Australian Institute of Employment Rights

Submission of the Australian Institute of Employment Rights

Senate Select Committee on Education and Employment Legislation

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

Date: 10 November 2022
By : Australian Institute of Employment Rights (AIER)
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ABOUT THE AIER

The Australian Institute of Employment Rights (AIER) is an independent not-for-profit organisation that works in the public interest to promote the recognition and implementation of the rights of workers and employers in a cooperative workplace relations framework. The work of the AIER is informed by the Australian Charter of Employment Rights and the subsequent Australian Standard of Employment Rights[1] and overseen by a tripartite Executive Committee drawn from unions, industry and academia committed to these rights and principles.

EXECUTIVE SUMMARY

In summary, the AIER's main comments and recommendations on the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* ('the Bill') include that:

- In our view, the Bill is a good first step in addressing the many pressing issues with the current industrial relations regime and, for reasons we discuss in this submission, the *Fair Work Act 2009* (Cth) needs urgent reform, and we urge the Committee to recommend that Parliament urgently pass the Bill into law;

- However, the Bill does not go far enough, particularly in loosening practical restrictions on multi-employer bargaining (MEB), the benefits of which are various and much needed, including promoting gender equality, productivity and improved bargaining coverage.

- All practical restrictions on multi-employer bargaining should be removed from the *Fair Work Act* and impediments to the right to take industrial action must be removed including

[1] Bromberg, M. and Irving, M. (eds). 2007. *Australian Charter of Employment Rights*, Melbourne: Hardie Grant Books; Howe, J. 2009. *Australian Standard of Employment Rights: A How-to Guide for the workplace*, Melbourne: Hardie Grant Books.

in relation to MEB. This includes removing the focus in the Act on making single-enterprise bargaining the dominant mode of bargaining;

- Parliament should indicate that the objective of promoting 'job security' should be interpreted broadly with the intention to eliminate insecure work, including all aspects of work and income insecurity;
- Other legislative measures ought to follow to reduce other insecure work arrangements;
- The AIER considers that s243 relating to the making supported bargaining determination could be improved by tightening the language on the matters to which the Commission must be satisfied so the exercise of the discretion is more mandatory than directory; and
- The Government should also remove the requirement in the Single Interest Bargaining stream that the employees are "fairly chosen" and for demonstration of majority support lest it leads to union busting.

INTRODUCTION

The AIER thanks the inquiry for the opportunity to make a submission on the Bill. We would be happy to expand upon our submission and answer any questions the Committee might have at hearing.

The AIER supports the objectives of the Bill, which include boosting bargaining, promoting job security, and gender equity and restoring fairness and integrity in Australia's work relations regime. We consider that the Bill will go some way towards these ends, however, we consider that the challenges Australia faces mean that the Government should go further.

As we discuss in our new book, Fleming (ed.), *A New Work Relations Architecture: The AIER Model for the Future of Work* (Hardie Grant, 2022), the industrial relations system is facing critical

problems, including the collapse of collective bargaining, historically low union density, low productivity growth, a persistent gender pay gap, rising inequality and high levels of entrenched insecure work. In the book, we call for significant reform and outline a vision for a new system, including removing restrictions on multi-level/industry bargaining (see Chapter 8). We further suggest major reforms to the structure of the Fair Work Commission, and major changes to improve gender equity and prevent discrimination, bullying and sexual harassment. We show how these changes would not only make Australia's work relations system fairer, more inclusive, and more responsive to future challenges, but the reforms we outline would also be attended by significant economic benefits, including increasing productivity and increased Australia's national output.

In our view, especially in the area of multi-employer bargaining, the Bill mainly represents incremental, rather than fundamental, change, and so while a move in the right direction, it does not go far enough towards addressing the above issues. It is true that the loosening of Australia's practical restrictions on multilevel bargaining, restrictions that fall foul of our international labour law standards, is an encouraging first step, but we find the Bill in its current form is unlikely to promote the widespread take up of multilevel and industry bargaining and so Australia will likely miss out on the productivity and other benefits that entails and that we detail below. The Bill also contains a number of exemptions in several areas that will undermine its objectives. In the time available, we have chosen to focus mainly on the area of bargaining, with some short comments on the Bill's gender equity and job security measures.

JOB SECURITY

Australia has a high incidence of insecure work. Our industrial relations system currently allows for work relationships to be arranged in a variety of ways that lack job security, such as independent contracting, casual employment and fixed term employment. We note that the Bill will make promoting job security an objective of the act and limit the use of fixed term (and maximum) term employment contracts as a way of creating secure work. Fixed (and maximum) term contracts have

been deployed across many sectors such as the education sector to keep workers who should enjoy full job security on contracts that leave them no certainty about whether they will have a job the following year. However, we note that the Bill's exceptions are such that a great many workers on fixed (and maximum) term contracts will not be assisted by these changes.

