The Senate

Education and Employment Legislation Committee

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

November 2022

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Contents

List of Recommendations

Recommendation 1

2.161 The committee recommends that the bill be passed, subject to the amendments that follow.

Recommendation 2

2.166 The committee recommends that an amendment be made to the bill to clarify that conciliation should take place before arbitration of disputes over flexible working arrangements unless there are exceptional circumstances.

Recommendation 3

2.171 The committee recommends that an amendment be made to the bill to clarify that the protections and entitlements under the *Fair Work Act 2009* apply regardless of immigration status.

Recommendation 4

2.175 The committee recommends that the provisions of the bill prohibiting sexual harassment be reviewed for consistency with the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* and the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022.

Recommendation 5

2.182 The committee recommends that the definition of 'small business employer', for the purpose of Part 21 of the bill be increased from fewer than 15 employees, to fewer than 20 employees, including regular and systematic casuals, based on headcount. The definition of 'small business employer' in section 23 of the *Fair Work Act 2009* should remain unchanged.

Recommendation 6

2.187 The committee recommends the amendment of the 'minimum bargaining period' in s235(5)(i) for the purpose of an intractable bargaining declaration, to provide for a nine month minimum bargaining period commencing after either the nominal expiry date of the agreement or nine months from the commencement of bargaining, whichever is later.

Recommendation 7

2.190 The committee recommends that a statutory review of the bill be undertaken but occurs no earlier than three years after the bill receives Royal Assent.

Recommendation 8

2.194 The committee recommends section 180A of the bill be amended so that no party can unreasonably withhold agreement for a proposed enterprise agreement being put to a vote, and the Fair Work Commission should have the power to resolve disputes pertaining to this.

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Chapter 1
Introduction

1.1 The Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (bill) seeks to amend the *Fair Work Act 2009* (FW Act), *Fair Work (Registered Organisations) Act 2009* (FWRO Act), *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP Act), and related legislation to make a range of changes to Australia's industrial relations framework.

Context of the bill

1.2 The Regulation Impact Statement (RIS) provided as part of the explanatory memorandum states that secure, well-paid jobs are critical enablers for financial independence, stronger communities, and broad-based prosperity. Despite this, the RIS notes that real wages growth in Australia has failed to keep pace with productivity growth and increases in the cost of living. In addition, it contends that the enterprise bargaining system—which should incentivise increased productivity, higher wages, and better conditions—no longer works effectively.[1]

1.3 In response, the bill seeks to implement commitments made by the Australian Government (government) during the 2022 federal election and at the September 2022 Australian Jobs and Skills Summit. These commitments aim to modernise Australia's workplace relations system, with an emphasis on boosting wages and closing the gender pay gap.

The government's workplace relations commitments

1.4 During the 2022 federal election campaign, the current government made several election commitments regarding workplace relations reform. This section provides a brief overview of some of the key commitments relevant to the bill.

Implementing Respect@Work recommendations

1.5 The current government committed to fully implement all 55 recommendations of the *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Respect@Work report). Among other measures, this included introducing legislation requiring employers to have a positive duty to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment, and victimisation.[2]

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[1] Department of Employment and Workplace Relations, *Enterprise Bargaining outcomes from the Australian Jobs and Skills Summit, Regulation Impact Statement* (Regulation Impact Statement), p. 3.

[2] Australian Government, *Budget October 2022–23: Building a better future*, October 2022, p. 51.

Improving gender equality

1.6 The current government stated that it would create pay equity and care sector expert panels within the Fair Work Commission (FWC) and reform the equal remuneration provisions in the FW Act to strengthen the FWC's ability and capacity to address gender pay inequality.[3]

Enhancing enterprise bargaining

1.7 As an outcome of the Australian Jobs and Skills Summit, the current government indicated that it would support the following measures in relation to enterprise bargaining:

- provide the FWC with broader powers to arbitrate disputes in relation to, or arising in the course of, enterprise bargaining;
- prevent the unilateral termination of collective agreements if termination would reduce employee entitlements; and
- improve access to collective bargaining and potentially introduce multi-employer bargaining.[4]

Limiting the use of fixed contracts

1.8 The current government proposed to limit the number of consecutive fixed term contracts an employer can offer for the same role or a maximum duration, up to a maximum cap of two years, including renewals. Except in limited circumstances, once the cap is reached, the employer would be required to offer the worker a permanent position.[5]

Improving job security

1.9 The current government committed to amending the FW Act to enshrine 'secure work' as an additional objective of the FW Act. Such a reform would require the FWC to consider job security in its decision making.[6]

The Australian Jobs and Skills Summit

1.10 On 1 and 2 September 2022, the government held the Australian Jobs and Skills Summit (Summit) at Parliament House in Canberra, which brought together businesses, unions, civil society, and the federal, state, and territory governments.

1.11 The Summit was led by the Prime Minister, the Hon. Anthony Albanese MP, and the Treasurer, the Hon. Dr Jim Chalmers MP, and focussed on:

- keeping unemployment low, boosting productivity and incomes;

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3 Australian Government, *Budget October 2022–23: Building a better future*, October 2022, p. 27.

4 Australian Government, *Budget October 2022–23: Building a better future*, October 2022, p. 19.

5 Australian Government, *Budget October 2022–23: Building a better future*, October 2022, p. 19.

6 Australian Government, *Budget October 2022–23: Building a better future, October 2022*, p. 19.

- delivering secure, well-paid jobs and strong, sustainable wages growth;
- expanding employment opportunities for all Australians including the most disadvantaged;
- addressing skills shortages and getting our skills mix right over the long term;
- improving migration settings to support higher productivity and wages;
- maximising jobs and opportunities from renewable energy, tackling climate change, the digital economy, the care economy and a Future Made in Australia; and
- and ensuring women have equal opportunities and equal pay.[7]

1.12 In the lead-up to the Summit, since at least August, the government and the Department of Employment and Workplace Relations (department) extensively consulted on reforms to get wages moving, improve job security, and support gender equity.[8]

1.13 Following the Summit, the government agreed to 36 immediate initiatives, including modernising Australia's workplace relations laws to make collective bargaining accessible for all workers and businesses.[9]

Origins of collective bargaining in Australia and the current reform agenda

1.14 The following section provides a brief overview of the origins of collective bargaining in Australia and outlines the government's rationale for its current reform agenda.[10]

Collective bargaining in Australia and the FW Act

1.15 The current bargaining framework is contained within the FW Act and aims to support the tailoring of workplace arrangements to the unique circumstances and requirements of each business and their employees. The FW Act commenced in full on 1 January 2010 in the wake of the global financial crisis. It replaced an industrial relations system which had evolved through several major reforms during the 1990s, culminating in the Work Choices reforms of the then Howard coalition government in 2005–06.[11]

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7 The Treasury, *Jobs and Skills Summit*, https://treasury.gov.au/employment-whitepaper/jobs-summit (accessed 31 October 2022).

8 Department of Employment and Workplace Relations, *Submission 49*, p. 4.

9 Prime Minister of Australia, *Media Release*, 2 September 2022, https://www.pm.gov.au/media/outcomes-jobs-and-skills-summit (accessed 1 November 2022).

10 Much of the information contained within this section has been sourced from the regulation impact statement (RIS) included with the bill's explanatory memorandum.

11 Regulation Impact Statement, p. 4.

1.16 Among other things, the intention of the FW Act was to 'promote productivity and fairness through enterprise bargaining'.[12] It did this through a number of mechanisms, such as:

- providing the right for employees and employers to appoint persons to represent them in negotiations;
- facilitating good faith bargaining through orders and assisting with disputes;
- allowing low-paid bargaining orders, which aimed to increase outcomes for low-paid sectors within the economy; and
- implementing the better off overall test, aimed at ensuring employees were better off under any agreement than the applicable new award.[13]

1.17 Notwithstanding the Work Choices reforms, for most of the last three decades, a core principle of the Australian workplace relations framework has been bargaining at an enterprise, not individual, level. This approach involves negotiations between an employer and their employees, including bargaining representatives, with the aim of reaching agreement on the minimum terms and conditions of employment for a particular enterprise.[14]

1.18 This form of bargaining arose during the 1980s as a way for unions to exceed the government wage controls in place at the time, which were themselves implemented as a response to stagflation[15] Australia experienced during the 1970s. The original policy intent of this approach was to 'provide parties at the industry and workplace level with the opportunity to reach agreements directed at lifting productivity and competitiveness'.[16]

1.19 When the bill for the FW Act was introduced into the Australian Parliament in November 2008, the then Rudd Labor government highlighted evidence demonstrating that collective bargaining and higher productivity were positively correlated, and that the new framework contained within the bill would promote worker productivity.[17]

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[12] Regulation Impact Statement, p. 4.

[13] Regulation Impact Statement, p. 4.

[14] Regulation Impact Statement, p. 4.

[15] Stagflation is an economic term used to describe economies simultaneously experiencing slow economic growth, high unemployment, and high inflation.

[16] Regulation Impact Statement, p. 7.

[17] Regulation Impact Statement, p. 7.

1.20 Currently, there are four bargaining streams in the framework. These are:

- single-enterprise stream;
- single-interest employer authorisation stream;
- multi-enterprise agreement stream; and
- low-paid bargaining stream.[18]

Rationale for the current reform agenda

Decline in the utilisation of enterprise agreements over time

1.21 According to the Australian Bureau of Statistics (ABS), the proportion of employees covered by enterprise agreements fell from 43 per cent in 2010 to 35 per cent in 2021. Over the same period, reliance on industry and occupation awards (also known as modern awards) rose from 15 per cent to 23 per cent.[19] Further, data collected by the department show that the number of new agreements made in 2020–2021 was approximately half that made in 2013–14.[20]

1.22 A number of reasons have been posited to explain the decline in enterprise agreements over time. These include:

- employers and employees choosing not to replace existing arrangements;
- procedural and technical complexity of the system;
- the costs involved and perceptions around delays in agreement approvals;
- those employers inclined to bargain have already done so;
- loopholes and inefficiencies; and
- declining union membership.[21]

1.23 Notwithstanding this longer-term decline, since 2018 there has been an increase in the number of employees covered by current agreements. This increase is the result of the renewal of large agreements that had been relied on for extended periods post their nominal expiry date. This trend was particularly evident in the retail sector, as demonstrated by the national Woolworths supermarket agreement in 2018, as well as the education and higher education sectors, where 13 new university agreements were made.[22]

1.24 Currently, agreements in place continue to operate past their nominal expiry date unless they are replaced with new agreements or are terminated by the FWC. Hence, these agreements remain fully enforceable during this period, even if there have been substantive changes to the relevant modern award.

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[18] For more information on each bargaining stream, see pages 5 and 6 of the regulation impact statement which accompanies the bill.

[19] Regulation Impact Statement, p. 3.

[20] Regulation Impact Statement, p. 10.

[21] Regulation Impact Statement, pp. 11–12.

[22] Regulation Impact Statement, p. 10.

This can result in situations where employees' overall pay and conditions are less under an agreement than they would be under the relevant award.[23]

1.25 Further, although most agreements provide for annual wage increases prior to their nominal expiry date, it is uncommon for increases to continue past this date, resulting in agreements operating with no further wage increases for employees.[24]

1.26 The Productivity Commission recently noted that 56 per cent of employees covered by an agreement are on an expired agreement, with this figure considerably higher in various industries, including health care and social assistance, education and training, and accommodation and food services.[25] In fact, the Australian Institute of Employment Rights highlighted that just 14.7 per cent of employees in Australia are covered by an enterprise agreement that is not expired.[26]

Ongoing inequality and the gender pay gap

1.27 According to the Workplace Gender Equality Agency, data shows that the gender pay gap[27] in Australia is currently 14.1 per cent. Research highlights that a combination of salary differences between men and women and gender concentrations within specific industries contribute to this gap.[28]

1.28 It has been argued that countries which enable both single and multi-employer bargaining have both lower wage inequality and higher employment, and that this outcome is particularly evident for vulnerable cohorts, including women, and for individuals employed on a temporary or part-time basis.[29]

Wages growth has decoupled from productivity gains

1.29 Productivity measures the efficiency of production within an economy and relates inputs, such as labour and capital, to outputs, such as goods and services. Productivity increases if additional output is produced from the same level of inputs, or an equal amount of output is produced with fewer inputs.

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[23] Regulation Impact Statement, pp. 10–11.

[24] Regulation Impact Statement, p. 11.

[25] Productivity Commission 2022, *5-year Productivity Inquiry: A more productive labour market*, Interim Report, Canberra, October, P. 54.

[26] Australian Institute of Employment Rights, *Submission 17*, p. 10.

[27] The gender pay gap is measured by differences in average weekly full-time earnings.

[28] Regulation Impact Statement, p. 13.

[29] Regulation Impact Statement, p. 13.

1.30 Labour productivity is generally driven by capital accumulation, research and development, innovation, management practices, and workplace arrangements—all of which can be influenced to varying degrees by enterprise agreements.[30]

1.31 Historically, labour productivity and real wage growth have been highly positively correlated, and labour productivity growth is generally considered to be a key driver of long-term real wage growth over time. This is based on the rationale that if workers are more productive, firms are able to pay higher wages, as well as take on additional workers. Over time, this places upward pressure on wages and can result in higher standards of living.[31]

1.32 However, this longstanding relationship has reduced over time and the two variables appear to be 'decoupling'. Such an outcome has significant ramifications for workers, as they no longer benefit to the same degree from their increased productivity. For example, over the last decade, productivity growth in Australia was 11 per cent, while real wages growth was only 0.1 per cent.[32]

1.33 Both nominal and real wages growth in Australia over the last decade has been not just the worst in post-war Australian history, but also among the worst of any Organisation for Economic Co-operation and Development (OECD) countries.[33]

Non-compliance with international obligations

1.34 Many submitters to the inquiry noted that Australia's severe restrictions on workers' rights to collectively bargain and take industrial action are inconsistent with Australia's obligations under International Labour Organisation (ILO) conventions, including the Freedom of Association and Protection of the Right to Organise Convention No. 87 and the Right to Organise and Collective Bargaining Convention No. 98.[34]

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30 Regulation Impact Statement, p. 13.

31 Regulation Impact Statement, p. 13.

32 Regulation Impact Statement, p. 14.

33 Dr Jim Stanford, Economist and Director, Centre for Future Work, *Committee Hansard*, 11 November 2022, p. 23.

34 See, for example, Australian Council of Trade Unions, *Submission 47*, p. 57; Australian Institute of Employment Rights, *Submission 17*, pp. 8 and 20; Mr Tom Roberts, Senior Legal Officer, Australian Council of Trade Unions, *Committee Hansard*, 4 November 2022, p. 31; Per Capita Australia, *Submission 14*, p. 6.

1.35 Several witnesses also noted that Australia is an outlier among OECD nations for its substantial restrictions on access to multi-employer bargaining in the FW Act, particularly in comparison with comparable Western European countries.[35]

Power imbalances during enterprise bargaining negotiations

1.36 A fit-for-purpose enterprise bargaining framework must promote the ability of businesses and employees to bargain on an equal footing. However, it is argued that exploitation of loopholes and the unintended usage of FW Act provisions has eroded this principle over time and resulted in power imbalances during collective bargaining negotiations.[36]

1.37 Evolving case law and a decade of lived experience with the FW Act continues to reveal issues. For example, in the 2015 Aurizon case, the full bench of the FWC expanded the ability of employers to apply to unilaterally terminate, or threaten to terminate, an expired enterprise agreement during the bargaining process. It has been argued that this is an unfair negotiating tactic as it influences employees' decision to accept a new agreement, with potentially inferior pay and conditions to the existing agreement, as the alternative would be to revert to the even lower modern award.[37]

1.38 Several submitters noted that Qantas used the threat of enterprise agreement termination as a bargaining tactic with their international flight attendants. In that instance, termination and reversion to Award rates would have represented a pay cut of between 25 to 70 per cent. The threat of this substantial pay cut enabled Qantas to coerce workers into voting for an offer that had earlier been rejected by a resounding 97 per cent majority.[38]

Overview of the bill

1.39 The bill seeks to amend the FW Act and related legislation to make changes to industrial relations laws relating to enterprise bargaining processes, job security and gender equality, workplace conditions and protections, and the abolition of the Australian Building and Construction Commission (ABCC) and Registered Organisations Commission (ROC).

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[35] See, for example, Associate Professor Chris F. Wright, *Committee Hansard*, 4 November 2022, p. 5; Mr Tom Roberts, Australian Council of Trade Unions, Senior Legal Officer, *Committee Hansard*, 4 November 2022, p. 31; Centre for Future Work, *Submission 18*, pp. 14–15.

[36] Regulation Impact Statement, p. 16.

[37] Regulation Impact Statement, p. 16.

[38] Centre for Future Work, *Submission 18*, p. 23; Transport Workers Union of Australia, *Submission 83*, p. 3; Australian Council of Trade Unions, *Submission 47*, p. 84.

1.40 This overview is based largely on the provisions of the bill as referred to the Senate Education and Employment Legislation Committee (committee) on 27 October 2022. A summary of the government's amendments to the bill is provided in Chapter 2.

Changes to enterprise bargaining

1.41 The bill seeks to improve the enterprise bargaining system by reducing barriers to the existing multi-employer bargaining streams under the FW Act to allow more employers, employees, and their representatives to engage in the bargaining process on an equal footing.

Supported bargaining stream

1.42 The bill would amend the existing low-paid bargaining provisions in the FW Act to create a supported bargaining stream.[39] Under the bill, the FWC would be required to make a supported bargaining authorisation if it is satisfied that it is appropriate for the relevant employers and employees to bargain together when considering:

- the prevailing pay and conditions in the relevant industry/sector, including whether low rates of pay prevail in the industry or sector;
- whether the employers have clearly identifiable common interests which may include geographic location, the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises, and whether they are substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory;
- whether the likely number of bargaining representatives is manageable; and
- any other matters the FWC considers appropriate.[40]

Cooperative workplaces bargaining stream

1.43 The bill would amend existing provisions in the FW Act related to the making of multi-enterprise agreements to be known as the cooperative workplaces bargaining stream. The proposed changes would allow employers and employees to apply to the FWC to be covered by an existing cooperative workplace agreement. Specifically, the bill would empower the FWC to exclude persons for the purposes of an agreement in certain circumstances if the agreement is a cooperative workplace agreement, single interest employer

[39] *Explanatory Memorandum*, p. 159.

[40] *Explanatory Memorandum*, pp. 159–170. Once an agreement is made under the proposed supported bargaining stream, it may then be varied to cover additional employers and their employees, subject to certain conditions.

agreement, or supported bargaining agreement. It would also vary an existing cooperative workplace agreement to add employers and employees.[41]

Single interest employer authorisations and agreements

1.44 The bill would remove certain limitations on access to single interest employer authorisations and simplify the process for obtaining them. The proposed amendments would also enable single interest agreements to be varied to remove an employer and affected employees from coverage. The bill would:

- remove the requirement for two or more employers with common interests who are not franchisees (or otherwise single interest employers) to obtain a ministerial declaration before applying for a single interest employer authorisation;
- provide for employee bargaining representatives to apply for a single interest employer authorisation to cover two or more employers, subject to majority support of the relevant employees;
- permit employers and employee bargaining representatives to apply to vary a single interest employer authorisation to add or remove the name of an employer from the authorisation, subject to specific requirements; and
- insert a new provision to permit employers and employee organisations covered by existing single interest employer agreements to apply to the FWC to extend coverage of that agreement to the new employer and its employees, subject to meeting specific requirements.[42]

Arbitration of intractable bargaining disputes

1.45 The bill would increase scope for the FWC to provide effective assistance to parties to resolve intractable bargaining disputes. It would repeal the current serious breach declarations and bargaining related provisions in the FW Act and introduce a new intractable bargaining declaration scheme. The new arrangements would allow the FWC to issue an intractable bargaining declaration if it is satisfied, among other things, that there is no reasonable prospect of the parties reaching agreement.[43]

Termination of enterprise agreements

1.46 The bill would amend the FW Act and the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (FW Transitional Act) to clarify that the FWC can only terminate an enterprise agreement that has nominally expired

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41 *Explanatory Memorandum*, pp. 189–192. The new provisions would not apply to bargaining for a greenfields agreement or for an agreement for which a single interest employer authorisation is in operation.

42 *Explanatory Memorandum*, pp. 171–188.

43 *Explanatory Memorandum*, pp. 143–149.

on the unilateral application of a party in limited circumstances.[44] The proposed amendments would require the FWC to terminate an enterprise agreement that has passed its nominal expiry date if it is satisfied the:

- continued operation of the agreement would be unfair to employees;
- agreement does not, and is not likely to, cover any employees; or
- continued operation of the agreement would pose a significant threat to the viability of the employer's business.[45]

Sunsetting of 'zombie agreements'

1.47 The bill would amend the FW Transitional Act to provide for the sunsetting of all remaining agreement-based transitional instruments, state employment agreements and enterprise agreements made during the 'bridging period' for the FW Act.[46]

Changes to the Better Off Overall Test (BOOT)

1.48 In order to address concerns about the complexity of the current process for approving enterprise agreements, the bill would simplify and clarify the operation of the BOOT. Specifically, it would:

- require the FWC to consider the views of specified persons and give primary consideration to any common views expressed by the specified bargaining representatives;
- clarify that the BOOT must be applied as a global assessment, not a line-by-line comparison between the proposed agreement and relevant modern award;
- require the FWC to only have regard to patterns or kinds of work, or types of employment that are reasonably foreseeable at the time the BOOT was applied; and
- enable the FWC to directly amend or excise a term in an agreement that does not otherwise meet the BOOT.[47]

1.49 The proposed amendments would also enable the BOOT to be reassessed if there has been a material change in working arrangements or the relevant circumstances were not properly considered during the approval process.[48]

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[44] Currently, under section 225 of the *Fair Work Act 2009*, if an enterprise agreement has passed its nominal expiry date, an employer, employee, or union covered by the agreement may unilaterally apply to the Fair Work Commission to terminate the enterprise agreement.

[45] *Explanatory Memorandum*, pp. 116–120.

[46] *Explanatory Memorandum*, pp. 121–124. A legacy agreement (commonly referred to as a 'zombie' agreement) refers to instruments made prior to the commencement of the *Fair Work Act 2009* and during the 'bridging period' between 1 July 2009–31 December 2009.

[47] *Explanatory Memorandum*, pp. 136–140.

[48] *Explanatory Memorandum*, pp. 139–140.

Approval of enterprise agreements

1.50 The bill would simplify the approval requirements for enterprise agreements by replacing most pre-approval requirements with a more flexible principles-based requirement for the FWC to be satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement. Specifically, the bill would:

- remove the various steps that an employer must currently take within strict timeframes, including the requirement to provide employees with access to the agreement during a seven day 'access' period;
- remove the requirements to provide a Notice of Employee Representational Rights (NERR) and to wait until at least 21 days after the last NERR before requesting employees to vote on the agreement;
- replace pre-approval requirements with a broad requirement for the FWC to be satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement.[49]

Initiating bargaining – single enterprise agreements

1.51 The proposed amendments would simplify the process for initiating bargaining by permitting an employee bargaining representative to initiate bargaining where the proposed qualifying single-enterprise agreement would replace an existing agreement that has a nominal expiry date within the past five years and has a scope substantially like the proposed agreement.[50]

Protected industrial action

1.52 The bill would establish a panel of ballot providers who are 'pre-approved' to conduct Protected Action Ballots (PAB). It would empower the FWC to require bargaining representatives to attend a conciliation conference during the PAB period and enable the FWC to conduct the conference within a 14-day period before voting closes on the PAB.[51] It would also include a new notice requirement (120 hours) before commencing protected industrial action for single interest employer and supported bargaining agreements.[52]

Dealing with errors in enterprise agreements

1.53 The bill would enable the FWC to vary enterprise agreements to correct or amend obvious errors, defects, or irregularities. It would also enable the FWC to validate a decision to approve an enterprise agreement or variation, in

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[49] *Explanatory Memorandum*, pp. 125–132. The bill would require the Fair Work Commission to publish a 'statement of principles' containing guidance for employers about how they can ensure employees have genuinely agreed.

[50] *Explanatory Memorandum*, pp. 133–135.

[51] *Explanatory Memorandum*, p. 150.

[52] *Explanatory Memorandum*, pp. 150–158.

circumstances where the wrong version of the document was inadvertently submitted to the FWC for approval.[53]

Improving job security and gender equality

1.54 The bill seeks to implement a series of reforms designed to improve job security and gender equality for workers, with a particular focus on employees in low-paid sectors and ensuring that women can participate more easily in the workforce.

Objects of the FW Act

1.55 The bill would amend the FW Act to include job security and gender equality in the objects of the FW Act, the modern award objective, and the minimum wage objective. It would require the FWC to take the objects of the FW Act into account when performing functions or exercising its powers under the Act.[54]

Limiting the use of fixed-term contracts

1.56 The bill would insert new provisions into the FW Act to prohibit an employer from engaging an employee on a fixed-term contract for the same role beyond two years (including renewals) or on a contract which may be extended more than once, whichever is shorter. The provisions would prohibit the use of a third or more fixed-term contract where an employee has previously been engaged on two consecutive contracts for the same or similar work. For the prohibition to apply, there must be substantial continuity between all three or more of the contracts. The prohibition would apply when the employment relationship exceeds two contracts, even if it does not exceed two years in duration.

1.57 The FWC would be empowered to resolve disputes regarding an employee's status as a fixed term employee, including by consent arbitration. Employees would also be able to access the small claims jurisdiction in eligible courts to enforce the legislative provisions. These provisions will commence 12 months after the bill receives Royal Assent.[55]

1.58 The bill contains nine relatively broad exceptions to the limitations, including where:

- an employee is engaged to perform a distinct and identifiable task involving specialised skills;
- the employee earns more than the high income threshold;
- they are engaged under a training arrangement;
- they are engaged in essential work during peak demand;

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53 *Explanatory Memorandum*, pp. 141–142.

54 *Explanatory Memorandum*, pp. 65–67.

55 *Supplementary Explanatory Memorandum*, p. 1.

