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STRONGER TOGETHER
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Senate Education and Employment Legislation Committee

Inquiry into the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020

Submissions of
THE AUSTRALIAN WORKERS' UNION

5 FEBRUARY 2021

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A. EXECUTIVE SUMMARY

A.1 About The Australian Workers' Union

The Australian Workers' Union (**AWU**) is the nation's oldest union and has broad constitutional coverage in a wide variety of industries including construction, steel, manufacturing, mining, agriculture, pastoral, horticulture, hair and beauty, aviation and oil and gas.

A.2 Support for ACTU submissions

The AWU has had the opportunity to read the Australian Council of Trade Unions' (**ACTU**) submission to this inquiry. The AWU supports those submissions, and the submissions made by the AWU below are made in addition to those of the ACTU.

A.3 Summary of AWU position

The Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (**"Bill"**) reduces the rights of hardworking Australians and must be **fixed** or **rejected**.

In relation to the five Schedules in the Bill, the AWU's position is:

Schedule 1: Casual employment

The Bill seeks to retrospectively legalise the unlawful use of 'permanent casuals' in Australia. No meaningful improvements arise for employees.

Schedule 2: Modern awards

Legislating modern award terms sets a dangerous precedent and constitutes an attempt by the Government to bypass the modern awards objective and the independent processes of the Fair Work Commission.

Schedule 3: Enterprise agreements

Any goodwill generated by the IR Working Groups process has been completely undermined by the proposed amendments concerning enterprise agreements. The amendments constitute an attack on unions and an attempt to encourage the approval of agreements that reduce minimum safety net conditions in modern awards.

Schedule 4: Greenfields agreements

The amendments seek to address problems that don't exist. The amendments are clumsy and contrived.

Schedule 5: Compliance

The amendments undermine important progress previously made with wage theft laws in Victoria and Queensland. The amendments deliver only very minor improvements for workers and constitute a major missed opportunity.

A.4 The Bill will damage the economy

The amendments proposed in the Bill, particularly in relation to enterprise agreements, awards and casual employment, will undoubtedly result in reduced working conditions for low paid Australian workers. Given low paid employees are the cohort which is most likely to stimulate the economy via additional spending, the Government's policy decision to undermine the working conditions of low paid employees is economic madness. The employer lobby group in Australia consistently fails to recognise the benefits to the overall economy of improved conditions for low paid workers and instead focuses on cost savings for individual businesses. The Government is endorsing this simplistic and misguided approach in the Bill to the ultimate detriment of the Australian economy and all Australians.

PART 1 – CASUAL EMPLOYMENT

1.1 Casual employee definition

1. Schedule 1, Part 1, Item 2 of the Bill seeks to introduce a new definition of a casual employee at s 15A of the FW Act. The definition places substantial emphasis on an employer's subjective characterisation of the employment relationship rather than objective indicators. This arises from the focus on the terms of the employer's offer of employment[1], whether the employment is described as casual employment[2] and whether a casual loading is paid.[3]

2. Significantly, while s 15A(1) and (2) purport to make "no firm advance commitment to continuing and indefinite work according to an agreed pattern of work" a condition of casual employment, s 15A(3) and (4) then completely undermines the ability of an employee to prove that this condition has not been satisfied.

3. Section 15A(3) states:

> *To avoid doubt, a regular pattern of hours does not of itself indicate a firm advance commitment to continuing and indefinite work according to an agreed pattern of work.*

This provision is a statutory oxymoron. A regular pattern of hours can only arise where an agreed pattern of work has been offered by an employer for a continuing period.

4. Section 15A(4) states:

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

This provision validates sham arrangements. It permits an employer to label an employee as a casual employee and then utilise them as if they are a permanent employee.

5. The amendments to casual employment conditions proposed in Schedule 1 of the Bill are overwhelmingly directed at ensuring employers are not exposed to

[1] Section 15A(1).
[2] Section 15A(2)(c).
[3] Section 15A(2)(d).

underpayment claims rather than providing a fair and reasonable definition of "casual employment".

6. It appears the Government's response to the exploitative use of 'permanent casuals' by Australian employers, as exposed in the *Workpac*[4] litigation in relation to the mining industry, is to make this conduct lawful on a retrospective basis[5].

1.2 Casual conversion

7. Schedule 1, Part 1, Item 3 of the Bill proposes the insertion of a new Division 4A into Part 2-2 of the FW Act, which contains the National Employment Standards.

8. The impact of these changes for employees will generally be either:

   (i) the replication of existing modern award casual conversion entitlements which are accessible after 12 months of casual employment[6]; or

   (ii) a reduction to existing modern award casual conversion entitlements in at least 15 modern awards which are currently accessible after six months of casual employment or a lesser period.[7]

9. Although modern awards can currently improve upon the minimum entitlements in the National Employment Standards, Schedule 7, Part 10, Item 48 of the Bill requires the Fair Work Commission to conduct a review within six months of commencement to ensure all modern awards contain casual conversion provisions that are consistent with those in the Bill.

10. The policy rationale or justification for dramatically expanding the legal definition of a casual employee and then also making it harder for employees

[4] *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 and *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84.

[5] The definition operates retrospectively due to the application provisions in Schedule 7, Part 10, Item 46 of the Bill.

[6] A model casual conversion clause was inserted into 85 modern awards during the 4-yearly review of modern awards: see *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541.

[7] See *Asphalt Industry Award 2020; Building and Construction General On-site Award 2010; Cement, Lime and Quarrying Award 2020; Concrete Products Award 2020; Electrical, Electronic and Communications Contracting Award 2020; Food, Beverage and Tobacco Manufacturing Award 2020; Graphic Arts, Printing and Publishing Award 2020; Horse and Greyhound Training Award 2020; Joinery and Building Trades Award 2010; Manufacturing and Associated Industries and Occupations Award 2020; Mobile Crane Hiring Award 2010; Plumbing and Fire Sprinklers Award 2010; Sugar Industry Award 2020; Textile, Clothing, Footwear and Associated Industries Award 2010 and Vehicle Repair, Services and Retail Award 2020*.

to access conversion to permanent employment is elusive given the COVID-19 pandemic has highlighted the pervasiveness of insecure work in the Australian economy.

11. The proposed statutory casual conversion provisions contain an array of terms which can be relied upon by an employer to prevent converting a casual employee to permanent employment. These include:

    (i) the requirement to both be employed for a total of 12 months and work a regular pattern of hours on an ongoing basis during at least the last 6 months is extremely onerous and creates the potential for an employer to alter an employee's pattern of hours during the latter part of the 12-month employment period to avoid offering permanent employment[8];

    (ii) an employer is not required to make an offer where there are "reasonable grounds" not to make an offer based on facts known or reasonably foreseeable at the time of deciding not to make the offer.[9] Although some "reasonable grounds" are identified in s 66C(2), these examples do not limit the breadth of the term "reasonable grounds" in s 66C1. When these provisions are considered in conjunction with the fact that the FWC can only arbitrate a dispute where both parties agree[10], it is apparent that the conversion rights are almost entirely reliant on goodwill from the relevant employer and are essentially a "toothless tiger";

    (iii) an employer is expressly relieved from the obligation to offer conversion where the employee's position will cease to exist in the period of 12 months after the time of deciding not to make the offer.[11] The effect of this provision, in addition to the 12-month qualification period for conversion rights, means that a casual employee can be engaged just like a full-time employee for up to 24 months; and

    (iv) an employer can avoid the conversion obligation by making a significant change to a casual employee's hours, days or times of work during the second year of their employment.[12]

[8] Section 66B(1).
[9] Section 66C(1).
[10] Section 66M(5)(b).
[11] Section 66C(2)(a).
[12] Section 66C(2)(b) and (c).