Further, addressing fixed (and maximum) term employment, whilst important and necessary, only addresses one type of insecure work arrangement. Other forms of insecure work arrangements such as casual employment (made more insecure thanks in part to recent jurisprudence and law reforms) or the use of labour hire and outsourcing, are not addressed by the current Bill, but need to be as a matter of priority. New and emerging ways of arranging work such as digital platforms and the "gig economy" are also all in desperate need of industrial regulation. We hope that these will be addressed in subsequent legislative rounds.

Defining 'job security'

Usefully, the Bill would make promoting job security an objective of the Act, however 'job security' is not defined, and the term is used rather ambiguously in the academic literature. It can mean 'the certainty of retaining a specific job with a specific employer'[2], for example, access to unfair dismissal protection, or point to other aspects of work and income insecurity. Insecure work contains many dimensions of economic insecurity beyond the certainty of retaining a specific job.

Guy Standing outlines a number of other interconnected aspects of a "labour-related security" that are relevant to insecure work, for example, income security, work security (health and safety and protections against unsociable hours), skill reproduction security, and representation security

[2] Leschke, J., G. Schmid, And D. Griga. 2007. "On The Marriage Of Flexibility And Security: Lessons From The Hartz-Reforms In Germany". In H. Jörgensen, H. And P. Kungshøj Madsen (eds). Flexicurity and Beyond. Finding a New Agenda for The European Social Model. Copenhagen: DJÖF Publishing, at 340.

(access to union representation).[3] Chapter Four of *A New Work Relations Architecture* on 'Work and Income Security' discusses this in more detail.

It is not clear in the explanatory memorandum how broadly the term 'job security' is to be interpreted in the Act. It states:

> The reference to promoting job security recognises the importance of employees and job seekers having the choice to be able to enjoy, to the fullest extent possible, ongoing, stable and secure employment that provides regular and predictable access to beneficial wages and conditions of employment.[4]

In our view, a more appropriate objective may be 'eliminating insecure work' rather than promoting job security, or at least parliament should signal more clearly that the objective entails that the Commission seek to promote all dimensions of work and income security.

As we outline in, *A New Work Relations Architecture*, one solution to extend work and income security to all workers is to set up a subordinate body in the Fair Work Commission that can ensure universal standards by translating employment minimum rates and conditions into piece rates covering gig workers that are independent contractors, and also to extend paid leave and other entitlements to casual workers and independent contractors, in a manner inspired by the Swedish system.[5]

GENDER EQUITY

The AIER welcomes the Bill's focus on measures to achieve gender equity in workplaces. We understand these measures include *inter alia* the creation of a Pay Equity Expert Panel and a Care

[3] See Guy Standing, "The Precariat: Today"s Transformative Class?" Development 61(1-4) 2018: 115–21. http://dx.doi.org.ezproxy.its.uu.se/10.1057/s41301-018-0182-5.
[4] See *Explanatory Memorandum*, paragraph 337.
[5] See, in particular, chapters 2 and 4 of Fleming (ed.), *A New Work Relations Architecture: The AIER Model for the Future of Work* (Hardie Grant, 2022).

and Community Sector Expert Panel, bringing industrial legislation in conformity with discrimination legislation, banning pay secrecy, removing the need for a male comparator in pay equity cases, and providing avenues for workers affected by sexual harassment to seek redress through the Fair Work Commission, as well as including promoting gender equity in the objectives of the Act.

These measures are to be commended but the wider of multi-employer bargaining would also help promote gender equity, by promoting same pay for the same work within and potentially across industries.

We outline other relevant reforms that could significantly aid gender equity in *A New Work Relations Architecture*. If Australia lifted women's workforce participation around 10 percentage points to match Sweden's at 70.4% through Swedish levels of paid parental leave and affordable childcare access, for example, this would not only aid gender equality but, we calculate enormous economic benefits. It would increase overall labour force participation by more than 4 percentage points or by about one million women. This would increase both employment and GDP by at least 6% – as much as $100 billion or more, well above the cost of childcare and paid parental leave provision.[6]

MULTI-EMPLOYER BARGAINING

In *A New Work Relations Architecture*, we argue why restoring multi-employer bargaining (MEB) is a necessary and timely reform that can fix many of the problems with our current work relations system and bring Australia's work relations closer to international standards.[7]

[6] See Fleming, J (ed.), *A New Work Relations Architecture: the AIER Model for the Future of Work* (Hardie Grant, 2022), pp 86-7, 190-2.
[7] See in particular, Chapter 8 at pp B. Redford and K. Harvey's 'Bargaining in the New Work Architecture' pp. 152 to 167, and M. Perica's '*A Fair Say All Round,* Chapter 7 at p. 145.