- they are engaged during the temporary absence of another employee; or
- if their employment is funded by government funding for more than two years, where there is no reasonable prospect that the funding will be renewed.[56]

Prohibiting sexual harassment in connection with work

1.59 The bill would implement recommendation 28 of the Respect@Work report by inserting an express prohibition on sexual harassment in connection with work into the FW Act, which would:

- apply to workers, prospective workers and persons conducting businesses or undertakings;
- create a new dispute resolution function for the FWC that would enable people who experience sexual harassment in connection with work to initiate civil proceedings if the FWC is unable to resolve the dispute; and
- merge the existing stop sexual harassment order jurisdiction into new Part 3-5A of the FW Act to ensure all provisions dealing with sexual harassment are located together and streamline the processes for applicants.[57]

Expert panels

1.60 The bill would establish a Pay Equity Expert Panel and a Care and Community Sector Expert Panel within the FWC to determine equal remuneration cases and certain award cases. It would also allow for the appointment of members with expertise in gender pay equity, anti-discrimination, and the care and community sector.[58]

Equal remuneration

1.61 In relation to equal remuneration and work value cases, the bill would amend the FW Act to require that the FWC's consideration of work value reasons be free of assumptions based on gender and include consideration of whether there has been historical gender-based undervaluation of the work under consideration. Specifically, the proposed amendments would:

- provide examples of matters the FWC may take into account when deciding whether there is equal remuneration for work of equal or comparable value;
- clarify that evidence of a 'male comparator' is not required for the FWC to grant an Equal Remuneration Order (ERO); and
- allow the FWC to make an ERO on its own initiative as well as on application and would confirm that the FWC is not required to find discrimination based on gender to grant an ERO.[59]

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56 *Explanatory Memorandum*, pp. 101–107.

57 *Explanatory Memorandum*, pp. 80–96.

58 *Explanatory Memorandum*, pp. 71–77.

59 *Explanatory Memorandum*, pp. 68–70.

Prohibiting pay secrecy

1.62 The bill would insert new provisions into the FW Act to provide employees with a positive right to disclose (or not disclose) information about their remuneration and any related terms and conditions of their employment to any other person, as well as to ask other employees about their remuneration and other related terms and conditions of their employment.[60]

Flexible working arrangements

1.63 The bill would amend the FW Act to expand the circumstances in which an employee may request flexible work arrangements, to include situations where an employee, or a member of their immediate family or household, experiences family and domestic violence. The proposed amendments would also amend the procedure for dealing with requests for flexible work by expanding the employer's obligations to:

- discuss a request for a flexible work arrangement with the employee;
- provide reasons for any decision to refuse the request; and
- if the request is refused, inform the employee of any changes in working arrangements the employer is willing to make that would accommodate the employee's circumstances.[61]

1.64 The FWC would be empowered to resolve disputes regarding flexible work arrangements where the employer refuses the employee's request or does not respond to the employee's request within 21 days. This includes by mandatory arbitration where the employer refuses the employee's request or does not respond to the employee's request within 21 days. Contraventions of the flexible work provisions in Division 4 of Part 2-2 would be a civil remedy provision under section 44 of the FW Act.[62]

1.65 The FWC would not be permitted to make an order that would be inconsistent with a provision of the FW Act or a fair work instrument that applies to the employee and employer (other than a previous order made by the FWC under these provisions).[63]

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60 *Explanatory Memorandum*, pp. 78–79. The proposed measure would apply to all new contract employment contracts or other written agreements entered into (including contracts or agreements that are revised or amended) after the provision comes into effect.

61 *Explanatory Memorandum*, pp. 108–112.

62 *Explanatory Memorandum*, pp. 112–115.

63 *Supplementary Explanatory Memorandum*, p. 19.

Improving workplace conditions and protections

1.66 The bill would make several changes designed to strengthen workplace conditions and protections for workers, including additional anti-discrimination measures in the workplace, increasing the amount of unpaid entitlements workers can recover through the small claims process, and prohibiting job advertisements with unlawful rates of pay.

Anti-discrimination and special measures

1.67 The bill would add three further protected attributes—breastfeeding, gender identity and intersex status—to the existing provisions that provide protections against discrimination. The bill would confirm that 'special measures to achieve equality' are matters pertaining to the employment relationship and therefore matters about which an enterprise agreement may be made and that 'special measures to achieve equality' are not discriminatory terms and therefore not unlawful terms in an enterprise agreement.[64]

Enhancing the small claims process

1.68 The bill would increase the monetary cap on the amounts that can be awarded in small claims proceedings under the FW Act from $20 000 to $100 000. The proposed amendments would also enable the court, in a small claims proceeding, to award a successful claimant any filing fees they paid to the court as costs, from the other party.[65]

Prohibiting advertisements with a pay rate that would contravene the FW Act

1.69 The bill would insert a new provision prohibiting national system employers from advertising employment at a rate of pay that would contravene the FW Act or a fair work instrument. The new provision would require advertisements of piecework to include any periodic rate of pay to which the pieceworker would be entitled. Employers would not contravene the provision if they had a reasonable excuse for not complying.[66]

Workers' compensation presumptions for firefighters

1.70 The bill would amend existing presumptive liability provisions in subsection 7(8) of the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) to reflect the outcomes of the *Review of the Firefighter Provisions of the Safety, Rehabilitation and Compensation Act 1988*. The new provision would outline the circumstances in which employees are taken to have been employed as a firefighter for the purposes of the Act.[67] The bill would clarify that employees covered by

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64 *Explanatory Memorandum*, pp. 97–100.

65 *Explanatory Memorandum*, pp. 193–194.

66 *Explanatory Memorandum*, pp. 195–197.

67 *Supplementary Explanatory Memorandum*, p. 46.

paragraph 7(9)(a)(i) of the SRC Act are taken to have been employed as a firefighter during any period in which they were a member of a firefighting service.[68] The bill would also amend section 5 of the SRC Act to update the references to the emergency services legislation of the Australian Capital Territory included in the SRC Act.[69]

Abolition of the ABCC and the ROC

1.71 The bill would amend the BCIIP Act to abolish the ABCC and repeal the Code for the Tendering and Performance of Building Work 2016, while transferring the ABCC's remaining functions to the Fair Work Ombudsman. The bill would retain provisions of the BCIIP Act that establish the Federal Safety Commissioner and the Work Health and Safety Accreditation Scheme.[70] The bill also proposes to amend the FWRO Act to abolish the ROC and transfer its regulatory functions to the FWC.[71]

Financial implications

1.72 The explanatory memorandum notes that the government has committed $111.6 million over four years to support the implementation of the measures contained in the bill.[72] In its submission, the department indicated that the abolition of the ABCC 'will deliver a saving to the budget of $130.9 million over the forward estimates from 2022–23'.[73]

Consideration by other parliamentary committees

1.73 When examining a bill, the committee considers any relevant comments published by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny Committee) and the Parliamentary Joint Committee on Human Rights (Human Rights Committee).

1.74 At the time of writing, neither the Scrutiny Committee nor the Human Rights Committee had considered the bill; however, the statement of compatibility with human rights, included in the bill's explanatory memorandum, concluded that the bill is compatible with the *Human Rights (Parliamentary Scrutiny) Act 2011* because it 'promotes human rights, including civil, political, social, economic and labour rights. To the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate'.[74]

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68 *Supplementary Explanatory Memorandum*, p. 46.

69 *Explanatory Memorandum*, p. 209.

70 *Explanatory Memorandum*, pp. 27–64.

71 *Explanatory Memorandum*, pp. 5–26.

72 *Explanatory Memorandum*, p. iii.

73 Department of Employment and Workplace Relations, *Submission 49*, p. 3.

74 *Explanatory Memorandum*, p. *l*.

Conduct of the committee's inquiry

1.75 On 27 October 2022, the Senate referred the bill to the committee for inquiry and report by 17 November 2022. On 17 November 2022, the committee presented a progress report requesting that the Senate grant an extension of time to report until 22 November 2022.

1.76 The committee advertised the inquiry on its website and invited submissions by 11 November 2022. The committee received 96 submissions which are listed at Appendix 1 of this report. The public submissions are available on the committee's website.

1.77 The committee held five public hearings:

- Sydney – Friday, 4 November 2022;
- Canberra – Friday, 11 November 2022;
- Melbourne – Monday, 14 November 2022;
- Melbourne – Tuesday, 15 November 2022; and
- Canberra – Tuesday, 22 November 2022.

1.78 A list of the witnesses who gave evidence at the hearings is included at Appendix 2.

1.79 The committee thanks those individuals and organisations who contributed to this inquiry by preparing written submissions and giving evidence at the public hearing.

Notes on references

1.80 References in this report to the committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and official transcripts.

Chapter 2
Key issues

2.1 Despite a near-record low unemployment rate of 3.5 per cent, inflation is outpacing wages growth and workers are falling behind.[1] Indeed, real wages are lower today than they were a decade ago.[2] According to the Regulation Impact Statement, this reflects both an imbalance in bargaining power and the 'failure of the market to work within a legislative framework which presently does not adequately promote collective bargaining'.[3]

2.2 In addition, the last four decades have seen little progress made in closing the gender pay gap. This is in large part because of the undervaluation of some jobs, particularly in female-dominated industries.[4] However, women are also impacted by insecure work and make up more than half of all employees engaged on fixed-term contracts.

2.3 This has occurred within the context of an increase in insecure work more broadly, with the proportion of Australian employees holding full-time jobs with leave entitlements falling below 50 per cent for the first time ever in 2018.[5] The rapid growth in insecure work includes rising rates of part-time employment with few or no guaranteed hours, labour hire, gig work and fixed-term contracting.

2.4 In response to these issues, the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (bill) seeks to implement commitments that are expected to promote job security, help close the gender pay gap, modernise the workplace bargaining system, and increase wages.[6]

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1 The Hon. Tony Burke MP, Minister for Employment and Workplace Relations, *House of Representatives Hansard*, 27 October 2022, pp. 4–5.

2 The Hon. Dr Jim Chalmers MP, Treasurer, *Budget Speech 2022–23*, https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/speeches/budget-speech-2022-23 (accessed 10 November 2022).

3 Department of Employment and Workplace Relations, *Enterprise Bargaining outcomes from the Australian Jobs and Skills Summit, Regulation Impact Statement* (Regulation Impact Statement), p. 25.

4 The Hon. Tony Burke MP, Minister for Employment and Workplace Relations, *House of Representatives Hansard*, 27 October 2022 p. 6.

5 Senate Select Committee on Job Security, *Fourth Interim Report: The Job Insecurity Report*, p. 16.

6 The Hon. Tony Burke MP, Minister for Employment and Workplace Relations, 'Delivering secure jobs, better pay and a fairer system', *Media Release*, 27 October 2022, https://ministers.dewr.gov.au/burke/delivering-secure-jobs-better-pay-and-fairer-system (accessed 10 November 2022).

2.5 The remainder of this chapter explores the extent of support for the bill and examines the specific concerns raised by participants during the Education and Employment Legislation Committee's (committee) inquiry.

General views on the bill

2.6 There was broad support for many of the measures contained in the bill, including prohibiting pay secrecy, boosting the bargaining power of low-paid workers, and addressing gender inequality.[7] The need for higher wages, increased innovation and productivity, and a more diverse and dynamic economy was also acknowledged by stakeholders.[8] This was particularly the case in the context of a decade of real wage declines and record low wages growth, rising job insecurity, the decline of wages relative to profit as a share of GDP, and recent cost of living pressures.[9]

2.7 In line with the discussion at the September 2022 Australian Jobs and Skills Summit (Summit), the inquiry heard significant consensus about the need to reform Australia's industrial relations system. Indeed, a number of participants noted that the current workplace relations framework was neither delivering a fair go for workers nor achieving productivity gains for employers. For example, the Australian Council of Trade Unions (ACTU) explained that real wages have been declining for workers:

> Australians urgently need a pay rise. The average worker today is about $3,000 worse off than they were a year ago. That's due to low wage growth and rocketing inflation that they have done nothing to cause.
>
> …
>
> The wages crisis is real. We are at 7.2 per cent inflation and heading towards eight per cent, and the last figures we have officially show wages are only going up 2.6 per cent. Even if we factor in expected small wage growth since then, inflation is more than double the rate of wage increases. Real wages are going backwards by about four per cent.[10]

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[7] See, for example, Maurice Blackburn Lawyers, *Submission 61*, pp. 1–4; Professor Chris F. Wright, *Submission 1*, pp. 3–6; Australian Council of Trade Unions, *Submission 47*, p. 4; National Foundation for Australian Women, *Submission 3*, [p. 2]; Goodstart Early Learning, *Submission 30*, [p. 2]; Circle Green Community Legal, *Submission 65*, pp. 2–4.

[8] See, for example, Australian Council of Trade Unions, *Submission 47*, pp. 9–15; Ms Jennifer Westacott, AO, Chief Executive, Business Council of Australia, *Committee Hansard*, 4 November 2022, p. 45; Australian Institute of Employment Rights, *Submission 17*, pp. 7–13.

[9] On the impacts of low wages growth see, for example, Dr Jim Stanford, Economist and Director, Centre for Future Work, *Committee Hansard*, 11 November 2022, p. 23; Maurice Blackburn Lawyers, *Submission 61*, pp. 2–3; Transport Workers'·Union of Australia, *Submission 82*, p. 2.

[10] Ms Michele O'Neil, President, Australian Council of Trade Unions, *Committee Hansard*, 4 November 2022, pp. 14 and 15.

2.8 The Business Council of Australia (BCA) also underscored the need to reinvigorate the bargaining system. To this end, it advocated for sustainable wages growth supported by higher productivity, which it argued was responsible for 80 per cent of all income growth over the last four decades. On this point they said:

> Working smarter is the result of ingenuity, the creativity of people and investment—investing in new tools and new equipment that allow those people to be more productive. This is proven to occur best at the enterprise level, and enterprise bargaining should therefore also happen at that same level. The No. 1 objective of this bill should therefore be to get enterprise bargaining working again.[11]

2.9 There was strong support for the bill's objective of increasing job security and gender equality for employees. For example, the Centre for Future Work (CFW) argued that the measures to strengthen gender equality in the FW Act 'are especially welcome as necessary to addressing gender inequities—including poorer working time protections and gendered undervaluation of skills in low-paid feminised industries—that are embedded and reproduced in existing employment regulation'.[12] Notwithstanding this, inquiry participants had divergent views on how to best achieve job security in practice.[13]

2.10 The committee also heard differing views on whether the bill's reforms to collective bargaining would address long-standing issues with the current system and increase the utilisation of enterprise agreements, boost wages, and reduce inequality. For example, in relation to multi-employer bargaining, some employer groups raised concerns that its increased use would be detrimental and have unintended consequences.[14] However, this was strongly refuted by other participants who cited experience overseas that demonstrated significant benefits in terms of employment, equity, and macroeconomic outcomes.[15]

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[11] Mr Tim Reed, President, Business Council of Australia, *Committee Hansard*, 4 November 2022, p. 44.

[12] Centre for Future Work, *Submission 18*, p. 24.

[13] See, for example, Mr Scott Harris, Director, Workplace Relations and Business, Pharmacy Guild of Australia, Committee Hansard, 4 November 2022, p. 62; Ms Michele O'Neil, President, Australian Council of Trade Unions, *Committee Hansard*, 4 November 2022, p. 14; Ms Jennifer Westacott AO, Chief Executive Officer, Business Council of Australia, p. 52.

[14] See, for example, Regional Universities Network, *Submission 7*, pp. 1–2; Australian Meat Industry Council, *Submission 9*, [p. 5]; Franchise Council of Australia, *Submission 13*, pp. 4– 5; Rio Tinto, *Submission 69*, [p. 2]; Qantas, *Submission 59*, pp. 2–4. Please note that the evidence received by the committee is discussed in further detail later in this chapter.

[15] See, for example, Associate Professor Chris F. Wright, private capacity, *Committee Hansard*, 4 November 2022, pp. 1–2; Dr Jim Stanford, Economist and Director, Centre for Future Work, *Committee Hansard*, 11 November 2022, pp. 28–29.

2.11 While some inquiry participants raised concerns about the time frame provided for consideration of the bill, it was also recognised that the government had engaged with stakeholders in good faith and was working in a collaborative manner, especially regarding possible amendments to the bill.[16] The Department of Employment and Workplace Relations (department) noted that it 'held over 50 consultation meetings during development of the bill with union, business and industry representatives, state and territory officials, individual businesses, academics, the National Women's Alliances, and the Women's Economic Equality Taskforce'.[17] The department also noted that it had made itself available to anybody who asked to meet with it.[18]

2.12 The committee also heard calls from some participants for the bill to be broken up to allow for the contested provisions to be considered separately.[19] Other stakeholders argued that the cost-of-living crisis and decade of declining real wages required the bill to be urgently dealt with by the Parliament.[20] In its submission to the inquiry, Per Capita rejected assertions that the government had rushed the reforms, noting that many were expressed in the Australian Labor Party's 2022 election platform and that they reflected decades of legal, economic, and sociological research.[21] The Australian Hotels Association (AHA) also noted that the multi-employer bargaining aspects of the bill were raised at the Jobs and Skills Summit.[22]

Comments on specific aspects of the bill

2.13 While stakeholder feedback addressed various aspects of the bill, most of the commentary centred on the following key measures:

- addressing gender inequality in the workplace;
- improving job security for workers;

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16 Ms Jennifer Westacott, AO, Chief Executive, Business Council of Australia, *Committee Hansard*, 4 November 2022, p. 45.

17 Department of Employment and Workplace Relations, *Submission 49*, p. 4. See also, Department of Employment and Workplace Relations, answer to question on notice IQ22-000367 (received 14 November 2022).

18 Ms Jody Anderson, First Assistant Secretary, Safety and Industry Policy Division, Department of Employment and Workplace Relations, *Committee Hansard*, 11 November 2022, p. 69.

19 See, for example, AgForce Queensland Farmers Limited, *Submission 5*, [pp. 1–2]; Australian Small Business and Family Enterprise Ombudsman, *Submission 70*, [p. 2]; Maritime Industry Australia Ltd, *Submission 37*, p. 4; Australian Chamber of Commerce and Industry, *Submission 27*, p. 1; Ms Mary Aldred, Chief Executive Officer, Franchise Council of Australia, *Committee Hansard*, 11 November 2022, p. 42; and Australian Hotels Association, *Submission 25*, p. 2.

20 Maurice Blackburn, *Submission 61*, p. 2.

21 Per Capita Australia, *Submission 14*, p. 4.

22 Mr Stephen Ferguson, National Chief Executive Officer, Australian Hotels Association, *Committee Hansard*, 15 November 2022, p. 50.

- reforming the bargaining streams under the *Fair Work Act 2009* (FW Act);
- abolishing the Australian Building and Construction Commission (ABCC);
- expanding the role of the Fair Work Commission (FWC); and
- streamlining the better off overall test (BOOT).

2.14 These issues are examined in further detail below. Due to the chronology of events, the evidence the committee received relates largely to the provisions of the bill as they were referred to the committee by the Senate on 27 October 2022. Government amendments to the bill, which address some of the issues raised by inquiry participants, are listed later in this chapter.

Addressing gender inequality in the workplace

2.15 Although Australian women are amongst the most educated across OECD member countries, Australia still has a significant gender pay gap: 14 per cent for full-time workers.[23] Each week, a woman takes home $473 less on average in pay than a man.[24] Further, women are more likely to work in insecure roles and have other markers of lower job quality, such as poorer career progression and working time regulation, and less of a voice in the workplace.[25] Successive governments have been unable to effectively close this gap, and since 1983 it has only been reduced by 5.1 per cent.[26]

2.16 In recent years, submitters noted that Australia's performance on gender equality at work has in fact worsened. Australia's ranking in the World Economic Forum's Global Gender Gap Index has dropped from 15th in 2006 to 43rd in 2022, while the gender pay gap has been stagnant for the past five years and has recently worsened.[27]

2.17 The need to address gender inequality in the workplace was raised by a number of participants,[28] both in terms of career progression and wages. For example, in terms of career progression, the National Assistant Secretary of the National Tertiary Education Union (NTEU), Ms Gabrielle Gooding,

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[23] The Hon. Tony Burke MP, Minister for Employment and Workplace Relations, *House of Representatives Hansard,* 27 October 2022, pp. 4 and 5.

[24] Australian Council of Trade Unions, *Submission 47*, p. 19.

[25] Professor Rae Cooper, private capacity, *Committee Hansard,* 4 November 2022, p. 1.

[26] The Hon. Tony Burke MP, Minister for Employment and Workplace Relations, *House of Representatives Hansard,* 27 October 2022, pp. 4 and 5.

[27] Australian Council of Trade Unions, *Submission 47*, p. 19.

[28] See, for example: Professor Rae Cooper, *Submission 2*; National Foundation for Australian Women, *Submission 3*; Professor Meg Smith and Dr Michael Lyons, *Submission 12*; Australian Institute of Employment Rights, *Submission 17*; Centre for Future Work, *Submission 18*.

highlighted that, although 50 per cent of academic staff are female, only 36 per cent of them are at senior lecturer level or above.[29]

2.18 Accordingly, there was broad support for many of the reforms aimed at addressing enduring gender inequality within the workplace.[30] For example, Professor Rae Cooper submitted that the following aspects of the bill would help address the issue:

- strengthening the right to request flexible working arrangements;
- introducing the supported bargaining stream;
- making gender pay equity an objective of the FW Act;
- changing the way in which equal remuneration applications are heard; and
- building the capacity of the FWC through expert panels.[31]

2.19 The Australian Institute of Employment Rights (AIER) also welcomed the bill's focus on achieving gender equality in the workplace, and specifically commended the measures that would prohibit pay secrecy, remove the need for a male comparator in equity cases, and provide options for workers impacted by sexual harassment to seek redress through the FWC.[32]

2.20 The Parenthood, an independent, not-for-profit advocacy organisation representing more than 78 000 parents, expressed its strong support for the new gender equality objective. On this issue, it also stated the following:

> Progress to address the gender pay gap in Australia through the Fair Work Commission has been too slow. Most equal remuneration cases have failed, including two affecting early childhood educators and teachers. Arcane arguments about the need for 'male comparators', under-recognition of the skills and expertise required of traditionally feminised workforces, the rigidity of the modern award system, and lack of access to enterprise bargaining have all combined to prevent much progress on the gender pay gap through the Commission.[33]

2.21 Although recognising that making gender equity an object of the FW Act was a positive development, Associate Professor Meg Smith and Dr Michael Lyons argued that a preferred term was 'gender equality'. On this, they said:

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[29] Ms Gabrielle Gooding, National Assistant Secretary, National Tertiary Union, *Committee Hansard*, 4 November 2022, p. 15.

[30] See, for example: Centre for Future Work, *Submission 18*, Australian Institute of Employment Rights, *Submission 17*; Australian Discrimination Law Experts Group, *Submission 21*; The Parenthood, *Submission 32*; Australian Retailers Association, *Submission 28*.

[31] Professor Rae Cooper, private capacity, *Committee Hansard*, 4 November 2022, p. 1.

[32] Australian Institute of Employment Rights, *Submission 17*, pp. 5 and 6.

[33] The Parenthood, *Submission 32*, p. 1.

> … it is a term that more comprehensively encompasses substantive equality in impact, outcome or result for a wider range of industrial and employment matters.[34]

2.22 Similarly, the ACTU listed banning pay secrecy and enhancing the role of collective bargaining among the specific measures that would help lift women's wages.[35] On this last point, the President of the ACTU, Ms Michele O'Neil, stated that the bill:

> … clarifies that gender equity is a matter that can be bargained over and makes it easier for multi-employer bargaining to lift up wages in sectors where the majority of workers are women. That's why countries that have a form of multi-employer bargaining have lower gender pay gaps than Australia.[36]

2.23 Ms O'Neil also noted the importance of the provisions aimed at improving flexible work rights for those workers who have caring responsibilities.[37]

2.24 However, the proposed changes to flexible working arrangements were not universally supported. The Chief Executive Officer (CEO) of the Council of Small Business Organisations Australia (COSBOA), Mrs Alexi Boyd, explained her members' concerns:

> This aspect is already causing stress and worry at a time when small businesses are trying to rebuild and recover after COVID. Aspects such as operating hours may be impacted, potentially affecting the whole business and other employees, and the size of the business means that they will be disproportionately affected by this new regime.[38]

2.25 The department clarified that the proposed changes to flexible working arrangements would not alter the 'reasonable business grounds' threshold for which employers can refuse requests. Further, it stated that the circumstances in which the FWC can make orders requiring employers to make changes to employees' working arrangements have been specifically limited, and that the FWC may only alter such arrangements when it is 'satisfied' that there are no

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[34] Associate Professor Meg Smith and Dr Michael Lyons, *Submission 12*, p. 3.

[35] Ms Michele O'Neil, President, Australian Council of Trade Unions, *Committee Hansard*, 4 November 2022, p. 13.

[36] Ms Michele O'Neil, President, Australian Council of Trade Unions, *Committee Hansard*, 4 November 2022, p. 13.

[37] Ms Michele O'Neil, President, Australian Council of Trade Unions, *Committee Hansard*, 4 November 2022, p. 14.

[38] Mrs Alexi Boyd, Chief Executive Officer, Council of Small Business Organisations Australia, *Committee Hansard*, 4 November 2022, p. 56. See also, Clubs Australia, *Submission 66*, p. 6; Australian Small Business and Family Enterprise Ombudsman, *Submission 70*, [p. 5]; Association of Independent Schools of New South Wales, *Submission 40*, pp. 5–6.

reasonable prospects of the dispute being resolved without the making of such an order.[39]

2.26 Submitters noted that bolstering access to flexible working arrangements would go some way towards addressing a key obstacle for women in the workforce. For example, the National Foundation for Australian Women (NFAW) pointed to the fact that women are far more likely than men to apply for flexible working arrangements, and are overrepresented in lower paid, less secure jobs. This means that the status quo is framed by a significant imbalance of power for many female employees.[40] While employees are currently free to apply for flexible arrangements, there is little recourse available when employers turn down a request.[41]

Improving job security for workers

2.27 Broad-based secure employment is fundamental to Australia's social fabric and cohesion, as it strengthens communities and enables financial independence. Unfortunately, insecure arrangements continue to proliferate. Importantly, these temporary arrangements have a disproportionate impact on women, who represent 58.3 per cent of all employees engaged on fixed-term contracts.[42]

2.28 In its evidence to the inquiry, the ACTU highlighted the prevalence of this issue in contemporary Australia and noted that one in three workers are insecurely employed.[43] The NTEU also contended that job security was a major issue for its members and stated that over three quarters of all research staff at higher institutions in Australia are on rolling fixed-term contracts.[44] Across all staff in higher education, two thirds are on casual or fixed-term contracts, and the number of casual and fixed term workers in the sector has increased by 89 per cent since 2000.[45]

2.29 The ACTU believes that the bill begins to address these issues through limiting the use of fixed-term contracts and making secure work an objective of the

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39 Department of Employment and Workplace Relations, *Submission 49*, p. 9.

40 National Foundation for Australian Women, *Submission 3*, p. 8.

41 The Hon. Tony Burke MP, second reading speech, *House of Representatives Hansard*, 27 October 2022, p. 5.

42 The Hon. Tony Burke MP, Minister for Employment and Workplace Relations, *House of Representatives Hansard,* 27 October 2022, p. 8.