PART 2 - MODERN AWARDS

2.1 Identified awards

12. Schedule 2 of the Bill is directed at part-time employment conditions and flexible work directions in 12 "identified modern awards".

13. The 12 identified modern awards cover an extremely broad range of industries. For example, the list includes:

    (i) the *Meat Industry Award 2020;*

    (ii) the *Nursery Award 2020*;

    (iii) the *Pharmacy Industry Award 2020;*

    (iv) the *Restaurant Industry Award* 2020; and

    (v) the *Seafood Processing Award 2020*.

    The connections or similarities between an abattoir, a nursery, a chemist, a restaurant and a food manufacturing factory are not immediately apparent. It is also concerning that the list of 12 awards can be subsequently amended via regulations.[13]

14. The nature of the industries covered by the 12 identified awards means that the overwhelming majority of employees covered by these awards will not be able to work from home. That brings into question the utility of work location directions for these awards.

15. Further, the Bill's approach in prescribing award conditions in the FW Act[14] constitutes a substantial departure from the current method of determining safety net award conditions in Australia. An independent tribunal, the Fair Work Commission, currently determines award conditions in accordance with the modern awards objective. The modern awards objective is to provide a fair and relevant safety net of terms and conditions taking into account a list of nine factors which cover worker, employer and national economic interests. The Bill circumvents this approach and allows award conditions to be set by politicians.

2.2 Additional hours for part-time employees

[13] Section 168M(3)(m) and 168M(4).
[14] This arises from s 168S and s 789GZO.

16. Schedule 2, Part 1 of the Bill constitutes an attack on overtime penalty rates for part-time employees covered by the 12 identified awards. The provisions are directed at permitting employers to pay ordinary time rates instead of overtime penalty rates when part-time employees work beyond their guaranteed minimum hours of work.

17. Under the *Seafood Processing Award 2020*, a part-time employee is currently entitled to overtime penalty rates when they work in excess of their agreed ordinary hours of work[15] with the penalty rates being 150% for the first three hours and then 200%.

18. By way of example, a Level 1 Process Attendant whose regular ordinary hours are 20 per week would currently earn the following amounts if they worked 10 additional hours for the week on two different days:

    CURRENT AWARD

    - 20 hours x ordinary rate of $19.84 = $396.80
    - 6 overtime hours at 150% ($29.76) = $178.56
    - 4 overtime hours at 200% ($39.68) = $158.72

    TOTAL EARNINGS = $734.08

19. If the employee enters into a simplified additional hours agreement, their earnings would be:

    SIMPLIFIED ADDITIONAL HOURS AGREEMENT

    - 30 hours x $19.84 = $595.20

20. Therefore, the employee is **$138.88 worse off for the week** as a result of the simplified additional hours agreement. That is a massive amount on any measure for an already low-paid employee.

21. The unfortunate reality is that many employees will not feel comfortable to decline an offer from an employer to enter into a simplified additional hours agreement. That will particularly be the case if they consider the alternative to entering into the agreement will be that they will not receive any additional hours of work.

[15] Clause 10.7.

22. In addition, it is completely unrealistic to expect that low-paid employees will be able to enforce their right to refuse to enter into a simplified additional hours agreement via the general protections in the FW Act. Any industrial lawyer with experience in general protections matters will know that the legal costs associated with properly prosecuting a general protections claim in the Federal Court or Federal Circuit Court will generally be cost prohibitive for a low-paid employee.

2.3 Flexible work directions

23. Schedule 2, Part 2 of the Bill proposes to insert rights for an employer covered by the 12 identified awards to issue flexible work directions to an employee concerning what duties the employee is to perform and their work location.

24. The rights are similar to those currently appearing in Part 6-4C of the FW Act. However, the significant difference is that an employer does not have to demonstrate a revenue reduction[16] to access the flexible work directions proposed in the Bill and there is no access to arbitration of disputes by the Fair Work Commission unless the employer agrees[17].

25. Instead of a revenue reduction test, the Bill refers in proposed s 789GZK to a direction only being available where "the employer has information before the employer that leads the employer to reasonably believe that the direction is a necessary part of a reasonable strategy to assist in the revival of the employer's enterprise".

26. The vagueness of this qualifying provision combined with the limited access to arbitration will result in access to the flexible work directions largely being unfettered for employers covered by the 12 identified awards. This outcome is unjust given many employers covered by the 12 identified awards will have suffered minimal economic damage as a result of the pandemic.

PART 3 - ENTERPRISE AGREEMENTS

3.1 Objects - undermining collective bargaining

27. Schedule 3, Part 1 of the Bill proposes significant amendments to the objects of Part 2-4 – Enterprise Agreements in the FW Act. The term "collective bargaining" is conspicuously absent from the proposed s 171(a) which

[16] As per s 789GDC of the FW Act.
[17] This is currently available under s 789GV of the FW Act.

identifies the following object of the enterprise agreements part of the FW Act (our emphasis):

> *to provide a simple, flexible, fair and balanced framework for employers and employees to agree to terms and conditions of employment, particularly at the enterprise level.*

28. *ILO Convention No. 98,* Article 4 states:

> *Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.*

29. The Bill is contrary to this ILO Convention Article because it seeks to enhance the ability of employers to circumvent a proper collective bargaining process and instead to seek agreement on terms and conditions of employment directly with employees.

30. While this approach may appear legitimate at first glance, it must be understood in the context of the inherently unequal bargaining positions of employers and employees. This inherent inequality has led to the formation of trade unions around the world. Trade unions play a critical industrial role via negotiating collectively on behalf of employees which provides a balance to the power of employers. The Bill's attack on collective bargaining constitutes an attempt by the Government to undermine the influence of unions and in turn to provide additional bargaining strength to employers.

3.2 Weakening the genuine agreement test

31. Schedule 3, Part 3 of the Bill dramatically reduces the existing safeguards which ensure an enterprise agreement has been genuinely agreed to by the relevant employees.

32. The FW Act currently ensures an enterprise agreement can only be approved if the employer has:

    (i) provided a copy of the agreement to the relevant employees along with any incorporated material;

(ii) notified employees about when the vote will occur and the method of voting at least seven days before the vote will occur; and

(iii) explained the terms of the agreements and their effect.

33. Given enterprise agreements are statutory instruments that can set employment conditions for all current and prospective employees, even if an employee personally did not agree to the terms, it is essential that mechanisms are in place to ensure employees are provided with sufficient information and time to make an informed decision when voting for an enterprise agreement. The mandatory steps identified above are minimal and completely appropriate given the legal implications of an enterprise agreement.

34. The Bill replaces these mandatory steps with a general obligation to "take reasonable steps to ensure that the relevant employees are given a fair and reasonable opportunity to decide whether or not to approve the agreement".[18] An employer is "taken to have met" the general requirement if the steps above have been followed, but an agreement can still be approved if the steps have not been taken.

35. The amendments proposed in the Bill will dramatically increase the likelihood of enterprise agreements being approved even when an employer has not taken the minimum necessary steps to ensure employees can make an informed decision about whether or not to support the agreement.

36. As per the casual employment amendments, the Bill represents the Government responding to examples of employers not complying with the current legislative requirements by amending the laws to suit the conduct of employers – this effectively rewards poor conduct.