Restricting bargaining to enterprise level-only bargaining has never complied with our obligations under Article 4 of the ILO *Freedom of Association Convention* 98, which requires free and voluntary collective bargaining. The Committees of the ILO have decided for decades that "legislation should not constitute an obstacle to collective bargaining at the industry level".[8] As John Ritchotte from the Collective Bargaining and Labour Relations team at the ILO explained recently at the AIER's annual Ron McCallum Debate in Sydney:

> Crucially, bargaining should be possible at any level… The collective bargaining framework needs to enable employers, employers, organizations, and trade unions, as well as their federations and confederations to conclude collective bargaining agreements at their chosen level of negotiation. We know, of course, that bargaining can take place at any level at the workplace or the establishment at the enterprise, at industry, sector or branch level, territorial level, municipal or regional, or, by occupation or profession at the national level, or a combination of these…[9]

Enterprise bargaining was introduced into the Australian workplace relations system with a two-fold objective: to boost productivity and economic performance and to share the benefits of that increased productivity with workers through higher wages. It was also linked to a micro-economic reform strategy which sought to build high performance workplaces staffed by highly skilled workers. This was to be a win-win-win: for employers, employers and the Australian economy and society.[10]

Enterprise based bargaining is failing to meet these objectives on multiple fronts: recent productivity performance has been poor and wages growth has stagnated. What productivity gains

[8] International Labour Organisation, 2018, *Compilation of Decision of the Committee on Freedom of Association 6th ed*, Geneva, para 1409.
[9] See video recording and transcript of the debate on the AIER website: https://www.aierights.com.au/2022_recording/.
[10] See Fleming, J (ed.), *A New Work Relations Architecture: the AIER Model for the Future of Work* (Hardie Grant, 2022), especially Chapter 8, p152 and ff.

that have occurred have not been equitably shared with workers. The share of national income flowing to employees is at historic lows.[11]

Specifically, the Productivity Commission in 2021 noted that Australia's economic performance over the past decade has been the slowest in at least 60 years on a per person basis and that "considering that Australia's poor economic performance in the 1970s was a key justification for the economic reforms of the 1980s and 1990s, the fact that the last decade of growth was even worse warrants further reflection".[12]

The Productivity Commission noted "falling usage of collective bargaining about the same time as falling wage growth".[13] Likewise, the Productivity Commission noted that when productivity improves this is not sufficient to translate into real wage increases. For that to happen, it is necessary that "workers have the capacity to bargain with employers for increases in remuneration in line with observable productivity improvements".[14] Demonstrably, this is not happening.[15]

The Productivity Commission has recently released Interim Report 6 in its five-year productivity study: *A more productive labour market Interim report* October 2022,[16] showing that:

a. bargaining is predominantly used in the public sector [where 84% of employees are covered by agreements] and in the largest private enterprises [66% of employees of businesses with more than 1000 employees are covered by agreements];

b. "56% of employees covered by an agreement are on an expired enterprise agreement"; and

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[11] Ibid.
[12] Ibid, p 156.
[13] Ibid, p 157.
[14] Ibid, p158 .
[15] See ibid., chart p 157.
[16] See: https://www.pc.gov.au/inquiries/current/productivity/interim6-labour/productivity-interim6-labour.pdf, Pages 50-1, 54 and 62. Statement [c] is qualified with a 'potential' impact on productivity.

c. Regarding multi-employer bargaining, the report states that this "could improve the overall bargaining position of employees, allowing them to achieve more favourable conditions and wages (at least in the short run)".

In his Second Reading Speech on the current Bill, the Minister remarked that only 14.7% of employees are covered by an enterprise agreement that has not expired.[17] The Productivity Commission notes that more than half of employees on an agreement are on an expired agreement.[18]

These stark statistics indicate that enterprise-based bargaining has failed to deliver the promised benefits. If enterprise bargaining is considered to be a source of productivity benefits, then the absence of current agreements and/or the fact that most existing agreements are expired means that the overwhelming majority of workplaces and workers are not benefitting at all from enterprise bargaining, nor is the Australian economy. Doing nothing is not an option for employers, workers or the Australian economy. AIER supports the intention of the present Bill to flow the spread of bargaining and the best option for doing so in the present circumstances is the encouragement of MEB.