43 Ms Michele O'Neil, President, Australian Council of Trade Unions, *Committee Hansard,* 4 November 2022, p. 13.

44 Ms Gabrielle Gooding, National Assistant Secretary, National Tertiary Education Union, *Committee Hansard,* 4 November 2022, pp. 14–15.

45 Senate Select Committee on Job Security, *Second Interim Report: Insecurity in publicly-funded jobs*, p. 149.

FW Act; however, it argued that further work needs to be done to improve security for casual, labour hire, and gig workers, as well as to eliminate sham contracting arrangements.[46]

2.30 Noting the importance of the issue, the BCA said it supported the intent of the bill in increasing job security. Notwithstanding this, it argued that the principal tools to achieve such an outcome were improving economic growth and increasing productivity.[47] To this end, the Hon. Tony Burke MP, Minister for Employment and Workplace Relations (Minister), noted in his second reading speech that this bill is only the beginning of the government's workplace relations reform agenda, with a second tranche of legislative amendments expected next year.[48]

2.31 The NFAW welcomed the limitations on the use of fixed-term contracts for the same role beyond two years; however, it noted that preserving the indefinite recycling of fixed-term contracts, where permitted under a modern award, would appear to exempt a large proportion of women from benefiting from this reform.[49] A number of other submitters, including the AIER and the Australian Council of Social Service (ACOSS) expressed concern that the limitations do not go far enough or that the scope of the exceptions from the limitations is too broad.[50]

2.32 Employer groups such as Master Builders Australia (MBA) did not oppose the proposed changes, and noted that exceptions to the two-year limit would include (but are not limited to):

- engaging an employee who has specialised skills required to complete a specific task;
- apprentices or trainees;
- essential work during a peak period, including seasonal work;
- emergency situations or where a permanent employee needs to be replaced for a period of leave; and

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[46] Ms Michele O'Neil, President, Australian Council of Trade Unions, *Committee Hansard*, 4 November 2022, p. 13.

[47] Ms Jennifer Westacott AO, Chief Executive Officer, Business Council of Australia, *Committee Hansard*, 4 November 2022, p. 51.

[48] The Hon. Tony Burke MP, second reading speech, *House of Representatives Hansard*, 27 October 2022, p. 9.

[49] National Foundation for Australian Women, *Submission 3*, [p. 6].

[50] Australian Institute of Employment Rights, *Submission 17*, pp. 4–5; Australian Council of Social Service, *Submission 52*, pp. 4–5.

- where an employee earns more than the high-income threshold (calculated from the first year of the contract, noting that the threshold is currently $162 000 per annum).[51]

2.33 The Migrant Workers Centre also articulated the benefits to employers of this reform, citing a possible reduction in the risk of poorer business outcomes, and allowing people to continue to work, and businesses to retain those skills.[52]

2.34 The department indicated that the bill had been amended to strengthen the prohibition on the use of fixed-term contracts, ensure the anti-avoidance provisions are 'strong and effective', and extend the commencement date to allow for further consultations with stakeholders and for employers to adjust their hiring practices.[53]

Reforming the bargaining streams under the FW Act

2.35 The bill would amend existing bargaining streams under the FW Act with the aim of expanding the use of enterprise agreements and increasing wages. This section outlines support for reform of the bargaining system and addresses stakeholder views in relation to two key measures—reform of multi-employer bargaining and the low-paid bargaining provisions in the FW Act.

Support for bargaining system reform

2.36 The Summit earlier this year confirmed a widespread desire to reform Australia's bargaining system, with a consensus being reached regarding the need to modernise Australia's workplace relations laws to make bargaining accessible for all workers and businesses.[54]

2.37 As mentioned in Chapter 1, there has been a marked decline in the utilisation of enterprise agreements over time, with Australian Bureau of Statistics (ABS) data indicating that only 35 per cent of employees were covered by these agreements in 2021. This represents a fall of eight per cent since 2010 and compares poorly to other comparative countries, including the vast majority of European countries—the United Kingdom, Canada, Japan, New Zealand, and Chile—each of which have far greater bargaining coverage.[55]

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51 Master Builders Australia, *Submission 15*, p. 16.

52 Mr Mathew Kunkel, Chief Executive Officer, Migrant Workers Centre Inc, *Committee Hansard*, 15 November 2022, p 40.

53 Department of Employment and Workplace Relations, *Submission 49*, p. 10.

54 Department of Employment and Workplace Relations, *Enterprise Bargaining outcomes from the Australian Jobs and Skills Summit–Regulation Impact Statement*, p. 25. Please note this document is included as an attachment to the bill's explanatory memorandum.

55 Centre for Future Work, *Submission 18*, p. 17.

2.38 Of the small minority of employees covered by enterprise agreements, 56 per cent are covered by an agreement that has expired.[56] Just 14.7 per cent of employees in Australia are covered by an enterprise agreement that is not expired.[57]

2.39 A number of participants highlighted the link between enterprise agreements and higher wages. For example, in his evidence to the inquiry, the President of the BCA, Mr Tim Reed, highlighted the beneficial nature of enterprise agreements, stating that covered workers typically earn $100 more per day than those relying on awards.[58]

2.40 Other stakeholders noted that the current lack of effective multi-employer streams presents a barrier to higher wages. For example, the CFW stated that, as a result of the ineffectiveness of the existing multi-employer streams under the FW Act, hundreds of thousands of workers, across many sectors, are currently dependent on safety net minimum award pay and conditions. On this issue, it said the following:

> These safety net standards fall well below normal standards for workers who have been able to access collective bargaining – and well below what is required for a decent standard of living. The low-paid bargaining stream of the FW Act is not fit for purpose; it has been a complete failure. It is too complicated, too restrictive, and provides inadequate support for workers to exercise power through industrial action. The other options have provided virtually no scope for unions and employees to initiate bargaining at all.[59]

2.41 Similarly, Associate Professor Chris F. Wright pointed out that low wages are a key reason why employers are currently facing challenges in attracting and retaining staff. He went on to explain that the root cause of this problem is deficient labour laws.[60] On this point, he argued that:

> Australia's industrial relations laws are stuck in an outdated paradigm fixated on solving problems that have diminished or no longer exist, such as perceived excess union power and inflationary wage pressures.[61]

2.42 More broadly, the Acting Secretary of the Electrical Trades Union of Australia (ETU), Mr Michael Wright, contended that Australia has enterprise bargaining in name only and described it as a broken part of the industrial relations

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[56] Productivity Commission, *5-year Productivity Inquiry: A more productive labour market*, Interim Report, October 2022, p. 54.

[57] Australian Institute of Employment Rights, *Submission 17*, p. 10.

[58] Mr Tim Reed, President, Business Council of Australia, *Committee Hansard*, 4 November 2022, p. 43.

[59] Centre for Future Work at the Australia Institute, *Submission 18*, p. 12.

[60] Associate Professor Chris F. Wright, *Submission 1*, pp. 1–2.

[61] Associate Professor Chris F. Wright, *Submission 1*, p. 2.

system. In support of this view, he related the example of Abbotsford brewery in Melbourne:

> You would think that we could do an agreement that covered that enterprise, but we can't because there are five different employers on site, all under the control of Carlton United, and they can chop and change as they wish. We can't do an enterprise agreement that covers that site. We don't have enterprise bargaining in Australia.
>
> When we go into bargain for our members, we are restricted by the corporate entity that the employer throws up for us on the day.[62]

2.43 This strategy of fragmenting a workforce across numerous employing entities to disenfranchise workers is taken to its most extreme at Qantas, which has split its frontline workforce across 38 different employing entities, including 17 Qantas-owned subsidiaries and 21 external labour hire or services contractors:

> Qantas has now positioned itself as the head, basically, of a complex labour hire network. The airline has now got 17 subsidiaries and 21 contractors in Australia alone. These didn't suddenly emerge over the last two years. This is evidence of a long-term plan to disenfranchise the workforce, exploiting the current flawed system. That's allowed the airline to transfer roughly half of its directly hired workforce onto lower paying, insecure jobs at those entities.[63]

2.44 Qantas submitted to the inquiry that it opposes the proposed reforms to bargaining, asserting without substantiating evidence, that the reforms will:

> … mean less flying because costs will rise, and demand will be destroyed – particularly on marginal routes. This will result in less investment and fewer jobs in aviation, with a flow on effect for communities and tourism.[64]

2.45 Qantas' assertion that it cannot afford to fairly bargain with its splintered workforce should be viewed in the context of its estimated $1.2 billion half-yearly profit, its recently announced $400 million share buyback, and its recently announced $4 million annual bonus for its Chief Executive Officer (CEO), Mr Alan Joyce, which suggests Qantas may have the financial capacity to end its deliberate wage suppression tactics.[65]

2.46 Likewise, ACOSS said:

> The enterprise bargaining system is currently not working for millions of workers in the care sector and community services, or their employers. It is challenging, especially in the many smaller organisations across the sector, for unions and employers to use this complex, rigid and time-consuming

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62 Mr Michael Wright, Acting Secretary, Electrical Trades Union of Australia, p. 18.

63 Mr Michael Kaine, National Secretary, Transport Workers Union of Australia, *Committee Hansard*, 14 November 2022, p. 63.

64 Qantas, *Submission 59*, p. 3.

65 Transport Workers Union of Australia, *Submission 82*, p. 3.

> process to negotiate pay and conditions for workers. That leaves many workers in the sector completely reliant on the Award system.[66]

2.47 Multi-employer bargaining, as set out in the bill, would provide a solution to the wages crisis currently faced in the care and community sectors by allowing employees to collectively bargain for better agreements. This has been shown to work in the early childhood education sector in Victoria where bargaining across hundreds of small and large early childhood providers has effectively secured superior wages and conditions over time. Through the collaboration of employers, unions and government, these agreements have increased retention of teachers and improved quality.[67]

Support for the multi-employer bargaining reforms

2.48 Although the FW Act currently permits multi-employer bargaining, due to its strict regulatory requirements, very few multi-employer agreements have been established since the Act came into force. Hence, single-employer enterprise bargaining is currently the principal form of bargaining.[68]

2.49 It was highlighted during the inquiry that a majority of OECD member countries bargain predominantly on a multi-employer basis, and that international research, including from the OECD itself, suggests this form of bargaining has significant benefits, including improved employment outcomes and gender equality; a fairer wage distribution; and better macroeconomic outcomes and worker training.[69]

2.50 Research published by the CFW during this inquiry concluded that, if the bargaining reforms in the bill result in bargaining coverage increasing toward a level typical of other countries where most bargaining occurs at the enterprise level, there would be substantial and long overdue upward pressure on wages growth:

> Elevating bargaining coverage in Australia to this intermediate level would imply a reversal of most (but not all) of the loss in coverage experienced over the past decade. It is anticipated that coverage would grow by slightly over 10 percentage points on this basis. Considering the observed correlation between bargaining coverage and wage growth in recent years, this in turn would lead to an improvement in nominal wage growth of some 1.6 percentage points per year. Just one year of faster wage growth would boost annual earnings for a worker with average full-time wages by $1473. That increment would expand to almost $8300 by the fifth year of (compounded) faster wage growth. On a cumulative basis over the first five years alone, the average worker would receive additional income of almost $24,000. By restoring bargaining overage and hence more

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66 Australian Council of Social Service (ACOSS), *Submission 52,* p. 6.

67 Early Learning Association Australia, *Submission 20,* pp. 1–4.

68 Associate Professor Chris F. Wright, private capacity, *Committee Hansard,* 4 November 2022, p. 1.

69 Associate Professor Chris F. Wright, private capacity, *Committee Hansard,* 4 November 2022, p. 2.

> traditional wage growth, these reforms would underpin a significant improvement in household incomes.[70]

2.51 The AIER submitted that multi-employer bargaining leads to fairer outcomes and is good for the economy. In support of this position, they referenced a 2018 article written by Emeritus Professor Joe Isaac and published in the Australian Economic Review. In that article, Emeritus Professor Isaac wrote:

> Compared to enterprise bargaining, MEB [multi-employer bargaining] 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.[71]

2.52 Associate Professor Wright argued that by promoting multi-employer bargaining, the bill would likely lift wages for low paid workers and create a better balance between employers and employees. In support of this, he referenced international evidence indicating that a coordinated multi-employer bargaining system can be good for workers, employers, and the broader economy.[72] Further, based on research he undertook with colleagues at the University of Copenhagen, he submitted the following:

> … comparing the wage determination systems of Australia and Denmark provides further evidence about the benefits of multi-employer bargaining. Denmark has the type of multi-employer bargaining system that the Australian government wants to move to with this bill. Despite 65 per cent of its workforce being members of unions who have extensive rights to undertake strike action, Denmark generally has fewer industrial disputes than Australia, lower unemployment and similar wages growth. Multi-employer bargaining is a key ingredient of Denmark's strong economic performance.[73]

2.53 In a joint submission to the inquiry, Distinguished Professor Anthony Forsyth and Professor Shae McCrystal provided support for the reforms but expressed concern that the modest nature of the reforms to multi-employer bargaining may not go far enough. Specifically, their submission argued:

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70 Jim Stanford, Fiona Macdonald, Lily Raynes, Centre for Future Work, *Collective Bargaining and Wage Growth in Australia*, November 2022, p. 5, Available at: https://australiainstitute.org.au/wp-content/uploads/2022/11/Collective_Bargaining_and_Wage_Growth_in_Australia_FINAL.pdf (accessed 18 November 2022).

71 Emeritus Professor Joe Isaac, 'Why are Australian Wages Lagging and What Can Be Done About It?', *Australian Economic Review*, vol. 51, issue 2, June 2018, pp. 175–90. Available at: https://onlinelibrary.wiley.com/doi/full/10.1111/1467-8462.12270 (accessed 12 November 2022).

72 Associate Professor Chris F. Wright, *Submission 1*, p. 6.

73 Associate Professor Chris F. Wright, private capacity, *Committee Hansard*, 4 November 2022, p. 2.

> International evidence clearly demonstrates the connection between industry/multiple employer bargaining systems and high levels of bargaining coverage (especially in continental Europe). Therefore, an unequivocal statutory preference should be stated in favour of multi-employer agreement options as the pathway to increasing the volume of collective bargaining and lifting workers' wages above award levels.[74]

2.54 Distinguished Professor Forsyth raised that, conversely to the positions of some employer groups, the restrictions around single interest multi-employer bargaining was too onerous, and more onerous than provisions in place in comparable countries, even prior to the government's amendments requiring a majority determination in each workplace:

> We have a majority threshold in the act now with the majority support determination just to get a regular agreement. Even in that context, majorities can be very difficult to obtain, and, in other countries like the US and the UK, where majority support is required, what it does is opens up the workplace contest over whether bargaining should occur and in what form it should take place to quite vigorous campaigns driven by employers to defeat the majority ever being achieved. So, while it's framed as, and sounds like, a democratic principle and you might think, 'Why would you move away from that?', the reason is the range of employer tactics that we know have been engaged in even under the majority support determination mechanism in the current law.
>
> So, in terms of getting a majority for an agreement now and employers opposing that, let's say the union is trying to use a petition to establish majority support, employers have engaged in—and there have been many cases on this in the last 13 years—questioning the validity of the petition; refusing to provide the total number of employees so you don't know what the target is to get a majority of; and going directly to the workforce with appeals in the nature of, 'The business will have to close if you vote up this type of agreement to fortify this union.' So there are a range of employer tactics that are engaged in, even under current law.
>
> The lowering of the threshold is not about being antidemocratic; it's about recognising the difficulties in establishing legitimacy in the workforce across a wider bargaining unit, and I think that's why they've chosen to adopt that lower threshold [10 per cent] in New Zealand.[75]

2.55 In her evidence to the committee, Ms O'Neil stated that the bill starts to fix Australia's 'broken' bargaining system. She went on to say the following:

> Even if workers can bargain, the system is so out of balance that workers have almost no leverage in the bargaining process, which, under the Fair Work Act, is full of red tape. Bargaining is largely limited to a single enterprise, even when pay is often effectively set across employers, particularly in low-paid sectors such as early childhood education and care or cleaning or government-funded services.

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[74] Distinguished Professor Anthony Forsyth and Professor Shae McCrystal, *Submission 6*, [p. 14].

[75] Distinguished Professor Anthony Forsyth, private capacity, *Committee Hansard*, 4 November 2022, p. 34.

> Even when workers have successfully bargained to get an agreement in place, it's all too easy for an employer to simply apply to get it terminated, sending workers back to minimum rates of pay. So we need to fix bargaining to get wages moving in this country again. The bill seeks to address this with modest changes that make a range of fairer bargaining options available to employers, employees and their unions. Having multi-employer bargaining in our workplace laws is not new. What the facts tell us, though, is that the current provisions just don't work.[76]

2.56 In its submission to the inquiry, Per Capita supported the bargaining reform measures in the bill, which it considered to be 'sensible, overdue, and essential'. It also noted that there had been decades of campaigning by Australian working people to put these reforms on the legislative agenda and that they:

> … recognise that secure work and better wages are the essential ingredients for productivity and shared economic prosperity. This is why this Bill is crucial to Australia's future economic security and success. It should be passed as soon as possible.[77]

2.57 Likewise, the CFW argued that multi-employer bargaining holds 'great promise' in reversing the declines in collective bargaining seen in Australia. In their submission they articulated this position as follows:

> When negotiations can occur at more than one workplace or enterprise at a time, negotiators can establish common terms across multiple worksites. The bargaining process becomes more efficient, by coordinating negotiations across several firms (rather than replicating the entire process at numerous separate worksites). And by establishing terms and conditions that apply evenly across a wider population of businesses, multi-employer bargaining can lift wages and standards for workers but in a way that does not disadvantage any particular company or enterprise – since similar terms will apply to their competitors.[78]

2.58 ACOSS stated its support for the multi-employer bargaining reforms in the bill, adding that OECD research has demonstrated that 'sector level bargaining or coordination can assist in negotiating targeted raises in female-dominated and low-paid sectors'.[79] A number of other civil, social, legal and religious groups also indicated their support for the multi-employer bargaining reforms,

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[76] Ms Michele O'Neil, President, Australian Council of Trade Unions, *Committee Hansard*, 4 November 2022, p. 13.

[77] Per Capita, *Submission 14*, pp. 9–10.

[78] Centre for Future Work at the Australia Institute, *Submission 18*, p. 9.

[79] Australian Council of Social Service, *Submission 52*, p. 7.

including Catholic Religious Australia, the Migrant Justice Institute, the NFAW, The Parenthood, and Maurice Blackburn.[80]

2.59 In addition to broad support from workers, unions, academics and other civil, social, legal, and religious groups, a number of employers and employer associations indicated they either supported or did not oppose the multi-employer bargaining reforms, including the single-interest stream.

2.60 For example, Ms Julie Price, Executive Director of the Community Child Care Association, which represents over 750 community not-for-profit early childhood education and care (ECEC) providers, set out how a multi-employer agreement in the Victorian ECEC sector has delivered above-award wages for workers for over a decade, with the support of employers:

> Community Child Care has been with the employer representatives for the last round of the PCS agreements in Victoria, which have been going since 2008 in various different guises. However, at the moment, that agreement only covers just under 60 services in Victoria. It certainly is a fantastic instrument to help ensure better wages and conditions. For example, the base rate for our first year certificate III qualified educator from 1 July this year under the award is $24.76 an hour. But, under our PCS agreement, their base rate is $28.87, so that's 16 per cent above the award. So this agreement, over time, has really enabled the signatories to this agreement to continue to improve the wages and conditions of educators and teachers in their employment. And those 56 centres are small community owned and managed services, so they're managed by boards or committees of volunteer parents, and they really don't have the financial resources or they don't necessarily have the expertise in industrial relations to be able to negotiate an agreement themselves.[81]

2.61 Ms Price further noted that there has been a collaborative approach to multi-employer bargaining with the unions and the sector, with no threat of industrial action as a result. Contrary to the assertions of some employer groups that multi-employer bargaining results in industry-wide strike action. Ms Price explained why this is the case:

> For the community services sector, because there's been cooperative bargaining and negotiations, they haven't felt the need. Each time there have been negotiations about improving wages and different conditions, it's gone backwards and forwards between the employers and the unions, but, because it's been collaborative and not adversarial, they haven't felt the need to go to industrial action.[82]

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[80] Catholic Religious Australia, *Submission 22*, pp. 2–3; Migrant Justice Institute, *Submission 45*, p. 2; National Foundation for Australian Women, *Submission 3*, [pp. 9–10]; The Parenthood, *Submission 32*, pp. 2–3; Maurice Blackburn Lawyers, *Submission 61*, p. 3.

[81] Ms Julie Price, Executive Director, Community Child Care Association, *Committee Hansard*, 14 November 2022, p. 10.

[82] Ms Julie Price, Executive Director, Community Child Care Association, *Committee Hansard*, 14 November 2022, p. 11.

2.62 Ms Price was also asked whether engaging in multi-employer bargaining had enabled employers to pick up best practices and productivity tips through the bargaining process. In her response she said:

> I would definitely think so. The volunteer parent boards and committees are often quite isolated and on their own and haven't got a background or any expertise in our sector, or even in human resources development or management. Being able to sit and be part of the negotiations—during the last round of the PCS negotiations, we had video link-ups of 60 to 70 people with a representative from each board or committee speaking to the group—and certainly sharing ideas about what could be improved and what might go in as an offer from employers in the bargaining process was a learning experience for many of those committee and board members. I think that the sharing of best practice, and what can be done in different services, is definitely a by-product of this negotiation process.[83]

2.63 Mr John Cherry, Head of Advocacy at Goodstart Early Learning (Goodstart), Australia's largest not-for-profit provider of early learning and childcare, said that while Goodstart has a history of successful single enterprise agreements and would continue as their primary method of bargaining, he welcomed the multi-employer bargaining provisions:

> I certainly believe that this bill will make it easier because one of the challenges we have in our sector is 80 per cent of the sector does not have an enterprise agreement. We do. Twenty per cent does; 80 per cent doesn't. And 63 per cent of the workforce is paid no more than the award rate. We certainly think that an enterprise agreement will make it easier to record any variation in wages that the government puts in place—definitely.[84]

2.64 Mr Mimmo Scavera, President of the HVAC Manufacturing and Installation Association, representing nine major employers collectively employing approximately 900 people, also stated his strong support for the single-interest multi-employer bargaining provisions of the bill:

> It's about not having a race to the bottom, to put it bluntly. At the moment the major construction projects don't have any regulation in relation to pay. So you have a mixture of people on a site that will be either enterprise agreement covered, award covered or covered by whatever other means people are creating. We're hoping that through this mechanism we can have an industry agreement through multi-enterprises. That's what we're aiming for: to regulate the market a bit more.[85]

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[83] Ms Julie Price, Executive Director, Community Child Care Association, *Committee Hansard*, 14 November 2022, p. 14.

[84] Mr John Cherry, Head of Advocacy, Goodstart Early Learning, *Committee Hansard*, 14 November 2022, p. 10.

[85] Mr Mimmo Scavera, President, HVAC Manufacturing and Installation Association, *Committee Hansard*, 14 November 2022, p. 51.

2.65 Mr Scavera added that the HVAC Manufacturing and Installation Association hoped that multi-employer bargaining could help the industry better address productivity, safety and certification issues:

> We need to get some sort of control there. There's nothing that says that the company putting in a tender for a project needs to be of a certain standard. That's the sort of thing that we want to put in play.
>
> … We want to introduce formal training, formal recognition, certification and licencing to work in the area of HVAC. There are certain areas of HVAC that, logistically, have to be monitored. We need to put that into place now to ensure that people are paid according to skills that have been assessed.[86]

2.66 Other witnesses noted the importance of the single-interest multi-employer bargaining reforms to specific industries. Mr Michael Wright, Acting Secretary of the Electrical Trades Union, noted the importance of collective bargaining in the renewables industry to a successful social transition to net zero emissions:

> In too many areas in Australia, 'renewables' has become a dirty word. The renewable sector is plagued by poor wages, lack of opportunities for locals, lack of opportunities for apprenticeships, and poor quality. These poor conditions have been an underlying fuel source that has been powering Australia's climate wars, because too many regions simply couldn't see a future for them in Australia's renewable future. What these reforms offer is an opportunity to break this cycle.
>
> What we see that we'll be able to do with the multi-employer bargaining is to do agreements that cover an entire renewable energy zone, because the problem we have is not that employers are bad, that they're jerks or that they want to drive down conditions for the sake of it; it's that, when it comes to an individual wind farm or solar farm, they don't go for long enough that an individual employer has any incentive to invest in the community, to provide apprenticeships or to provide opportunities for locals.
>
> We know that there is an enormous amount of work coming in across the region. These sorts of agreements will allow for the coordination to deliver training and career-pathing for workers that will then give those communities and those regions buy-in into the renewable future.[87]

2.67 Ms Emeline Gaske, Assistant National Secretary of the Australian Services Union, told the committee that single-interest multi-employer bargaining is essential to raising wages in low paid, feminised call centre work.[88] This was reiterated by Ms Sinead Francis-Coen, a call centre worker, who said

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[86] Mr Mimmo Scavera, President, HVAC Manufacturing and Installation Association, *Committee Hansard*, 14 November 2022, p. 51.

[87] Mr Michael Wright, Acting Secretary, Electrical Trades Union, *Committee Hansard*, 4 November 2022, pp. 16–17.

[88] Ms Emeline Gaske, Assistant National Secretary, Australian Services Union, *Committee Hansard*, 15 November 2022, p. 19.

multi-employer bargaining could not just deliver better terms for her and her colleagues, but also productivity benefits for her employer:

> These are the sorts of things that would make a real difference for us, and I think that, in being able to work with my colleagues across the contact centre area locally, we can bring in a lot of better practice in terms of procedures and things that will work well for us and my employer.[89]

Concerns raised regarding the multi-employer bargaining reforms

2.68 Since the announcement of the reforms, a number of employer groups, including the BCA, Australian Industry Group (Ai Group), Australian Chamber of Commerce and Industry (ACCI), and the Minerals Council of Australia (MCA), have expressed their opposition to the proposed changes to Australia's multi-enterprise bargaining framework. These organisations are concerned that the reforms provide the potential for industry-wide agreements to proliferate, hypothetically allowing for ill-suited terms and conditions to be imposed on employers.[90]

2.69 In its evidence to the inquiry, the BCA specifically raised issues around the expansion of the concept of 'single interest' to potentially cover large numbers of businesses that may have nothing in common with each other or may even be in direct competition. They were concerned that these changes risked a 'fundamental shift in Australia's workplace relations landscape' and argued that the case for these reforms had not yet been made.[91]

2.70 The BCA also argued that, as the bill is currently drafted, a majority of employees in large workforces would be able to, amongst other things, determine sectoral coverage, whether to enter into multi-employer agreements or not, the scope and conditions of any such agreements, and whether or not to take protected industrial action. Such an outcome could result in small businesses being 'roped into' bargaining processes with much larger businesses and, hence, lose control of their own circumstances.[92] It was also submitted that the reforms could:

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[89] Ms Sinead Francis-Coen, Workplace Delegate, United Services Union, *Committee Hansard*, 15 November 2022, p. 19.