[18] Proposed s 180(2).

Case Study One: Rigforce

Rigforce applied to have an enterprise agreement approved by the Commission. The agreement was made with three employees despite Rigforce having a workforce of almost 200 at the time by the use of a related entity. There was no union involvement in the EA. The AWU had identified Rigforce as one of the lowest paying operators in the sector that had continually undercut the market and accordingly targeted the renegotiation of its soon to be expired non-union EA. To avoid bargaining, Rigforce chose to create a new non-union EA with another entity and three employees.

The agreement was approved by the Commission. The AWU appealed the approval decision and was successful on s.180(5) as the company had provided an explanation that stated the rates of pay in the new agreement are higher than the current agreement, despite this not being the case for casual employees in two of the three classifications. On remittal, the AWU was successful in arguing that genuine agreement could not be satisfied due to the operation of s.188(1)(c). Commissioner Lee found that as the company had stated that the rates of pay were higher but did not quantify this statement with a dollar figure or percentage, it wasn't possible to ascertain if an undertaking to ensure that the rates were higher (a 5% increase) actually aligned with the explanation given to employees. The application for approval was dismissed on remittal.

3.3 Voting requirements

37. Schedule 3, Part 4 of the Bill contains proposed amendments directed at the determination of which casual employees are entitled to vote in relation to a proposed enterprise agreement or a variation to an enterprise agreement. The Bill confines the right to casual employees "who performed work at any time during the access period".

38. These amendments have the potential to allow employers to manipulate voting processes by not engaging casual employees during the access period. For example, an employer may use a small permanent workforce of two or three employees to approve an agreement that will ultimately apply to a much larger number of casual employees who did not work during the access period. The Bill does not contain any safeguards to prevent this type of manipulation.

3.4 Weakening of the BOOT

39. Schedule 3, Part 5 of the Bill contains proposed amendments to the better off overall test (**"BOOT"**). The BOOT is designed to ensure enterprise agreements result in improvements to the safety net conditions in modern awards.

40. The Bill proposes to cynically use the COVID-19 pandemic to dramatically expand the circumstances in which an agreement that fails the BOOT can be approved by the Commission for a two-year period. However, it is only the power to approve new agreements that fail the BOOT that lapses after two years, agreements approved by the Commission during the two-year period can continue operating until they are terminated or replaced.

41. These amendments constitute an attack on the safety net that will potentially allow employers to provide conditions of employment that are inferior to the relevant modern award for the next five to 10 years. The potential for inferior agreements to remain in place for lengthy periods is highlighted by the amendments proposed in Schedule 3, Part 13 of the Bill. The automatic sunsetting of transitional instruments has become necessary because numerous employers have decided to avoid bargaining for agreements under the FW Act and instead have just continued to rely on nominally expired agreements approved under predecessor legislation because the conditions are below those that would otherwise apply under the relevant modern award.

42. It is extremely regrettable and concerning that the Government's long-term policy response to the COVID-19 pandemic is to lower the safety net for low-paid employees. It is well established that this cohort is more likely to stimulate the economy via additional spending if they receive wage increases yet the Government is proposing instead to reduce their spending capacity. This makes no economic sense.

43. The Bill also proposes to amend s 193 of the FW Act to limit the type of roster patterns that can be taken into account for the purposes of the BOOT to those being worked by award covered employees and those the employer considers "reasonably foreseeable" for the future.

44. The inclusion of a subjective measure, what the employer considers to be "reasonably foreseeable", is completely inappropriate for an objective assessment process like the BOOT.

45. The amendments will allow the Commission to conclude an agreement passes the BOOT even when it can be clearly established that employees

working roster patterns permitted by the agreement will be worse off. This makes a mockery of the BOOT.

46. The Government apparently considers it is appropriate for employees to earn below the minimum award conditions if their roster pattern wasn't being worked when the relevant agreement was approved and their employer did not subjectively consider the roster to be reasonably foreseeable at the test time.

47. The impact of the changes proposed to the BOOT in the Bill should not be underestimated. The BOOT currently ensures enterprise agreements are used to improve upon safety net conditions for all employees. The amendments in the Bill will create a number of exceptions to the requirement for all employees to be better off. This has the potential to result in large numbers of employees being locked into below award conditions for the next decade.

48. The Government's response to concerns about a decrease in the use of enterprise agreements appears to be to make agreements more attractive to employers via an opportunity to reduce award conditions. This is statutory wage theft from the Government.

Case Study – Drilling Industries Australia

Drilling Industries Australia applied to have an enterprise agreement approved by the Commission. There was no union involvement in bargaining. The AWU sought to be heard on the basis of the agreement covering an industry in which the AWU is the primary union. This request was granted by Commissioner Johns.

In relation to the BOOT, the AWU drafted and filed two analyses of an employee working a typical roster in the hydrocarbons industry. Both found that the agreement did not pass the BOOT. This is despite the FWC's agreement approvals team initially finding that the rates of pay in the agreement were between 47% and 156% above the award. The FWC's analysis was ultimately wrong due to the rolled-up rates and the removal of the living away from home allowance in the agreement.

In response to the analyses provided by the AWU, the employer's representative submitted that when an employee 'works a mixture of day work and night work, which is what the employees currently work' the resultant wages payable under the agreement will be more beneficial than those in the award – a concession that the rates under the agreement are worse off than the award should an employee perform night shift work for longer than half a cycle. The employer also failed to list the entitlements under the award that formed part of the rolled-up rate as less beneficial terms of the agreement.

The Commission found that the agreement was not genuinely agreed to by the employees and that the agreement also did not pass the BOOT. In relation to the analyses provided by the AWU to demonstrate BOOT failure, the Commissioner noted: 'It is no answer to the rosters submitted by the AWU to say that the employer does not operate those types of rosters. If it is a possible roster under the agreement, then it is proper to assess it. Often an employer facing a roster that does not pass the BOOT will give an undertaking that it will not operate that roster for the life of the agreement. That did not occur in the present matter.'

3.5 Limitations on union rights to appear in agreement approval matters

49. Given the Bill has arisen from the IR Working Group process which brought together the Government, employer and union representatives, it is extremely disappointing that Schedule 3, Part 9 of the Bill proposes to introduce new limitations on the ability of unions to appear in agreement approval and agreement variation matters before the Fair Work Commission. It appears the union movement has been rewarded for its constructive assistance in the Working Group process by another attack from the Government.

50. The Bill proposes the insertion of a new s 254AA which will prevent a union being heard in an enterprise agreement approval matter unless the union was a bargaining representative for the agreement and will prevent an employee being heard in an enterprise agreement variation matter unless the union is covered by the agreement.

51. These provisions unfairly restrict unions from making submissions about enterprise agreements that will operate in industries that are within their constitutional coverage. The working conditions in these industries are a legitimate concern for unions even if the relevant union does not have a member covered by the agreement, because the conditions in one enterprise agreement can have consequences for conditions in other parts of the industry where the union does have members.

52. Similarly, a union may not be covered by an existing enterprise agreement because it did not have members when the agreement was negotiated. However, the union may have recruited members since the agreement was approved and has a legitimate right to represent its members in relation to an application to approve a variation to the agreement.

53. There are countless recent examples of unions, including the AWU, playing a critical role in assisting the Fair Work Commission to perform its enterprise agreement approval functions.

Case Study: Horticulture Agreements – *The Australian Workers' Union v Gray Australia Pty Ltd as trustee for The Gray Family Trust T/A ceres Farm & Kenrose Pty Ltd and Others* [2019] FWCFB 4253.