The OECD Report on Bargaining 2019 notes multi-employer bargaining helps lift collective bargaining coverage:

> Collective bargaining coverage is generally high and stable in countries with multi-employer bargaining (i.e. where agreements are signed at sectoral or national level), where the share of firms that are members of an employer association is high, or where mechanisms exist to extend coverage to employees beyond those working for firms that are members of a signatory employer association. In countries where collective agreements are signed mainly at firm level, coverage is lower and goes hand-in-hand with trade union density.

[17] Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 Second Reading SPEECH Thursday, 27 October 2022, Proof Hansard, p 8.
[18] See footnote 16 above.

> Workers in small firms are less likely to be covered as these firms often do not have the capacity to negotiate a firm-level agreement, often because there is no worker representation in the workplace.[19]

Comparing countries around the world, the report states:

> In countries where bargaining takes place predominantly at company level, collective bargaining coverage is typically below 20% (the Czech Republic and Ireland are the only exceptions). In these countries coverage tends to go hand in hand with trade union membership since having a trade union or worker representation in the workplace is a necessary condition to be able to negotiate a collective agreement. Higher-level agreements (or similar regulation mechanisms such as "Modern Awards" in Australia or "Sectoral Employment Orders" in Ireland) can set some general minimum wage and work organisation standards and thus limit coverage erosion to some extent. Finally, among countries with dominant firm level bargaining Japan stands out due to the significant and unique degree of co-ordination (Shunto).[20]

Multi-employer bargaining also leads to fairer outcomes and is good for the economy. In a 2018 paper in the *Australian Economic Review*, Joe Isaacs, the great labour economist, argues multi-employer bargaining increases productivity and innovation, promotes a fairer share of profits for workers, and a more level playing field for business. It also takes wages out of competition, removing the race to the bottom. He writes:

> Compared to enterprise bargaining, MEB establishes greater fairness and uniformity in pay, in that employees doing the same work are likely to be paid the same/similar wages by all employers covered by the agreement. MEB establishes a common standard for all employers involved—the profitable and the less profitable. It takes wages out of competition and forces the less efficient firms, rather than being subsidised by lower wages, to operate at greater efficiency in order to survive, thus raising productivity.[21]

This effect on productivity and innovation that Isaacs identifies obviously works best when bargaining can cover a broad range of businesses, for example, a whole industry. Underperforming firms in an industry covered by a collective agreement are forced to become more efficient, for

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[19] OECD, *Negotiating Our Way Up Collective Bargaining in a Changing World of Work,* 18 Nov 2019, p 15.
[20] Ibid., p73-4.
[21] Joe Isaac, "Why are Australian Wages Lagging and What Can Be Done About it" Vol 51, no 2 Australian Economic Review, 175 to 190.

example, by investing in productivity enhancing equipment, in order to pay the industry rate, or otherwise are forced to downsize or exit. Higher performing firms are then able to increase their market share. Hence, multi-employer bargaining helps to turbocharge Schumpeterian creative destruction, continually raising productivity across the industry and increasing capital investment, moving production from low performing to high performing firms.

As firms are required by a common collective agreement to pay the same or similar going industry rate, they can't compete by forcing down wage costs. This not only removes the race to the bottom on wages but pushes competitive activity towards genuine innovation. The industrial relations system prior to the shift towards single-enterprise bargaining was probably exhibiting these effects and these were underappreciated in the move towards bargaining decentralisation. At that time, it was thought shifting bargaining to the single enterprise level would increase productivity by giving individual workplaces the incentive to find productivity-improving changes in return for wage premiums. Prior to the change, multi-enterprise agreements were possible and collective agreements were commonly extended to entire sectors or industries as awards, and award minimums set high general standards close to the mean. Tseng and Wooden argue, however, that the evidence of productivity improvements due to the shift to enterprise bargaining is hard to find and, such that it does exist, it is unconvincing.[22]

The shift towards the de-centralisation of bargaining to the single-enterprise only level in the 1980s and 1990s in Australia also occurred at a time before the challenges of the gig economy and Industry 4.0, with the increasing disaggregation of the firm into smaller and smaller units and more complex supply chains. These and other practical issues with single-enterprise bargaining were usefully discussed by union and business leaders in this year's Ron McCallum debate that can be

[22] See Yi-Ping Tseng and Mark Wooden, *Enterprise Bargaining and Productivity: Evidence from the Business Longitudinal Survey* (Working Paper No 8/01, Melbourne Institute Working Paper No. 8/01, Melbourne Institute of Applied Economic and Social Research, The University of Melbourne, July 2001).

watched online (transcript available).[23] As the participants discuss, often bargaining with the one 'enterprise' thus now in practice means bargaining with multiple legal entities. MEB is necessary in order to bargain with these related entities and also to include the price setters at the top of the supply chain.