[90] Jaan Murphy, Scanlon Williams, and Elliott King, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, *Bills Digest No. 34*, 2022–23, Parliamentary Library, Canberra, 2022, p. 28.

[91] Mr Tim Reed, President, Business Council of Australia, *Committee Hansard*, 4 November 2022, p. 44; and Ms Jennifer Westacott AO, Chief Executive Officer, Business Council of Australia, *Committee Hansard*, 4 November 2022, p. 46.

[92] Ms Jennifer Westacott AO, Chief Executive Officer, Business Council of Australia, *Committee Hansard*, 4 November 2022, p. 46.

> … open the door for widespread industrial action across multiple parts of the economy, because we're opening this up across a range of sectors, across a range of employers.[93]

2.71 Given the above concerns, the BCA made the following suggestions for amendments to the bill:

- multi-employer bargaining should be confined to low-paid sectors;
- small businesses with less than 100 employees, as well as high-paid industries with a history of bargaining, such as construction and mining, should be excluded from multi-employer bargaining; and
- a majority vote of employees in each workplace should be required to enter into multi-employer agreements, to agree to any terms and conditions, and to take protected industrial action—which has been actioned through subsequent government amendments.[94]

2.72 The peak organisation representing Queensland's cane, cattle, grain, sheep, and wool producers, AgForce, raised concerns regarding the unintended consequences of the bill's changes to multi-enterprise bargaining. In its submission to the inquiry, it argued that certain aspects of the bill appeared to be designed to unionise currently non-unionised sectors. AgForce concluded by saying that such significant changes 'cannot be rushed' and advocated for a splitting of the bill.[95]

2.73 The Regional Universities Network were concerned that the changes to multi-employer bargaining may inadvertently oblige universities with significant differences in size, scope, mission, and location to be covered by single-interest multi-employer agreements. It believes this outcome could have significant adverse effects on regional universities and the regions in which they operate.[96]

2.74 The Australian Meat Industry Council raised with the committee that their membership is concerned that the reforms to multi-employer bargaining would 'force employers in to bargaining processes which may not benefit their business or even their direct employees'.[97]

2.75 The Franchise Council of Australia contended that the bill represents the 'most significant changes ever introduced to the Fair Work Act'. It was concerned that widening the 'single interest' bargaining provisions would enable

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[93] Ms Jennifer Westacott AO, Chief Executive Officer, Business Council of Australia, *Committee Hansard*, 4 November 2022, p. 46.

[94] Ms Jennifer Westacott AO, Chief Executive Officer, Business Council of Australia, *Committee Hansard*, 4 November 2022, pp. 46–47.

[95] AgForce Queensland Farmers Limited, *Submission 5*, [pp. 1–2].

[96] Regional Universities Network, *Submission 7*, [p. 1].

[97] Australian Meat Industry Council, *Submission 9*, [p. 2].

employees and union representatives to organise broad-based protected industrial action.[98]

2.76 However, in response to a number of critiques raised by employer groups regarding the expansion of multi-employer bargaining in Australia, Associate Professor Wright pointed out that:

> Employer groups have strongly criticised the proposed expansion of multi-employer bargaining, claiming that it would return Australia to a 1970s-style industrial relations system, with high levels of industrial conflict, unemployment and wage-led price inflation. These outcomes are highly unlikely and fanciful.
>
> The 1970s industrial relations system was starkly different to today. Unlike then, only a small minority of workers now are union members, and it is much harder for them to undertake industrial action. The concerns that have been raised about multi-employer bargaining overlook the extensive international evidence regarding its benefits, including for employers.[99]

2.77 In addition, the department highlighted that the existing prohibition on industrial action in support of pattern bargaining would be retained. The department also stated that the amended bill:

> … precludes multi-employer agreements (other than greenfields agreements) from covering employees in relation to the performance of work in the 'general building and construction' industry, as defined in relevant modern awards. The provisions also prevent variations to extend coverage of multi-employer greenfields agreements to employers and employees performing work in the general building and construction industry.[100]

2.78 In relation to the proposed changes to the single interest bargaining stream, the department clarified that businesses (with 15 or more employees) cannot be compelled to bargain unless their employees show majority support. Furthermore, the bill as amended:

> … provides the [FWC] with discretion to refuse to add an employer to a single interest authorisation or agreement if it is satisfied that the parties are bargaining in good faith and have a history of effectively bargaining, and less than 6 months have passed since the most recent relevant agreement has passed its nominal expiry date. In addition, employers and employees who have agreed in writing to bargain, or who are covered by an in-term enterprise agreement, will be excluded from the stream.
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> The bill as amended also provides that voting in the single interest stream in relation to majority support determinations, protected action ballots and agreement approval will occur on an employer-by-employer basis.[101]

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98 Franchise Council of Australia, *Submission 13*, pp. 3 and 4.

99 Associate Professor Chris F. Wright, *Committee Hansard,* 4 November 2022, pp. 1–2.

100 Department of Employment and Workplace Relations, *Submission 49*, p. 15.

101 Department of Employment and Workplace Relations, *Submission 49*, p. 18.

2.79 With respect to the concerns raised that the multi-employer bargaining provisions of the bill would result in widespread unionisation, collective bargaining and industrial action at small businesses, the ACTU noted that even when union density was substantially greater than it is now, small businesses were not unionised or involved in industrial disputes:

> We also know that small businesses are largely un-unionised; they're not businesses that are traditionally involved in taking industrial action, because of the reality of what I heard senators talking about before. People work really closely together with their employer. They're often engaged daily in just trying to work out how to keep the business running and how to meet workers' needs for their families as well as the business's needs. Nothing in this bill is going to change that. That is the reality. Even when unions had 60 per cent density in Australia, there was not unionisation of small businesses, and there was no history of industrial action in relation to small businesses.[102]

2.80 Considering the evidence provided to the inquiry by various academics and think tanks that multi-employer bargaining overseas has often been associated with superior wages, employment, and macroeconomic outcomes, and in some instances less industrial action, major employer groups were offered the opportunity to cite evidence in support of their assertions to the contrary. The CEO of the BCA, Ms Jennifer Westacott AO, affirmed she did not have evidence to support her claims:

> We're basing it on the way the bill is drafted and the consequences that it would open up in terms of solving some of the problems, which we don't believe it will solve, and opening up the door for large, widespread industrial action and all of the complexities we've talked about.[103]

2.81 The National Farmers' Federation provided a similar response when it was asked whether it had any evidence to substantiate its assertions that the bill would have 'a similar, or indeed worse' impact than the COVID-19 pandemic:

> We don't. We can see what has happened in the past… We are talking about potential consequences.[104]

2.82 When the same question was put to the Ai Group, Ms Nicola Street, Director of Workplace Relations Policy, responded that research by Mr Mark Wooden had suggested that:

> … across Europe, countries that have multi-employer bargaining have actually delivered lower, on average, wage growth than countries with an

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[102] Ms Michele O'Neil, President, Australian Council of Trade Unions, *Committee Hansard*, 4 November 2022, p. 21.

[103] Ms Jennifer Westacott AO, Chief Executive Officer, Business Council of Australia, *Committee Hansard*, 4 November 2022, p. 55.

[104] National Farmers' Federation, *Submission 54*, p. 6; Mr Ben Rogers, General Manager Workplace Relations and Legal Affairs, National Farmers Federation, *Committee Hansard*, 11 November 2022, pp. 20–21.

> enterprise bargaining system where wages are developed and negotiated at the enterprise.[105]

2.83 This was the only academic citation provided to the committee in support of many of the claims made by employer groups opposing the multi-employer bargaining provisions of the bill. The submission by the CFW, provided to the inquiry prior to Ms Street's comments, cast doubt on the veracity of Mr Wooden's conclusions:

> One recent commentary by Mark Wooden cites international evidence to argue that greater latitude for multi-employer bargaining would potentially reduce wage growth in Australia. This commentary has been cited by opponents of the proposed IR reforms to argue that the existing enterprise-based system is best for wages. However, this conclusion is not even consistent with the data provided in Wooden's commentary, let alone with a more nuanced analysis of international comparisons.[106]

2.84 The CFW explained that Mr Wooden's analysis inaccurately categorised 15 OECD countries into two categories—where bargaining predominantly occurs at a multi-employer level, and where it occurs predominantly at an enterprise level. The CFW noted 'many complexities prevent such a simple binary categorisation, and the OECD itself does not group countries this way'. The CFW noted that some of the countries Mr Wooden categorised as being dominated by single enterprise bargaining, such as Canada, the United Kingdom, Ireland and South Korea, in fact have a far greater incidence of multi-employer or industry-wide agreements than Australia. The CFW also noted that in the 10-year sample period, the countries Mr Wooden characterised as being dominated by multi-employer bargaining saw wages grow almost twice as much as in Australia.[107]

2.85 Mr Wooden's assertion that the government's decisions on workplace relations policy can impact wages, in either a positive or negative sense, would also appear to contradict political commentary he chose to make to the media during the 2022 federal election campaign, when he said:

> Anthony Albanese is saying we will raise wages, which I think is very interesting since the only lever have [sic] to pull is wages of the public service ... when he says he's raising wages, it's just political games.[108]

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[105] Ms Nicola Street, Director of Workplace Policy, Australian Industry Group, *Committee Hansard*, 15 November 2022, p. 99.

[106] Centre for Future Work, *Submission 18*, p. 18.

[107] Centre for Future Work, *Submission 18*, p. 18.

[108] Angus Thompson, 'Fair Work advisor questions whether Labor can raise wages', *Sydney Morning Herald*, 5 May 2022 https://www.smh.com.au/politics/federal/prime-minister-refuses-to-back-increase-in-minimum-wage-20220505-p5aiqt.html (accessed 18 November 2022).

Approving and varying enterprise agreements

2.86 Some industry and employer groups expressed concern about the government's amendments to the bill that could require an employer to obtain written approval from employee bargaining representatives prior to requesting that employees vote to approve or vary a multi-enterprise agreement.[109] However, the National Secretary of Transport Workers Union, Mr Michael Kaine, argued that the changes were needed to ensure that agreements were not pushed through without genuine agreement:

> The union's involvement is important, particularly in sectors that are under such immense pressure, with such splintered workforces and companies with a history of antiworker, anticollectivism and anti-union approaches. With Swissport, we had workers being faced with Swissport ramming through agreements that ultimately were ruled illegal by the Fair Work Commission for not being able to pass the better off overall test … This is what occurs when you have companies that have an unfettered right to just push through agreements. They'll find the loopholes and they'll exploit them, and we saw the worst of that in the case of Swissport. Registered organisation involvement in agreements is vital to make sure that situations like that don't occur.[110]

2.87 Indeed, the department clarified the rationale for the changes:

> … this amendment applies to the multi-employer streams and really it's getting at ensuring that genuine bargaining has actually occurred and employers aren't rushing off to put an agreement to a vote before that bargaining has occurred and has been finalised. For the multi-employer streams, some of the employees that are covered by those agreements need to be represented by an employee organisation. So this is recognising that special role that employee organisations play in the system to get their agreement before it's put to a vote.[111]

Support for the supported bargaining stream

2.88 The bill would reform the low-paid bargaining provisions in the FW Act and create the supported bargaining stream, with the aim of addressing the initial scheme's limited take-up. While it was originally hoped that the low-paid bargaining stream would address pay outcomes for low-paid workers, the criteria were considered too onerous and a major barrier to entry. This difficulty is demonstrated by the fact that since the commencement of the

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[109] See, for example, Australian Industry Group, *Submission 23*, p. 45; Business Council of Australia, *Submission 55*, p. 19; Australian Chamber of Commerce and Industry WA, *Submission 74*, p. 3; Maritime Industry Australia Ltd, *Submission 37*, p. 16.

[110] Mr Michael Kaine, National Secretary, Transport Workers Union, *Committee Hansard*, 14 November 2022, p. 66.

[111] Ms Anne Sheehan, First Assistant Secretary and Chief Counsel, Workplace Relations Legal Division, Department of Employment and Workplace Relations, *Committee Hansard*, 11 November 2022, p. 73.

FW Act over a decade ago, the stream has been rarely used, with just four applications being made and only a single one actually being granted.[112]

2.89 There was broad support for the proposed reforms.[113] For example, Professor Rae Cooper said the following:

> I think that there are some aspects of the design of the supported bargaining stream which are different to the low-paid bargaining stream and which, I think, take out some of those tripwires that we had in the low-paid bargaining stream that aren't in existence anymore.
>
> One thing that I'm particularly heartened by is the inclusion of the capacity to bring the funders to the table when there's an application for a supported bargaining order. So that might mean, as you all know, in areas in human services such as aged care or early childhood education and care, where essentially the federal government is the funder and sets the parameters of what the wages will be, that that funder can be brought to the table to be involved in the conversation between the parties—the unions representing the workers, employer associations who might be representing the employers and also employers in the sector themselves—about how to make a sustainable basis for wages in those areas.
>
> I think there is quite some merit in that, and there's quite some evidence that the funding that flows from government funding in those types of areas absolutely sets what's available for wage increases, so I very much hope that that will make a big difference.[114]

2.90 Noting that the current system is not delivering for workers in low-paid sectors—and that this problem was a key issue identified at the Summit earlier this year—the BCA expressed their strong support for the renamed and reformed supported bargaining stream. However, it argued that the broader multi-employer bargaining changes should be pursued through this stream rather than the approach taken by the bill, which it believes will expose the whole economy to the 'risks of multi-employer bargaining'.[115]

2.91 Although the NFAW was supportive of the new stream and the powers available to the FWC to facilitate agreements, it remained concerned that the barriers to entry will continue to be too high. It concluded that this would ultimately depend on the approach taken by the FWC in applying the stream's

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[112] Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, *Explanatory Memorandum,* p. 159; and Department of Employment and Workplace Relations, *Enterprise Bargaining outcomes from the Australian Jobs and Skills Summit–Regulation Impact Statement,* p. 20.

[113] See, for example, Australian Council of Trade Unions, Submission 47, p. 17; Per Capita, *Submission 14*, p. 4; Migrant Justice Institute, *Submission 45*, p. 2; Professor Chris F. Wright, *Submission 2*, pp. 2–3.

[114] Professor Rae Cooper, private capacity, *Committee Hansard,* 4 November 2022, p. 6.

[115] Ms Jennifer Westacott AO, Chief Executive Officer, Business Council of Australia, *Committee Hansard,* 4 November 2022, p. 45.

criteria which, it observed, had historically been 'so conservative that no agreements could ever be made'.[116]

2.92 ACOSS also expressed its support for the bill's changes to supported bargaining. It articulated its reasoning as follows:

> We support the introduction of a fairer and simpler system of enterprise bargaining that allows organisations to bargain together in multi-enterprise agreements to reach outcomes that better support care and community organisations and their employees. We note OECD research demonstrating that sector level bargaining or coordination can assist in negotiating targeted raises in female-dominated and low-paid sectors.
>
> Given that, we are supportive of the supported bargaining and cooperative workplace bargaining streams proposed by the Bill. We are encouraged that the proposals to revise the current low paid bargaining stream to become the supported bargaining stream will allow sector workers struggling with low pay, modest conditions and job insecurity to achieve much more equitable outcomes. [117]

Concerns raised regarding constraints on industrial action

2.93 Distinguished Professor Anthony Forsyth and Professor Shae McCrystal noted the provisions of the FW Act limiting access to industrial action are some of the 'most complex and over engineered provisions regulating strike action in the world'.[118] They further explained that:

> With only the possible exception of the UK, no other country which purports to provide workers with the right to take lawful strike action makes it so difficult to access lawful strike action, so challenging to take meaningful and impactful strike action, and so easy inadvertently to break those rules and lose the capacity to strike.[119]

2.94 Contrary to some of the fears raised by employer groups, the bill's most substantive change to the process of taking protected industrial action is a new requirement for a conciliation conference conducted by the FWC prior to the close of a Protected Action Ballot (PAB), thus making industrial action more onerous and difficult for employees to take.

2.95 While there was broad support from employer groups for this provision—despite it negating their argument that industrial action would be more prevalent if the bill were to pass—it was widely opposed by other stakeholders. Professor McCrystal told the committee:

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[116] National Foundation for Australian Women, *Submission 3*, [pp. 9–10].

[117] ACOSS, *Submission 52*, pp. 5–6.

[118] Distinguished Professor Anthony Forsyth and Professor Shae McCrystal, *Submission 6*, [p. 8].

[119] Distinguished Professor Anthony Forsyth and Professor Shae McCrystal, *Submission 6*, [p. 8].

> Australia's strike laws are some of the most complex and challenging in the developed world, and the introduction of a three-month ballot mandate combined with the need to return to the commission for a PAB order and a reballot, along with a compulsory conciliation conference, will exacerbate that problem. [120]

2.96 The ACTU informed the committee that the requirement for compulsory conciliation 'would only move us further away from meeting our labour rights obligations arising under international law, not closer towards them'.[121] Similarly, the AIER told the committee that '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'.[122]

Concerns raised regarding the exclusion of the building and construction industry

2.97 The bill, as amended in the House of Representatives, excludes workers engaged in building and construction work from accessing multi-employer bargaining. The exclusion received support from employer groups including the Ai Group and MBA.[123]

2.98 The committee received evidence from other organisations strongly opposed to the exclusion. The AIER noted the provision 'flagrantly breaches the collective bargaining convention and their right of free association'.[124] Distinguished Professor Forsyth and Professor McCrystal, in their joint submission, argued the pre-amendment exclusion 'should be removed from the bill so that all workers and their unions have the opportunity to access multi-employer bargaining'.[125]

Abolishing the ABCC and the Registered Organisations Commission (ROC)

2.99 The bill would abolish the ABCC and the ROC and transfer various regulatory functions to the Fair Work Ombudsman (FWO) and the Fair Work Commission (FWC). In his second reading speech, the Minister stated that these two organisations were 'ineffective and discredited' and that they were more concerned about prosecuting workers and their representatives than addressing wage theft or promoting workplace safety, education, and good industrial relations.[126]

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120 Professor Shae McCrystal, *Committee Hansard*, 4 November 2022, p. 33.

121 Australian Council of Trade Unions, *Submission 47*, p. 60.

122 Australian Institute of Employment Rights, *Submission 17*, p. 22.

123 Australian Industry Group, *Submission 23*, p. 77; and Master Builders Australia, *Submission 15*, p. 25.

124 Australian Institute of Employment Rights, *Submission 17*, p. 25.

125 Distinguished Professor Anthony Forsyth and Professor Shae McCrystal, *Submission 6*, p. 20.

126 The Hon. Tony Burke MP, Minister for Employment and Workplace Relations, *House of Representatives Hansard*, 27 October 2022, p. 11.

2.100 The ACTU also highlighted the 'politicised' nature of the ABCC and ROC and argued that they have utilised taxpayer funds to pursue unions which were only taking action to 'make sure workers in one of the most dangerous industries in the country are safe'. She further articulated this as follows:

> Pursuing workers and unions over things like people going in to have a cup of tea with workers, and using taxpayers' money to go all the way through the courts over years about saying that a union organiser couldn't go and have a cup of tea with a group of workers, is ridiculous, when you think of the rates of injury and death, underpayment and wage theft that happen in that sector, and the ABCC completely ignoring those issues and instead pursuing an ideological attack on unions.[127]

2.101 In its evidence to the inquiry, the BCA disagreed with the government's proposed abolition of the ABCC. It submitted that the sector is 'driven by a union culture of lawlessness and militancy', and to not have a 'tough cop on the beat' would be a mistake. The BCA also highlighted the critical nature of the construction sector to the economy, noting that it is this industry which ultimately determines whether community infrastructure is constructed and houses are built.[128]

2.102 Abolition of the ABCC was also opposed by MBA. They stated that evidence shows the ABCC has been an 'effective and efficient regulator', and that it has improved compliance with the rule of law and driven positive cultural change. It also argued that the FWO would not be an effective replacement for the ABCC.[129]

2.103 The MBA also stated its opposition to the abolition of the ABCC on purported economic and productivity grounds. Specifically, it cited a report it had commissioned from EY, that claimed that the economic impact of abolishing the ABCC would be $47.5 billion by 2030.[130]

2.104 The credibility of this report has been scrutinised separately by Dr Phillip Toner, an Honorary Senior Research Fellow at the University of Sydney, and Dr Richard Denniss, the Chief Economist at the Australia Institute.

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[127] Ms Michele O'Neil, President, Australian Council of Trade Unions, *Committee Hansard*, 4 November 2022, p. 24.

[128] Ms Jennifer Westacott AO, Chief Executive Officer, Business Council of Australia, *Committee Hansard*, 4 November 2022, p. 45.

[129] Master Builders Australia, *Submission 15*, p. 3.

[130] EY, *The costs of abolishing the Australian Building and Construction Commission*, April 2022, p. vii, (accessed 18 November 2022).

2.105 Dr Toner, in concluding the EY/MBA report's methodology was 'effectively anecdotal- empirically empty and useless as a basis for analysis and modelling',[131] found:

> - There are two key disclaimers. First, the report represents solely the 'interests' of the MBA and so does not have regard to other evidence that contradicts these interests. Second, the modelled outcomes are contingent 'on the collection of assumptions as agreed with the Client'. That is, the assumptions critical for modelling which, forms the core of the report, were determined by the MBA and not based on objective data or accepted economic theory.
> - The EY report appears to regard all industrial action, both protected and unprotected, as illegitimate and simply a cost, and has no regard to the role of industrial disputes in raising safety standards, recovering unpaid wages, improving conditions and seeking a fair distribution of the surplus generated by both capital and labour.
> - The study does not attempt to directly measure the effect of the ABCC on productivity or firm performance rather, it establishes a hypothetical case by first estimating how productivity could be affected by abolition of the ABCC and then applying these estimates in an economic model to determine the impact of this change on productivity and output in the macro-economy.[132]

2.106 The analysis by the Australia Institute reached a similar conclusion, describing the MBA/EY report as 'astonishing', 'unreliable', and 'grossly misleading', in finding:

> - EY's survey 'involved' just 49 respondents, only 34 of which appear to have provided responses to key questions.
> - Respondents appear to have just guessed the impact of abolishing the ABCC on worker productivity and labour costs, with no methodology or workings provided.
> - Given that the ABCC employs just 154 full-time equivalent staff, EY's results [a $47.5 billion economic impact] suggests the staff effectively generate the same amount of GDP as over 11 800 construction workers that they oversee. If true, the ABCC staff are among the most productive in the world.[133]

2.107 Both the Toner and Australia Institute reports note the MBA/EY report did not refer to publicly available ABS data on productivity in the construction

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[131] Dr Phillip Toner, *An Assessment of the Methodology and Findings of the EY Report (2022) 'The costs of abolishing the Australian Building and Construction Commission'*, pp. 2–3.

[132] Dr Phillip Toner, *An Assessment of the Methodology and Findings of the EY Report (2022) 'The costs of abolishing the Australian Building and Construction Commission'*, p. 2.

[133] Richard Denniss, Matt Saunders, and Rod Campbell, *Commission Impossible: Commissioned modelling of the economic impact of the Australian Building and Construction Commission*, October 2022, pp. 4 and 11.

industry. If they did, they would have seen that 'productivity has largely gone backwards under the ABCC, suggesting that its abolition could in fact improve construction industry performance, the exact opposite of EY's conclusion'.[134]

2.108 In addition to overseeing declining productivity, the ABCC has confirmed that between its re-establishment in December 2016, and the end of December 2021, a five-year period, it had only recovered $4.796 million in unpaid wages and entitlements for construction workers.[135] By comparison, in a five-month period in late 2021, the construction union recovered more than $17 million in unpaid wages and entitlements for workers.[136] Thus, in five months the union recovered more than three times more in stolen wages for workers than the ABCC had in five years.

2.109 The ACTU argued that the FWO was very well resourced to undertake its additional responsibilities and would investigate matters as they occurred in the industry. It highlighted that this reform meant the industry would now be subject to the same laws as everyone else and would also have the same regulator.[137]

2.110 This view was supported by representatives of the department, which indicated that the FWO had been provided with an additional $69.9 million over the forward estimates, which included funding 80 ASL (average staffing level).[138] The department also explained how the new arrangements would work:

> The current situation is that under the Fair Work Act both the ABCC and the Fair Work Ombudsman have overlapping jurisdiction for matters dealt with in the Fair Work Act, so it's not a transfer of functions, if you like. The ombudsman already has the ability to regulate those provisions in the act, so they will essentially just pick up that function again. The ABCC won't be enforcing those provisions. The Fair Work Ombudsman will commence. They have been given additional funding[.][139]

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134 Richard Denniss, Matt Saunders, and Rod Campbell, *Commission Impossible: Commissioned modelling of the economic impact of the Australian Building and Construction Commission*, October 2022, p. 5.

135 Mr Stephen McBurney, Commissioner, Australian Building and Construction Commission, *Senate Education and Employment Legislation Committee Estimates Hansard*, 16 February 2022, p. 76.

136 Ewin Hannan, 'CFMEU recovers $17 million for workers', *The Australian*, 9 December 2021 (accessed 18 November 2022).

137 Mr Tom Roberts, Senior Legal Officer, Australian Council of Trade Unions, *Committee Hansard*, 4 November 2022, p. 24.

138 Ms Jody Anderson, First Assistant Secretary, Safety and Industry Policy Division, Department of Employment and Workplace Relations, *Committee Hansard,* 11 November 2022, p. 70.

139 Ms Anne Sheehan, First Assistant Secretary and Chief Counsel, Workplace Relations Legal Division, Department of Employment and Workplace Relations, *Committee Hansard*, 11 November 2022, p. 70.

