
2. employees employed within the scope or classification structure of the proposed authorisation; and
3. employed at a particular workplace, site or geographic location specified in the authorisation and/or who are covered by the scope of a particular enterprise

[16] s.249A(2)
[17] The six month period only applies to the making or varying of single authorisations. It provides no protection where workers are already in scope, eg.s.251(8) of the Bill as amended by Government amendments passed by the House of Representatives on 10 November 2022

agreement, which cannot include agreements that have not yet passed their nominal expiry date.

"Single interest" multi-employer stream

The most far-reaching and negative consequences of the Bill will flow from its expansion of the current "single interest" stream of multi-employer bargaining, which are contained in Part 21 of the Bill.

The "single interest" stream currently exists for a small cohort of agreements that cover multiple employing entities who are part of a single enterprise, such as franchisees or other forms of associated entities. Whilst the "single interest" stream was designed for these types of corporate structure, it will now be fundamentally re-purposed to enable it to expand to all types of businesses in almost all parts of the economy. It will do this as a result of the cumulative impact of the various amendments contained in Part 21 of the Bill, as follows:

1. The current "single interest" stream is entirely voluntary – businesses can "opt in" and cannot be compelled to bargain together. This will change, as unions will be given the power to have employers "roped in" against their will;
2. The existing test for a "single interest" will be substantially broadened, so that an inordinately wider range of businesses, who may have no commercial interests in common, can be forced to bargain together;
3. The current requirement that the businesses operate "collaboratively rather than competitively" will be removed, which will allow for direct competitors to be roped in together;
4. The ability to take Protected Industrial Action will be expended to the same extent as the concept of "single interest" will be expanded. Such action is currently limited only to a single enterprise and its associated entities, whereas under the Bill it could extend to entire industry sectors and supply chains.

Roping in to the "single interest" stream – non-voluntary and anti-democratic

The existing stream for "single interest" agreements will be greatly expanded. It is currently entirely voluntary and only employers can apply for a "single interest employer authorisation" to enable multi-employer bargaining. Each of these elements will change.

The current requirement for Ministerial approval for a single interest authorisation will be removed. The Fair Work Commission will instead issue authorisations. Either a business or a union may apply.[18]

If a union applies then they can nominate as many businesses as they like in the application, provided they are not currently covered by an "in term" agreement,[19] though such businesses could subsequently be added once their agreement expires.

It will also be possible for unions to obtain "single interest" authorisations for multiple entities within a corporate group, thus undoing existing arrangements that were based on separate single enterprise agreements. Only "small businesses" (fewer than 15 employees) will be exempt.[20]

For a business (or part of one) to be roped in, the FWC must be satisfied that a "majority" of employees of each employer wish to be covered by the authorisation.

Additional employers can also be added to multi-employer authorisations in this way. This can be done as soon as their existing agreement expires, or six months later if they have been bargaining for a new agreement.

Unions will also be able to have agreements varied to add employers to agreements in the same way once the agreement is in force. Contrary to all principles of enterprise agreement-making, this will not require the employer to agree to be covered by the agreement – they could be roped in against their will, even if the

[18] s.248(1)
[19] s.249(3)
[20] s.249(3A)(a)

agreement is completely unsuited to their operations.[21] The Explanatory Memorandum confirms that this will be an involuntary process for businesses:

> *"It is not intended that an employer can refuse to sign the variation because they did not consent to the FWC making the variation and thereby defeat the making of the variation."*[22]

The cumulative effect of these changes is to fundamentally change the system of enterprise bargaining. They will remove both the "enterprise" and the "bargaining" and replace them with a system of multi-employer compulsion.

The outcome – lower wage growth through lower efficiency

Rather than single enterprise agreements having primacy, the Bill would quickly create a situation in which multi-employer bargaining becomes the norm. The imposition of sector-wide conditions will increasingly act as a "ceiling" on wages. Businesses that would have been able to pay above the "ceiling" under a single enterprise agreement will no longer do so, since they will not be able to gain the efficiency improvements to that a single enterprise agreement would have achieved. Instead they will be dragged down to a "low ball" outcome with lower wage growth and lower efficiency to match their less efficient competitors. In other cases, the "ceiling" may be higher than a smaller or less efficient business can afford, which will inevitably lead to job losses.

Watered down "common interest" test

The current "common interest" test will be replaced with a new, broader test. The current elements in the "common interest test" will be removed. These elements include:

- the history of bargaining of the relevant employers;
- their interests in common and whether they should be permitted to bargain together;
- whether it would be more appropriate for the employers to make separate agreements; and most importantly:
- whether they operate "collaboratively rather than competitively".

In addition, under the current rules, it is the businesses that decide whether they should bargain together, rather than unions.

Under the new test, employers must have "clearly identifiable common interests".[23] This test is extremely vague Factors that "may" be relevant to a "common interest" are "geographic location" or "regulatory regime".[24]

In relation to separate businesses, the removal of the existing test is likely to lead to direct competitors and other parties with no real common interest to be forced to bargain together. Such broad-based bargaining has little prospect of reaching agreed outcomes that would generate productive outcomes or sustained wage growth.

Within single businesses, the impact will be to drag into a single authorisation and subsequent agreement those separate business units currently with their own single enterprise agreements. A single agreement covering a very large business may have little or no scope to take into account the often very different geographic, operational and competitive dynamics that apply to each separate workplace.

Whilst the impact will vary between industries, there is no evidence to support the assertion that this is a formula to achieve higher wage growth. In many cases the outcome may be to drag wage growth down to a lower level that would otherwise be achieved, as businesses will no longer have any incentive to pursue separate agreements with higher productivity that could produce higher wages.

The new "common interest" test could be so broad that the current train strike in Sydney could be extended to buses and ferries in future. These three services all share both a common "geographic location" and "regulatory

[21] s.216DC
[22] Page 174, Paragraph 985
[23] s.249(3)(b)
[24] s.249(3C)

regime", as they are all regulated by Transport for NSW. As another example, the entire university sector in all states could be roped in to the same "single interest" authorisation. The sector is governed by a common regulatory regime, so the only question is whether the "geographic location" would be limited to something less than the entire country.

A "public interest test" will also apply. However, this is expressed negatively – the FWC must be satisfied that it would *"not be contrary to the public interest"* to grant a multi-employer authorisation.[25] An employer would have to argue that it was against the public interest for it to be forced in. This is also contrary to the objects of the Act to prioritise single enterprise bargaining. To preserve the primacy of single enterprise bargaining, the Bill should be amended so that the onus is on the union to demonstrate it is in the public interest to rope in competing businesses.

Limited protection for employers who have had, or wish to have, single enterprise agreements

Businesses that have an "in term" agreement that has not expired cannot be subject to a multi-employer authorisation. Businesses with a single-enterprise agreement will be able to covered by a multi-employer authorisation once their agreement expires, Once a business is covered by a single interest authorisation, they *"must not bargain for any other agreement"*[26], even if they have a history of bargaining and have even commenced bargaining for a new agreement.

This process could be "gamed" by unions, who could drag out bargaining for a new agreement until after the nominal expiry date and the six month "grace period". They can then apply to have the employer covered by a single interest authorisation.