During the 4-yearly review of modern awards, the Fair Work Commission granted an application by the AWU for the insertion of casual overtime entitlements into the then *Horticulture Award 2010* (**"Award"**).

In response to this decision, a large number of employers in the horticulture industry sought to have pro forma agreements approved by the Commission that did not contain overtime entitlements for casual employees. The employers sought to have the agreements approved before the award changes came into effect so that they would not have to comply with the casual overtime conditions in the Award.

The relevant employers did not explain to the voting employees that the primary reason they were seeking to make an enterprise agreement was to avoid the imminent award changes. A large number of employees who work in the Australian horticulture industry are from overseas and many are from non-English speaking backgrounds.

The AWU was not a bargaining for these agreements but sought to intervene in the agreement approval proceedings on the basis that the AWU is entitled to represent workers in the horticulture industry and the agreements constituted an underhanded attacked on the safety net conditions.

The agreements were initially approved by the Fair Work Commission. However, the AWU appealed these decisions and a Full Bench upheld the appeal and dismissed the employers' applications. The Full Bench accepted the AWU's argument that the agreements were not genuinely agreed to by the relevant employees because they were not informed about the imminent award changes.

If the amendments proposed in the Bill are accepted, the AWU may be prevented from making submissions in this type of matter in the future.

Case Study: Diamond Offshore

Offshore drilling contractor, Diamond Offshore General Company, applied to have a new enterprise agreement approved. There was no union involvement in bargaining for the agreement. The MUA requested, and was granted, leave to participate in the approval process for the enterprise agreement.

Deputy President Kovacic found that the agreement was not genuinely agreed to by employees on the basis of Diamond failing to provide an explanation of the differences between the current agreement and the proposed agreement, which included:

- A reduction of $4,000 in the minimum annual wage payable under the agreement (it was a baseline EA with one minimum rate for all positions);
- A reduction in superannuation payable – from 12% to 9.5%;
- A reduction in the casual loading – from 25% to 20%; and
- The removal of a 25% foreign service premium from the agreement (it was placed into a policy instead).

Diamond Offshore appealed the decision of the Deputy President to a Full Bench of the Commission, represented by Clayton Utz. The AWU requested to be heard alongside the MUA in defending the appeal and was granted this request. A main focus for Diamond Offshore was that s.180(5) only required an employer to explain the effect of a term, and not the effect of a term in comparison to another term (in this case, the current term applying to an employee's agreement). In the words of the employer's representative: "the obligation placed on an employer to provide an explanation of the terms of an agreement and the effect of those terms is limited to the operative outcome that the text of the term produces."

The Full Bench rejected this characterisation of s.180(5) and refused the company leave to appeal. Subsequently, the AWU began negotiations with Diamond Offshore for an enterprise agreement to replace the expired agreement on behalf of our members at Diamond. The replacement EA was a vast improvement on the previous one and miles in front of the failed EA.

Had unions not party to the agreement not been permitted to intervene *and* make submissions regarding genuine agreement, it is possible that this agreement would have been approved with some undertakings, and employees would not have been aware that their terms and conditions of employment had been significantly reduced as these changes were not explained to them.

3.6 Termination of agreements

54. Schedule 3, Part 8 of the Bill proposes to introduce a temporal limitation on when an application can be made to terminate an enterprise agreement. The amendment will prevent an application being made within three months of the nominal expiry date.

55. This amendment is a cynical and tokenistic concession to the union movement.

56. A number of large multi-national corporations have attempted to use the termination of agreement provisions in the FW Act to reduce employment conditions following the *Aurizon* litigation.[19]

57. The AWU has been involved in three major termination of agreement cases, the employers were Alcoa of Australia Limited (**"Alcoa"**), Esso Australia Pty Ltd (**"Esso"**) and BP Refinery (Kwinana) Pty Ltd (**"BP"**).

58. In those cases, the relevant nominal expiry dates and the dates that the employers applied to terminate the existing enterprise agreements were:

    (i) Alcoa – nominal expiry date: 31 March 2017 – application to terminate agreement filed: 12 March 2018;

    (ii) Esso – nominal expiry date: 10 October 2014 – application to terminate agreement filed: 3 August 2018; and

    (iii) BP – nominal expiry date: 30 November 2017 – application to terminate agreement filed: 17 October 2018.

59. It can be seen, therefore, that the three applications were not made within three months of the nominal expiry date. That means the amendment proposed in the Bill would not have helped the AWU members affected by these aggressive attacks on employment conditions by wealthy multi-national corporations at all.

60. It is completely unacceptable for an employer to be able to unilaterally act to move employees off enterprise conditions and onto minimum award conditions via a termination of agreement application. The applications have

[19] This concluded with the Full Federal Court judgment in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Aurizon Operations Ltd* [2015] FCAFC 126.

been repeatedly used by employers as leverage to force employees to accept changes to the conditions in their enterprise agreement via the threat of being placed on award conditions. The Bill does nothing to prevent this type of bullying conduct by wealthy multi-national corporations and other employers in the future.

3.7 Time limits for determining applications

61. Schedule 3, Part 10 of the Bill contains amendments which would require the FWC to determine agreement approval applications and agreement variation applications within 21 days or to publish reasons explaining why the timeframe has not been met.

62. The need for this change is highly questionable given the FWC has already implemented extensive internal processes directed at improving the speed at which enterprise agreement applications are determined.[20]

63. Unfortunately, when this proposed amendment is considered in conjunction with the weakening of the genuine agreement requirements, the weakening of the BOOT and the limitations on who can make submissions before the FWC, it is apparent the Government is attempting to reduce scrutiny on enterprise agreements and enable agreements that do not meet the current statutory requirements to be approved by the FWC.

64. This approach is not only incredibly unfair for the hardworking Australians that will lose conditions, but it also makes no economic sense to respond to the COVID-19 pandemic by promoting a reduction in working conditions.

3.8 FWC functions – recognising the outcome of bargaining

65. Schedule 3, Part 11 of the Bill seeks to amend the FW Act by inserting a new s 254B which reads:

> *The FWC must perform its functions and exercise its powers under this Part in a manner that recognises the outcome of bargaining at the enterprise level.*

66. This proposed amendment is an inappropriate attempt to influence the operations of the FWC. The FWC is an independent statutory tribunal that should assess whether enterprise agreements can be approved in a rigorous

[20] See here: https://www.transparency.gov.au/annual-reports/fair-work-commission/reporting-year/2019-20-24

manner based on whether the BOOT and other statutory requirements have been met.

67. As the Horticulture Agreements Case Study above demonstrates, the fact that employees have voted in favour of an enterprise agreement may constitute nothing more than a group of non-English speaking employees putting their hand up in support of an agreement in the presence of their employer because they want to have a job.

68. Describing many non-union agreements as an "outcome of bargaining" is also misleading. In a large number of cases, there will have been no bargaining meetings at all, an employer has simply asked employees to vote on an agreement that has been drafted by the employer or their legal representatives.

3.9 Transfer of business

69. Schedule 3, Part 12 of the Bill proposes an exclusion from the operation of the transfer of business protections in the FW Act where the transfer is between associated entities and "before the termination of the employee's employment with the old employer, the employee sought to become employed with the new employer at the employee's initiative".

70. Making the important transfer of business protections contingent on an assessment of whether an employee sought employment with the new employer on their own initiative is fundamentally flawed.

