Key Points to be addressed by Distinguished Professor Anthony Forsyth & Professor Shae McCrystal in Senate Education and Employment Legislation Committee Hearing (Inquiry into the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*) on 4 November 2022

The following are the areas of the Bill on which we feel we able to comment; we will elaborate upon these and make some additional points in a detailed written submission to follow by 11 November 2022. Our comments are focussed on the aspects of the Bill dealing with agreement-making and collective bargaining,

Part 12/13 Termination of Enterprise Agreements after nominal expiry date and Sunsetting of 'zombie' agreements

The Part 12 amendments strike the right balance between enabling the termination of enterprise agreements in appropriate circumstances, and ensuring that threats of agreement termination cannot be used as bargaining leverage by employers during negotiations for a new agreement. The Part 13 amendments will ensure that out of date agreements and obsolete agreements are phased out, while ensuring adequate safeguards exist for unintended consequences.

Part 14 Enterprise Agreement Approval

The FW Act enterprise agreement approval provisions are crucially important to ensure that the interests of employees are protected where enterprise agreements are created without any employee representation or collective bargaining. The provisions reflect the fact that the FW Act creates a system of enterprise agreement-making, not a system of collective bargaining, and therefore protecting the interests of unrepresented employees is paramount. The amendments respond to concerns that the approval provisions are overly technical and cumbersome, but in considering the amendments it is important to be satisfied that employee interests are protected. In this respect:

- The changes to the NERR provisions retain the obligation on employers to issue the NERR and wait 21 days for single-enterprise agreements. These are the only type of agreement under the proposal that may potentially be created without negotiation with employee representation;
- The agreement approval requirements around ensuring that employees are fully informed about the commencement of bargaining, the vote, the content of the agreement and their rights to representation have been moved to a 'statement of principles' to be created by the FWC and applied at approval time. This shift creates the potential for inconsistency in approach to agreement approval – and a weakening of protections.
- The FWC must be satisfied that the employees requested to vote on an agreement have 'genuinely agreed'. The proposed new definition of genuine agreement in s 188(2)(a) provides that those employees must 'have a sufficient interest in the terms of the agreement'. The EM to the Bill states that this provision means that where an agreement has not been the product of genuine collective bargaining, the employees won't have such an interest. If this is correct, then this is a welcome change to the FW Act, requiring that agreements be, at least, the product of actual collective bargaining, and alleviates some concerns over the changes to the approval requirements. However, this does not appear to be what the text of the section actually says, and if this is the stated intention, the text of the proposed amendment should be made clearer.

Part 15 Initiating Bargaining

This change to the FW Act addresses the existing imbalance in the Act between the freedom accorded to employers to commence bargaining at any time, and the inability of employees to initiate bargaining without going through the majority support determination process. In enterprises with a recent history of collective bargaining, an MSD to commence bargaining should not be necessary.

Part 18 Bargaining Disputes

This Part decouples access to arbitration for intractable disputes from the necessity to show a serious breach of the good faith bargaining provisions, and will provide meaningful access to arbitration for disputes with no reasonable prospect of resolution.

Part 19 Industrial Action

The FW Act protected industrial action provisions are some of the most complex and over engineered provisions in the world. Although the Bill would slightly expand the circumstances where protected action can be taken, the amendments exacerbate the existing problems with the legislation by:

- Requiring employees and their unions to re-apply for a PAB Order and reballot every 3 months;
- Adding another step before protected industrial action can be taken in the form of a conciliation conference connected to the PAB Order – meaning that every three months during negotiations unions must seek an order of the FWC, attend a conciliation conference, and formally ballot their members on proposed industrial action;
- Incentivising escalation of industrial action in month two and three after a ballot – in order to avoid the need to go back to the FWC – rather than because it is industrially appropriate;
- Adding a new ground whereby employees can lose access to the capacity to take protected industrial action where a breach of a FWC order occurs in the context of a conciliation conference, with no provision for how such breach could be remedied;
- Making a quorum in a strike ballot more difficult to achieve in the context of negotiations for agreements in the context of supported bargaining and single-interest employer bargaining.

Multi-employer bargaining

In general, the Bill is a very welcome attempt to move beyond the constraints of the current enterprise bargaining framework by introducing new multi-employer agreement options. There are several aspects, however, which are likely to limit the Bill's capacity to implement the Government's key policy objective of lifting workers' real wages.