This risk will be amplified in situations where multiple agreements in an industry have common expiry dates.

This arrangement falls short of the previously stated intent of the Government. Specifically, the Outcomes Statement from the Summit stated that the bargaining system would *"allow businesses and workers who already successfully negotiate enterprise-level agreements to continue to do so"*.

The six month "grace period" is not a workable solution

Government amendments to the Bill passed by the House of Representatives on 10 November provide that the Fair Work Commission may be able to provide a "grace period" of up to 6 months after the expiry of an agreement in which the employer can conclude bargaining for a new agreement.[27] However, this solution is unlikely to be of benefit in practice.

The six month period is a "hard deadline" that cannot be extended. The FWC should have discretion to extend the period where bargaining is still taking place and there is a reasonable prospect of agreement being reached. The period should also be automatically extended once a new agreement is lodged for approval with the FWC, and "stop the clock" for as long as it takes for the FWC to consider the application.

Further, the way it is drafted may mean that the "grace period" may turn out to be inaccessible in practice due to its level of complexity. It can only be accessed if an employer applies to the FWC and the FWC is satisfied of certain criteria. Even then, the FWC may allow the grace period.[28]

Under the amendment, it is not sufficient for an employer to have had a single enterprise agreement in place. It must also show that it "effectively bargained" for the agreement. We note the comments in the Supplementary Explanatory Memorandum that confirm that this will add another level of complexity:[29]

[25] s.249(3(f)
[26] s.249A(2)
[27] s.216DC(3B)
[28] s.249(8)
[29] page 31, paragraph 189 (emphasis added)

> *For the purposes of paragraph 250(3)(b), an employer is likely to have a history of effectively bargaining in relation to one or more enterprise agreements if one or more of those resulting enterprise agreements provided for terms and conditions that were more than a marginal improvement on those contained in the relevant award (i.e. they must do more than simply pass the BOOT). The requirement would operate so that only enterprise agreements that provide genuine benefits to both the employer/s and their relevant employees would be relevant to the FWC's decision to exercise its discretion not to vary the agreement to add the employer and its relevant employees. This discretion would not need to be relied upon where the parties have agreed (in writing) to bargain for a single-enterprise agreement as these parties would be excluded under new section 249(1D)(b).*

In practice, this will require the FWC to apply an "Even Better Off Overall Test" to determine whether the existing agreement was sufficiently "effective". Any union that wished to rope in the employer to its multi-employer authorisation could argue to the FWC that the existing agreement failed this new test. This process will invariably create more disputes and uncertainty. Arguments over whether the former agreement meets the new "EBOOT" could well take up the entire six month period, by which time it will be too late for the employer to resist being roped in.

Businesses who are roped in to multi-employer bargaining cannot get out

Once a business is subject to a multi-employer authorisation it may be impossible for them to every escape this stream, even once a multi-employer agreement expires and even if they then wish to revert to a single interest agreement. The Bill specifies that, if an employer applies to be removed from an authorisation:[30]

> *"the FWC must … remove the employer's name if the FWC is satisfied that… (b) because of a change in the employer's circumstances it is no longer appropriate."*

The onus will be on the employer to prove a "change in circumstances". It would not be sufficient for the business and its workers to simply wish to bargain for a single enterprise agreement.

Even where both the business, its employees and a relevant union wish to exit the multi-employer stream voluntarily, they must still satisfy the FWC that there has been a "change in circumstance." The Bill provides no guidance as to what sort of "change" is sufficient. The views of the parties are clearly not sufficient to meet this requirement, which is fundamentally anti-democratic and a denial of the objects of the Act that prioritise cooperative agreements between parties and an emphasis on bargaining at the single enterprise level.

This provision alone will destroy any remaining notion under the Act that single enterprise agreements will continue to have primacy in the bargaining system.

Businesses can be added to multi-employer bargaining without their consent

One of the most novel elements of the Bill is that supported agreements will be able to be varied once they are on foot to add additional employers, without the consent of the employer.[31] A similar provision also applies to the "supported bargaining" stream.[32]

This change has the potential to fundamentally alter the nature of enterprise agreements, by enabling businesses to be covered by agreement without their actual agreement. The usual process of workplace democracy will not apply in this situation. Unlike other processes to approve or vary agreements, no vote of employees is required.[33] No case has been made for such a radical change, nor was such a change every foreshadowed at either the Summit or the processes since the Summit. It should be removed from the Bill.

[30] s.251(2)
[31] s.216DB
[32] Subdivision AB – *Variation of supported bargaining agreement to add employer and employees (without consent)*
[33] s.216DC(3)

Union veto over employee votes

As a result of Government amendments passed by the House of Representatives on 10 November, the Bill will now require the written approval of every union that is a bargaining representative for a multi-employer agreement before it can be put to employees for a vote to approve the agreement.

This amendment was not previously foreshadowed, and no case has been made for it. It will incentivise any union to frustrate the process, regardless of the views of employees. Some employers often need to bargain with several bargaining representatives for a particular agreement, including unions that represent only a tiny fraction of the total workforce. Any union, no matter how minor, could prevent the agreement being voted on for a sufficient period to trigger arbitration.

This amendment is guaranteed to add further delays to the multi-employer bargaining process and further delay any wage rises that may result from it. There is no such veto in relation to single enterprise agreements, nor should there be. It is not correct to assert that there is an equivalent "veto" power for employers, as agreements under the Act are made between employers and their employees and, as is the nature of an agreement, they must be agreed by each party.

This amendment will make a complex and unworkable system even more unworkable. There is a serious risk that no multi-employer agreement will ever be made under this system, as every union, no matter how small or how irresponsible, will have an incentive to prevent it being made if they have either an ulterior motive and/or believe they can secure a better outcome through arbitration. This element alone is sufficient to render Part 21 of the Bill inappropriate and sufficient reason for it to not be passed by the Senate if this provision is retained.

Recommendation: If Part 21 of the Bill cannot be amended to address its very serious problems then it should not be passed.

If it is to be passed it should be amended to:

1. Make it genuinely voluntary for businesses, by retaining the current rules whereby businesses initiate the bargaining process and decide whether or not to be involved
2. Protect workplaces that have a history of single enterprise bargaining from being roped in, by ensuring the right to pursue a single enterprise agreement continues to have primacy in the bargaining system
3. Preserve the ability for large businesses to have separate agreements for different parts of their business. This must be able to reflect existing arrangements that reflect business needs, for example separate agreements for different locations or separate agreements for retail and distribution parts of a business
4. Retain the existing "common interest" test, including that the businesses operate "collaboratively rather than competitively"
5. Strengthen the "public interest" test to include preserving the primacy of single enterprise bargaining and protecting workers and consumers from anti-competitive conduct. This must expressly prevent commercial competitors being forced to bargain together
6. Remove the union veto on employee votes to approve agreements
7. Require any variation of an agreement to add an additional employer to require both the agreement of the employer and a vote of relevant employees

8. Exclude sectors of the economy where multi-employer bargaining is neither appropriate nor necessary – Construction, and other critical sectors on which the Australian community depend, including Energy, Ports, Airlines, Retail, Banking and Mining
9. Enable businesses to get out of multi-employer bargaining if it is not working. They should not have to prove a "change in circumstances" as the Bill currently requires
10. Exclude any employer with less than 100 employees. Businesses of this size will not have sufficient resources to participate effectively in a complex bargaining process and risk having their interests overridden by much larger employers

"Cooperative workplaces" stream

Part 23 of the Bill will introduce a further "Co-operative workplace" stream of multi-employer bargaining. It is intended to target smaller businesses but will in theory be open to all.