2.111 The department also pointed to the proposed establishment of the National Construction Industry Forum as an ongoing statutory advisory body. This was an outcome of the Summit and intends to address various issues across the industry, including mental health, safety, training, apprentices, productivity, culture, diversity, and gender equality.[140]

Expanding the role of the FWC

2.112 The bill would expand the role of the FWC in resolving intractable disputes between negotiating parties, through arbitration, when there is no reasonable prospect of an agreement being reached. According to the Minister, these changes are, amongst other things, intended to incentivise good faith negotiations and allow for a quicker resolution of intractable disputes.[141]

2.113 The New South Wales (NSW) Minister for Employee Relations, the Hon. Damien Tudehope MLC, said in his submission to the inquiry that he supported this specific reform in light of protracted industrial disputes in certain parts of the NSW public sector:

> The proposed intractable bargaining scheme is welcome and supported in circumstances where a resolution between the parties appears to have reached an impasse following a reasonable period of genuine bargaining.[142]

2.114 The ACTU indicated it supported the introduction of an arbitration mechanism to resolve intractable bargaining negotiations but expressed concern that the minimum bargaining period in the bill is too short, and may encourage bargaining representatives to run out the clock and avoid bargaining in good faith. It recommended that the minimum bargaining period be extended.[143]

2.115 Some employer groups, including the MCA, ACCI, and the Ai Group, stated their objections to this provision of the bill.[144] When asked about the protracted industrial disputes taking place in New South Wales rail, and at Svitzer, the MCA indicated they are satisfied with the existing system which has thus far failed to resolve the disputes:

> I think that any disruption is unfortunate and, reading the article about Svitzer, apparently there's a history of protected industrial action by the unions over years rather than months, I think. And there are current

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140 Department of Employment and Workplace Relations, *Submission 49*, p. 22.

141 The Hon. Tony Burke MP, Minister for Employment and Workplace Relations, *House of Representatives Hansard,* 27 October 2022, p. 9.

142 The Hon. Damien Tudehope MLC, NSW Minister for Employee Relations, *Submission 68*, p. 3.

143 Australian Council of Trade Unions, *Submission 47,* p. 6.

144 Minerals Council of Australia, *Submission 31,* p. 3; Australian Chamber of Commerce and Industry, *Submission 27,* p. 1; and Australian Industry Group, *Submission 23,* pp. 2–4.

> provisions in the act that enable industrial action to be brought to an end if there is significant damage to an important part of the Australian economy. It could well be that those current provisions come into play in bitter disputes like we're hearing about with Svitzer. It would appear that they could be very relevant, the current provisions.[145]

2.116 Qantas, which in 2011 took the extraordinary step of grounding its entire fleet over a protracted bargaining dispute, leaving 70 000 people stranded in Australia and around the world, including 20 world leaders attending the Commonwealth Heads of Government Meeting in Perth, also submitted that it is opposed to the FWC having the power to resolve protracted industrial disputes through arbitration.[146]

2.117 Ms Westacott, also raised concerns regarding these changes, stating that the definition of 'intractable' was unclear and that the threshold was too low. To address these issues, she suggested that:

- a party should not be able to apply for arbitration unless they have complied with good faith bargaining obligations and have genuinely tried to reach an agreement; and
- the FWC must be satisfied that the position of the party applying for arbitration is fair and reasonable in the context of the employer's business.[147]

2.118 The AIER supported the expanded arbitration role of the FWC; however, it also raised concerns with the term 'intractable', noting that it was undefined. Given this, it recommended that the bill's text be amended to clarify that a declaration could only be made when bargaining had reached a stalemate, attempts at reaching an agreement had persisted for some time, and there was no reasonable prospect of reaching an agreement.[148]

2.119 Recognising these concerns, the government made amendments which clarify that the FWC must be satisfied that a minimum period of good-faith bargaining has occurred before moving to arbitration. Further, it also removed the previously proposed changes to the 30-day rule for protected action ballots.[149]

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[145] Mr Graeme Watson, Consultant, Minerals Council of Australia, *Committee Hansard*, 15 November 2022, p. 9.

[146] Qantas, *Submission 59,* p. 2.

[147] Ms Jennifer Westacott AO, Chief Executive Officer, Business Council of Australia, *Committee Hansard,* 4 November 2022, p. 47.

[148] Australian Institute of Employment Rights, *Submission 17,* p. 24.

[149] For further information on government amendments to the bill, please see the supplementary explanatory memorandum available at: https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=r6941 (accessed 14 November 2022).

Streamlining the BOOT

2.120 There was general support amongst inquiry participants for the streamlining of the BOOT. For example, the BCA said it was 'very supportive' of the changes, as they removed a number of problems holding back enterprise bargaining and causing a decline in agreements being reached. By taking a global approach, combined with giving primary consideration to the common view of an employer and bargaining representative, Ms Westacott said the following regarding the reforms:

> We believe that this paves the way for more ambitious agreements, focusing on how the enterprise shapes itself, training and looking at how it orientates itself to its markets. But most importantly, we believe this will bring in a new era of employers and employees really working together in that enterprise to drive collaboration, to improve productivity and to share those benefits through higher wages and better conditions.[150]

2.121 COSBOA was also supportive of the move to a global assessment for the BOOT. Responding to questions from the committee, Mrs Boyd said the following:

> It's certainly a step in the right direction, and it would assist with small businesses being able to understand, rather than line by line, that they are trying to do something that makes the entire situation better both for the employee and for themselves as the employer.[151]

2.122 However, other stakeholders, such as the Retail and Fast Food Workers Union (RFFWU) strongly opposed the reforms to the BOOT. For example, the RFFWU argued that the existing test is fit for purpose and that the proposed changes would enable the approval of enterprise agreements which would currently fail. It submitted that, as a result, many low paid workers would earn even less, and called for the changes to be abandoned.[152]

2.123 Responding to concerns from stakeholders, the government has amended the bill to align the commencement of these changes with its reforms to the multi-agreement streams. Further, it introduced a 'safeguard' against the possibility that employers may structure agreements that would not result in new employees being better off overall when assessed against the relevant modern award if they were assessed as a separate cohort'.[153]

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[150] Ms Jennifer Westacott AO, Chief Executive Officer, Business Council of Australia, *Committee Hansard,* 4 November 2022, p. 45. Notwithstanding this endorsement, Ms Westacott raised concerns that the changes would lose their efficacy if employers and employees were unable to pursue single-enterprise agreements.

[151] Mrs Alexi Boyd, Chief Executive Officer, Council of Small Business Organisations Australia, *Committee Hansard,* 4 November 2022, p. 64.

[152] Retail and Fast Food Workers Union, *Submission 16,* p. 15.

[153] Department of Employment and Workplace Relations, *Submission 49*, p. 21.

Government amendments to the bill

2.124 On 9 November 2022, as a result of ongoing consultation since the bill was introduced into the House of Representatives (House), the Minister introduced amendments aimed at addressing the concerns raised by the community, members of Parliament, and senators. Some of these amendments aim to address issues raised by inquiry participants during the committee's inquiry, and which have been discussed earlier in this chapter.

2.125 As introduced by the Minister, these amendments would:

- remove the capacity for ministerial directions to the general manager of the FWC about the performance of their functions under the *Fair Work (Registered Organisations) Act 2009*;
- preserve the concurrent operation of state and territory laws dealing with sexual harassment and ensure that the Commonwealth can be held vicariously liable for contraventions of the new prohibition on sexual harassment by defence members;
- provide that certain FWC orders under new section 65C cannot be inconsistent with the FW Act, or a term of a fair work instrument (other than another FWC order of the same kind);
- strengthen the fixed term contract anti-avoidance provisions, by providing that a person must not fail to re-engage an employee and instead engage another person to do substantially the same work, in order to avoid the prohibition in new section 333E, and insert a new commencement date of 12 months for these provisions;
- require that before issuing an intractable bargaining declaration, the FWC must be satisfied that a prescribed minimum period of good faith bargaining has elapsed;
- provide that employers and their employees are precluded from being compelled into an authorisation or single interest employer agreement where they have agreed to bargain for a proposed single enterprise agreement;
- give the FWC discretion to refuse to make an authorisation for a single interest employer agreement, vary an authorisation or vary an agreement to add an employer and their employees in prescribed circumstances (broadly, where there is a history of effective bargaining between the parties, the employer is bargaining in good faith and it has been less than six months since the nominal expiry date of a previous relevant enterprise agreement);
- ensure that single interest employer agreements would be treated as multi-enterprise agreements in all respects (while preserving the current rules for those with current agreements or who have applied for a declaration or an authorisation prior to the commencement of the provisions);

- replace proposed new section 178C, with a scheme precluding multi-employer agreements from covering employees in relation to the performance of certain types of work in the building and construction industry;
- provide that before an employer requests employees to approve a multi-enterprise agreement by voting for it, the employer must obtain written agreement to the making of the request from each bargaining representative for the agreement that is an employee organisation;
- ensure that for multi-enterprise bargaining, protected action ballot (PAB) orders will be issued with respect to each employer on an enterprise-by-enterprise basis;
- omit Division 1 of Part 19 of the Bill that would provide a PAB is valid for three months and that industrial action can only be taken during that period under that PAB;
- retain specific safeguards concerning explaining agreements to employees and in an appropriate manner taking into account the particular circumstances and needs of those employees, for example, those who are young, from a culturally and linguistically diverse backgrounds or who did not have a bargaining representative for the enterprise agreement;
- provide that the better off overall test reconsideration process would be available to 'new employees' (engaged after the original 'test time') in circumstances where an enterprise agreement provides different terms and conditions for those employees than it does for the 'original employees' when they engage in the same patterns or kinds of work, or types of employment; and
- insert a new Part 25A to establish a National Construction Industry Forum as a statutory advisory body.[154]

2.126 On 10 November 2022, the House agreed to 153 government and 4 crossbench amendments to the bill. This included codifying the role of the FWO and FWC in providing outreach in community languages.[155]

Committee view

2.127 Australia's industrial relations framework is broken. Despite near record low unemployment and high business profits, wages remain stagnant and workers continue to fall behind. Real wages today are lower than they were a decade ago, and insecure work arrangements proliferate. Further, the gender pay gap persists and reports of sexual harassment in the workplace are all too common. It is the Senate Education and Employment Legislation Committee's

[154] *Supplementary Explanatory Memorandum,* pp. ii and iii.

[155] For more information, please see the bill's webpage located here: https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=r6941 (accessed 11 November 2022).

(committee) view that the existing frameworks are failing to deliver positive outcomes for both Australian businesses and their workers, and that urgent reforms are necessary. As articulated in more detail below, the committee believes the bill is a positive first step in this process.

Comprehensive consultation

2.128 The committee would like to thank all inquiry participants for their engagement throughout the inquiry process and for the valuable contributions they made in assisting and informing the committee's deliberations. The committee consulted widely across business groups, unions, employers, workers, and academics, receiving 96 submissions and hearing from 46 individuals and organisations across five days of hearings. It is notable that this inquiry has heard more evidence in public hearings than any other industrial relations-related bill inquiry since the *Fair Work Act 2009* (FW Act) commenced over a decade ago.[156]

2.129 The committee would also like to acknowledge the ongoing participation of key stakeholders in the various government consultation processes, which have occurred over many months across many fora, and have informed the development of the bill, as well as the Australian Government's (government) subsequent amendments.

2.130 While noting the concerns of some inquiry participants about the length of time available for consultation, the committee does not believe that additional time is warranted in this case. The committee is satisfied with the government's extended, and ongoing, consultation with key stakeholders, and notes that the bill delivers on several of the government's election commitments and implements recommendations emerging from the Australian Jobs and Skills Summit held in Canberra earlier this year.

2.131 In addition, the committee notes that many of the proposed reforms are not new. In fact, a number of them were the subject of broad consultation as far back as 2020. As highlighted by Per Capita, they also reflect decades of legal, economic, and sociological research. People should not have to wait any longer to benefit from evidence-based policy. The evidence is in, and the government must act.

2.132 In its deliberations, the committee must try to separate facts and sincerely held beliefs, from hyperbole and unsubstantiated scare campaigns, particularly when some wealthy and powerful inquiry participants—the self-described 'corporate gorillas'—publicly threaten to spend tens of millions of dollars engaging in a 'mining tax campaign but on steroids'.

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[156] Please see Appendix 3 for further information.

2.133 The committee notes with disappointment the astroturfing that has taken place throughout the inquiry, with lobby groups representing big business consistently framing their opposition to provisions of the bill through baseless assertions about its purported impact on small business.

2.134 This was exemplified by the Franchise Council of Australia stating in its submission that it 'represents an estimated 94 000 small businesses', and in its opening statement that it 'is a voice for just over 90 000 small businesses', when it had actually revealed to the Parliamentary Joint Committee on Corporations and Financial Services in 2018 that it has just 483 franchisor members (many of which are large multinational companies), and two franchisee members.[157]

2.135 What was not disputed by any inquiry participant is that Australian workers have suffered through a record decline in real wages over the last decade, at a time when productivity and corporate profits continued to rise. The fundamental disagreement over the bill is whether this is desirable, or a crisis requiring urgent reform. The committee's view is that low and middle income earners deserve a pay rise.

Addressing job insecurity and gender inequity

2.136 The committee is encouraged by widespread support for action to promote job security and address gender inequality and sexual harassment in the workplace. In 2022, it is untenable that Australia's industrial relations act does not explicitly prohibit sexual harassment. It is also untenable that workers in undervalued and female dominated industries, such as childcare, have been unable to win pay rises because they are unable to find an appropriate male comparator group.

2.137 To this end, the committee notes the particular support for measures, such as strengthening the rights of workers to request flexible working arrangements, prohibiting pay secrecy provisions, and the introduction of the supported bargaining stream to assist workers in low-paid industries who currently face barriers to bargaining.

2.138 Further, the committee recognises the strong support for making job security and gender equality objectives of the FW Act, as well as changing the way that equal remuneration applications are heard by the Fair Work Commission (FWC).

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[157] Franchise Council of Australia, *Submission 13*, p. 2; Ms Mary Aldred, Chief Executive Officer, Franchise Council of Australia, *Committee Hansard*, 11 November 2022, p. 35; Ms Mary Aldred, Chief Executive Officer, Franchise Council of Australia, Parliamentary Joint Committee on Corporations and Financial Services, The operation and effectiveness of the Franchising Code of Conduct, *Committee Hansard*, 21 September 2018, pp. 13 and 16.

Repairing a broken bargaining system

2.139 The committee notes the concerns raised by a number of employer groups regarding the expansion of multi-enterprise bargaining in Australia. While the committee heard claims that this could lead to increased bargaining disputation, reduced productivity, and industry-wide industrial action, there was never at any point any evidence provided to support these assertions. In contrast, research shows this form of bargaining can result in beneficial outcomes for both workers and employers, including improved employment outcomes, fairer wages, and gender equality.

2.140 The committee also considers the multi-employer bargaining reforms contained within the bill to be a vital step forward in repairing Australia's broken bargaining system, where less than 15 per cent of employees are covered by an in-term enterprise agreement and reliance on safety net awards has increased materially since 2010. As highlighted during the inquiry, workers covered by an agreement typically earn $100 more per day than those relying on an award—a substantial sum of money which would assist many Australians currently struggling to deal with cost-of-living pressures.

2.141 The committee accepts that productivity growth is a contributor to wages growth, although certainly not the only factor, and notes that productivity growth has outstripped real wages growth considerably over the last decade. The committee further notes that promoting productivity remains an object of the FW Act and must be taken into consideration by the FWC when performing its functions or exercising its powers under the FW Act.

2.142 The committee also accepts the evidence of numerous stakeholders—including employers from the Victorian early childhood education and care (ECEC) sector and the HVAC manufacturing and installation sector—that multi–employer bargaining can deliver productivity benefits through the exchange of best practice ideas, human resources efficiencies, and by moving the focus of competition away from labour costs and towards innovation.

2.143 The committee was encouraged by the strong support it heard for the supported bargaining stream. The problems of the existing low-paid bargaining stream are well known, and the fact that only one application has been granted since the commencement of the FW Act highlights its ineffectiveness. The committee considers that this reform is vital to improve pay outcomes for the lowest paid workers in Australia, including those individuals working across the aged care, disability care, and childhood education and care sectors—sectors with large percentages of women workers.

2.144 The committee was surprised to hear of the opposition by some employer groups to empowering the FWC to arbitrate intractable bargaining disputes, particularly in light of ongoing protracted high-profile disputes in New South Wales rail, and at tugboat operator Svitzer. The latter is particularly

concerning, given the current system has enabled the dispute to escalate to the point that Svitzer/Maersk, a multinational, multi-billion-dollar company, is now threatening to bring the entire Australian economy to a standstill through an indefinite lockout.

2.145 The committee also notes that many of the employers engaging in a fear campaign about the bill purportedly leading to widespread protracted industrial action, are at the same time opposed to the FWC having the power to arbitrate protracted industrial action.

2.146 The committee notes there have been some calls for the bill and bargaining provisions to be split so that the low-paid bargaining stream can be reformed now, and the single-interest stream delayed until next year. While it is urgent that low paid Australian workers get a pay rise, it is no less urgent that those on middle incomes are given a long overdue opportunity to collectively bargain for a fair pay increase after a decade of declining real wages.

Abolishing the Australian Building and Construction Commission (ABCC)

2.147 The committee recognises the importance of the building and construction industry in delivering long-term prosperity across Australia's cities, towns, and regions. This sector represents approximately 10 per cent of the Australian economy, employs 1.1 million people, and generates $200 billion in revenues.[158]

2.148 The committee considers that the ABCC has not realised its objective of making the building and construction industry fair, efficient, and productive. On the contrary, it has allowed underpayments to workers to endure, and has had an insufficient focus on improving workplace safety and education and achieving harmonious workplace relations. More generally, the committee also considers that the construction industry should be subject to the same laws, and have the same regulator, as other industries. It should not be treated differently for political purposes.

2.149 The committee believes Master Builders Australia (MBA) commissioning and citing a report on the purported economic impact of the abolition of the ABCC, that turned out to be based on the opinions of 43 people and concluded the ABCC's 154 full-time equivalent (FTE) employees contribute $47.5 billion to the Australian economy, or $308.4 million each, perfectly illustrates the unjustified hysteria that has dominated debate on this reform. The committee further notes that productivity in the construction sector has actually worsened since the reintroduction of the ABCC in 2016.

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[158] Master Builders Australia, *A Snapshot: Building and Construction Industry in Australia*, https://www.masterbuilders.com.au/MediaLibraries/MB/Industry-snapshot/Industry-Infographic-March-2018-web-ready-single-page.pdf (accessed 13 November 2022).

2.150 The committee notes that in addition to the misinformation disseminated about the ABCC's supposed economic value, the actual lives and livelihoods of construction workers are often ignored in the political debate about the ABCC. The fact that in a five-month period last year, the construction union recovered more than three times more in stolen wages than the ABCC has in the five years since its establishment suggests the ABCC is fundamentally either disinterested in, or incapable of protecting the rights of construction workers.

2.151 Given the above, the committee supports the government's abolition of the ABCC and the transfer of its various responsibilities to the Fair Work Ombudsman (FWO). Based on evidence received during the inquiry, the committee is satisfied that the FWO will be adequately funded and resourced to undertake its expanded role going forward and will be an effective regulator of the industry into the future.

2.152 Importantly, the committee believes this reform will support the maintenance of law and order on Australian construction sites, while also improving safety, education, and industrial relations. Further, the committee recognises that the abolition of the ABCC has been a long-standing policy of the Australian Labor Party, and that its election commitments were endorsed by the Australian electorate at the 2022 federal election.

2.153 It is important to note that existing illegal behaviours on construction sites, such as intimidation and violence, will remain criminal offenses under the new arrangements. Workers and employers subjected to such antisocial and illegal behaviours will continue to be able to submit complaints to the police force for their investigation and remedy.

Government amendments and ongoing consultation

2.154 The committee notes that the government introduced a series of amendments to the bill to address key stakeholder concerns. These amendments are outlined above at paragraph 2.125. The committee is encouraged by these amendments and believes that they will address many of the concerns that have been raised by stakeholders during the inquiry process.

2.155 The committee is also reassured by the government's commitment that it will continue to consult and engage stakeholder groups to gauge the impact of the reforms. The committee strongly encourages the government and the Department of Employment and Workplace Relations to monitor and evaluate the changes as they are implemented to ensure that the desired outcomes are delivered for both workers and business.

2.156 The committee believes that the reforms in the bill are urgently needed to address a decade of low wages growth and the increasing prevalence of insecure work arrangements. The committee is particularly pleased with the bill's focus on addressing a number of key issues for lower-paid and

female-dominated workforces and making a range of fairer bargaining options available to both employers and employees.

2.157 The committee is strongly of the opinion that Australian women have waited far too long for harassment-free workplaces and pay equity, and that workers deserve higher wages and increased job security right now. These reforms are long overdue and there is no time to wait.

2.158 The committee notes that there is still work to be done, and this bill only represents the first step. The committee is encouraged by the government's publicly stated commitment to address wage theft, fairly define casual employment, protect 'employee-like' workers from exploitation, and implement the principle of same job, same pay.

2.159 Overall, the committee considers that this bill will deliver on its objectives of closing the gender pay gap, improving workplace relations on construction sites, eliminating the scourge of sexual harassment from workplaces, fixing Australia's broken bargaining system, and addressing job insecurity and wage stagnation.

2.160 Accordingly, the committee recommends that the bill be passed.

Recommendation 1

2.161 The committee recommends that the bill be passed, subject to the amendments that follow.

2.162 The committee received a number of submissions which suggested that the FWC should be required to conciliate disputes over flexible work arrangements before arbitration, including from Woolworths, the Business Council of Australia (BCA), National Retail Association, and the Australian Chamber of Commerce and Industry (ACCI). This matter was also raised in the House of Representatives (House) by way of an amendment proposed by the Member for Wentworth, Ms Allegra Spender MP.[159]

2.163 The committee notes that, during debate in the House, the Minister for Employment and Workplace Relations (Minister), the Hon. Tony Burke MP, indicated the advice he had received was that the structure of the FW Act presumed conciliation would take place before arbitration, and that this had been the practice of the FWC. As such, the government indicated it shares the intention that conciliation would precede arbitration of a flexible work dispute.[160]

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[159] Woolworths Group, *Submission 48,* p.4; Business Council of Australia, *Submission 55,* p. 7; National Retail Association, *Submission 56,* [p. 4]; Australian Chamber of Commerce and Industry, *Submission 27*, p. 48.

[160] The Hon. Tony Burke MP, Minister for Employment and Workplace Relations, *House of Representatives Hansard*, 10 November 2022, p. 52.

2.164 Given the concerns raised by stakeholders, the committee considers that making this explicit in the bill would be a helpful clarification and be consistent with the policy objectives of the provisions, which the committee endorses. Such clarification would provide additional certainty for parties regarding the FWC's processes.

2.165 The committee agrees with the proposal made by Woolworths that the requirement to conciliate before arbitration should not apply if there are exceptional circumstances. This will preserve a discretion for the FWC if urgency is required.

Recommendation 2

2.166 The committee recommends that an amendment be made to the bill to clarify that conciliation should take place before arbitration of disputes over flexible working arrangements unless there are exceptional circumstances.

2.167 The committee heard evidence from both the Migrant Justice Institute and Migrant Workers Centre on the special difficulties facing migrant workers in ensuring access to the protections afforded all workers under Australian law.[161] In particular, the issue was raised that there is conflicting case law as to whether workers' migration status can impact their right to the protections of the FW Act and other workplace laws (including anti-discrimination law).[162] The Migrant Justice Institute noted that the legal uncertainty creates a loophole which permits the exploitation of workers performing work without permission under the *Migration Act 1958*.[163]

2.168 The issue raised here was also addressed by the Report of the Migrant Workers' Taskforce, which the government has committed to implementing as an election commitment. Recommendation 3 of that report is that 'legislation be amended to clarify that temporary migrant workers working in Australia are entitled to workplace protections under the *Fair Work Act 2009*'.[164]

2.169 The FWO, as the dedicated regulator responsible for workplace laws, states that 'Visa holders and migrant workers have the same workplace protections as all other employees in Australia'.[165] However, there is practical uncertainty

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[161] Ms Catherine Hemingway, Legal Director, Migrant Justice Institute, *Committee Hansard*, 15 November 2022, p. 35; Mr Mathew Kunkel, Chief Executive Officer, Migrant Workers Centre Inc, *Committee Hansard*, 15 November 2022, pp. 36–37.

[162] Migrant Justice Institute, *Submission 45*, p. 9.

[163] Migrant Justice Institute, *Submission 45*, p. 9.

[164] Australian Government, *Report of the Migrant Workers' Taskforce*, March 2019, p. 9.

[165] Fair Work Ombudsman, *Visa holders & migrants*, https://www.fairwork.gov.au/find-help-for/visa-holders-migrants#:~:text=Visa%20holders%20and%20migrant%20workers,understand%20these%20legally%20enforceable%20rights (accessed 21 November 2022).

as to whether this is the case—as demonstrated by the recommendation of the Migrant Workers' Taskforce and the submissions referred to above.

2.170 To ensure migrant workers receive the protections of the bill, and to clarify the pre-existing policy intent of the FW Act, the committee considers the bill should clarify that migration law does not affect workers' entitlements to pay and conditions under the FW Act.

Recommendation 3

2.171 The committee recommends that an amendment be made to the bill to clarify that the protections and entitlements under the *Fair Work Act 2009* apply regardless of immigration status.

2.172 While there was broad consensus among academic submitters that the changes to promote gender equality contained within the bill were significant and positive steps, a submission from the Australian Discrimination Law Experts Group identified a potential area where the bill's provisions on sexual harassment do not line up with proposed amendments to the *Sex Discrimination Act 1984* contained in the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 and amendments recently made by the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021*.

2.173 These reforms, which build on the critical work of the Respect@Work Report, ensure that sex-based harassment is prohibited (as a related, but distinct concept) and that discrimination on the basis of workplace environments that are hostile on the ground of sex is prohibited.

2.174 Given the relationship between the FW Act and anti-discrimination law, and the need for consistency between the regulatory frameworks, the committee agrees that this issue should be considered further.

Recommendation 4

2.175 The committee recommends that the provisions of the bill prohibiting sexual harassment be reviewed for consistency with the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* and the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022.

2.176 The committee received several submissions and heard evidence from peak bodies, including from the Business Council of Australia, Australian Hotels Association, Australian Chamber of Commerce and Industry, and the Council of Small Business Organisations Australia, which called for an amendment to the small business exemption that applies to the single-interest bargaining

stream.[166] This matter was also raised in the House by way of amendment proposed by several independent members.

2.177 The submissions and evidence reflect concerns that these peak bodies have about the capacity for small businesses to adapt to single-interest employer bargaining. Broadly, the view by these peak bodies is that the FW Act's current definition of 'small business employer' (fewer than 15 employees) is too restrictive a number within contemporary workplaces and not fit for purpose to define the scope of the single-interest stream exemption.

2.178 By contrast, submissions by the Australian Council of Trade Unions (ACTU) and some academics recommend that the small business exemption to single-interest bargaining be removed from the bill entirely, on the basis that the rights of employees should not be restricted solely because of the size of the business they work in.[167]

2.179 The effect of increasing the scope of the exemption is that a larger number of workplaces will not be permitted to access the single-interest stream, even if the majority of the employees in that workplace wish to do so. This places a significant limitation on the rights of these employees, and the committee is approaching this matter with caution.