71. In many transfer scenarios involving associated entities, an employee may be informed that work will move from one entity to another – hence the employee's options will be being made redundant or seeking employment with the new employer. In this situation, the transfer has not truly arisen at the employee's initiative at all, the restructuring decision has been unilaterally made by the employer, the employee is simply deciding whether to have a job or not.

72. Significantly, because the amendment operates as an exclusion from the definition of a "transfer of business", it appears to remove jurisdiction for the FWC to determine whether an instrument should transfer with an employee or not. This issue arises because the jurisdiction to make orders under s 318 and 319 of the FW Act is only enlivened where a transfer of business has occurred.

3.10 Sunsetting of instruments

73. Whilst the eventual ending of 'zombie agreements' negotiated under predecessor legislation to the FW Act is positive, it is unclear why these instruments can continue operating until 1 July 2022.

74. It is notable that the array of amendments in the Bill that will benefit employers commence operating the day after Royal Assent but this provision, which will likely lead to improved conditions for employees, will not commence operating until 1 July 2022. The situation is manifestly unjust. Employers generally have greater financial resources at their disposal than employees, yet employers are given 18 months to prepare for changes whereas employees have to deal with them immediately.

PART 4 – GREENFIELDS AGREEMENTS

4.1 Definition of 'major project'

75. The Amendment proposes a definition of 'major project' as capital expenditure of at least $500 million that has been incurred or is reasonably likely to be incurred in carrying out the project. If the 'major project' is deemed so by the Minister by way of declaration, that amount can be as little as $250 million.

76. Three obvious issues flow from the definition proposed by the Amendment. Firstly, the thresholds of $500m and $250m for 'major projects' is comically low. A project value of $250m - $500m is the cost of an office development, a shopping centre upgrade or a residential tower. None of these projects are 'major'. They are all entirely commonplace. Additionally, there is no project with a value of $250m - $500m that would take more than four years to construct, let alone eight years. For a project to truly be a 'major project', it must represent a large investment, much larger than an ordinary construction project. The AWU considers that a major project must represent at least $5bn in construction value.

77. Secondly, an applicant employer under the life of project stream isn't put to proof over its claims that the project meets the definition of a major project – the definition of a 'major project' is merely based on whether it is 'reasonably likely' that such amounts will be incurred. This is poorly thought out by the Government. It is unknown how such a definition would work should it be implemented, and it would inevitably act as a mechanism by which the life of project agreement stream – and all its negative impacts for workers – is broadened to include projects that don't fall within the project value determined by the legislation.

78. Thirdly, although the proposed s.186(5)(b) states that the agreement must relate to the *construction* of a major project, the value assigned by the

definition of 'major project' in proposed s.23B does not confine the threshold amounts to expenditure on construction only – it is expenditure incurred 'in carrying out the project'. How the Government intends for this issue to be reconciled is not apparent.

4.2 The supposed purpose of the Amendment

79. The provisions of the Amendment will not 'assist Australia's recovery' in any way, particularly with regard to the life of project greenfields agreement stream.

80. If the government was looking to assist Australia's recovery, the provisions of the Bill would not be solely focused on gifting the business lobby its wish list – or in the words of the Amendment 'attracting investment'– the provisions of the Bill would assist working Australians at least in gaining or retaining work and/or provide increased opportunities for the skilling of the workforce.

81. If the life of project greenfields agreement stream was truly intended to assist Australia's recovery, the benefits to Australians would be plain to see. However, there is no proposal for a local content requirement for 'major projects' in the Amendment, meaning manufacturing jobs such as those in steel or cement receive no benefit. A likely result is that such work will continue to be lost to overseas manufacturers. This is of no assistance to Australia at all.

82. The same can be said about local workforce requirements or apprentice requirements, which is an abject failure that will put local jobs at risk of being lost. The absence of an apprentice requirement clearly shows that the government is failing to even consider providing young Australians or Australians out of work the opportunity to develop their skills and find meaningful work. Without investment in the training of the Australian workforce, particularly new entrants, any claimed increase in 'investment' in Australia will be only temporary and be of very limited assistance to working Australians retaining or gaining employment. Surely an investment in Australia means an investment in its workers.

83. There is also no requirement for a strong, all-inclusive dispute resolution procedure. Due to the nature of these proposed agreements being that the agreement will apply to the workforce for the entire duration of the project, workers who will be covered by these agreements will never have an opportunity to renegotiate the terms and conditions of their employment at that project. Therefore, additional focus on dispute resolution is absolutely necessary.

84. Additionally, and very importantly, there is absolutely no evidence that investment will increase in Australia as a result of the introduction of life of project greenfield agreements. Any claim that investment will suddenly surge as a result of this amendment is fantasy and entirely based on a vague concept.

85. The true purpose of this Amendment insofar as life of project greenfield agreements are concerned is to gift big business the opportunity to avoid bargaining with their workers and the potential for protected action. The Amendment has been drafted with this, and only this, in mind. There has been no consideration of how to assist the working men and women of Australia.

4.3 The requirement for an annual increase in base rate of pay

86. Proposed section 187(7) provides that if a greenfields agreement has a nominal expiry date of more than four years after it is approved by the Fair Work Commission (**Commission**), the Commission must be satisfied that the agreement provides an annual increase on the base rate of pay.

87. Although ostensibly designed as a 'protection' for workers' renumeration to keep pace with the cost of living, this proposed section is woefully inadequate and, in reality, it provides very little protection, if any.

88. Firstly, the proposed provision does not set a minimum annual increase. This means that an eight-year agreement that contains an annual increase of 0.1% (on the base rate of pay only) will meet the requirements of this proposed provision.

89. Secondly, the proposed provision only requires an annual increase on an employee's base rate of pay and not for allowances. Allowances are traditionally and generally subject to annual increases to keep pace with the cost of living, not just base rates of pay. Allowances in Modern Awards are subject to increases by the Commission yearly. This is particularly problematic where an allowance forms a significant part of an employee's take home pay, such as a remote location allowance or a living away from home allowance.

90. Finally, the provision confusingly provides that the Commission 'must be satisfied' that the agreement provides annual increases when it is a simple exercise to determine if these increases exist or not. It is unknown why the Government has not drafted this in a clearer manner.

4.4 Interaction with s.182(4)

91. Section 182(4) of the Act permits an employer to provide a six-month deadline to the union or unions involved in greenfields agreement negotiations. If agreement is not reached within that time after the employer gives notice, the employer can effectively make a unilateral greenfields agreement with no union agreement or endorsement required.

92. That s.182(4) exists is already highly problematic and actively undermines collective bargaining in a significant and objectionable manner. However, with an enterprise agreement of up to eight years' length on the line, this section is likely to have an even more profound effect and be pursued by employers seeking to completely sideline unions from the bargaining process. It is entirely conceivable that an employer will intentionally frustrate the bargaining process in order to have an opportunity to set the terms and conditions of employment for the project unilaterally, especially if this is for the entire term of a major project that is expected to last many years. However, no protection has been built in to the Amendment to prohibit such action occurring.

4.5 Nominal expiry date and commencement date interaction

93. It appears that there is nothing in the Amendment to prevent a life of project greenfields agreement from having a commencement date that is considerably distant from the approval date. For example, it appears that a life of project greenfields agreement could potentially commence operation two years after approval and have a nominal expiry date eight years after that. This would mean that an agreement approved in 2021 could commence in 2023 and nominally expire in 2031. This will clearly have a negative impact on the conditions in the industry as the agreement is unlikely to reflect current industry terms and conditions if made ten years earlier (or indeed five, six, seven or eight years earlier for that matter).