The difficulties in organising bargaining representation in increasingly atomised workplaces is a part of the difficulty of promoting collective bargaining under a single-enterprise focussed system. The transaction costs can also be prohibitive for individual small businesses. Multi-employer bargaining is more efficient in transaction costs and is difficult in fact to distinguish from the standard form collective agreements employers often use, except that in MEB, workers are more likely to be effective in influencing the terms. While industry bargaining puts upward pressure on productivity improvements and wages, single-enterprise bargaining above a minimal award often leaves workers bargaining under the opposite gravity, with the threat of falling backwards to the award putting downward pressure on workers to make concessions on wages and conditions.

The AIER commends the Government on the *Secure Jobs Better Pay Bill* in so far as it extends the capacity of workers and their representatives to secure MEB. The enterprise bargaining mechanisms in the *Fair Work Act 2009* are in terminal decline. The number of award dependent employees is increasing. The AIER regards the re-introduction of multi-employer bargaining in this bill as a necessary and urgent first step towards more free collective bargaining in Australia. We do, however, have concerns about the limitations and complexity of the amendments, and the extent to which they fully deliver on Australia's commitments as an ILO member state.

[23] See video recording and transcript of the debate on the AIER website: https://www.aierights.com.au/2022_recording/.

Conceptual Dissonance: Multi Employer Bargaining in an Act Designed for Enterprise Bargaining

The three streams of MEB in the Bill are an attempt to graft MEB onto the conceptual framework of the *Fair Work Act 2009*, an Act which, was (and is) designed to give primacy to enterprise bargaining. The Minister, in his second reading speech, confirmed the primacy of single enterprise bargaining will continue in the amended Act. He states: "Bargaining at the enterprise level delivers strong productivity benefits and *is intended to remain the primary and preferred type of agreement making*" (emphasis added).

The difficulty with grafting MEB into an Act designed for enterprise bargaining is a conceptual dissonance between the processes in the Act (which are designed to secure enterprise agreements) when they are applied to MEB. For example, the Bill imports concepts for the taking of protected action and methods of proving majority support which are not, in the view of the AIER, appropriate for MEB.

THE THREE STREAMS

Supported Bargaining

One of the new bargaining streams is the "supported bargaining" stream. This is intended as a replacement for the failed "low paid" stream in the Fair Work Act 2009.

According to the *Explanatory Memorandum*, this new stream is "intended to assist those employees and employers who may have difficulty bargaining at the single-enterprise level. For example, those

in low-paid industries such as aged care, disability care, and early childhood education and care who may lack the necessary skills, resources, and power to bargain effectively".[24]

Under the new regime, there is a roping in process whereby an employer and its employees can be roped into a "supported bargaining agreement" once an supported bargaining determination is made.

The power of the Commission to make a supported bargaining determination will derive from s243 which states:

> The FWC must make a supported bargaining authorisation in relation to a proposed multi-enterprise agreement if:
>
> (a) an application for the authorisation has been made; and
>
> (b) the FWC is satisfied that it is appropriate for the employers and employees (which may be some or all of the employers or employees specified in the application) that will be covered by the agreement to bargain together, having regard to:
>
> (i) the prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector); and
>
> (ii) whether the employers have clearly identifiable common interests; and
>
> (iii) whether the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process; and
>
> (iv) any other matters the FWC considers appropriate; and
>
> (c) the FWC is satisfied that at least some of the employees who will be covered by the agreement are represented by an employee organisation. The FWC must disregard any employee

organisation excluded for the purposes of the agreement by an order under section 178C (regardless of how recently the order was made).

Common interests

(2) For the purposes of subparagraph (1)(b)(ii), examples of common interests that employers may have include the following:

(a) a geographical location.

(b) the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises.

(c) being substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory.[25]

Part of the process is a paper or electronic ballot[26] to vote for variation to join a supported bargaining agreement. The threshold is "a majority of the affected employees who cast a valid vote approve of the variation to be bound by it".[27]

Issues with the supported bargaining stream

A multi factor test applied through a guided discretion where "the Commission is satisfied" invites legal contestation and judicial review. This danger is exacerbated when the guided discretion is linked to subjective concepts such as whether it is "appropriate" for the workers to be bargaining together. Similarly, a concept like "clearly identifiable common interest", is likely to be a heavily contested matter before the Commission and the Courts.

[25] See Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, Explanatory Memorandum at Paragraph 37.
[26] s216A(1).
[27] s216A(3).