2.180 The committee is of the view that the mechanism for determining the number of employees should continue to be headcount, including regular and systematic casuals. Moving to a 'full-time equivalent' measure may be confusing for small businesses and is subject to fluctuate quite significantly.

2.181 After considering the evidence, the committee considers that an increase from fewer than 15, to fewer than 20 employees, for the single-interest stream exemption, will provide the certainty that small businesses have called for, but will not exclude too many workplaces that it would be appropriate for the single-interest stream to cover, for example early childhood centres.

Recommendation 5

2.182 The committee recommends that the definition of 'small business employer', for the purpose of Part 21 of the bill be increased from fewer than 15 employees, to fewer than 20 employees, including regular and systematic casuals, based on headcount. The definition of 'small business employer' in section 23 of the *Fair Work Act 2009* should remain unchanged.

2.183 Several of the peak employer bodies' submissions advocate for an increase to the 'minimum bargaining period' required before the FWC may make an

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[166] Business Council of Australia, *Submission 55*, p. 6; Australian Hotels Association, *Submission 25*, p. 4; Australian Chamber of Commerce and Industry, *Submission 27*, p. 5; Council of Small Business Organisations Australia, *Submission 84*, p. 5.

[167] Australian Council of Trade Unions, *Submission 47*, p. 82.

intractable bargaining declaration. The ACTU's submission also calls for an increase to the 'minimum bargaining period' for intractable bargaining declarations to ensure that a declaration may only be made after bargaining has been engaged in for an appropriate period and bargaining is truly intractable.

2.184 Currently, the bill provides that the end of the minimum bargaining period would be the earlier of six months after the nominal expiry date for the existing enterprise agreement, or the latest nominal expiry date if there are multiple existing enterprise agreements that apply; or three months after an application to deal with a bargaining dispute under section 240 was made in relation to the proposed enterprise agreement (if any).

2.185 ACCI called for this minimum period to be extended from six to nine months when engaging in multi-employer bargaining including for single interest agreements. While not advocating for a particular minimum bargaining period, the BCA's evidence to the committee called for arbitration to only be available to parties who have met their good faith bargaining obligations and have genuinely tried to reach agreement.[168]

2.186 Arbitration is a crucial mechanism to ensure that disputes don't drag on—damaging the economy and delaying pay rises. However, the committee acknowledges and agrees with the policy intent of giving parties a reasonable opportunity to try to reach agreement before access to arbitration is available. Increasing the period to 9 months from the nominal expiry date or the commencement of bargaining will provide a greater opportunity for agreement and limit the prospect of either party engaging in delaying tactics in order to access arbitration.

Recommendation 6

2.187 The committee recommends the amendment of the 'minimum bargaining period' in s235(5)(i) for the purpose of an intractable bargaining declaration, to provide for a nine month minimum bargaining period commencing after either the nominal expiry date of the agreement or nine months from the commencement of bargaining, whichever is later.

2.188 The committee heard evidence from Professor Andrew Stewart regarding his recommendation for a statutory review of the provisions. Professor Stewart's evidence suggests a review within two to three years to determine how the provisions are working in practice.[169]

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[168] Ms Jennifer Westacott, AO, Chief Executive, Business Council of Australia, *Committee Hansard*, 4 November 2022, p. 47.

[169] Professor Andrew Stewart, private capacity, *Committee Hansard*, 14 November 2022, p. 4.

2.189 The committee notes that a similar amendment was moved in the House by the Member for Wentworth, Ms Allegra Spender MP, which called for a statutory review after 12 months.

Recommendation 7

2.190 The committee recommends that a statutory review of the bill be undertaken but occurs no earlier than three years after the bill receives Royal Assent.

2.191 Several of the peak employer bodies' submissions have advocated for the removal of the bill's current requirement for the written approval of every employee organisation that is a bargaining representative for a multi-employer agreement before it can be put to employees for a vote to approve the agreement.[170]

2.192 The committee heard evidence from the Transport Workers' Union (TWU) and others about some employers, such as Swissport, ramming through agreements without the approval of employee representatives, which in some instances left employees worse off than even the Award minimum.[171]

2.193 As a principle, the current requirement in the bill provides an important safeguard to ensure that enterprise agreements reflect genuine agreement amongst the bargaining representatives. However, this must be balanced with the need to reinvigorate enterprise agreement making. Amendments to this current requirement in the bill should ensure that proposed multi-employer enterprise agreements are not being unreasonably prevented from being voted on by employees.

Recommendation 8

2.194 The committee recommends section 180A of the bill be amended so that no party can unreasonably withhold agreement for a proposed enterprise agreement being put to a vote, and the Fair Work Commission should have the power to resolve disputes pertaining to this.

Senator Tony Sheldon
Chair
Labor Senator for New South Wales

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[170] See, for example, Australian Industry Group, *Submission 23*, p. 45; Business Council of Australia, *Submission 55*, p. 19; Australian Chamber of Commerce and Industry WA, *Submission 74*, p. 3; Maritime Industry Australia Ltd, *Submission 37*, p. 16.

[171] Mr Michael Kaine, National Secretary, Transport Workers Union, *Committee Hansard*, 14 November 2022, p. 66.

Coalition Senators' dissenting report

1.1 Coalition Senators do not support the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (bill).

1.2 The Albanese Government has consistently said this legislation aims to 'get wages moving', yet there has been no evidence provided as to whether wages will increase, whose wages will increase and when wages will increase. They have also not mentioned how this legislation will lead to an increase in productivity.

1.3 The biggest problem with this legislation is that it breaches the trust of the Australian people. Coalition Senators note the Albanese Government did not take significant industrial relations reform to the 2022 federal election; in fact, the Albanese Government promised the Australian people that they would not introduce industry-wide bargaining.

1.4 While appearing on television in November 2021, Dr Jim Chalmers MP, the now Treasurer, when asked if industry-wide bargaining was on the agenda, replied, 'it's not part of our policy'.[1] This legislation attempts to implement industry-wide bargaining by stealth, a clear breach of trust of the promise the Treasurer made to the Australian people.

1.5 Holding a sham talkfest like the Jobs and Skills summit shortly after the election does not substitute as a mandate from the Australian people to introduce radical new industrial relations reform that will devastate the Australian economy.

1.6 Only a few short months ago, the Prime Minister was trying to suggest to the Australian people that he was all about building consensus between employers and employees. The Prime Minister said at the Jobs and Skills Summit:

> Let's promise each other that we won't spend them playing our greatest hits, re-hashing the same arguments or re-heating old conflicts. We have not gathered here to dig deeper trenches on the same old battlefield. Our goal and indeed our responsibility—all of us—is to carry the conversation to the common ground, where the work is done, and the progress is made.[2]

1.7 Less than two months later, the Albanese Government completely abandoned the façade of promoting unity in the workplace and introduced the most extreme changes to the industrial relations framework in decades.

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1 'Labor's IR package faces new mandate pressure', *The Australian*, 8 November 2022.

2 Prime Minister of Australia, *Opening of National Jobs and Skills Summit*, 1 September 2022, https://www.pm.gov.au/media/opening-national-jobs-and-skills-summit (accessed 22 November 2022).

1.8 This legislation could do significant damage to the Australian economy. The abolition of the Australian Building and Construction Commission (ABCC) alone is estimated to cost the economy $47 billion by 2030.[3]

1.9 The moves towards multi-employer bargaining, where businesses are forced onto enterprise agreements against their will, could lead to a significant increase in strike action across the economy whilst not leading to a rise in either wages or productivity.

1.10 The Coalition believes this legislation should be opposed and calls on the Albanese Government to work constructively with all stakeholders, including the Opposition and crossbench when considering changes to our industrial relations framework.

Committee Referral

1.11 Coalition Senators find the haste and haphazard approach the Albanese Government has taken regarding how this legislation was introduced to the Senate unacceptable.

1.12 From the time of its referral to the Senate Education and Employment Legislation Committee (EEC), the committee had just 22 days to conduct public hearings and report back to the Senate while the Budget Estimates process was concurrently running.

1.13 The Albanese Government was motivated by pure ideology and displayed a blind disregard for the usual procedures and processes involving the scrutiny of legislation that usually accompany such a substantial piece of legislation, let alone an omnibus bill. It is simply unacceptable and a genuine concern if this is how the Albanese Government intends to operate regarding future legislation.

1.14 The Coalition Senators strongly object to the Albanese Government's flagrant lack of respect shown to the 'House of Review' and the critical role committees play in investigating and scrutinising proposed government legislation. Whether the Albanese Government agrees with the role of the committee process or not, this vital function has been an enduring safeguard against the excesses of the executive.

1.15 It is unacceptable that public hearings were hastily convened at extremely short notice and held on dates when some crossbench Senators could not participate. All merely to meet the Albanese Government's ridiculous timetable of having this bill passed before Christmas—presumably in the vain hope that the effects of the legislation will be forgotten in the New Year.

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[3] Master Builders Australia, *The costs of abolishing the Australian Building and Construction Commission*, April 2022, https://www.masterbuilders.com.au/MediaLibraries/MB/Election/EY-The-cost-of-abolishing-the-Australian-Building-and-Construction-Commission.pdf (accessed 22 November 2022).

1.16 The due date for stakeholder submissions fell after the public hearings had already commenced, meaning stakeholders were appearing even before they had made their inquiry submissions. This was a point expressed by many stakeholders, including AgForce Queensland Farmers Ltd, who pointedly said:

> … providing adequate time is a courtesy that should be afforded to all stakeholders in the interests of transparency and developing the most effective legislation arrangements.[4]

1.17 The Minerals Council of Australia (MCA) concurred with this, saying in their submission:

> … the timeframe for consideration of the bill by the Senate Education and Employment Legislation Committee stands in stark contrast to review periods for legislation or comparable complexity and risk. The ten working days (excluding public holidays) provided to make submissions since the bill's introduction does not allow sufficient time for representative bodies such as the MCA to consult with members on the bill's many unintended consequences.[5]

1.18 Clubs Australia said in its submission:

> … it has not had sufficient time to scrutinise the entire bill plus the recent amendments, or to consult with our member stakeholders … there are sections of the bill on which Clubs Australia would otherwise have feedback, but for which have not been included given the timing.[6]

1.19 The Civil Contractors Federation were frank in their assessment of the consultation period, noting:

> … the time frame for response to such an important bill – a bill that risks significant unintended consequences for our industry if not all industries in Australia – is simply too short. Feedback from our Members is that the more they grasp the consequences of what is inside this significant piece of legislation, the more unanswered questions they have.[7]

1.20 By contrast, Coalition Senators note the timeframe given to the Senate Standing Committee on Education and Employment to deal with the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020. From the time the bill was referred by the Senate to the committee for inquiry (10 December 2020) to the time the committee reported back to the Senate (12 March 2021) was **four months**.[8] The original version of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 was 111 pages. A stark contrast to the mammoth 249 pages of the Fair

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4 AgForce Queensland Farmers Limited, *Submission 5*, p. 1.

5 Mineral Council of Australia, *Submission 31*.

6 Clubs Australia, *Submission 66*, p. 3.

7 Civil Contractors Federation, *Submission 33*, p. 14.

8 See: Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 [Provisions] (accessed 22 November 2022).

Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022. Additionally, when the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 came before the Parliament, there was a period of three and half months from the time the Senate referred it to the committee (4 July 2019) to when the committee reported (25 October 2019).[9]

1.21 By its own design, the Albanese Government deliberately sought to advance the controversial pathway by cloaking less contentious aspects that would share broad political support with incendiary provisions in an omnibus bill. It could easily have split the less controversial elements of the bill into a separate piece of legislation. This would have facilitated a quick passage of the consensus bill before Christmas while providing more time for greater stakeholder participation and debate of the more contested aspects of the bill.

1.22 Therefore, Coalition Senators note it was evident early on that the Albanese Government's introduction of the bill blindsided many stakeholders and even crossbench Senators. On the day the bill was introduced into the House of Representatives, key peak bodies expressed alarm at many provisions contained in the legislation. It was hardly a shining example of conciliation and seeking 'a common purpose and promote unity' for the common good.[10]

1.23 The head of the Australian Industry Group (AIG) remarked that growth in jobs and wage increases didn't come with a 'union gun being held to an employer's head'.[11] The Business Council of Australia (BCA) stated the legislation would allow unions to organise industry-wide strikes and that the changes risked 'sending our economy over the edge'.[12] The chief executive of the Australian Chamber of Commerce and Industry (ACCI) said that 'the significant broadening of the "single-interest employer" test exposes the economy to sector-wide strike action, disrupting supply chains and key industries at a time of global volatility'.[13]

1.24 Further evidence of the rushed and ham-fisted approach of the Albanese Government was that shortly after introducing the bill into the House of Representatives, it immediately flagged it would water down some aspects of its bill following the vocal criticism from many sectors of the economy. It began making amendments to its bill while the committee hearings were simultaneously taking place. The Albanese Government also sought to

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9 See: Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 (accessed 22 November 2022).

10 'Election 2022 live news: Anthony Albanese promises to bring Australians together', *The Australian*, 22 May 2022.

11 'Bosses press for retreat on industrial relations reform', *The Australian*, 27 October 2022.

12 'Bosses press for retreat on industrial relations reform', *The Australian*, 27 October 2022.

13 'Bosses press for retreat on industrial relations reform', *The Australian*, 27 October 2022.

downplay that 'many fear the proposed changes will bring back the bad old days of industrial turmoil of the 1970s' when trade unions were at their zenith and had unfettered access to Australian workplaces.[14]

1.25 Australia has not easily forgotten the inglorious period of Australian history, in 1974, during the disastrous time of the Whitlam government, when for every 1000 employees, an astonishing 1200 days were lost to industrial action.[15] Indeed, industrial action has been in decline since the Second World War. According to Dr Jim Stanford, from 1950 to 1990, there was an average of 1700 work stoppages per year. The 1970s saw the peak of work stoppages from industrial action when an average of 2,000 work stoppages each year of that decade.[16] Unlike the current Labor government, previous Labor governments after the Whitlam era were acutely aware of the folly of facilitating industrial strike action to cripple the Australian economy. Thankfully, today's strike action is largely negligible and, in a historical context, 'have really never been lower'.[17]

Multi-Employer Bargaining

1.26 During the first public hearing of the Education and Employment Legislative Committee, Coalition Senators sought to clarify whether, if passed unamended, the bill would weaponise strike action in the workplace. Professor McCrystal, on day one of the hearings, indicated:

> … if the supported bargaining and single interest employer provisions get up, that will mean strikes will become available potentially in a multi-enterprise context, which is not currently the case … The only component of the bill that will potentially make it easier to strike is that you're opening it up in a multi-employer context.[18]

1.27 The Albanese Government has sought to promote this bill as an opportunity to increase wages yet has not provided any modelling or other information to indicate how this bill will raise wages and whether there will be an increase in wages.

1.28 Coalition Senators note this bill is simply an avenue by stealth which the Albanese Government seeks to re-energise and reward its trade union base, and a covert effort to increase trade union membership under the guise of

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14 'Editorial: Small businesses at risk from IR changes', *The West Australian*, 1 November 2022.

15 'Outlook Conference: Bosses 'wrong' to declare IR back to 1970s, says labour expert', *The Australian*, 2 November 2022.

16 Jim Stanford, *Briefing Note: Historical Data on the Decline in Australian Industrial Disputes*, 30 January 2018, p. 3.

17 Professor Shae McCrystal, *Proof Committee Hansard*, 4 November 2022, p. 38.

18 Professor Shae McCrystal, *Proof Committee Hansard*, 4 November 2022, p. 39.

sustainable wage growth. As Judith Sloan noted in her article *Rushed IR reforms play squarely into the unions' hands*:

> … the new provision that will require a union official to formally consent before an agreement is presented to workers, whether or not they are union members, underpins one core purpose of the legislative amendments – to recruit new members in settings that have proven difficult for the unions to achieve much (if any) penetration.[19]

1.29 This is when the economy is facing economic challenges not seen in a generation and when it is widely recognised trade union membership has been in freefall for several decades. Indeed, Master Builders Australia (MBA) note in the building and construction industry only 10 per cent of its workforce are union members. 'That leaves around 90% of a 1.1 million plus workforce who have chosen to not join a union. The rights of this overwhelming majority cannot be subservient to those of a small majority'.[20]

1.30 Some academics are not convinced that multi-employer bargaining involving a single or common interest will lift wages. According to Professor Mark Wooden:

> … a switch to multi-employer bargaining is no guarantee that wages are going to improve. I see a lot of attention has been devoted to the supported bargaining stream, which is going to replace what was the low-paid bargaining stream, but I sort of don't get it. Why do we need a bargaining stream for low-wage industries or sectors when we have awards? Awards are there to protect low-wage workers. Twenty-five per cent are on awards, and awards are increased every year.[21]

1.31 Amazingly, only days after the bill had been introduced, the head of the Productivity Commission told a public forum:

> … the predominant view in the literature is you get better productivity outcomes from a firm-based system than an industry-based system because that's what allows productive firms to grow, expand, offer a different deal to their workers. [It] allows workers to move towards higher productivity firms. And that's a very important mechanism by which economy-wide productivity growth occurs.[22]

1.32 Initially, the Albanese Government had attempted to frame a picture that the Jobs and Skills summit had smoothed the way with the business sector to ramp up multi-employer bargaining. This was discounted by the BCA during

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[19] Judith Sloan, *'Rushed IR reforms play squarely into the unions' hands'*, The Australian, 14 November 2022.

[20] Master Builders Australia, *Submission 15*, p. 4.

[21] '*Outlook Conference: Bosses 'wrong' to declare IR back to 1970s, says labour expert'*, The Australian, 2 November 2022.

[22] Tom McIlroy and Phillip Coorey, *'Multi-employer bargaining less helpful for productivity: Brennan'*, Australian Financial Review, 2 November 2022.

its testimony to the committee inquiry when it outlined that these conversations were 'fundamentally a discussion about low-paid workers and female-dominated sectors of the economy'.[23]

1.33 Multi-employer bargaining was also a surprise to the Australian Retailers Association, who were attendees at the Jobs and Skills Summit:

> **Senator O'Sullivan:** Were you involved in the Jobs and Skills Summit at all?
>
> **Mr Zahra:** I was.
>
> **Senator O'Sullivan:** Did any aspects of the multi-enterprise bargaining provisions in this bill come as a surprise to you?
>
> **Mr Zahra:** It was a total surprise.
>
> **Senator O'Sullivan:** Were they raised at the summit?
>
> **Mr Zahra:** Not that I can recall.
>
> **Senator O'Sullivan:** Not in any substantial way or at all?
>
> **Mr Zahra:** Not that was memorable.[24]

1.34 It is disappointing that less than two months after hosting the Jobs and Skills Summit, which the Albanese Government claimed was about promoting unity, it introduced radical legislation into Parliament and is trying to ram through this bill without proper consultation or scrutiny.

1.35 In their submission, the Australian Retailers Association said multi-employer bargaining:

> … will create confusion, add cost and complexity, and result in more disputes and fewer enterprise agreements being reached. While we are particularly concerned about the impact on our small and medium-sized members, we also hold that these changes are not fit-for-purpose for larger businesses. Nor do we believe multi-employer bargaining will drive wage growth in our sector, where a war for talent is already driving healthy competitive tension in pay and conditions.[25]

1.36 Coalition Senators note the concerns the MCA has with this bill, particularly concerning multi-employer bargaining. The mining industry is one of the most significant drivers in the Australian economy and is this country's largest export industry, generating $413 billion in exports in 2021–22.[26] The industry paid $43.2 billion in tax and royalty payments in 2020-21 and accounted for 30

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[23] Ms Jennifer Westacott AO, Business Council of Australia, *Proof Committee Hansard*, 4 November 2022, p. 45.

[24] Mr Paul Zahra, Chief Executive Officer, Australian Retailers Association, *Proof Committee Hansard*, 14 November 2022, p. 61.

[25] Australian Retailers Association, *Submission 28*, pp. 1–2.

[26] Minerals Council of Australia, *Submission 31*, p. 3.

per cent of all company tax paid that year.[27] The mining industry will undoubtedly be pondering whether the federal government will next turn its attention to raising the minerals resource rent tax from the dead.

1.37 According to the MCA:

> … the major changes the bill would introduce will undoubtedly have severe unintended consequences economy-wide – on investment, productivity, economic growth, job security and wages. Providing significantly enhanced rights for unions to force pattern agreements on non-consenting employers is the very antithesis of an economically responsible approach … the spread of multi-employer bargaining to all parts of the economy will replace flexibility with rigidity and stifle the ability of businesses to grow, innovate, compete and be productive. In the mining industry, this will lead to poorer wage outcomes and fewer jobs.[28]

1.38 Coalition Senators acknowledge the fundament contribution the mining industry has made to Australia's economic wealth over the past several decades. For this reason alone, it defies logic that the government would attempt to move on this industry. According to the MCA:

> … the bill would make it possible to take protected industrial action across the entire multi-employer agreement. The substantial contribution of mining – and the opportunities for minerals development and value-adding – must not be compromised by a reckless return to industrial disruption which characterised multi-employer bargaining in the 1980s.[29]

1.39 Coalition Senators note the ACCI believes multi-enterprise bargaining:

> … will ultimately see multi-employer bargaining significantly encroach on enterprise-level bargaining in Australia. This will see wages go backwards in Australia. The complexity of multi-employer bargaining and the increased risk of disputation arising from multiple employers, groups of employees and unions being forced to come to common positions will only serve to drive down wages to "low ball" outcomes if agreement can be reached at all.[30]

1.40 Coalition Senators note the significant concerns outlined by the Laundry Association of Australia (LAA) in their submission. In an industry currently experiencing acute staff shortages of around 10 per cent vacancies in its workforce, the LAA contend 'the proposed multi-employer bargaining arrangements represent a lack of consultation and an actual lack of understanding of private sector business operations'.[31]

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27 Minerals Council of Australia, *Submission 31*, p. 3.

28 Minerals Council of Australia, *Submission 31*, p. 3.

29 Minerals Council of Australia, *Submission 31*, p. 15.

30 Australian Chamber of Commerce and Industry, *Submission 27*, p. 6.

31 Laundry Association of Australia, *Submission 4*, p. 3.

1.41 Coalition Senators note the submission from Qantas that stated the bill would 'reverse decades of consensus about the importance of enterprise-level bargaining in our industrial relations framework'.[32] While the airline agreed with some provisions of the bill:

> … other elements of the bill aim to dismantle a multi-partisan industrial relations framework that, before the COVID-19 pandemic, helped to deliver more than a decade of uninterrupted economic growth and record low unemployment for Australia.[33]

1.42 If, as the Albanese Government states, the purpose of this bill is to get wages moving, Qantas believes if the bill remains in its current form, it 'runs the very real risk of moving unemployment upwards, driving capital investment downwards, and slowing investment and competition'.[34]

1.43 Coalition Senators note Qantas believes:

> … compulsory multi-employer wage outcomes divorced from both productivity and the specific needs and constraints of individual enterprises will mean higher costs for consumers, that in turn will destroy demand on marginal routes especially, putting the viability of some services into questions.[35]

1.44 Specifically, on this last point, Qantas emphasises:

> … the bill places at risk a vigorously competitive, efficient, and innovative Australian aviation industry. For the Qantas Group, it will almost certainly mean less flying because costs will rise, and demand will be destroyed – particularly on marginal routes. This will result in less investment and fewer jobs in aviation, with a flow-on effect for communities and tourism.[36]

Small Business Sector

1.45 Coalition Senators are disturbed that the sector with the most to lose from this bill is the all-important small business sector. This bill is nothing more than an attempt to provide the unions with a foothold in the small business sector, who can be roped into a bargaining process it does not desire and could have terms and conditions forced upon them.

1.46 This was a point the Franchise Council of Australia (FCA) concurred with when asked during a public hearing if this bill would grow wages or grow union membership:

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[32] Qantas, *Submission 59*, p. 1.

[33] Qantas, *Submission 59*, p. 1.

[34] Qantas, *Submission 59*, p. 1.

[35] Qantas, *Submission 59*, p. 1.

[36] Qantas, *Submission 59*, p. 1.

> **Senator O'Sullivan:** The government has stated that the purpose of this bill is to drive up wages. … Will [this Bill] lead to an increase in wages for employees or an increase in union involvement in small business?
>
> **Ms Aldred:** We would suggest that union involvement in small businesses may ultimately undermine the sustainability and viability of many small businesses, which undermines the viability of jobs, so we have grave concerns on that basis.[37]

1.47 Coalition Senators note in the evidence presented to the committee from Per Capita, a self-described 'Labor-ist think tank',[38] it could be reasonably anticipated this bill would 'lead to an increase in union membership'. Ms McKenzie stated:

> I don't think that is a bad thing. I think the reason for that is because … unions do a lot of work for the workers of Australia, workers who are not union members…[39]

1.48 Coalition Senators agree with the BCA that, at the very least small businesses with fewer than 100 employees should be excluded. The small business sector is an integral pillar of the Australian economy. It represents 98 per cent of all business in this country,[40] and for reasons only known to the government, or more accurately, trade unions, are intent on causing as much disruption to this sector as possible.

1.49 Small businesses do not have HR departments and legal departments to shield union meddling and fend away applications being filed against them by organisations who don't respect the law and have stated they believe it is ok to break the law. Small business operators are mums and days who work long hours, often seven days a week, who just want to get on with running their business, not examining reams of complex legislation that would seek to undermine workplace harmony by introducing pay secrecy clauses.

1.50 Coalition Senators are very concerned small businesses could be compelled into a bargaining process involuntarily and swamped by larger employers in the same sector under the majority vote support proposition. This was illustrated during the first inquiry public hearing:

> **Senator O'SULLIVAN:** As another example, let's talk about grocery stores. Obviously, Woolworths and Coles are big employers, but then you've got lots of independent grocers. Those independent grocers could easily be brought in if the majority of employees, who presumably would be within

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[37] Ms Mary Aldred, Chief Executive Officer, Franchise Council of Australia, *Proof Committee Hansard*, 11 November 2022, pp. 42–43.

[38] Per Capita Australia, *Submission 14*, p. 46.

[39] Per Capita Australia, *Submission 14*, p. 44.

[40] Australian Chamber of Commerce and Industry, *Small Business is a Big Deal*, https://www.australianchamber.com.au/wp-content/uploads/2019/05/GOWB-SBIABD-May-2019.pdf (accessed 22 November 2022).