Unlike the other streams, it will be voluntary for employers, who may opt in to bargaining and also opt in to an agreement once it is in place, subject to an employee vote. Businesses will be free to "jump in" and "jump out" of bargaining during the process if they wish.

Protected Industrial Action will not be available in this stream.

This stream is consistent with the spirit of the commitments made by the Government at the Summit, which included *"removing unnecessary limitations on access to single and multi-employer agreements."*[34] The stream will provide a clear path for businesses to engage in multi-employer bargaining when they genuinely believe it is in their interests. This is sufficient to achieve the objective of "removing unnecessary limitations". The availability of this stream is a further reason why the dramatic expansion of the "single interest" multi-employer stream under Part 21 of the Bill is utterly unnecessary.

Recommendation - Part 23 of the Bill ("Cooperative workplaces") should be passed by the Senate.

"Supported bargaining" stream

Part 20 of the Bill will reform the existing "low paid" stream of multi-employer bargaining, which will be re-named the "supported bargaining" stream. The amendments made to this stream are intended to be consistent with Government commitments at the Jobs and Skills Summit and elsewhere to amend this stream to address the needs of workers who were in lower-paid "feminised" industries or who had been "locked out" of bargaining. This is the appropriate stream to address these issues and is sufficient to do so. This is in contrast to the amendments to the "single interest" stream, which were not previously foreshadowed by the Government and for which no case has been made.

However, the drafting of the Bill has created several serious issues which will need to be addressed.

Whilst the stream will continue to be limited to "low paid" sectors, the definition of "low paid" will be modified to give consideration to "prevailing wage levels" in an industry. This is likely to broaden its reach in a manner that will be both uncertain and potentially damaging. The concept of "prevailing wage levels" will reach much further than those who are genuinely "low paid" and could potentially cover any employees who are paid less than the

[34] Jobs and Skills Summit "Outcomes Statement", 2 September 2022, page 7

"prevailing" average in an industry. Within the mining industry, for example, employees currently earn on average around $144,000 per year.

The potential for higher-paid workers to be captured by this stream is more problematic, given majority support is not required and Protected Industrial Action can also be taken. Whilst the BCA supports the goals of this stream in assisting "low paid" workers, the Bill as drafted goes much further. It is not consistent with either the outcomes of the Jobs and Skills Summit, or the commitment by the Government, that the stream be targeted at low paid workers who had been "locked out" of bargaining. The Bill also contains other measures that are unnecessary and potentially damaging.

Existing single enterprise agreements can be overridden

Part 20 includes two elements that are unnecessary and compromise the principal that single enterprise agreements should be given precedence in the bargaining system.

First, it will provide that an existing single-enterprise agreement will be displaced if a new supported bargaining agreement comes into effect.[35]

Second, businesses with a single enterprise agreement in place will also be able to be covered by a multi-employer authorisation if the agreement was entered into in order to avoid multi-employer bargaining. If so, their existing agreement would be invalidated as a result. The test under the Bill is whether the employer's *"main intention in making the agreement was to avoid being specified in a supported bargaining authorisation."*[36] It appears that the existing agreement would cease to apply as soon as the multi-employer agreement takes effect.

This provision is likely to be highly uncertain and contested in practice. The notion that an agreement that has been approved by the FWC as passing the BOOT can then subsequently be over-ridden due to the alleged motives of the employer in entering into it is highly novel. The proposed test is highly subjective and requires a retrospective challenge to the employer's state-of-mind. Once an agreement has met the requirements of the Act for approval, employers should be able to rely on the provisions of the Act that give them the legal and commercial certainty that the agreement will remain in force. There can be no policy reason to allow for one category of agreements to be retrospectively invalidated, let alone on the basis of such a subjective test.

A "low paid" agreement could capture higher paid workers

As drafted, it is unclear whether the Bill would enable employers to be roped in where they currently have enterprise agreements with wide-ranging pay scales that cover both "low paid" and higher paid workers. Will all of those employees be caught up in a new "supported bargaining" agreement, or will the higher paid employees be excluded from its scope?

Recommendation: Part 20 of the Bill ("Supported bargaining") should not be passed by the Senate unless the following amendments are made:

1. Remove the ability for a single enterprise agreement to be retrospectively invalidated.
2. The definition of "low paid" should have greater clarity and target those who are genuinely "low paid", rather than those who are paid below average in their industry.
3. Confirm that higher paid employees of a business cannot also be captured by a "supported bargaining" authorisation for its "low paid" workers

[35] s.58(3)
[36] s.243A(3)

4. Prevent new employers being added to existing agreements without a democratic process
5. Protect single enterprise bargaining, in the same manner as the "single interest" stream should be amended

Industrial action, "intractable bargaining" and arbitration

Protected Industrial Action

Part 19 of the Bill will amend rules relating to the taking of Protected Industrial Action (PIA). When combined with other aspects of the Bill, most notably Part 21 expanding "single interest" multi-employer bargaining, the Bill will lead to a significant expansion of the circumstances in which PIA can be taken. This will invariably lead to more industrial action and strikes across the Australian community.

The Bill makes several changes to procedural rules around PIA. Notice requirements of PIA will be 3 working days for single enterprise agreements and 120 hours for multi-employer agreements.[37] A new requirement will be introduced for a compulsory conciliation conference if the FWC issues a Protected Action Ballot Order (PABO).[38] The PABO cannot be acted upon until the parties have attended this conference.

The rationale for these changes is unclear. The FWC currently has discretion to require a longer notice period for PIA in certain industries where it is appropriate, such as essential services. This discretion should not be removed through the imposition of uniform notice periods.

For multi-employer agreements, a majority of the employees must vote to approve the industrial action. Government amendments to the Bill now require that a majority of employees in each employer must vote in favour for PIA to be taken in relation to that employer. However, this is not sufficient to ameliorate concerns.

Most concerning is the ability for PIA to expand across industries to an almost unlimited extent in support of "single interest" multi-employer bargaining. There is potentially no limit to the number of businesses that could be covered by such industrial action, as it can be as broad as the scope of "single interest authorisation", which as currently drafted, has no outer limits. This is not a theoretical concern. Multiple unions have already indicated their desire to use this new stream to rope businesses across entire sectors into multi-employer bargaining and then inflict industrial action on them. The secretary of the United Workers Union has stated that:

> *"the legal capacity to take industrial action should be simple and straightforward and not have a whole lot of red tape"*

The acting secretary of the ETU has also stated that:

> *"there's an artificial distinction to draw between a major employer with hundreds of thousands of workers, those workers have access to industrial action, but a few hundred or a few thousand under a sectoral approach are denied it."*

"Intractable bargaining"

Part 18 of the Bill will introduce the concept of an "intractable bargaining determination". The FWC may make an "intractable bargaining workplace determination" if agreement cannot be reached.[39]

Unions may apply for an "intractable bargaining declaration" for single enterprise agreements and supported bargaining agreements. If the FWC issues such a declaration, then this will be the trigger for arbitration.[40] "Intractable" is not defined in the Bill.