94. It is no protection to state that a greenfields agreement must involve a relevant union. As stated above, an employer can apply for a greenfields agreement unilaterally after giving any union(s) notice under s.182(4).

4.6 There is no proven need for a new greenfields agreement stream

95. The proposed 'life of project' stream takes from workers the ability to renegotiate the terms and conditions of their employment on matters affecting the workers during the job – issues or matters that have arisen onsite throughout the progress of the project that may be subject to resolution through the renegotiation of the enterprise agreement.

96. The perceived need for this stream to 'attract investment' or 'give certainty' to employers on the basis of industrial action is entirely misplaced. Industrial

action is very low in Australia. In order to take industrial action, there are a number of steps that must be taken. There are sections of the Act that enable employers to apply to the Commission have industrial action stopped.

97. Industrial action is not a threat to investment and any statement saying otherwise is not on the basis of evidence. There is no trend that major projects are commonly held up by industrial action associated with enterprise agreement negotiation – certainly not a trend that requires legislative amendment to remove the potential for industrial action entirely on the basis of a vague 'investment' promise that has no evidentiary support.

98. There is zero evidence to support a claim that a life of project greenfields agreement stream will attract any investment in Australia at all. There is no dearth of investment in projects in Australia – foreign investment has increased dramatically in the last two decades without life of project agreements and no one is able to point to a major project that would have gone ahead *but for* there being no life of project agreement stream under the Act.

99. The only purpose the government is pursuing these changes is to further stifle industrial action in Australia, which is already incredibly low and highly regulated.

PART 5 – COMPLIANCE

100. Schedule 5 to the Bill proposes a number of amendments to the Fair Work compliance and enforcement framework. These amendments can be grouped into the following categories:
    a. changes to the penalties payable for remuneration-related contraventions;
    b. changes to the small claims procedure for recovery of unpaid wages;
    c. prohibiting employment advertisements paying less than the minimum wage;
    d. modifying the compliance tools available to industrial regulators
    e. excluding State wage theft offences and creating a federal offence of dishonestly engaging in a systematic pattern of underpaying employees.

101. The AWU's overall position is that these reforms are an 'opportunity missed' in terms of grappling with the critical issue of wage theft, and represent a backward step so far as they seek to curtail innovative State responses to the issue in Victoria and Queensland. Further, the small claims amendments are likely to be entirely ineffective in practice, based on past experience of 'consent arbitration' options available in the FWC.

5.1 Changes to the penalties payable for remuneration-related contraventions

102. The Bill proposes two major changes to the penalties system under the Act: increases to the maximum penalties payable for *remuneration-related contraventions* and a restriction on the payment of some of those higher penalties to the Commonwealth.

103. In particular, the Bill would permit penalties for non-small business employers found to have engaged in remuneration-related contraventions to be penalised up to twice the value of the benefit withheld (for a non-serious contravention) or three times the value of the benefit withheld (for a serious contravention).

104. The AWU supports the increases to the penalties as set out in Part 1 of Sch 5 to the Bill. That is, we support items 1 to 6 of Sch 5, aside from one aspect of item 4 set out below.

105. Item 4 would insert a new s 546(3A) of the Act, which would require that pecuniary penalties calculated based on the value of the benefit withheld must be paid to the Commonwealth.

106. This represents a significant departure from the current law, in which penalties may be paid to any of the Commonwealth, "*a particular organisation*" (being an employee or employer organisation registered under the *Fair Work (Registered Organisations) Act 2009*) or "*a particular person*".[21]

107. As the Full Federal Court has recognised on a number of occasions, the ordinary rule is that any penalties payable following successful contravention proceedings should be payable to the moving party who has borne the cost and inconvenience of prosecuting the proceedings.

108. This rationale was set out in the Explanatory Memorandum to the Fair Work Bill 2008 (Cth):

> *2157. Subclause 546(3) provides that the court may order pecuniary penalties (or part of a pecuniary penalty) to be paid to the Commonwealth, a particular organisation or a person. Ordinarily, any pecuniary penalty awarded by the court is paid to the applicant or, in the case of proceedings brought by a Commonwealth official such as an inspector, to the Commonwealth (on the basis that the applicant represents the Commonwealth).*

[21] Section 546(3) of the Act.

2158. Also, it gives the court the flexibility to award the penalty to someone other than the plaintiff or applicant where the plaintiff or applicant requests. For example, where an inspector brings penalty proceedings against the director of a company that has gone into liquidation, the inspector might request the court to pay any penalty to an employee rather than the Commonwealth in circumstances where the employee is out of pocket as a result of the company being liquidated.

...

2160. Subclause 546(5) provides that a court can make a pecuniary penalty order in addition to one or more orders made under clause 545. The effect of this is that a court is not restricted to the making of only one order in respect of any contravention of a particular civil remedy provision.

2161. For example, in a case involving a contravention of a civil remedy provision related to underpayment of minimum wages under a modern award, the court may order that the employee is entitled to compensation for that underpayment and a pecuniary penalty may also be imposed on the employer for the contravention.

109. As the Full Federal Court set out in *Sayed v CFMEU*,[22] this rule and the provision in s 546(3) has its origins in the "*common informer*" provisions of the *Conciliation and Arbitration Act 1904* (ss 44-45). Their Honours summarised the history of these provisions, from the 1904 legislation to the *Industrial Relations Act 1988* (Cth) and the *Workplace Relations Act 1996*, and concluded:

72. One may begin to understand, therefore, why it is that s 546(3), in Pt 4.1, Div 2, Subdiv B, empowers the Court to order that a pecuniary penalty, or a part of the penalty, be paid to the Commonwealth, a particular organisation, or a particular person. If a proceeding for contravention of s 351(1) is brought by the inspector, the inspector being a public official of the Commonwealth, it may be expected that ordinarily the pecuniary penalty would be paid to the Commonwealth. If a union were to bring the proceeding successfully, for the benefit of its members, it may be expected that the penalty would be paid to the union. If the union brought the proceeding for the benefit of a particular member, there might be payment of the penalty to that member, on the basis he or she is a particular person to whom it should be paid; or part payment to that member and the balance to the union. If a person individually affected by a contravention brought the proceeding, then the penalty may be paid to him

[22] [2016] FCAFC 4; (2016) 239 FCR 336.

or her as a particular person. There is a certain symmetry between the person or entity authorised to prosecute an enforcement proceeding and the person or entity to whom the penalty, if imposed, might be paid. This symmetry is recognised by the Explanatory Memorandum and authority.

110. Their Honours further explained that the payment of a penalty could not be considered a 'windfall' for the successful claimant, as the purpose of a penalty was not compensatory.[23]

111. The effect of new s 546(3A) would be to depart from the rule which has been applied in federal industrial legislation since 1904 and require payment of certain kinds of penalties to the Commonwealth.

112. This new provision appears motivated by the very concern which the Court dismissed in *Sayed v CFMEU* and earlier cases – that the claimant may receive a windfall.

113. It is likely that the inclusion of such a provision would create a substantial disincentive to private wage claim proceedings, brought by parties other than the Fair Work Ombudsman and her inspectors.

114. The resulting changes to the legislation seem absurd: a claimant who sues to recover unpaid wages from a small business employer can expect to receive the penalty (if any) ordered by the Court; but a claimant who sues to recover wages from an ASX-listed corporation cannot receive a penalty (if it is based on the value of the benefit withheld) – as it will instead be payable to the Commonwealth.