> those larger employers, agreed, and then all those others could be added to it.
>
> **Ms Westacott:** If the amendments that we're proposing are made, which is that Coles and Woolworths would basically continue to bargain—they've got a long history of bargaining—what's more likely, I think, is that all of those shops could be compelled to bargain together, irrespective of whether or not people want to.
>
> **Senator O'SULLIVAN:** In that workplace, yes.
>
> **Ms Westacott:** Say you've got a shopping centre, leaving the big supermarkets and the big department stores to one side, subject to these changes that we're proposing going through in the normal way, then you might have someone with 100 employees, someone with 50, someone with 25—suddenly they're dragged into an agreement. I mean, theoretically, everyone could be dragged into an agreement with Coles and Woolworths. Our biggest concern is Coles and Woolworths being compelled to bargain together, and that would have a very, very serious impact on those smaller businesses. And let me be super-clear: we represent those companies; they have a great history of bargaining; we think they should be allowed to bargain. But we simply do not understand what is trying to be achieved in these competitive provisions. Why would you want to drag Coles and Woolworths into the same bargaining arrangements? It would be very bad for those smaller enterprises in that shopping centre.[41]

1.51 Even after the Albanese Government made substantial amendments to its own bill— while budget estimates and the EEC inquiry into the bill were still ongoing—the BCA called on the government to scrap the 'right for unions to sign off on agreements made between workers and their employers before the agreement could go to a vote'. This also includes making the single interest stream for multi-employer bargaining voluntary.[42]

1.52 It was a point echoed by the FCA, which said, 'in a modern economy, it makes no sense to lump the employees of one business in with employees at a totally separate business in the same industry'.[43] Furthermore, the provisions to expand multi-employer bargaining 'lacks sufficient safeguards to ensure that it won't impact sectors or employers that are already capable of bargaining at the enterprise level'.[44]

1.53 According to the ACCI and Industry, the impact on multi-employer bargaining on small to medium size businesses is:

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[41] Ms Jennifer Westacott AO, Chief Executive Officer, Business Council of Australia, *Proof Committee Hansard*, 4 November 2022, p. 50.

[42] Angus Thompson, *'Big businesses unite to oppose amended IR bill'*, Sydney Morning Herald, 9 November 2022.

[43] Franchise Council of Australia, *Submission 13*, p. 5.

[44] Franchise Council of Australia, *Submission 13,* p. 5.

> … ill-suited collective agreements have the potential to significantly constrain how business owners can manage their businesses, which will eventually risk the viability of the business. This will lead to business closure and job losses.[45]

1.54 Coalition Senators note the concerns of the Council of Small Business Organisations Australia and agree that this bill in no way makes things simpler for small businesses. Instead:

> … it creates more layers of complexity and additional regulatory requirements and adds to the already stifling burden of reporting. This takes small-business people away from managing, growing, and innovating their business and, ultimately, employing more staff.[46]

1.55 The FCA has raised several concerns with the bill. The franchise sector contributes around $172 billion to the economy, which has around 94 000 individual franchised outlets, each are small businesses, employing more than 565 000 people.[47] Coalition Senators note the FCA believes 'the lack of widespread, meaningful consultation can also be seen by the fact that, to date, the government has already introduced more than 150 amendments to the legislation'.[48] Regarding the expansion of the single interest bargaining provisions, this:

> … would enable employees and union representatives to organise protected industrial action, such as strikes, at multiple workplaces across the country – as long as the businesses share an extensive common interest. This would devastate many businesses and ultimately undermine the security and substantiality of thousands of jobs.[49]

1.56 Coalition Senators agree the 'common-interest test' for multi-employer bargaining is too broad, is not appropriately defined and could force large competitors to be compelled to bargain together, which in the words of the BCA, 'that's bad for wages, bad for competition and bad for consumers'.[50]

1.57 The Australian Hotels Association, in its testimony before the committee, underlined how the complexity of this bill would impact small businesses. Of its members, around 65 per cent of businesses are family-owned—mum and dad-run enterprises. When it came to bargaining, it would remove them from the business for six months while they negotiated with the unions:

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45 Australian Chamber of Commerce and Industry, *Submission 27*, p. 9.

46 Mrs Alexi Boyd, Chief Executive Officer, Council of Small Business Organisations Australia, *Proof Committee Hansard*, 4 November 2022, p. 57.

47 Franchise Council of Australia, *Submission 13*, p. 2.

48 Franchise Council of Australia, *Submission 13*, p. 4.

49 Franchise Council of Australia, *Submission 13*, p. 4.

50 Business Council of Australia, *Positive steps on workplace reform but more to do*, 8 November 2022, https://www.bca.com.au/positive_steps_on_workplace_reform_but_more_to_do (accessed 22 November 2022).

> You're taking that person out of the business and putting them into an area where they have fewer skills than other people. They don't have the resources, unless we're able to go and help them. But if these things are springing up all over the place, we won't be able to get there. They may have to, unnecessarily, divulge information to their competitors. We're just saying that's far too complex a place and we think it will probably drive suboptimal outcomes, rather than just negotiating in that workplace for that business.[51]

Better Off Overall Test (BOOT)

1.58 Coalition Senators note the concerns of MBA, FCA, BCA and other stakeholders, regarding the veto power included in part 16 of the bill related to the Better Off Overall Test (BOOT). According to the MBA, unions will have more significant input than the employees the agreement will cover on whether a proposed agreement meets the BOOT:

> The bill makes it clear that the FWC must give consideration to any views of the employer, employees and bargaining representatives as to whether the agreement passes the BOOT. However, this consideration is subservient to a further new step that requires FWC to give *primary* consideration to any *common view* of the employer and employee bargaining representatives (unions) as to whether the agreement should pass the BOOT.[52]

1.59 The inclusion of this provision will be of strong concern to employers because it gives unions a foothold in the process. At the same time, the employer does not have the ascendency unless their position is also the 'common view' as held by the union. 'The effect of this amendment is that unless a union agrees, a proposed EBA risks being rejected for non-compliance with the BOOT'.[53]

1.60 The AIG's view is:

> … the union veto on employers and employees agreeing to vary a single interest employer agreement, a supported bargaining agreement or a cooperative bargaining agreement, to remove the employer and its employees from the coverage, is unfair and inappropriate.[54]

1.61 Clubs Australia point out that 213A and 213B of the bill:

> … would empower employees or unions to approach the FWC for reconsideration of BOOT after the Agreement is approved. Enterprise Agreements give clubs certainty and stability, under which investment and

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[51] Mr Stephen Ferguson, Chief Executive Officer, Australian Hotels Association, *Proof Committee Hansard*, 15 November 2022, p. 49.

[52] Master Builders Australia, *Submission 15*, p. 21.

[53] Master Builders Australia, *Submission 15*, p. 21.

[54] Ai Group, *Submission 23*, p. 3.

> operational decisions are made. Allowing the entire Agreement to be varied would remove this certainty and the accompanying benefits.[55]

Greenfield Agreements and Sovereign Risk

1.62 This is a silent provision that has gone largely unnoticed but has fundamental repercussions on the mining industry if the provision is successful as it relates to 'greenfield agreements' for major new resources and energy projects. According to the Australian Resources and Energy Employer Association, (AREEA), 'should this section be repealed, it will again become a common bargaining tactic for unions to stall and delay greenfield agreements for at least six months, in order to get their claims before a Full Bench of the FWC for arbitration'.[56] This provision is terrible for job creation and bad for projects that are pipeline economic drivers.

1.63 Coalition Senators, like AREEA, are 'bewildered as to why the Albanese Government would seek to make the IR framework for investors more risky and more uncertain'.[57] Additionally, the framework proposed by the government will increase sovereign risk. In its submission, this point was reinforced by the MCA, which asserted that 'multi-employer bargaining will cement Australia's reputation among international investors as a high-cost jurisdiction with complex and prescriptive workplace regulations'.[58]

1.64 Specifically related to sovereign risk vulnerabilities, Coalition Senators pressed the MCA on what threats this bill potentially posed to future investment:

> **Senator O'Sullivan:** … Do you see any sovereign risk to the industry?
>
> **Ms Constable:** That sovereign risk has already been pointed out by some countries at the moment who are asking very pointed questions of the government about what Australia might be doing to change the industrial relations system to put more uncertainty into the system and to reduce the flexibility of employers. That then makes those investors and those countries very cautious about whether they invest here. That is a fact. It's been raised publicly. It's been raised privately in discussions. Its raised regularly with me and with the CEOs in the mining industry.[59]

Denmark

1.65 Proponents of the bill have fondly cited Denmark as the bastion of multi-employer bargaining. However, they overlook the Danish system is 'profoundly different', which includes not having an awards system and not

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55 Clubs Australia, *Submission 66*, p. 4.

56 Australian Resources and Energy Employer Association, *Submission 29*, p. 14.

57 Australian Resources and Energy Employer Association, *Submission 29*, p. 14.

58 Minerals Council of Australia, *Submission 31*, p. 17.

59 Ms Tania Constable, Chief Executive Officer, Minerals Council of Australia, *Proof Committee Hansard*, 15 November 2022, pp. 16–17.

having a National Employment Standards, which forms the safety net Australia has.[60] According to Professor Wooden, real wages growth averaged just 0.7 per cent in each year from 2011 to 2021 in countries where multi-employer bargaining was dominant.[61]

1.66 The AIG contended that:

> … Australia has a system of industry awards that set a safety net of wages and minimum conditions across numerous industries. Australia's modern award system, combined with the National Employment Standards, provides a comprehensive set of legally enforceable wage rates and conditions of employment at the industry level. There is no point in having an award, if the employers in the industry are covered by a multi-employer agreement that overrides the award.[62]

1.67 Clubs Australia says any international comparison is inherently fraught with danger as there are complex differences between Australia and other countries, particularly Denmark. In its testimony, they pointed out Australia has 'a tried and tested method of increasing wages, being single-enterprise agreements'.[63]

1.68 The Bills Digest has made similar observations. It asserted:

> … the evidence concerning macroeconomic linkages with collective bargaining was weak and faced numerous methodological constraints – bargaining systems differ considerably across OECD countries, even among those sharing similar characteristics. This limits the practicability of international comparison for policy makers.[64]

Abolition of the ABCC

1.69 Unsurprisingly, Coalition Senators note it did not take long for some of the more militant unions to think the bad old days were back and felt emboldened by this new legislation, even when it purportedly did not include them in this bill's remit. It was reported an Adelaide property developer was reconsidering a large-scale project in view of the increased activity of the South Australian CFMEU, a union led by the notorious John Setka.[65] This does not bode well for the building and construction industry generally, and jobs and economic

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[60] Ms Jennifer Westacott AO, Chief Executive Officer, Business Council of Australia, *Proof Committee Hansard*, 4 November 2022, p. 54.

[61] Adrian Lowe, *'Multi-employer bargaining unlikely to boost wages as government hopes, expert says*', The West Australian, 25 September 2022.

[62] Ai Group, *Submission 23*, p. 6.

[63] Mr Simon Sawday, Executive Manager, Policy and Government, Clubs Australia, *Proof Committee Hansard*, 15 November 2022, p. 43.

[64] Jaan Murphy, Scanlon Williams, and Elliott King, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, *Bills Digest No. 34,* 2022–23, Parliamentary Library, Canberra, 2022, p. 21.

[65] *'State of alarm as John Setka-led CFMEU flexes its muscles on building sites'*, The Australian, 7 November 2022.

growth more broadly, when one provision of the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 is the abolition of the ABCC.

1.70 Coalition Senators strongly oppose the removal of the ABCC as the building and construction watchdog. According to the MBA:

> The ABCC has made a significant difference in ensuring building industry participants comply with the rule of law, and it has driven much-needed positive industry cultural change. The work of the ABCC is not yet done, and its removal will undo the significant improvement it has delivered for our building and construction industry.[66]

1.71 This was a point supported by AIG, which said:

> … the Australian Building and Construction Commission is carrying out a vital role, and it should not be abolished. The higher penalties that apply to building industry participants should not be reduced, given the ongoing lawbreaking of the CFMMEU (Building and Construction Division).[67]

1.72 The current government's loathing of this vital regulator is well known since the ABCC was first established in 2005 and then reintroduced in 2016 after it had been abolished by the Rudd/Gillard governments. As recently as 27 July 2022, the Minister for Employment and Workplace Relations said of the ABCC, 'this has not been a good regulator. This is a regulator that has simply increased conflict, and that has got in the way where agreements exist and where agreements are possible'.[68] The reasons for their dislike of the ABCC are hardly surprising. Time and again, the ABCC prosecuted the bad behaviour of their union allies, which included verbal abuse and threats against inspectors and outright breaking of the law.

1.73 Under this bill, some of the former responsibilities of the ABCC will be transferred to the Fair Work Ombudsman (FWO). Coalition Senators are not persuaded the FWO is the agency best equipped or adequately resourced to apply the law at building and construction sites rigorously, particularly concerning the outrageous behaviour of the discredited CFMMEU, whose outright recidivist disregard of the rule of law is consistent and well publicised. Nor do Coalition Senators believe that it is a like-for-like replacement, as the FWO will not be providing oversight for both the building code and workplace infringements.

1.74 These concerns are reaffirmed by the MBA, who said the bill:

> … does not give the FWO any new powers, allocate the necessary resources, or do anything to ensure it is appropriately equipped to tackle

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66 Master Builders Australia, *Submission 15*, p. 3.

67 Ai Group, *Submission 23*, p. 3.

68 The Hon. Tony Burke MP, Minister for Employment and Workplace Relations, *House of Representatives Hansard*, 27 July 2022, p. 135.

> the unique sector problems that have been forensically documented over several decades and are widely known.[69]

1.75 The Housing Industry Association of Australia (HIA) supported this position saying, 'charging the FWO with sole responsibility for enforcing industrial relations laws in the building and construction is a flawed approach'.[70] HIA went on to further say in its submission, 'sole coverage by the Fair Work Act means that the maximum penalties for illegal misbehaviour are significantly lower'.[71]

1.76 In their submission, AREEA outlines its opposition to the abolition of the ABCC, saying this regulator has performed 'necessary work to hold militant unions, most notably the CFMMEU, to account for persistent recidivist lawbreaking'.[72] Regarding the new functions of the FWO to oversee this industry, AREEA believes 'nothing less than the same level of policing and prosecution of CFMMEU thuggery would represent a significant failure in this space'.[73]

1.77 The ACCI accurately described that even with a specialist enforcement regulator like the ABCC, 'there has been no observable change in the cultures of the workplaces in parts of the building and construction industries'. Imagine then what the behaviour and culture will be when that regulator is removed.[74]

1.78 The Civil Contractors Federation (CCF), as the peak registered employer organisation representing nearly 2000 members who are responsible for the construction and maintenance of Australia's civil infrastructure, are highly alarmed at some of the provisions included in the bill, particularly around the removal of the ABCC.

1.79 According to the CCF:

> … the retention of the ABCC is paramount until the Government can demonstrate an alternative and effective regulatory framework will deliver an equal if not more robust compliance and enforcement regime. The abolition of the ABCC without a 'like replacement' runs the risk of increased industrial disputation, conflict, coercion, unlawful behaviour, and sites being brough to a halt due to industrial action as per the findings of previous Royal Commissions.[75]

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69 Master Builders Australia, *Submission 15*, p. 3.

70 Housing Industry Association, *Submission 19*, p. 15.

71 Housing Industry Association, *Submission 19*, p. 15.

72 Australian Resources and Energy Employer Association, *Submission 29*, p. 17.

73 Australian Resources and Energy Employer Association, *Submission 29*, p. 17.

74 Australian Chamber of Commerce and Industry, *Submission 27*, p. 35.

75 Civil Contractors Federation, *Submission 33*, p. 9.

1.80 Coalition Senators note what perils the CCF believes this bill presents for the civil construction sector. According to the CCF:

> An infrastructure sector embroiled in industrial disputation has the possibility of threatening the quantum of private sector investment whose collective sum total represents approximately 50% of Australia's total annual investment pipeline, or around $40 billion per annum. CCF contends this unintended consequence is live and a likely probability that will have catastrophic ramifications for displacing workers.[76]

1.81 As with the CCF, the HIA is also very concerned with the provision in this bill to abolish the ABCC. According to the HIA:

> … the ABCC had been doing a sound and effective job of law enforcement, clamping down on unions and others for illegal industrial behaviour and right of entry breaches ... However, its work was far from finished. Aggressive and unlawful industrial action persists as an area of concern for the industry ... The building industry still needs an effective deterrent and enforcer of the rule of law.[77]

1.82 Coalition Senators note not only would the bill abolish the ABCC, but it would also remove the *Code for Tendering and Performance of Building Work 2016* (Building Code). Additionally, the bill would also 'remove particular parts of the *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP) Act that exists to tackle conduct and illegal behaviour that commonly occurs in building and construction, including unlawful picketing and specific types of coercive conduct.'[78] In relation to this, the MBA points out that:

> … the abolition of the ABCC and associated Code means that, for the first time since 2001, there will be no industry-specific body to regulate industrial relations and enforce compliance with workplace laws for building and construction workplaces. This will be a disaster for every single participant within the building and construction industry.[79]

1.83 Coalition Senators believe maintaining the ABCC—an integral oversight body with a proven track record of winning prosecutions against union thuggery—would have been the agency more experienced and stronger placed to provide supervision of building and construction workplaces. At the very least, the building and construction industry should be excluded from the multi-employer bargaining stream. As a result, in the absence of this, there will be a pernicious increase in union militancy on building and construction worksites in Australia (which is well documented), as already evident in Adelaide. Only the Minister and the CFMMEU will be pleased about this.

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[76] Civil Contractors Federation, *Submission 33*, p. 9.

[77] Housing Industry Association, *Submission 19*, p. 14.

[78] Master Builders Australia, *Submission 15*, p. 6.

[79] Master Builders Australia, *Submission 15*, p. 7.

Intractable Bargaining Declaration

1.84 Coalition Senators note part of this bill will energise the arbitration process at the expense of the conciliation process. The BCA highlighted this during its testimony, where it expressed concern the threshold to trigger the arbitration process was low and the definition of 'intractable' not precise. There is a risk that such a low threshold will dramatically increase the volume of cases received by the FWC—as it will have to arbitrate a bargaining outcome—and it will be too readily used as an instrument when two disputing parties should first 'have genuinely tried to reach agreement'.[80]

1.85 Coalition Senators note apart from the BCA, many other stakeholders have raised concerns regarding intractable bargaining declaration provision. On this, the opinion of the Laundry Association of Australia is this provision has been included in this bill in order 'to facilitate the ability of unions to access arbitration in pursuit of wage rates and entitlements in addition to the already existing regulation through awards. We believe it will increase costs for small and medium-sized businesses'.[81]

1.86 The AIG believes:

> … the proposed new power for the FWC to arbitrate 'intractable bargaining disputes', including for some types of multi-employer agreements, would be harmful for businesses, workers and the community. The ability for a union to force an employer to bargain for replacement agreement, even if the employer and the majority of its employees do not wish to bargain, is unfair and inappropriate.[82]

1.87 Concerns with the loose intractable bargaining definition were also raised by the Australian Public Transport Industrial Association (APTIA) (Bus Industry Federation) in their submission. According to APTIA:

> What needs to be made clear is how the FWC will arbitrate. I assume they will arbitrate an agreement where the parties cannot reach an agreement. What is not clear is whether the FWC will accept one claim against the other or find some common ground that might appease both sides. APTIA's view is that having a winner and a loser would ensure that this mechanism wasn't used too regularly, as it detracts from the concept of enterprise bargaining if the FWC steps in every time. Consideration needs to be given to the method the FWC will follow when arbitrating, this needs to be clarified in the new legislation.[83]

1.88 The Civil Contractors Federation expressed concern 'the proposed expanded capacity of the Fair Work Commission to arbitrate the content of workplace

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[80] Ms Jennifer Westacott AO, Chief Executive Officer, Business Council of Australia, *Proof Committee Hansard*, 4 November 2022, p. 47.

[81] Laundry Association of Australia, *Submission 4*, p. 4.

[82] Ai Group, *Submission 23*, p. 3.

[83] Australian Public Transport Industrial Association, *Submission 26*, p. 6.

agreements will only encourage unions to make unreasonable demands and risk taking us back to a system of centralised setting of wage and conditions'.[84] Additionally, CCF also envisages that there could be:

> … a significant increase in the FWC involving itself in protracted bargaining disputes and could potentially be abused by more militant bargaining parties. While it could be desirable to have an arbitration in this regard, there is no definition as to how serious a bargaining dispute must be for such declaration to be made.[85]

1.89 Indeed, during the second hearing, when pressed the Department of Employment and Workplace Relations conceded 'intractable' was not defined in the bill:

> **Senator O'SULLIVAN:** Part 18 of the bill addresses bargaining disputes, and the bill refers to the scope the Fair Work Commission will have in relation to making an intractable bargaining declaration. Can you explain this to me, and, in doing so, can you provide me with a definition of 'intractable'—or is that left to the discretion of the Fair Work Commission?
>
> **Ms Sheehan:** The commission can make what's called an intractable bargaining declaration, where the parties have tried to resolve the issues through using the section 240 process. That might be conciliation, if the commission is satisfied that there is no reasonable prospect of agreement being reached and that it's otherwise reasonable in all the circumstances, taking into account the views of the party. The term 'intractable' is not defined in the bill. The test gives reference to no reasonable prospect of agreement being reached. The amendments that were agreed in the House now include a minimum period of good faith bargaining before that declaration can be issued.[86]

1.90 The LAA reiterated a one size fits all approach to every industry is not the answer to drive wage growth and reflected a poor comprehension about the capacity of some sectors to absorb new costs. According to the LAA:

> … the Federal Government, by pursuing pattern bargaining will risk business viability and certainly increase costs, thereby driving prices for laundry and textile supply services up. This is bad policy that doesn't appreciate the realities of business and is another inflation creating policy.[87]

1.91 This is a point emphasised by Qantas, who contend:

> … it is likely that some trade unions will weaponise the intractable dispute provisions… To be clear, even a six month (or longer) waiting period to

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84 Civil Contractors Federation, *Submission 33*, p. 11.

85 Civil Contractors Federation, *Submission 33*, p. 12.

86 Ms Anne Sheehan, First Assistant Secretary and Chief Counsel, Workplace Relations Legal Division, Department of Employment and Workplace Relations, *Proof Committee Hansard*, 11 November 2022, p. 78.

87 Laundry Association of Australia, *Submission 4*, p. 3.

> bring an application for an intractable bargaining determination will not change this bargaining strategy by some unions.[88]

1.92 The unions desire to strengthen intractable bargaining for its own vice and the risks associated with that was raised by the AIG during the fourth public hearing in response to a question from a Coalition Senator:

> **Senator Liddle:** So how will an intractable bargaining provision in this bill affect your members?
>
> **Mr Ferguson:** I think the big risk is that it takes us back to a system of, to some degree, centralised wage fixing – rather than having terms and conditions set at the workplace by the participants, it creates a dynamic whereby parties could be motivated to make ambit claims with a view to getting an arbitrated outcome rather then an agreed outcome. That's a big risk, especially when you put that together with the proposition that unions will have greater rights to force employers to bargain, even if they're not representing the views of the workforce, and, if there's no agreement reached on that, that you could end up in an arbitrated outcome. That would be a very backward step.[89]

1.93 Coalition Senators note the opinion of the LAA that 'this bill should also be considered and fully assessed by the Productivity Commission, so that all Australians will know how much it will impact on the cost of living for all Australians'.[90]

Regional Universities

1.94 Coalition Senators note it is not only the business sector who are worried about the multi-employer bargaining aspects of this bill, but also the university tertiary education sector. In their submission, the Regional Universities Network (RUN) indicated 'the proposed amendments to multi-employer bargaining, if not implemented appropriately, could have unintended, negative impacts on Australia's world-leading university sector and the communities they serve'. RUN also pointed out a one size fits all approach did not appreciate the differences between metropolitan and regional universities. On this they noted:

> The bill being considered potentially enables universities that are fundamentally different to be treated as if there were no differences – essentially assuming that apples and oranges are the same. If regional universities are joined with metropolitan, or one regional university joined with another, or two vastly different metropolitan universities joined in a single interest multi-employer agreement making process, there is a genuine risk that universities will be exposed to industrial action on matters that are not relevant to them and will result in poorer outcomes for

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88 Qantas, *Submission 59*, p. 3.

89 Mr Brent Ferguson, Head of National Workplace Relations Policy, Australian Industry Group, *Proof Committee Hansard*, 15 November 2022, p. 62.

90 Laundry Association of Australia, *Submission 4*, p. 5.

> each party. This could fundamentally undermine the international standing of Australia's universities…[91]

Conclusion

1.95 **Coalition Senators reject this bill.** The Albanese Government should immediately delay the passage of this legislation to allow for a longer and broader consultation process. As it is, this legislation is terrible for Australia. It's bad for the economy at a time of high inflation and elevated cost of living pressures, it does not provide adequate safeguards against malicious union behaviour, nor does it demonstrate how it will provide for wage growth or increased productivity. This latter point is noted by Jennifer Hewitt, who wrote that:

> … the biggest concern uniting the business community is their argument that Labor's bill will be counter-productive for wages and productivity by effectively encouraging a return to the centralised system of wage setting abandoned by Paul Keating three decades ago in favour of enterprise bargaining.[92]

1.96 The Albanese Government has sought to introduce this legislation at a time of great economic uncertainty in Australia. To date it has displayed an extraordinary level of tin ear from a significant number of key stakeholders, who when combined represent a wide range of Australia's economic output. Evidence provided to the Senate inquiry has repeatedly highlighted the dangers contained in this bill, the limited timeframe made available for consultation, and the lack of mandate the government has to deliver it.

1.97 This Albanese Government, as one of its first priorities since the election, has sought to rip open the scab of past industrial relations battles, merely to satisfy its trade union base—whose membership has dwindled to 14 per cent of the workforce and do not represent a majority of Australian workers.[93] Ramming through such an ill-thought-out bill to grow union membership represents an antiquated era of class battles and civil strife long forgotten and not sought after. The government ignores all these concerns at its peril.

1.98 Coalitions Senators suggest as a priority the Albanese Government should be more focused on tackling the cost of living, including getting inflation under control and increasing productivity—key levers for real wage growth—and spend less time galvanising trade union membership in workplaces where

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[91] Regional Universities Network, *Submission 7*, p. 2.

[92] Jennifer Hewett, *'Burke's simple slogans mock the 'silliness' of the business community'*, Australian Financial Review, 16 November 2022.

[93] Australian Bureau of Statistics, *Trade Union Membership*, https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/trade-union-membership/aug-2020 (accessed 17 November 2022).

they are not wanted.[94] This bill will empower unions to be involved in small businesses, embolden them to increase militant behaviour in workplaces, and only achieve in returning Australia to the bad old days of the 1970s when trade unions wreaked havoc across the country and this nation was poorer for it.

Recommendation 1

1.99 The Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 is not passed by the Senate.

Recommendation 2

1.100 The Albanese Government apologise to the Australian people for promising that industry wide bargaining was 'not part of our policy' before the election, and then attempt to legislate it by stealth once elected.