The FWC may make a declaration if:[41]

- It has previously exercised its powers to deal with a bargaining dispute;[42] and

[37] s.414(2)(a)
[38] s.448A
[39] s.269
[40] s.234
[41] s.235(2)
[42] s.240

- There is *"no reasonable prospect of agreement being reached"* if the declaration is not made; and
- It is *"reasonable in all the circumstances to make the declaration, taking into account the views of the bargaining representatives for the agreement."*

If a declaration is made it may be followed by a "post-declaration negotiating period" in which the parties have a "last chance" to reach agreement. The time for this period will be up to the FWC's discretion.[43]

If the Bill is passed in its current form, then these provisions are likely to be used extensively. This will in turn lead to more arbitrated outcomes, where the FWC will be required to resort to the new powers also provided for in the Bill.

Arbitrated outcomes in this situation will not result in benefits for business or workers. They will be inferior to the outcomes that could be gained from single enterprise agreements that are freely agreed. To the extent that they exceed the relevant awards, they will not be able to do so to the extent that genuine enterprise bargaining could.

New rules for arbitration

Where an intractable bargaining determination is issued and agreement still cannot be reached, the FWC may arbitrate and make an *"intractable bargaining workplace determination"* and this must be done *"as quickly as possible."*[44] Such declarations will be subject to the same rules as currently apply to workplace determinations.[45]

This will lower the threshold for arbitration and make it more likely that one party could "game" the system by holding out and refusing to reach agreement in order to access arbitration.

This will fundamentally alter the nature of the bargaining system from one that is agreement-based to one that will be arbitration-based. The result a historic regression from the principles of enterprise bargaining. These principles were first espoused in the Keating Government's 1993 legislation to properly establish enterprise bargaining, which it described as:

> *"the culmination of the Government's break with the past – our move as a nation from a centralised to a decentralised industrial relations system, to a system based on bargaining at the workplace with much less reliance on arbitration at the workplace"* [46]

It is no exaggeration to say that the Bill in its current form will take Australia backwards from this 30-year goal of a decentralised agreement-based system to one that is centralised and arbitrated. Nor is it an exaggeration to say that the cumulative effect of Parts 18, 19 and 21 of the Bill will be remove both the "enterprise" and the "bargaining" from the system of enterprise bargaining.

Recommendation: The expansion of arbitration and Protected Industrial Action in Parts 18 and 19 of the Bill are likely to substantially increase the level of industrial action and strikes and will also change the fundamental nature of the enterprise bargaining system to one that is agreement-based to one that is increasingly based on arbitrated outcomes. These measures should not be passed by the Senate without significant amendments.

Such amendments should:

1. Preserve the existing test for arbitration.
2. Allow for voluntary arbitration with the consent of the parties

[43] s.235A
[44] s.269
[45] s.272
[46] Laurie Brereton, Minister for Industrial Relations, Second Reading Speech, *Industrial Relations Reform Bill 1993*

3. Limit arbitration only to matters in dispute, rather than an entire agreement.

Objects of the Act

A new object will be included in section 3: *"promote job security and gender equality"*.

The "Modern Awards Objective" will be amended to add the following objectives:[47]

- *"need to improve access to secure work across the economy"*
- *"need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based under-valuing of work and providing workplace conditions that facilities women's' full economic participation."*

A similar object will also be added to the "Minimum Wages Objective".[48]

Whilst "gender equality" is a relatively clear concept, "job security" will be uncertain and contested, as "secure work" is both a subjective concept and value judgement. Nor is it defined in the Bill.

As noted in the Explanatory Memorandum of the Bill, *"The FWC must take into account the object of the FW Act when performing functions or exercising its powers under the FW Act."*[49]This could include, for example by increasing casual loadings above their current level, or varying awards to reduce or discourage the usage of casuals.

This is not a hypothetical concern. It is likely to become a reality and appears designed to do so. We note that the Second Reading Speech for the Bill included the following comments:

> *"Job insecurity now has many faces. ..... We see it where casual loading has not been a sufficient incentive to promote secure jobs."*

This could also have implications for the Better Off Overall Test, for example if an agreement does not reduce the scope for casual employment relative to the award then unions may argue that workers are not "better off".

The Explanatory Memorandum states that the "job security" as an object of the Act "*would place these considerations at the heart of the FWC's decision making…"*[50] It further states that:

> *"The FWC is also required under existing paragraph 578(a) of the FW Act to take into account the objects of the FW Act when performing functions or exercising powers under the FW Act. This includes, for example, the FWC performing functions or exercising powers in relation to dispute resolution, including arbitration, setting terms and conditions in modern awards and approving enterprise agreements."* [51]

This amendment is clearly likely to result in very far-reaching changes to the system of casual employment currently provided for in awards and agreements. A change of this magnitude should not be made without a sufficient process of evaluation beforehand.

Recommendation: The amendments in the Bill to include gender equity as an object of the Act should be passed by the Senate.

Recommendation: The proposed amendments relating to "job security" will result in a range of very significant consequences that have not been adequately considered.

[47] s.134(1)
[48] s.284(1)
[49] paragraph 6
[50] paragraph 333
[51] paragraph 334

Agreement terminations and "zombie" agreements

New rules for termination of agreements

Part 12 of the Bill will completely revise the test for the termination of expired agreements by the Fair Work Commission. The new test will be as follows:[52]

(a) Continued operation of the agreement would be unfair to employees; or

(b) The agreement no longer covers any employees; or

(c) All of the following:

(i) Continued operation of the agreement would be a significant threat to the viability of the business; and

(ii) Termination would reduce the likelihood of job losses; and

(iii) The employer guarantees to pay all entitlements due to employees who are made redundant.

Where a termination application is made during bargaining for a new agreement, the FWC must have regard *to "whether the termination of the existing agreement would adversely affect the bargaining position of the employees."*[53] This will effectively preclude terminations in such circumstances in future.

If an application to terminate an agreement is made "unilaterally" by an employer or union then it must be considered by a Full Bench of the Commission.[54]

These amendments are an over-reaction to an alleged "problem" that is based on a false premise. There is no right for employers to "unilaterally terminate" agreements. Where employers "unilaterally" apply to terminate agreements, they are typically concerned with outdated legacy conditions and not wage levels, as was the case in the *Aurizon* termination proceeding. This often follows "intractable" bargaining where agreement has not been reached on such legacy terms.

An alternative approach is to amend the current criteria that the Commission must take into account, for example to mandate that businesses must provide undertakings to not reduce employees' remuneration, as is already commonplace.

Sunsetting of pre-*Fair Work Act* "zombie" agreements

Part 13 of the Bill will introduce a mandatory "drop dead date" will apply for all "zombie agreements" made prior to the commencement of the *Fair Work Act*. This date will be 12 months after commencement of the Bill. Employers must notify employees of the drop-dead date within six months of commencement.