The AIER considers that s243 relating to the making supported bargaining determination could be improved by tightening the language on the matters to which the Commission must be satisfied so the exercise of the discretion is more mandatory than directory.

Single Interest Stream

The Bill also amends the Act to provide for "single interest" MEB (from here on referred to as "SIB") which expands the class of employees that may be specified in a single interest authorisation. The power of the Commission to make a single interest employer authorisation is conferred in a structured discretion in s216DC. The Commission must be "satisfied" of a number of matters such as:

> (a) if the employers covered by the agreement and the employer that will be covered by the agreement carry on similar business activities under the same franchise—all of those employers are:
>
> (i) franchisees of the same franchisor; or
>
> (ii) related bodies corporate of the same franchisor; or
>
> (iii) any combination of the above; and
>
> (b) if paragraph (1)(a) does not apply—having regard to the following, it is appropriate to approve the variation:
>
> (i) whether the employers covered by the agreement and the employer that will be covered by the agreement have clearly identifiable common interests.
>
> (ii) whether it is not contrary to the public interest to approve the variation; and
>
> (c) the employers, and any employee organisations, covered by the agreement have had an opportunity to express to the FWC their views (if any) on the application; and

(d) if the application is made under section 216DA (joint variation)—the variation has been genuinely agreed to by the affected employees in accordance with section 216DD; and

(e) if the application is made under section 216DB (application by employee organisation):

(i) the employer that will be covered by the agreement is not a small business employer; and

(ii) the affected employees are not covered by another enterprise agreement that has not passed its nominal expiry date at the time that the FWC will approve the variation; and

(iii) a majority of the employees who are employed by the employer at a time determined by the FWC and who will be covered by the agreement want to be covered by the agreement.

Common interests

(2) For the purposes of subparagraph (1)(b)(i), matters that may be relevant to determining whether the employers have a common interest include the following:

(a) geographical location.

(b) regulatory regime.

(c) the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises.

Majority support

(3) For the purposes of subparagraph (1)(e)(iii), the FWC may work out whether a majority of employees want to be covered by the agreement using any method the FWC considers appropriate.

Issues with the SIB stream

The requirements for the making of a Single Interest Employer Authorisation are highly technical and multi-faceted. It will require:

- some demonstration of majority support;
- that the employees are "fairly chosen" (a much-litigated expression in the current scope order process in s186);
- the employers must have "clearly identifiable common interests" which is not defined except with reference only to geography, regulatory regime, nature of the enterprises and the terms and conditions already in place; and
- this stream is not available in respect of businesses with less than 15 employees, unless they agree, and small businesses cannot be roped into a single interest agreement unless they agree.

A legislative provision which requires "satisfaction" of a series of matters opens the door to legal challenges. The AIER considers the provision of s216D relating to the making of a single interest employer authorisation could be improved by tightening the language on the matters to which the Commission must be satisfied so the exercise of the discretion is more mandatory than directory

The Government should remove the requirement that the employees are "fairly chosen" as a qualification in the SIB Stream. This phrase has already been the subject of litigation and controversy[28] in the current provisions for scope orders.

[28] See the *Scope Order Bench Book* of the Fair Work Commission: https://www.fwc.gov.au/scope-who-will-be-covered#meaning-of-fairly-chosen.

Further, the requirement for a "demonstration of majority support" could lead to union busting style legal interventions to prevent that threshold being reached.

Co-operative Bargaining

The cooperative bargaining stream is a species of MEB which, as the name suggests, can only be progressed on a consensus basis between employers and employees.

There is no access to protected industrial action. The Commission cannot assist with bargaining disputes unless all bargaining representatives agree. Further, additional employers can be roped into a cooperative agreement where they agree, and it is approved by a majority of employees.

Issues with Co-operative Bargaining

Given the necessity of consensus for this stream of bargaining it is unlikely to be widely used. We predict it will have no greater footprint than the current MEB stream available through s172 of the Act – a provision that is rarely used.