115. The courts already have a discretion to award part or all of a penalty to the Commonwealth in an appropriate case. Such an example may be, e.g., where a class action claimant brings proceedings on behalf of hundreds of underpaid workers and the court determines to order payment of a substantial penalty for hundreds of contraventions. In such a case, rather than awarding an massive sum directly to the test-case plaintiff, the court could decide that part of the penalties be paid to the Commonwealth – with the test-case plaintiff to receive an amount in recognition of the time and effort of bringing proceedings, and the other members of the class receiving compensation orders but no penalty proceeds.

116. That scenario is already permitted under existing s 546(3). By contrast, if s 546(3A) is enacted, such a test-case plaintiff could receive nothing in the way of penalties if successful against a large employer.

117. Critical to understanding the rationale for the penalties payment model since 1904 is the fact that industrial proceedings occur in a no-cost jurisdiction. They adopt the 'American rule' (ordinarily, each side pays their legal costs

[23] See *Sayed v CFMEU* at [58]-[122].

and disbursements), rather than the 'English rule' (ordinarily, the losing side pays the winning side's legal costs and disbursements).

118. The loss of the penalties mechanism would make it unviable for employees and unions to institute wage claim proceedings except at an expected loss, leaving the regulator as the only active player in the field.

5.2 Changes to the small claims procedure

119. Part 2 of Sch 5 seeks to modify the small claims procedure set out in s 548 of the Act.

120. The AWU supports increasing the small claims cap from $20,000 to $50,000 in item 8. However, we consider this cap should be indexed to inflation to ensure it does not lose real value over time.

121. The AWU also supports creating an explicit power for a small claims court to order that a defendant pays the cost of court filing fees to a plaintiff (item 9). We consider the preferable course would be, however, that filing fees for small claims be abolished – as is the case in the South Australian Employment Tribunal (SAET).[24] The SAET has power to hear wage claims under the federal *Fair Work Act 2009* (Cth) and under State legislation.

122. Currently, the small claims filing fee in the Federal Circuit Court is $245 for a claim below $10,000 in value or $400 for a claim above that in value.[25] The policy objective of the small claims procedure is defeated by barriers to entry such as filing fees which often amount to 5% of the value of the claim in question.

123. The remainder of Pt 2 deals with a new procedure by which small claims can be referred to the FWC for conciliation and, if agreed by the parties, arbitration of the claim.

124. It should be noted that the courts already have the power to refer wage claim disputes – or, indeed, any proceedings in the Fair Work Division – to the FWC for mediation.[26]

125. The genuinely new aspect of Pt 2 of Schedule 5 is that it provides for consent arbitration of small claims by the FWC. This is not presently permitted under the *Fair Work Act 2009* as a statutory procedure.

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[24] See https://www.saet.sa.gov.au/industrial-and-employment/money-claims-monetary-claims/. ("*A monetary claim as described above may be lodged in the SAET without incurring a filing fee.*")

[25] http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/forms-and-fees/fees-and-costs/fees-gfl/fees-gfl.

[26] See *Fair Work Act 2009* (Cth) s 576(2) ("*The FWC also has the following functions: … (ca) mediating any proceedings, part of proceedings or matter arising out of any proceedings that, under section 53A of the Federal Court of Australia Act 1976 or section 34 of the Federal Circuit Court of Australia Act 1999, have been referred by the Fair Work Division of the Federal Court or Federal Circuit Court to the FWC for mediation*").

126. However, it is clear that the FWC already has the power to arbitrate wage disputes under s 739 of the Act, because it may arbitrate where empowered by a "*contract of employment*" or "*other written agreement*" between the parties to a dispute. There is no reason why the parties could not execute a written agreement to submit a wage claim dispute to arbitration before a Commission Member under s 739(2)(a). However, as far as the AWU is aware, such a procedure has never been agreed and there are no published decisions of the FWC dealing with such a referral.

127. The existing ability of parties to submit wage claim disputes to arbitration (by consent) and the complete absence of any take-up of this option demonstrates that the reform in Pt 2 of Schedule 5 is unlikely to have any realistic effect on wage claim disputes.

128. In the AWU's experience, employers will never agree to arbitration before the FWC when they are free to put an employee to the cost, stress and expense of court proceedings. Another example from the existing Act bears this out. Since the passage of the *Fair Work Amendment Act 2013*, the Act has allowed parties to a general protections or unlawful termination dismissal dispute to consent to arbitration by the FWC (rather than determination by a court) where conciliation fails.

129. The statistics in the FWC's *Annual Report 2019-20* show that, of 4,823 general protections dismissal disputes filed in the FWC in that financial year, only **15** proceeded to consent arbitration before a Commission Member – or **0.31%** of applications filed. Similarly, of 138 unlawful termination disputes filed in that financial year, only **1** proceeded to consent arbitration – or **0.72%** of applications filed.[27]

130. The AWU's experience bears this out – no employer has ever agreed to consent arbitration of a general protections dispute in which we have represented a dismissed employee. This is despite the fact that (a) the FWC is the specialist industrial tribunal, while the Federal Circuit Court's workload is predominantly migration and family law matters, (b) arbitration in the FWC would substantially reduce likely cost and effort for both parties and (c) arbitration in the FWC would likely result in a far quicker outcome for both parties.

131. The key takeaway from the above factors is that there is no reason whatsoever to think that the appearance of a statutorily designed consent arbitration procedure is likely to alter the dynamics of small claims procedures in practice. The practical outcome will simply be that conciliation of such claims will be performed by Commission Members rather than Registrars, but most claims will end up being determined by a Judge regardless (if a settlement cannot be reached).

[27] https://www.fwc.gov.au/documents/documents/annual_reports/ar2020/fwc-annual-report-2019-20.pdf (pp 63-64).

132. In short, these changes are likely to result in no performance improvements on the small claims procedure for either side of the dispute.

133. This is not to say that the small claims procedure – and wage claim rules in general – are not in need of serious reform. It is just that Schedule 5 will not achieve any desired effect.

134. The critical issues with the current rules in the Act may be summarised as follows:

    a. The Act provides for a multiplicity of courts eligible to hear wage claims – the FCCA, the FCA, State Magistrates Courts, State District Courts and State Industrial Courts (where they exist). However, there is no uniformity of process or procedure between the courts (e.g., there are no general *Wage Claim Rules* which each court must apply to the proceedings). So, as set out above, filing fees differ between courts, as do standard timeframes for hearing, the approach to mediation/conciliation and other case management issues.

    b. The main federal court tasked with dealing with 'non-major' industrial matters – including general protections disputes and wage claims – the FCCA, is extraordinarily overworked and understaffed and its Judges and registry staff are overwhelmingly focused on dealing with their 'bread and butter' – family law and migration matters. It is not fair or reasonable to expect a Judge with a sizeable pending docket of cases which will determine whether an individual is deported and which parent will have custody of a couple's children to be able to give equal and serious focus to a bevy of industrial matters. Nor are the Judges of the Court selected on the basis of their industrial expertise – for the obvious reason that it is not the primary basis of their caseload.

    c. The only federal court with significant industrial law expertise is the FCA, but it is also the superior court of record in the jurisdiction and the primary appellate court. Litigants will regularly commence proceedings in the FCA to ensure an experienced industrial Judge will hear the matter, even though it would otherwise be more appropriately filed in the FCCA.

    d. NSW, the State with the largest population and workforce, has ended its practice of appointing specialised Industrial Magistrates and now allocates industrial matters as part of its ordinary civil proceedings list to any Magistrate who is available. As such, there is no longer any small claims expertise at the State level to take pressure off the FCCA.[28]