The FWC will be able to extend the operation of such agreements by up to 4 years in certain circumstances.

There is no justification for the indefinite operation of "zombie" agreements, which is currently provided for under the Act. When a similar "sunset" provision was considered by the Parliament in 2021 it was supported by the BCA.[55] For the same reasons as outlined at that time, the BCA now also supports these amendments.

Recommendation: The amendments in Part 12 dealing with termination of agreements are excessive and should not be passed by the Senate in their current form.

The amendments in Part 13 to sunset "zombie" agreements should be passed.

[52] s.226(1)
[53] s.226(4)
[54] s.615A(3)
[55] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020,

Institutional arrangements

Abolition of the Australian Building and Construction Commission

Part 3 of the Bill will abolish the office of the ABCC and its staff automatically terminated by the Bill. The Fair Work Ombudsman will be liable to pay the remaining wages and redundancy costs of the terminated employees.

Any ABCC investigations or legal proceedings currently on foot will be taken over by the Fair Work Ombudsman (FWO). It may continue them if it wishes to do so.

The Fair Work Ombudsman will ostensibly fill the gap created by the abolition of the ABCC. However, the Bill does not give the FWO the same evidence-gathering powers of the ABCC and the higher maximum penalties under the ABCC legislation will also be abolished. The Budget allocated additional funding the FWO for this purpose, though this amount will be less than half of the ABCC's budget.[56]

These amendments are not supported by the BCA.

The continuing need for the ABCC

This is not the first time that legislation has been put before the Parliament to abolish the ABCC. However, when the first iteration of the ABCC was abolished, the then Gillard Government took a different approach. The ABCC was replaced with a new industry-specific regulator, "Fair Work Building and Construction", albeit with reduced powers and penalties. This was consistent with the Government's 2007 election policy, which acknowledged that the unique industrial relations environment in the building and construction industry required the presence of a specialist regulator. When the legislation to replace the ABCC was first introduced in 2009, the then Minister, The Hon. Julia Gillard made the following remarks:

> *"We said that we would always keep a strong cop on the beat for the building and construction industry…In introducing these laws I made it clear in my second reading speech and I make it clear today that the Rudd government has no tolerance for the pockets of the industry where people think they are above the law, where employers flout their obligations to staff, where people think that threats and violence somehow have a place in our society. They do not. Anybody who breaches the law should feel the full force of the law."*
>
> *"…Of course, this is also an industry where there are parts of it with significant industrial troubles and disruption. I have publicly talked about those. For those parts, there should be absolutely vigorous, hard-edged compliance and no tolerance at all for unlawfulness"*
>
> *"…Each and every breach of the law is wrong and each and every breach of the law should be acted upon."*[57]

These sentiments are not reflected in the Bill to abolish the second iteration of the ABCC.

Whilst it has been suggested that the FWO could take on the former role of the ABCC and the Bill transfers to the FWO what will remain of its functions, this is not a credible alternative given the way in which the FWO is currently constituted:

- It does not have the requisite industry-specific expertise and the Bill makes no provision for this;
- It does not have the same evidence-gathering powers as the ABCC, i.e. the ability to require the compulsory production of evidence, which was recognised by the 2008 "Willcox Review" of the industry as being necessary to deal with the culture of intimidation of witnesses in the industry;
- It will have insufficient funding to take on the duties of the ABCC; and

[56] Budget Paper 2, page 27
[57] House of Representatives Hansard, 13 August 2009

- The maximum penalties available to it that are generally only one-third of those available to the ABCC.

Amendments to properly equip the Fair Work Ombudsman

If the role of the ABCC is to be given to the FWO, then there are several amendments that will need to be made to the Bill to enable it to be effective:

1. Strengthened evidence gathering powers to compel the production of evidence in respect to breaches of workplace laws by unions. Currently, the FWO only has these powers for alleged breaches by employers and not unions or individuals, unlike the ABCC. These powers should be provided to the FWO through amendments to the *Fair Work Act* if it is to replace the ABCC.
2. Additional funding that is equivalent to that being stripped from the ABCC. It is unrealistic to expect the FWO to take on the very significant additional compliance functions for the building and construction industry within its existing resources.
3. Significantly increased sanctions from those currently at its disposal. At present, the ABCC legislation provides for maximum penalties that are three times the level of the maximum penalties for equivalent breaches under the *Fair Work Act*.

Increasing the penalties under the *Fair Work Act* would also be consistent with the recent unanimous decision of the High Court that stated maximum penalties should be imposed on the CFMMEU given its record of law breaking and recidivism. It would also be consistent with the new Government's policy to increase maximum penalties for breaches of workplace laws by employers, including new criminal sanctions for serious "wage theft" (which the BCA supports).

The unique context of the building and construction industry

Both the Government and the Bill itself acknowledge that the building and construction industry has grave cultural problems that require industry-specific solutions. At the heart of these problems is the systemic culture of law-breaking and recidivism of the main union in the industry, the construction division of the CFMMEU.

Courts have found that the CFMMEU has repeatedly and deliberately breached industrial legislation, undertaking disruptive, threatening, and abusive behaviour towards employers and employees. This repeated and consistent unlawful behaviour should be unacceptable in any modern workplace. A recent 7-0 decision of the High Court described the CFMMEU as a *"serial offender"* in that it had historically acted in disregard of the law and appeared to treat the imposition of pecuniary penalties in respect of those contraventions as *"little more than the cost of its preferred business model"* and noted the *"demonstrated unwillingness of the CFMMEU to obey the law."*[58]

In another recent court finding against the CFMMEU, on 29 July, Justice Vasta of the Federal Court made the following comments (amongst others):

> *"The antecedents of the [CFMMEU] are notorious. I have previously described them as the "greatest recidivist offenders in Australian corporate history" and many other judges have also noted their infamous past.*
>
> *"There is no other "appropriate" penalty that will achieve the deterrent effect necessary other than the imposition of the maximum penalty."*
>
> *"I acknowledge that this penalty will still be insufficient to deter the [CFMMEU] who will, as I remarked during the hearing, regard such a sum as "chump change". But this is the only tool that the Parliament has given to the Court to deter such contraventions. It is a matter for the Parliament as to whether they wish to give the Court sufficient power to actually deter such contraventions of the FW Act or whether they are content with the status quo."*

[58] *ABCC v Pattinson and Anor* [2022] HCA 13, 14 April 2022

In the past financial year alone (2021-22), some $2.7 million in penalties against the CFMMEU were issued by the courts and over $16 million in penalties have been imposed against the CFMMEU since the ABCC's reinstatement in 2016.

The facts do not support the proposition that this is simply about "minor infractions" occurring. The union has faced significant fines imposed by courts, plainly demonstrating this is not the case. The High Court also found that the maximum penalties should be imposed against the CFMMEU for its contraventions due to its "*notorious*" history of non-compliance with workplace laws.