LIMITED AVAILABILITY OF INDUSTRIAL ACTION

It is well accepted, including by the ILO's Committee of Experts, that the right to strike arises under instruments to which Australia is a party, such as ILO Conventions 87 and 98 (and in the case of these two conventions even without there being explicit reference).[29]

In CFMEU v Woodside Burrup, the FWC Full Bench observed:[30]

[29] See Breen Creighton, The ILO and the Protection of Fundamental Human Rights in Australia (1998) 22 *Melbourne University Law Review,* 239, 248; See also Bernard Gernigon, Alberto Odero, Horacio Guidoilo, *ILO Principles Concerning The Right To Strike* (International Labour Office 2000), 9.
[30] *Construction, Forestry, Mining and Energy Union v Woodside Burrup Pty Ltd and another* [2010] FWAFB 6021 at [37]

> The objective to "facilitate good faith bargaining and the making of enterprise agreements" is of particular relevance. Like the Workplace Relations Act 1996 before it, the FW Act creates what the Explanatory Memorandum justifiably describes as a "right" in employees to take protected industrial action in support of claims for an enterprise agreement. That legislation may properly be seen as the means by which Australia has given effect to its important obligations under the International Labour Organisation Conventions, particularly Convention no. 87 Freedom of Association and Protection of the Right to Organise 1948 and Convention No, 98 Right to Organise and Collective Bargaining 1949, both ratified by Australia in 1973.

The right to strike that is envisioned within the right to organise and the freedom of associate is one which properly ought only be bound by such limitations as are necessary to protect essential services, certain public sector functions and the life, safety or health of the population.[31] Importantly, these limitations are directed at certain consequential aspects of strike action, not the reasons for which such action is taken. The view of the ILO Committee of Experts is that strike action may be a legitimate tool in pursuit of goals beyond collective bargaining claims, such as '...the seeking of solutions to economic and social policy questions and problems facing the undertaking which are of direct concern to the workers.''[32]

When measured against the backdrop of such a wide conception of the right to strike in international law, the laws that regulate industrial action in Australia are shown to be unduly restrictive of the right to take industrial action. The current reasons for this are many and varied. They include the separation of industrial action into "protected" and "unprotected" sub-species – which has been described as a continuation of the previous *Workplace Relations Act's* legacy of limiting industrial action.[33] Also pertinent are the procedural hurdles which attach to the taking of industrial action, such as the requirement for an order from the FWC, an affirmative ballot and strict

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[31] Convention 98, Articles 6, 9(1); International Labour Office, *357th Report of the Committee on Freedom of Association (2010)* Reports of the Committee on Freedom of Association, paragraph 224
[32] Convention 98, Articles 6, 9(1); International Labour Office, *357th Report of the Committee on Freedom of Association (2010)* Reports of the Committee on Freedom of Association, paragraph 224
[33] Chris Taylor and Belinda Sundaraj, Industrial Action: Strike Options Held in Check in Carol Louw (Ed.) *Understanding the Fair Work Act* (CCH Australia 2010) 65.

time limits for the commencement of industrial action – which, in combination, have been argued as an impediment to the taking of industrial action.

Given the current starting point – that Australian law draws short of fulfilling the right to strike as it is contemplated by international law – the appropriate assessment of the current suite of legislative amendments is whether they move Australian law closer to fully respecting the right to strike and the extent to which they do so.

New requirement for compulsory conciliation in s448A

Industrial action will be available for single enterprise bargaining, supported and single interest multi enterprise bargaining. The Bill places a new hurdle for the availability of protected action for workers. Conciliation will be required prior to the close of a protected action ballot.

A failure to attend conciliation by an employee bargaining representative will render that representative and the employees they represent incapable of organising or taking protected employee claim action. Similarly, a failure to attend conciliation by an employer or employer bargaining representative will render them unable to engage in organise employer response action.

This new barrier to industrial action is not consistent with the "intrinsic corollary" of the right to strike deriving from right to organize protected by Convention No. 87,[34]

[34] Shae McCrystal, 2010, *The Fair Work Act and the Right to Strike* (Federal Press, NSW), 15.

Retention of higher threshold for industrial action approvals

The amended Act would persist with the high voting threshold for protected industrial action in s459. The threshold is majority of workers in the enterprise. This is a higher that to approve an agreement or variation which merely requires the majority of persons who cast a valid vote.

If protected industrial action is the tool by which workers compel employers to participate in an MEB stream, it should not be subject to the higher threshold. If the rationale for the amendments is to spread bargaining beyond its current low footprint 14 percent, the tool of industrial action should be more (rather than less) available to workers and their unions.

Industrial Action Generally

Overall, many of the limitations on the right to take industrial action that are present in the current legislation will remain after the passage of this Bill. In light of the foregoing, this will mean that Australia's laws continue to fail to fully respect this important and fundamental right for workers.

Moreover, the creation of bargaining streams, such as "co-operative bargaining" in which industrial action cannot be taken further flies in the face of respecting the right to strike.

GREATER AVAILABILITY OF ARBITRATION FOR INTRACTABLE BARGAINING DISPUTES

Under the Bill the Fair Work Commission will be given broad powers to oversee bargaining, including to compel attendance, order production of documents and schedule meetings.