An over-arching concern is the primacy that is still given to single-enterprise agreements. Given the international evidence of the connection between industry/multiple-employer bargaining systems and high levels of bargaining coverage, an unequivocal statutory preference should be stated in favour of multi-employer agreement options as the pathway to increasing the number of agreements and lifting workers' wages above award levels.

Part 20 Supported Bargaining

The new Supported Bargaining stream improves considerably on the failed FW Act low-paid bargaining provisions. It removes many of the complex criteria for triggering that form of bargaining. However, given the likely practical difficulties of the proposed Single Interest Employer Bargaining stream (see below), Supported Bargaining should not be predominantly framed around low-paid work. That framing will assist workers in funded sectors such as aged care, disability care, and early childhood education and care to make multi-employer agreements. Supported Bargaining may also be useful for workers in low-paid settings in the private sector such as cleaning and security.

However, it may operate to exclude workers who have been able to engage in single-enterprise bargaining under the FW Act, but want to obtain better outcomes. This could be addressed by adding to the factors relevant to the granting of a Supported Bargaining authorisation (in proposed s 243(1)), the need to facilitate access to this form of multi-employer bargaining to provide workers the opportunity to improve wages and working conditions.

Part 21 Single Interest Employer Bargaining

The expanded Single Interest Employer Bargaining stream may assist in giving some workers access to a form of multi-employer bargaining. However, the requirements that must be satisfied to obtain a Single Interest Employer Authorisation are onerous and are likely to limit the effectiveness of this stream. In particular:

Employer agreement to bargain together (existing s 249(1)(b))

The Bill does not repeal this provision. It would have the practical effect of preventing Single Interest Employer Bargaining from occurring if employers do not consent. The Single Interest stream will be a dead letter if employer consent is required.

Common interests test (proposed s 249(3)(b) & (3C))

The employers must have 'clearly identifiable common interests', determined by reference to factors including (a) geographic location (b) regulatory regime (c) the nature of the enterprises to which the agreement will relate and the terms/conditions of employment in those enterprises. This will likely operate to significantly limit access to Single Interest Employer Bargaining, for example across multiple employers in a supply chain or where business functions have been outsourced.

Majority support test (proposed s 249(3)(a)(ii) & (3B))

This means that majority support of the employees *across all of the enterprises* is needed, a very difficult threshold to meet in the context of many separate and dispersed workplaces (for example, across a fast-food chain including brand-owned and franchised stores with tens of thousands of workers). A lower threshold should be set than the majority test proposed in the Bill. For example, In New Zealand's new system of industry-wide Fair Pay Agreements, the threshold is 10% of employees in the relevant sector who will be covered by a proposed FPA *or* 1,000 such employees.

Fairly chosen test (proposed s 249(3)(c) & (3D))

This is a concept borrowed from single-enterprise bargaining, but the reference to an agreement not covering all employees of the *employer* reveals that it does not have a place in the context of multi-employer bargaining where there are *two or more employers*. By its nature, an agreement in the Single Interest Employer Bargaining stream will *not* cover all of the employees of all the employers involved.

Public interest test (proposed s 249(3)(f))

This is intended to provide the FWC scope to consider all the relevant circumstances and the broader public interest, eg the economic ramifications of making an authorisation. However, the inclusion of a public interest test simply reinforces the idea that the new multi-employer bargaining streams are somehow exceptional – rather than necessary to lift workers' wages.

Part 23 Cooperative Workplaces

This stream might be utilised by small businesses like hairdressers who voluntarily agree to bargain together with their employees. However, without any of the statutory mechanisms available in other forms of bargaining (eg, arbitration, industrial action), it is unlikely that Cooperative Bargaining will have any greater take-up than the current multi-employer bargaining provisions. Proposed s 178C allows the FWC to exclude individuals and organisations from multi-employer bargaining, based on a record of repeated non-compliance with the FW Act. This would not only apply in the construction industry, but potentially to all unions and their officials. This approach to compliance was integral to the former Coalition Government's *Ensuring Integrity Bill 2019*, which the then Labor

Opposition vigorously opposed. Section 178C should be removed from the Bill so that all workers and their unions have the opportunity to access multi-employer bargaining.