Nor do the facts support any assertions that the ABCC is "ineffective", "discredited" or "politicised". In the 2021-22 financial year through to 22 June 2022, the ABCC reported that it:

- Finalised 22 court proceedings, with a total of $3.1m in penalties imposed.
- A further 39 matters are currently before the courts (36 union breaches, and 3 employer breaches).
- The vast majority of penalties awarded were against the CFMMEU ($2.7m).
- Recovered $2.4m in wages for over 4,000 employees.
- Undertook 1,499 site visits.

Recommendation: Part 3 of the Bill to abolish the ABCC should not be passed by the Senate. Alternatively, the Bill should be amended to ensure that the Fair Work Ombudsman has sufficient resources to fill the role of the ABCC including financial resourcing, evidence-gathering powers and the same maximum penalties.

Transfer of Registered Organisations Commission functions to the Fair Work Commission

Part 1 of the Bill will abolish the Registered Organisations Commission (ROC) and transfer its functions The to the General Manager of the Fair Work Commission. The basic powers of the ROC will not change but will instead be exercised by the General Manager.

Unlike the ABCC, the staff of the ROC are not terminated by the Bill and they could transfer to the FWC. The Budget papers indicated that the existing funding of the ROC will be retained and transferred to the FWC.[59]

The case for this amendment has not been made and the motives for it are not persuasive. Like the ABCC, it is demonstrably incorrect to assert that the ROC is "ineffective", "discredited" or "politicised". On the one occasion where such claims were made and tested before a court they were comprehensively dismissed.[60] On this occasion, His Honour Justice Bromberg of the Federal Court ruled that claims of inappropriate conduct by the ROC were, amongst other things, *"assertion"*; *"highly speculative"*; *"misconceived"*; *"difficult to follow"*; *"expressly denied"*; and *"unsupported by the evidence"*. Most notably, His Honour concluded that:

> *"... the AWU has not presented any evidence or even suggested a case concept or narrative that provides a motive for the knowing and deliberate conduct that it ascribes"* (to the ROC).

The BCA is concerned that the previous track record of the FWC in regulating registered organisations was poor. Its failure to adequately fulfil its role led to a number of high-profile examples of poor governance and misappropriation of funds from a number of unions. The people who paid the price for these failings were, of course, the members of those unions, whose trust was betrayed by law-breaking leaders and whose resources were misused for inappropriate purposes.

[59] Budget Paper 2, page 27
[60] *Australian Workers' Union v Registered Organisation Commission (No. 9)* [2019] FCA 1671

Recommendation: Part 1 of the Bill to transfer the powers of the ROC to the Fair Work Commission should not be passed by the Senate. No case has been made for such an amendment and previous experience indicates that the FWC is unlikely to perform the role as well as the ROC.

New Fair Work Commission expert panels

Part 6 of the Bill will establish two new Fair Work Commission "expert panels" for "Pay Equity" and the "Care and Community Sector." The Pay Equity panel will consider such matters as Equal Remuneration Orders. "Care and Community Sector" sector is not defined in the Bill.

It appears that the Government anticipates that these panels will have a sizable caseload, as the Budget allocated an additional $20.2 million to the FWC to fund the work of the panels.[61]

The BCA has no position on these amendments, which are likely to be uncontentious.

[61] Budget Paper 1, page 14

Gender Equity measures

Sexual harassment

Part 8 of the Bill introduces a range of amendments relating to the prevention of sexual harassment and new remedies and sanctions for such conduct. The BCA supports the intent of these measures, subject to the proposed amendment outlined below.

Amongst other measures, employers will be liable for sexual harassment in their workplace for conduct by sub-contractors contractors or non-employee workers.[62] Businesses will also be vicariously liable for conduct by their employees or agents unless they can prove they took all reasonable steps to prevent the relevant acts.[63]

The Fair Work Commission will also have new powers to deal with "sexual harassment disputes", including powers to:

- issue "stop sexual harassment orders";
- arbitrate disputes if it considers that *"all reasonable attempts to resolve the dispute are likely to be unsuccessful";* and
- order compensation.

The Bill also provides that "principals" who are not the employer can also be joined to such disputes.

Whilst the BCA supports the amendments, the expansion of potential liability on businesses, including liability for conduct that is not engaged in by either the business or its staff, means that further protections should be increased to enable businesses to fulfil their obligations. Specifically, the Bill should be amended to also give employers standing to apply for remedies to deal with sexual harassment, rather than just workers or unions, as is currently the case under the Bill. Given that businesses will become vicariously liable for the contact of their own employees and sub-contractors, they should have the ability to step in to stop inappropriate behaviour where an employee is unwilling or unable to do so themselves.

Anti-discrimination

Part 9 of the Bill will expand the range of "protected attributes" in the anti-discrimination provisions of the Act (set out in the "General Protections") to include three new attributes – breastfeeding, gender identify and intersex status.[64]

The Bill adopts the definitions of "gender identity" and "intersex status" contained in the *Sex Discrimination Act*. These are appropriate measures that keep the Act up to date with other legislation.

Equal Remuneration Orders

Part 5 of the Bill will amend the Act to reform the process for the Fair Work Commission to consider applications for Equal Remuneration Orders (EROs) in relation to award wages. Most notably, they will remove the current "male comparator" test which requires an assessment of whether work in "female-dominated" industries is of equivalent value to work in other industries. These amendments are intended to address concerns that the effectiveness of the existing ERO provisions has been reduced because of the complexity of the comparator test.

The BCA supports measures to address wage disparities in "female dominated" industries through appropriate variations to awards. These are likely to be much more effective than any multi-employer bargaining arrangements in raising wages in these sectors. In this regard, we note the recent decision by the Fair Work

[62] s.527D
[63] s.527E
[64] S.153(1)

Commission on 5 November 2022 to increase award wages in the Aged Care sector by 15 per cent, which is supported by the BCA.[65]

"Pay secrecy" terms

Part 7 of the Bill will prohibit "pay secrecy" terms in contracts of employment and industrial instruments that prevent employees from disclosing their remuneration.

A new workplace right will be added to the "General Protections" for employees to choose to either disclose or not disclose their remuneration.66 There will also be prohibitions on coercing employees to exercise or not exercise this right.

The new right will operate prospectively and not invalidate any existing arrangements.

Recommendation: Parts 5, 7, 8 and 9 of the Bill dealing with Equal Remuneration Orders, " "pay secrecy", sexual harassment and anti-discrimination should be passed by the Senate.

Part 8 should be amended to also give businesses the same standing as employees and unions to apply for "stop sexual harassment" orders and other remedies.

[65] https://www.bca.com.au/a_welcome_win_for_aged_care_workers
[66] s.333B

Flexible Working Arrangements

Part 11 of the Bill will greatly expand the existing right to request flexible working arrangements in the National Employment Standards will be expanded give the FWC the power to determine such requests. The right in the NES currently includes no scope for review of a refusal.

Under the amendments, employees will have the right to take disputes to the Fair Work Commission. The FWC will then have the power to arbitrate and overturn the employer's refusal. Arbitration is not by consent and can occur at the request of the employee only.[67] Whilst the FWC will have the option of conciliating a application before it arbitrates, the Bill should be amended to make this mandatory.

Impact on smaller businesses

The BCA supports the intent these changes, although it will be difficult for smaller businesses. Our preference would have been for the FWC to be able to review of the process for people requesting those working arrangements, rather than a review of the decision. This approach would have attracted broader business support.