If the FWC considers that bargaining is 'intractable' (or that there is no reasonable prospect of agreement) it will have the power to arbitrate the outstanding matters. "Intractable Bargaining Declarations" will be available on application following a section 240 Bargaining Dispute, where the

FWC considers that there is no reasonable prospect of agreement being reached and it is reasonable in the circumstances to make the declaration.

The consequence of an Intractable Bargaining Declaration being made is that if the parties cannot reach agreement in the subsequent "post-declaration negotiating period," the FWC must make a (Intractable Bargaining) Workplace Determination. Given the history of the use of arbitration to resolve disputes in Australia, the AIER welcomes a mechanism for arbitration in circumstances where there has been a failure to reach agreement.

The word "intractable", is not defined in the amending Act. The dictionary definition of that term is "difficult". There is a danger, if the current text is retained, that the Commission could pull the "trigger" of intractability before workers and their unions have a chance to apply the full pressure of industrial action. The text should be amended to ensure that the declaration can only be made when bargaining has reached a stalemate, attempts at reaching an agreement have persisted for some time and there is no reasonable prosects of reaching agreement.

A possible precedent for a form of words which protects the right of parties to use industrial action and provides a trigger point for arbitration after a failure to reach agreement is s177 of the *Industrial Relations Act 2016*(Qld). This provides for a "minimum period" before a conciliating member can refer a bargaining dispute to arbitration:

> (4) In this section— minimum period means the later of the following periods to end—
>
> (a) 6 months from the nominal expiry date of a certified agreement or bargaining award that applies to the parties.
>
> (b) 3 months from the day conciliation of the matter started.

REPEAT OFFENDERS' EXCLUSION FROM MEB

S178C of the Bill would exclude any person who has a record of repeated noncompliance with the Fair Work Act from participating in bargaining. This is shown by evidence of court rulings within the previous eighteen months depending on the number and seriousness of the contraventions.

This provision flagrantly breaches the collective bargaining convention and their right of free association. The CFA has found that:

One of the main objectives of workers in exercising their right to organize is to bargain collectively their terms and conditions of employment. Provisions which ban trade unions from engaging in collective bargaining therefore unavoidably frustrate the main objective and activity for which such unions are set up. This is contrary not only to Article 4 of Convention No. 98 but also Article 3 of Convention No. 87 which provides that trade unions shall have the right to exercise their activities and formulate their programmes in full freedom.[35]

It is clear the target of this exclusion is the CFMMEU. This offends the Governments own argument for abolition of the ABCC in the *Explanatory Memorandum* of the Bill (at paragraph 4) where it is stated:

> Part 3 would abolish the Australian Building and Construction Commission (ABCC) …This would ensure that workers in the building and construction industry have the same rights as other workers in relation to enforcement of the FW Act.

The lack of access of the CFMMEU to MEB does not ensure that union has "the same rights as other workers". As a footnote, we understand that amendments have been presented to the Bill that reconfigures this exclusion. It removes the exclusion based on the activity of a union and replaces it

[35] ILO Compilation of decisions of the Committee on Freedom of Association at paragraph 1450: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70002:0::NO::P70002_HIER_ELEMENT_ID,P70002_HIER_LEVEL:3947747,1.

with an exclusion based on an industry, namely large-scale civil construction. The AIER considers this form of exclusion still prevents bargaining of a group of unions and workers from a particular industry from engaging in MEB. The criticisms we make in this part therefore continue to apply.

General comparison of the Three Streams against International Labour Standards

The model of bargaining contemplated by the Bill is "one workplace at a time." Workers who wish to be part of an MEB will have to win a majority vote or expression of majority support of workers at the workplace to compel an employer to be covered by an MEB .

Neither of the three streams strictly comply with the ILO *Collective Bargaining Convention*. Neither stream allows freedom of workers or their representatives to choose the level of bargaining. The choice is limited to a single enterprise or across a number of enterprises through either of the three streams. The processes by which access to the streams is obtained are too constricted with qualifications to constitute "free collective bargaining". The CFA have stated

In cases in which governments had, on many occasions over the past decade, resorted to statutory limitations on collective bargaining, the Committee pointed out that repeated recourse to statutory restrictions on collective bargaining could, in the long term, only prove harmful and destabilize labour relations, as it deprived workers of a fundamental right and means of furthering and defending their economic and social interests.[i36]

There is no doubt however, that the three streams of multi-employer bargaining introduced by this Bill lead to more free collective bargaining and more choice than is provided in the current Fair Work Act 2009. We therefore ask the Committee to support the Bill to ensure its passage into law as soon as possible.

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[36] ILO Compilation ibid at p1423.

AIER, 10 November 2022.