135. The most effective and simplest way to address these issues would be to establish a federal Industrial Magistrates Court or Industrial Circuit Court, with its registry annexed to the FWC (to avoid administrative duplication). Judges

[28] Other States continue to provide specialised Industrial Magistrates, such as South Australia's SAET.

of this court could be dual-appointed as Presidential Members of the FWC to share expertise between the two jurisdictions. This was the model adopted in a number of States up until recently and it is plainly a more efficient model that trying to distribute industrial and wage claim litigation between nearly 20 State and federal courts.[29] While appeals from this court could continue to go to the Federal Court, it is likely its establishment would reduce the Federal Court's first-instance industrial caseload as confidence would be re-established in the inferior trial court for industrial matters among practitioners and regular litigants

5.3 Prohibiting advertisements paying less than the minimum wage

136. Part 3 of Schedule 5 creates a new civil remedy provision (item 24) by inserting new section 536AA of the Act.

137. The AWU supports, in-principle, the creation of a civil remedy provision banning the advertisement of jobs which pay less than the applicable national minimum wage. However, there are two respects in which this new provision is deficient.

138. Firstly, only the regulator is permitted to enforce it. Given the size of the Australian workload and the extent of wage theft, this restriction is inexplicable. The clear purpose of the provision is to create a preventative means to deter and avoid wage theft from occurring in the first place. It would make sense for such a provision to be as widely accessible as possible. As such, the AWU submits that the restriction should be removed and registered organisations including trade unions should be permitted to institute proceedings (as they are for all other civil remedy provisions under the Act).

139. Extending the scope of enforcement in this way would also permit registered organisations of employers (industry groups) to protect their law-abiding members from being undercut by operators who pay illegally low wages, but threatening enforcement proceedings against recalcitrant employers. In this way, the business community could assist to both support lawful operators and enforce community standards.

140. Secondly, the provision does not extend to the *casual loading* payable under national minimum wage orders. That is, as currently drafted, the provision does not make it llegal to advertise a casual job at a rate of pay well below the minimum hourly rate (taking into account the 25% loading set by the national minimum wage order). This is likely to dramatically reduce the availability of the remedy in practice.

141. For this reason, the AWU submits that new section 536AA should be modified as follows (additions underlined):

[29] The District and Magistrates/Local Court of each State (11, as Tasmania has no District Court), the ACT Magistrates Court and NT Local Court (2), the Industrial Courts of SA, Qld and WA (3) and the Federal Circuit Court and Federal Court (2) – for a total of 18. See definition of *eligible State or Territory court* in s 12 of the Act.

An employer must not advertise, or cause to be advertised, employment with the employer specifying a rate of pay less than the national minimum wage or special national minimum wage (including the casual loading, if applicable), as the case requires, set by a national minimum wage order.

5.4 Modifying the compliance tools available to industrial regulators

142. Items 33 and 34 of Schedule 5 increase the penalties for non-compliance with a compliance notice issued by an inspector by 50%. These changes are supported by the AWU. However, the AWU supports the comments of the ACTU in relation to the abolition of the "*not reckless*" defence as supported by numerous inquiry reports.

143. A broader and more significant issue with the compliance notice framework is that it does not permit registered organisations to provisionally enforce breaches of industrial instruments. In this respect, it differs from the 'provisional improvement notice' model adopted in the Model Work Health and Safety Act (the **MWHSA**). The MWHSA allows health and safety representatives to issue employers with 'provisional improvement notices' requiring them to rectify safety issues to ensure a safe workplace. Where an employer objects to the contents of the provisional notice, they can elect to have an expedited review conducted by one of the regulator's inspectors. The inspector may affirm, vary or revoke the provisional notice.

144. A similar procedure in relation to industrial underpayment breaches could drastically reduce the delays involved in the resolution of underpayment claims. Rather than waiting months for the process of discovery and case management to conclude in a busy court, a trade union official could issue a provisional notice in relation to an obvious underpayment, which would require the employer to either remedy the underpayment or, if they objected to the notice, request the attendance of an inspector to resolve the dispute. While the inspector's decision (to affirm, vary or revoke the provisional notice) would itself be open to 'appeal' in a competent court, it would fast-track the dispute resolution procedure and impose an impartial ruling from a third-party at an early stage of proceedings, encouraging both parties to accept the verdict.[30]

145. Items 28-32 of the Bill provide the Australian Building and Construction Commissioner to enter into enforceable undertakings with building industry participants. The AWU maintains its position that the dual system of

[30] See Division 7 of Part 5 of the *Work Health and Safety Act 2011* (NSW) in relation to provisional improvement notices and ss 716-717 of the *Fair Work Act 2009* (Cth) in relation to compliance notices and the procedure for review by a court.

regulation, in which the anti-union ABCC regulates the building industry and only rarely investigates wage theft on a tokenistic basis, should be abolished and the Fair Work Ombudsman should regulate the entire labour market. The AWU supports the position of the ACTU that, if these amendments are made, the guidance introduced by item 35 to guide the Ombudsman in relation to entering undertakings should equally apply to the ABC Commissioner.

5.5 Excluding State wage theft offences and creating a federal offence of dishonestly engaging in a systematic pattern of underpaying employees

146. Part 7 of Schedule 5 seeks to do two things:
    a. 'cover the field' and prevent State Parliaments from legislating in relation to wage theft offences – with the effect of invalidating the *Wage Theft Act 2020* (Vic) (the **VIC Act**) and *Criminal Code and Other Legislation (Wage Theft) Amendment Act 2020* (the **QLD Act**) – see item 43;
    b. create a new, federal criminal offence of dishonestly engaging in a systematic pattern of underpaying an employee or employees (the **systematic underpayment offence**) – see items 42, 44-58.

147. It is critical to make two points. Firstly, the two objectives are mutually exclusive – the Commonwealth could legislate the systematic underpayment offence without covering the field and invalidating the Victorian and Queensland wage theft offences. The AWU would support the creation of the systematic underpayment offence only if the VIC Act and QLD Act were expressly preserved by the legislation.

148. Secondly, the systematic underpayment offence is a far more limited enforcement tool than the wage theft offences created by the VIC Act and QLD Act. It exclusively seeks to deal with the most serious category of worker exploitation and wage theft. (The AWU endorses the ACTU's criticisms of the approach taken in relation to that aim.) By seeking to cover the field, the Commonwealth is indicating that any lesser category of worker exploitation and wage theft should not be subject to criminal sanction. In so doing, it accepts the 'status quo' and rejects the deliberate policy decision of the Victorian and Queensland legislatures to respond to community expectations by trying to stamp out wage theft through proportionate punitive measures.

149. The AWU supports the extensive comments of the ACTU in relation to the critical differences between the offences created by the VIC Act, the Qld Act and the proposed systematic underpayment offence. For those reasons, and for the reasons set out above, it would be a grave mistake for the Commonwealth Parliament to usurp the legitimate role of the State

Parliaments in responding to a policy gap left by the Act and replacing a valid response with legislated inaction.

150. Such steps would be especially imprudent and unreasonable in light of the stage at which the Victorian and Queensland schemes are at. Neither has commenced operation and it is plainly too early to say they have unworkable flaws or require extensive revision. It is appropriate for the Parliament to defer to the detailed lawmaking process already engaged in by their State counterparts, on the back of extensive inquiry research, and allow these schemes to operate unimpeded for a reasonable period of time.