We are concerned, particularly for small business, that this will become another costly issue. A small business will not always have the capacity to provide the flexibility a worker requests because they simply don't have the other staff to accommodate the request. In this regard, the Bill would be enhanced if it was amended to require the FWC to conciliate a dispute before it can exercise its proposed arbitration powers under proposed section 65C.

Other options to achieve flexibility are also desirable

We further note that whilst many larger businesses may be comfortable with the FWC being given the power to determine flexible work requests, more should be done within the system, particularly the bargaining system, to encourage flexibility.

Currently, enterprise agreements must contain a flexibility term that allows the employer and employee to make an Individual Flexibility Arrangement (IFA). The experience of most large businesses has been that unions have strongly opposed any expansion of the use of IFAs because they do not want employees having different arrangements, regardless of their need or desire for workplace flexibility.

When BCA members have sought to insert some of the additional elements of the model flexibility term into their enterprise agreements, the relevant unions have typically refused to agree. If the Government or the Parliament wishes to encourage greater workplace flexibility then they should either require the model flexibility term as a minimum in all enterprise agreements or make it part of the NES, so that there is a base level of acceptance around the need for all types of workplace flexibility.

Recommendation: Part 11 of the Bill should be amended to provide that the FWC cannot arbitrate a refusal to grant a request for flexible work unless it has first attempted to settle the matter by conciliation.

[67] s.65B

Fixed term contracts

Part 10 of the Bill will prohibit fixed term contracts of employment of more than two years, as well as consecutive contracts with a combined duration of more than two years[68], subject to various exemptions. Amongst other things, the exemptions will cover the following:[69]

- The employee is engaged for a "distinct and identifiable task involving specialised skills"
- engaged under a training arrangement
- "engaged to undertake essential work during a peak demand period"
- "engaged to undertake work during emergency circumstances or temporary absence of another employee"
- The contract relates to work that is government-funded and there are "no reasonable prospects" that the funding will continue beyond a fixed period.
- The employee is above the "high income threshold" in the Act (currently $162,000)

Employers must also provide all employees who are employed on a fixed term contract with a new "Fixed Term Contract Information Statement" upon commencement of their employment, even if they are covered by one of the exemptions.[70]

This proposal is a major concern, as it impacts the ability of a business to arrange its operations to meet its particular needs via the use of appropriate contracts. This is even more important in a changing technological economy, where it is can very difficult to predict future needs and adaptability is required.

Structuring these amendments on an "exemptions" model will be extremely challenging. It will not be possible to cover the full range of circumstances that should be covered, nor to have the ability to respond quickly as business needs change. The fact that the Bill already contains nine different exemptions and also enables further exemptions to be made by Ministerial regulation[71] is an acknowledgement that the current range of exemptions will not be sufficient.

There is a wide range of legitimate commercial and practical reasons why fixed term contracts are appropriate and they should not be dismissed as a failure of the system. New industries could grind to a halt if every time they are constantly having to get the Minister to approve a regulation to exempt their arrangements because no one had thought of their particular employment scenario.

Employers who employ workers who are temporary residents in Australia may also be subject to restrictions that require them to use fixed term contracts. For example, a temporary skills shortage visa sub class 482 can run for up to four years. The Bill should be amended to provide a further exemption so that the visa conditions/status can be accommodated.

A legislative amendment cannot hope to cover all scenarios that should be covered. For example, what if an employee works under two 12-month contracts doing quite different work? What rate of pay will apply on conversion? Usually there is a pay premium attached to a fixed term contract and that may not then be retained if they become a permanent employee, thus leaving the employee worse off.

A further concern is that the Bill includes an exemption for work relating to fixed term government funding but includes no such exemption for fixed term funding under commercial contracts. At the very least, the Bill should be amended to provide an equivalent exemption.

[68] s.333E
[69] s.333F
[70] s.333K
[71] S.333F(1)(i)

Whilst the intent of this amendment is to promote job security, it may actually encourage the reverse, with employers not employing people beyond two years on a fixed term contract given the risks and costs that then come with having to take that person on, on a permanent basis, or pay a redundancy if the role is no longer required. Employers who provide above the NES entitlements for redundancy may also be forced to re-examine what is provided, given the potential costs associated with this amendment.

Finally, it is not clear what the nature of the problem is that is sought to be addressed. If the problem is focussed on particular sectors, then an alternative approach is to tailor a solution for those sectors.

A further alternative approach is to not include a prohibition (with exemptions) in the Act but introduce a new workplace right for employees to not agree to such terms (subject to reasonable exemptions).

Recommendation: The case for these amendments is vague and unconvincing. In practice, they are likely to create needless complexity and limit legitimate forms of engagement. They should not be passed by the Senate.

If Part 10 of the Bill is to be passed, it should be amended to:

1. include an exemption for fixed term contracts relating to funding under fixed term commercial contracts, as is provided for in relation to government funding;
2. ensure that the exemptions are sufficient to protected fixed term contracts to accommodate the genuine commercial needs of an employer
3. allow for fixed term contracts in accordance with fixed term visas.

Compliance and enforcement

Small claims processes

Part 24 of the Bill will amend the threshold for "small claims" in courts will rise from $20,000 to $100,000.

Job advertisements

Part 25 of the Bill will prohibit employers from advertising jobs with wage rates that are less than the Federal Minimum Wage or the applicable rate in an industrial instrument.

Employers will not contravene this provision if they have a "reasonable excuse".

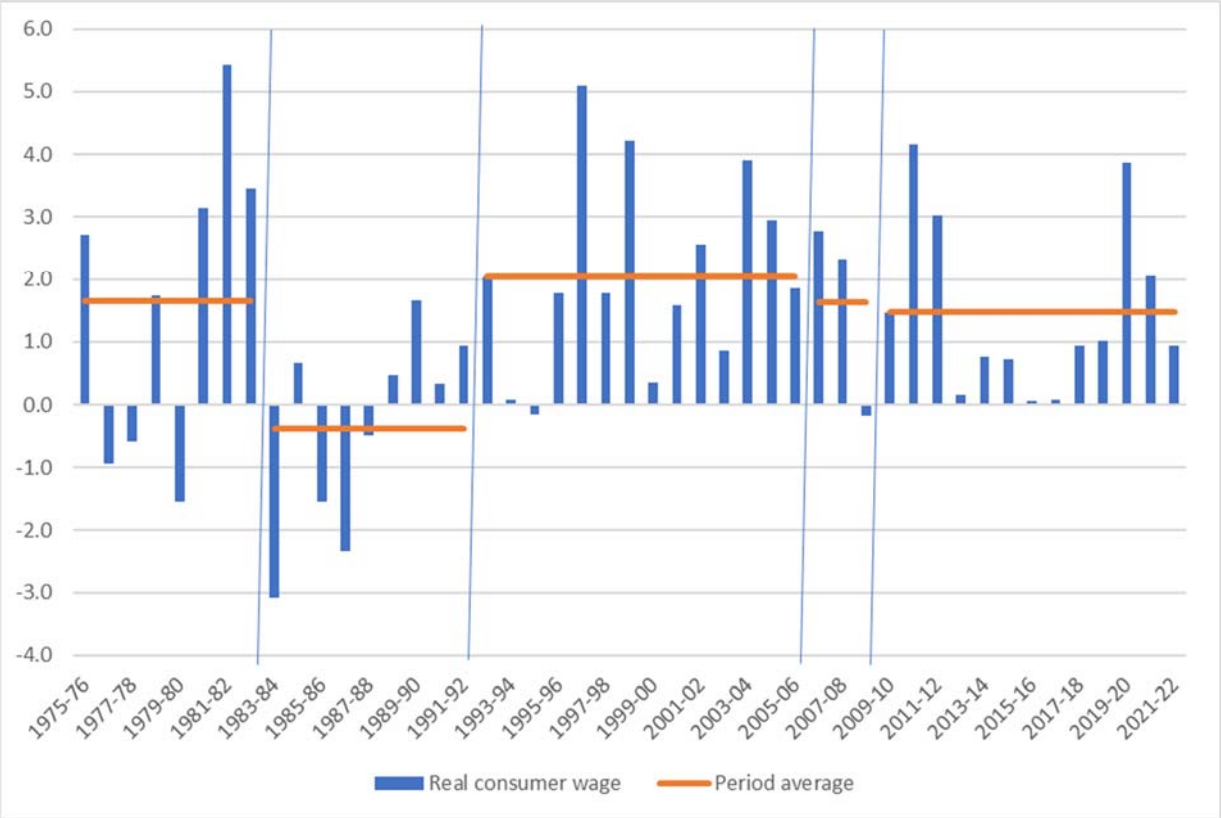
Comment: These provisions of the Bill are appropriate reforms and should be passed by the Senate.

Attachment – Australia's history of industrial relations reform and regression

To put the current Bill in context, it is important to consider the history of previous IR systems and attempts at reform and the outcomes produced under those systems in relation to wage growth.

Historically, Australia had a highly rigid system of centralised wage fixing, that fixed terms and conditions in great detail across entire industries. The nadir of this system was reached in the period around 1975 to 1982, which was characterised by high inflation, high unemployment and, by today's standards, incomprehensibly high levels of industrial disputes. The years between 1975 and 1982 also delivered a volatile "boom-bust" cycle of real wage increases interspersed with real wage cuts, depending on the level of inflation, with average annual real wage growth during the period being modest.

Real wage growth since 1975



Industrial relations frameworks since 1975

Since the 1970s, Australia has had a number of distinctive IR systems, which have had varying levels of success:

1975-82:	Centralised wage fixing and "industry-wide" strikes
1983-92:	"Accord" era
1993-2006:	Enterprise bargaining era
2006-2009:	"Work Choices" system
2009-	*Fair Work Act* system

The system of centralised wage fixing had existed since the early 20th century and by the 1970s was clearly no longer fit-for-purpose. The failure of the centralised system is reflected in the following figures for the year 1982, in which:

- Unemployment reached 9.4%;
- Inflation reached 12.4%; and
- 2 million working days were lost to industrial disputes

By the early 1980s, the system of industry-wide wage-fixing and industry-wide strikes was widely acknowledged as being unsustainable in its current form. In the years from 1983 the then Hawke Government implemented the "Accord" policy in cooperation with the union movement, in which for almost a decade the Government deliberately kept wage growth low in order to defeat inflation. The policy succeeded in this regard. It used the apparatus of the centralised system to fix the problems that the system had created. In 1992, the then Secretary of the ACTU, Bill Kelty, described the policy in the following terms:

> *"We had a long term strategy: first step, wage restraint; second step award restructuring; third step, implementing it on an enterprise level"* [72]

In the early 1990s the Hawke and Keating Governments progressively introduced the policy of enterprise bargaining, with the intention that wage rates for most workers would no longer be determined by centrally-set awards but by enterprise agreements at the workplace level, where higher wages could be agreed to in return for higher efficiency and productivity. The most significant step in the implementation of enterprise bargaining was the Keating Government's 1993 *Industrial Relations Reform Act*, which it described as:

> *"the culmination of the Government's break with the past – our move as a nation from a centralised to a decentralised industrial relations system, to a system based on bargaining at the workplace with much less reliance on arbitration at the workplace"* [73]

These reforms were further expanded by the 1996 *Workplace Relations Act* under the Howard Government, which built upon the foundation established by the 1993 legislation. These reforms implemented a system of enterprise bargaining in which the coverage of agreements consistently expanded, the level of award reliance declined, and real wages grew on the basis of productivity growth. It is instructive to note (as set out in the above graph) that the "Enterprise Bargaining Era" from 1993 to 2006 under this system delivered higher average real wage growth than any other system that has been in place over the past five decades. This is the model of success that remains relevant in 2022.

The 2009 *Fair Work Act* was based on the same goals as the 1993 legislation, with an emphasis on enterprise-level outcomes rather than centralised or multi-employer arrangements. The objects of the Act included:

> *"achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action"* [74]

Whilst the goal of the Act was to recapture the success of the "Enterprise Bargaining Era", it has fallen short of this goal, most notably due to the decline of enterprise bargaining, due to a number of unintended consequences that have arisen under the Act.

The Act should now be amended to address these consequences. However, any amendments should be true to the goals of both 2009 and 1993 – to give primacy to enterprise-level bargaining to achieve productivity and wage benefits and to resist a return to industry-wide settings at the expense of enterprise arrangements. This requires a careful balance. If the balance is not right, then there is a real risk that the current Bill could be a "tipping point" that triggers a further decline in enterprise-level bargaining and instead creates a system

[72] Paul Kelly *"The End of Certainty"*, 1992,
[73] Laurie Brereton, Minister for Industrial Relations, Second Reading Speech, *Industrial Relations Reform Bill 1993*
[74] section 3(f) *Fair Work Act 2009*

dominated by more centralisation, more arbitration, more industrial disputes and, ultimately, lower wages than would otherwise be achieved.

The goal of reform should be to finally deliver the objectives articulated by Prime Minister Keating in 1993 which, regrettably, have still not been fully realised:

> *"Let me describe the model of industrial relations which we are moving towards.*
>
> *It is a model which places primary emphasis on bargaining at the workplace level and within a framework of minimum standards provided by arbitral tribunals.*
>
> *It is a model under which compulsorily arbitrated and arbitrated wage increases would be there only as a safety net.*
>
> *This safety net would not be intended to prescribe the actual conditions of work of most employees, but only to catch those unable to make workplace agreements with employers*
>
> *Over time, the safety net would inevitably become simpler. We would have fewer awards, with fewer clauses."* [75]

The original intent of the enterprise bargaining system and the objects of the current Act both emphasised the primary of bargaining at the workplace level as the key factor to unlock productivity gains and drive wage growth. Unfortunately, the Bill as introduced fails to reflect this intent and, if passed, would constitute a substantial regression from the goal of the system, as enacted by the Keating Government, which in turn was built on the reform foundations of the Hawke Government.

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[75] Prime Minister Keating, speech to Australian Institute of Company Directors, 21 April 1993

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