Senator Hon Michaelia Cash
Deputy Leader of the Opposition in the Senate
Senator for Western Australia

Senator Matt O'Sullivan
Deputy Chair
Senator for Western Australia

Senator Kerrynne Liddle
Committee Member
Senator for South Australia

[94] Neyavan Suthaharan and Joanna Bleakley, Reserve Bank of Australia, *Wage-price Dynamics in a High-inflation Environment: The International Evidence,* https://www.rba.gov.au/publications/bulletin/2022/sep/wage-price-dynamics-in-a-high-inflation-environment-the-international-evidence.html (accessed 22 November 2022).

Australian Greens Senators' additional comments

1.1 For many years the Greens have been concerned that our current laws make it difficult for workers to organise and achieve real improvements in their pay and conditions. We have argued there are problems with the Fair Work Act and that industrial relations reform is needed—in relation to increasing collective bargaining, removing pay secrecy, enabling flexibility at work, reducing job insecurity, lifting minimum wages, narrowing the gender pay gap, lifting wages in the low paid care sector, and ensuring the right to take industrial action. We believe the principle of making no worker worse off should guide reform of workplace relations laws.

1.2 There is much that is good within this bill. Many of the amendments to the Fair Work Act contained within the bill respond to long standing issues that the Greens have campaigned to change for years. People in Australia have seen the value of wages go backwards in real terms and low waged workers are suffering. Collective bargaining now occurs in only a small proportion of Australian workplaces. The persistent gender wage gap is an injustice to women, who continue to shoulder the burden of unpaid care for children and other family members, which is of significant economic value, yet is undervalued and negatively impacts women's earning capacity and wealth over their lifetimes.

1.3 The Greens commend the amendments that insert the promotion of job security and gender equity as new objects of the Fair Work Act, with the Fair Work Commission needing to take account of this when performing its functions. We have long supported the abolition of the Australian Building and Construction Commission.

1.4 The Greens support provisions within the bill that aim to encourage wage growth, which is critically needed in our current context of cost-of-living pressure and high inflation. It is crucial that workers' wages and conditions are protected and improved upon, and that they do not go backwards. Many workers continue to be reliant on awards and it is important that our laws and systems provide a strong floor that cannot be eroded.

1.5 During hearings on the bill, examples from the retail industry were shared with the Committee of agreements that failed to pay workers what they would have earned under the equivalent Modern Award and National Employment Standards (NES). The approval of some agreements by the Fair Work Commission were appealed by workers and their representatives and subsequently terminated. These are some of our lowest paid workers and our

systems should operate to protect their basic pay and conditions. No one should fall through the safety net.

1.6 Despite the concern expressed by employer groups about the potential for this bill to enable and increase industrial action, it remains tightly prescribed and restricted, raising questions about continuing contravention of the basic human right set out by the International Labour Organisation (ILO) to withdraw labour to defend and improve working conditions.

1.7 Contract insecurity, in the form of successive fixed term contracts, is restricted in the bill, which is very welcome. However, the Greens are concerned that there are significant exclusions, allowing this practice to continue in some industries and roles. The bill does not attempt to curtail the exceptionally high levels of casual employment in Australia, which is an ongoing issue that needs attention. This remains a high priority for the Greens, reflected in the strong policy we took to the May 2022 election.

1.8 The bill's amendments to the NES that expand the circumstances under which an employee can request a flexible working arrangement, strengthen employer obligations in this regard, and introduce a dispute resolution process for requests of this nature, are all important changes and reflect recommendations from the Senate Select Committee on Work and Care's interim report.

1.9 Over recent months and across the country, the Senate Select Committee on Work and Care has received a great deal of consistent evidence about the failing architecture of work and care in Australia, and the inadequacy of our workplace laws in this regard.

1.10 While this bill inserts a welcome dispute resolution process for requests for flexible work, there remains one NES without a mechanism for appeal or arbitration: the right to request an extension to unpaid parental leave. The Greens are concerned that the lack of appropriate enforcement of this right undermines its effective application. There is no good reason for the absence of review and enforcement of this right, and it is our view the Fair Work Act should be amended in this respect. The fact that two NES rights of such relevance to women have remained unenforceable needs correction: we want to see all rights and especially those supporting working carers appropriately enforced and backed by civil penalties where employers do not do the right thing.

1.11 Further areas for reform arising from evidence submitted to the Senate Select Committee on Work and Care include: the need for a right for workers to disconnect from their work outside of paid work hours; and increasing worker rights in rostering practices, specifically with regard predictability and a likely minimum number of hours, so that rosters do not negatively interfere with workers' care commitments. We also believe it is time for an overarching assessment and revaluing of wages across the care sectors given their historic

undervaluation. Wages in the care sectors should appropriately reflect in award classification structures the true nature of skills and experience of this work, and appropriately value it in relative terms across aged care, early childhood education and care, and disability care.

1.12 Finally, it is worth noting that much of the legal architecture of the existing Fair Work Act was written by Labor as part of the Accord, and was the foundation of enterprise bargaining, of restrictions around the right to strike and of collapsing trade union membership in this country. It is disappointing to see that through this bill the Labor Party does not address the right to strike, which is a basic worker's right. Currently, workers only have a very limited ability to exercise their right to strike, and its well past time to redress the imbalance of power between workers and bosses.

Senator Mehreen Faruqi
Member
Greens Senator for New South Wales

Senator Barbara Pocock
Participating member
Greens Senator for South Australia

Senator David Pocock's additional comments

General comments: Process and timing

1.1 Senator Pocock notes the inadequate amount of time afforded to the committee to give due consideration to submissions and prepare for committee hearings. The Senate committee process provides an invaluable opportunity to scrutinise legislation in the best interest of the Australian community.

1.2 In this case, witnesses often did not have sufficient time to complete their submissions ahead of appearing before the committee, or submissions were circulated as witnesses arrived to give evidence.

1.3 This detracted from the value of the committee process.

1.4 The committee has had only ten days to consider 96 submissions, with six of those days taken up by Senate Estimates.

1.5 While the bulk of this bill introduces what are almost universally viewed as extremely welcome and long overdue reforms, a small number of provisions have caused deep concern across a wide variety of stakeholders.

1.6 For this reason, Senator Pocock maintains that those provisions of deepest concern should be split out and considered separately with adequate time to work through any unintended consequences, while also ensuring a mechanism to lift wages for all workers.

1.7 Senator Pocock again reiterates his support for measures to urgently lift wages with the current cost of living crisis, and notes in this context the desperate need for the Australian Government (government) to review and lift the rate of JobSeeker.

Part 1: Abolition of the Registered Organisations Commission (ROC)

The ROC exists as an independent regulator of unions and employer associations.

1.8 Senator Pocock acknowledges the government's election mandate to abolish the ROC, however he also notes feedback from employer groups that its work has been largely positive.[1]

1.9 Senator Pocock has raised with the government the need to ensure the Fair Work Commission is properly resourced to absorb the functions of the ROC.

1.10 Senator Pocock also urges the committee to consider the recommendations detailed in the ROC's submission regarding Infringement Notices.

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[1] Refer ACCI and BCA submissions.

Part 2: Additional Registered Organisations enforcement options

Transfers regulatory/enforcement responsibilities from the Australian Building and Construction Commission and ROC to Fair Work Commission

1.11 No additional comment.

Part 3: Abolition of the Australian Building and Construction Commission (ABCC)

1.12 Senator Pocock acknowledges the government's election mandate to abolish the ABCC, however he also notes concerns raised by a range of stakeholders, predominantly the peak employer organisations and notably Master Builders Australia as to the potential productivity impacts resulting from this provision. While welcoming additional resourcing allocated in the Budget, Senator Pocock further notes the views of these stakeholders who argue the Fair Work Ombudsman is 'not an effective replacement for the ABCC'.

1.13 Such sentiments have been echoed in correspondence Senator Pocock has received from a wide range of constituents including small local family builders.

1.14 Senator Pocock equally notes concerns raised by the CFMEU and other unions about what they felt was the ideological nature of the ABCC and that its powers discriminate against workers in the construction industry.

1.15 Senator Pocock welcomes this bill establishing a new National Construction Industry Forum as a positive and constructive tripartite step forward but notes that it will not have the same powers as the ABCC and the preferred option would be a model that saw a specialist regulatory division.

Parts 5–9: Objects of the Act, equal remuneration, expert panels, pay secrecy, sexual harassment, anti-discrimination and special measures

1.16 Senator Pocock strongly supports these parts, as does the vast majority of the evidence provided to the committee in hearings and submissions. They make important changes to Australia's Industrial Relations Framework that will help close the gender pay gap, improve gender equity, improve the Fair Work Commission's expertise, and better deal with sexual harassment and discrimination.

1.17 As ACOSS notes: 'We believe that these proposals offer an overdue updating of the legislation to more effectively improve gender equity in the workplace, noting again the central role government has in adequately investing in the sector and its workforce'.[2]

[2] ACCI submission.

Part 10: Fixed term contracts

Limits fixed terms contracts to 24 months

1.18 Senator Pocock welcomes the government's amendment moved in the House of Representatives to delay implementation of this part by 12 months, but notes this does not resolve a range of genuine concerns raised by stakeholders in the implementation of this provision.

1.19 While promoting security of employment is a worthy objective, this part of the bill may have a number of adverse unintended consequences on various sectors including in professional sports and university research.

1.20 As the AHEIA submission warns:

> This Bill could inadvertently result in research being moved offshore or discontinued and/or casuals being engaged increasingly to perform research activities.

Part 11: Flexible work

1.21 Senator Pocock notes the many benefits flexible working provisions will bring to a range of workers. Senator Pocock also acknowledges concerns that some employers and employer organisations have raised around how this may operate in practice and the role of the Fair Work Commission in arbitrating not just the process but also the outcome.

1.22 Senator Pocock notes the two recommendations put forward by ACCI on this part and encourages the government to consider them on their merits as a sensible compromise.

Parts 12 to 14: Termination of enterprise agreements after expiry, sunsetting 'zombie' agreements, enterprise agreement approval

1.23 No additional substantive comments. Senator Pocock notes the majority of evidence provided to the committee is supportive of these parts and recognises the benefits these reforms will deliver to Australian workers.

Part 15: Initiating bargaining

1.24 Senator Pocock welcomes the amendment to introduce a so-called 'grace period' during which employers and employees can commence good faith bargaining for a single-enterprise agreement prior to becoming eligible to enter multi-enterprise bargaining. Senator Pocock notes submissions from some stakeholders seeking further extension to 12 months of this threshold.

Part 16: Better Off Overall Test (BOOT), Part 17: Errors in agreements, Part 18: Bargaining disputes; Part 19: Industrial action, Part 20: Supported bargaining

1.25 No additional substantive comments. Senator Pocock notes the majority of evidence provided to the committee is supportive of these parts and recognises the benefits these reforms will deliver to Australian workers.

Part 21: Single interest employer authorisations

1.26 Senator Pocock notes evidence from the Department of Employment and Workplace Relations confirming that drafting on single-interest multi-enterprise agreement provisions did not commence until after the Jobs and Skills Summit.

1.27 Senator Pocock further notes the Office of Best Practice Regulation's (OBPR) assessment that the Regulatory Impact Statement (RIS) on the Bill is 'adequate and therefore sufficient to inform a decision'.

1.28 However, it also states that:

> To have been assessed as good practice under the Guide, the RIS would have been benefited from:
>
> - further analysis of the potential impacts on productivity, real wages and other distributional impacts, in particular on gender …
> - statements or evidence that the regulatory costs and their assumptions had been tested with stakeholders, or otherwise an acknowledgement why this had not been undertaken …

1.29 The overwhelming majority of evidence provided to the committee from a broad range of stakeholders expresses significant and wide-ranging concerns with the detail of the single interest multi-employer bargaining stream.

1.30 These are significant reforms with wide-ranging impacts. That's not a bad thing. Big reforms are needed to get a big increase in wages. But Senator Pocock shares the view of stakeholders that the size of the reforms increases the impetus to ensure they deliver as intended.

1.31 Senator Pocock notes concerns raised in multiple submissions around the definition and application of the common interest test.

1.32 National Disability Services says:

> We are concerned that the broad definitions of common interest proposed which include the nature of enterprises, terms and conditions of employment, geographical location and common regulatory regimes, could see disparate employers with varied operating conditions, possibly across different sectors be pulled into a common agreement.

1.33 Manufacturing Australia warns that 'the bill, as drafted, will have the reverse effect and lead to the unintended consequence of undermining the status of enterprise level bargaining as the primary and preferred type of agreement making. Specifically, Manufacturing Australia does not support, in its current form, Part 21 of the Bill…' This is in the context of their members having 'a strong track record of successful bargaining at the enterprise level. This track record of successful enterprise bargaining has typically delivered:

- wages growth over the decade to 2022 above consumer price index and wage price index.
- high levels of full-time employment, with 84% of manufacturing employees employed on a full time basis (69% higher than the national average)'.

1.34 These are just a few of the examples of a wide range of concerns expressed that the truncated timeframe afforded to committee members to provide comment has meant Senator Pocock is unable to detail in greater length here.

Part 22: Varying agreements to remove workplaces, Part 23: Cooperative workplaces, Part 24: Enhancing small claims, Part 25: Prohibiting illegal pay rate advertisements

1.35 No additional substantive comments. Senator Pocock notes the majority of evidence provided to the committee is supportive and recognises the benefits these reforms will deliver to Australian workers.

Senator David Pocock
Participating Member
Independent Senator for the Australian Capital Territory

Appendix 1
Submissions and additional information

Submissions

1 Associate Professor Chris F. Wright
2 Professor Rae Cooper AO
3 National Foundation for Australian Women
4 Laundry Association Australia
5 AgForce Queensland
6 Joint Submission by Distinguished Professor Anthony Forsyth and Professor Shae McCrystal
7 Regional Universities Network
8 Early Learning and Care Council of Australia (ELACCA)
9 Australian Meat Industry Council
10 Thrive by Five (Minderoo Foundation)
11 Joint Submission by Dr Alex Veen, Associate Professor Stephen Clibborn, Dr Joseph McIvor
12 Joint Submission by Professor Meg Smith and Dr Michael Lyons
13 Franchise Council of Australia
14 Per Capita
15 Master Builders Australia
16 Retail and Fast Food Workers Union
17 Australian Institute of Employment Rights
18 Centre for Future Work
19 Housing Industry Association
20 Early Learning Association Australia
21 Australian Discrimination Law Experts Group
22 Catholic Religious Australia
23 AI Group
24 The Pharmacy Guild of Australia
25 Australian Hotel Association
26 Australian Public Transport Industrial Association
27 Australian Chamber of Commerce and Industry
28 Australian Retailers Association
29 Australian Resources and Energy Employer Association
30 Goodstart Early Learning
31 Minerals Council of Australia
32 The Parenthood
33 Civil Contractors Federation
34 The Australian Chicken Meat Federation
35 Queensland Law Society

36 Manufacturing Australia
37 Maritime Industry Australia Ltd
38 National Disability Services
39 Australasian Convenience and Petroleum Marketers Association (ACAPMA)
40 The Association of Independent Schools of New South Wales
41 Australian Nursing and Midwifery Federation (ANMF)
42 Community Early Learning Australia (CELA)
43 Law Council of Australia
44 RAAA
45 Migrant Justice Institute
46 Professor Graeme Orr
47 Australian Council of Trade Unions
48 Woolworths Group
49 Department of Employment and Workplace Relations
50 Fair Work Ombudsman
51 Registered Organisations Commission
52 ACOSS
53 The Police Association Victoria
54 National Farmers Federation
55 Business Council of Australia
56 National Retail Association
57 Public Interest Advocacy Centre
58 Australian Business Industrial and Business NSW
59 QANTAS Airways Limited
60 Aged & Community Care Providers Association (ACCPA)
61 Maurice Blackburn Lawyers
62 Victorian Automotive Chamber of Commerce
63 SDN Children's Services
64 Initiate Futurity
65 Circle Green Community Legal
66 Clubs Australia
67 Adriana Orifici and Dominique Allen
68 The Hon Damien Tudehope MLC, Minister for Employee Relations, NSW Government
69 Rio Tinto
70 Australian Small Business and Family Enterprise Ombudsman
71 Disability Intermediaries Australia
72 Just Equal Australia
73 Australian Childcare Alliance
74 Chamber of Commerce and Industry WA
75 Australian Higher Education Industrial Association
76 Coalition of Major Professional and Participation Sports (COMPPS)
77 KU Children's Services

78 Federation of Ethnic Communities' Councils of Australia
79 Professor Marilyn Pittard
80 *Name Withheld*
81 *Name Withheld*
82 Transport Workers' Union of Australia (TWU)
83 Australian Road Transport Industrial Organisation
84 Council of Small Business Organisations Australia (COSBOA)
85 Master Grocers Australia Ltd (MGA)
86 National Electrical and Communications Association (NECA)
87 Recruitment, Consulting and Staffing Association
88 Uniting Church
89 Prof Andrew Stewart
90 Professor Sean Cooney
91 Australian HR Institute
92 Hancock Prospecting
93 The Australia Institute

Answer to Question on Notice

1 Answers to Questions on Notice, received from Professors McCrystal and Forsyth , 9 November 2022
2 Answer to Question on Notice, received from Emeritus Professor Sara Charlesworth, 9 November 2022
3 Answer to Question on Notice, received from Centre for Future Work, 14 November 2022.
4 Answers to Questions on Notice, received from the Department of Employment and Workplace Relations, 14 November 2022
5 Answers to Questions on Notice, received from the Department of Employment and Workplace Relations, 14 November 2022
6 Answers to Questions on Notice, received from the Department of Employment and Workplace Relations, 14 November 2022
7 Answers to Questions on Notice, received from the Franchise Council of Australia, 15 November 2022
8 Answer to Question on Notice, received from Transport Workers Union, 15 November 2022.
9 Answer to Question on Notice, received from Australian Chamber of Commerce and Industry 16 November 2022.
10 Answer to Question on Notice, received from Migrant Justice Institute, 16 November 2022.
11 Answer to Question on Notice, received from the Ai Group, 16 November 2022.
12 Answers to Questions on Notice, received from United Workers Union, 15 November 2022.

Tabled Documents

1 AFR Article titled 'EY economist-for-hire cherry-picked numbers. Again' tabled by Senator Tony Sheldon, at a public hearing in Canberra on 11 November 2022.

2 'Australian Economic Review - 2018 - Isaac - Why Are Australian Wages Lagging and What Can Be Done About It', tabled by Mr Mark Perica from Australian Institute of Employment Rights, at a public hearing in Melbourne on 15 November 2022.

3 'Industrial Relations Journal - 2021 - Brandl and Braakmann - The effects of collective bargaining systems on the productivity', tabled by Mr Mark Perica from Australian Institute of Employment Rights, at a public hearing in Melbourne on 15 November 2022.

4 AFR Article titled 'Port lockout threatens Christmas chaos' tabled by Senator Tony Sheldon, at a public hearing in Melbourne on 15 November 2022.

Correspondence

1 Letter of correction of evidence given at a public hearing in Melbourne on 15 November 2022 by Mr Mark Perica AM, Vice President, Australian Institute of Employment Rights, received 16 November 2022.

Appendix 2
Public hearings and witnesses

Friday, 4 November 2022
Stamford Plaza Sydney Airport
Sydney

Professor Rae Cooper, The University of Sydney, Private capacity

Associate Professor Chris F. Wright, The University of Sydney, Private capacity

Emeritus Professor Sara Charlesworth, RMIT University (via teleconference), Private capacity

Australian Council of Trade Unions and worker representatives

- Ms Michele O'Neil, President
- Mr Tom Roberts, Senior Legal Officer
- Mr Michael Wright, Acting Secretary, Electrical Trades Union
- Ms Debra James, General Secretary, Independent Education Union
- Ms Gabrielle Gooding, National Assistant Secretary, National Tertiary Education Union
- Mr Peter Richards, Worker

Professor Anthony Forsyth, RMIT University (via teleconference), Private capacity

Professor Shae McCrystal, The University of Sydney, Private capacity

Business Council of Australia

- Mr Tim Reed, President (via teleconference)
- Ms Jennifer Westacott, Chief Executive

Council of Small Business Organisations Australia

- Mrs Alexi Boyd, Chief Executive Officer
- Mr Scott Harris, Director, Workplace Relations & Business, The Pharmacy Guild of Australia (via teleconference)

Friday, 11 November 2022
Main Committee Room
Parliament House
Canberra

Emeritus Professor Sara Charlesworth, RMIT University (via videoconference), Private capacity

National Farmers' Federation
- Mr Ben Rogers, General Manager, Workplace Relations and Legal Affairs
- Mr Tony York, Chair of Workforce Committee

Centre for Future Work (via videoconference)
- Dr Jim Stanford, Economist and Director
- Dr Fiona Macdonald, Policy Director, Industrial and Social

Associate Professor Meg Smith, Western Sydney University (via videoconference), Private capacity

Franchise Council of Australia (via videoconference)
- Ms Mary Aldred, Chief Executive Officer

Master Builders Association
- Mr Shaun Schmitke, Deputy Chief Executive Officer

Department of Employment and Workplace Relations
- Ms Alexandra Mathews, First Assistant Secretary, Employee Entitlement Safeguards and Policy Division
- Mr Gregory Manning, First Assistant Secretary, Employment Conditions Division
- Ms Jody Anderson, First Assistant Secretary, Safety and Industry Policy Division
- Ms Anne Sheehan, First Assistant Secretary/Chief Counsel, Workplace Relations Legal Division
- Ms Rebecca Quill, Principal Government Lawyer, Appointments, Legislation and Registered Organisations Team
- Ms Sarah Godden, Assistant Secretary/Senior Executive Lawyer, Bargaining and Coverage Branch
- Mr David Cains, Assistant Secretary, Bargaining and Industry Policy Branch
- Ms Angela Wallbank, Assistant Secretary, Workplace Relations Consultation Branch
- Ms Danica Yanchenko, Assistant Secretary, Workplace Compliance and Enforcement Policy Branch
- Ms Jennifer Wettinger, Assistant Secretary, Economics and International Labour

- Mr Adrian Breen, Assistant Secretary / Senior Executive Lawyer, Safety, Compensation and Institutions Branch
- Ms Sharon Huender, Assistant Secretary, WR Strategy Branch
- Mr Stephen Still, Assistant Secretary/Senior Executive Lawyer, Employment Standards Branch
- Mr Timothy Johnson, Assistant Secretary, Safety and Compensation Policy Branch
- Ms Tara Williams, Acting Assistant Secretary, Safety Net Branch

Retail and Fast Food Workers Union (via videoconference)

- Mr Josh Cullinan, Secretary

Monday, 14 November 2022
Stamford Plaza, Melbourne
Buckingham 1 Room
Melbourne

Professor Andrew Stewart (via teleconference), Private capacity

Community Childcare Association (via teleconference)

- Ms Julie Price, Executive Director

Goodstart Early Learning

- Mr John Cherry, Head of Advocacy

Australian Resources & Energy Employer Association (via teleconference)

- Mr Tom Reid, Head of Policy & Public Affairs

Australian Public Transport Industrial Association and Bus Industry Confederation (via teleconference)

- Mr Ian MacDonald, National IR Manager

The Parenthood (via teleconference)

- Ms Georgie Dent, Executive Director

Per Capita Australia

- Ms Emma Dawson, Executive Director
- Mr Shirley Jackson, Director, Centre for New Industry
- Ms Sarah McKenzie, Research Associate

HVAC Manufacturing and Installation Association

- Mr Mimmo Scavera, President

Australian Retailers Association (via teleconference)

- Mr Paul Zahra, Chief Executive Officer
- Mr Nick Tindley, Executive Manager - HR Consulting & Advisory Services

Transport Workers Union (via teleconference)

- Mr Michael Kaine, National Secretary

Australian Road Transport Industrial Organisation

- Mr Peter Anderson, National Secretary

Tuesday, 15 November 2022

Stamford Plaza, Melbourne
Buckingham 1 Room
Melbourne

Australian Institute of Employment Rights

- Mr James Fleming, Executive Director
- Mr Mark Perica AM, Vice President

Minerals Council of Australia

- Ms Tania Constable, Chief Executive Officer
- Mr Harry Theophanous, Manager, Workplace Relations
- Mr Graeme Watson, Consultant

Australian Council of Trade Unions affiliates and workers

- Mr Paul Jeffares
- Ms Annie Butler, Federal Secretary
- Mr Ben Redford, Director
- Ms Emeline Gaske, Assistant National Secretary
- Ms Sinead Francis-Coen, Workplace Delegate
- Ms Sam Read, Member
- Mrs Anusha Govindapola, Member organiser, United Workers

Australian Chamber of Commerce and Industry

- Mr Scott Barklamb, Director, Workplace Relations
- Mr David Alexander, Chief Policy and Advocacy
- Jessica Tinsley, Deputy Director, Workplace Relations

Migrant Workers Centre

- Mr Matt Kunkel, Chief Executive Officer

Migrant Justice Institute

- Ms Catherine Hemingway, Legal Director

Clubs Australia

- Mr Simon Sawday, Executive Manager, Policy and Government
- Ms Joanne Ede, Executive Director

Australian Hotels Association

- Mr Stephen Ferguson, National CEO

- Mrs Sarah Swan, Employment Relations Manager
- Ms Melissa Butters, Senior Employment Relations Advisor
- Mr Sean D'Almada-Remedios, National Director, Legal and Industrial Affairs

Ai Group

- Mr Brent Ferguson, Head of National Workplace Relations Policy
- Nicola Street, Director, Workplace Relations Policy, Diversity, Equity and Inclusion

Tuesday, 22 November 2022

Committee room 2S3
Parliament House
Canberra

Department of Employment and Workplace Relations

- Ms Jody Anderson, First Assistant Secretary, Safety and Industry Policy Division
- Ms Sharon Huender, Acting First Assistant Secretary, Employment Conditions Division
- Ms Anne Sheehan, First Assistant Secretary/Chief Counsel, Workplace Relations Legal Division
- Mr Adrian Breen, Assistant Secretary/Senior Executive Lawyer, Safety, Compensation and Institutions Branch
- Ms Sarah Godden, Assistant Secretary/Senior Executive Lawyer, Bargaining and Coverage Branch
- Mr Stephen Still, Assistant Secretary/Senior Executive Lawyer, Employment Standards Branch
- Ms Jennifer Wettinger, Assistant Secretary, Economics and International Labour Branch
- Ms Alex Mathews, First Assistant Secretary, Employee Entitlement Safeguards and Policy Division
- Ms Danica Yanchenko, Assistant Secretary, Workplace Compliance and Enforcement Policy Branch

Fair Work Commission

- Mr Murray Furlong, General Manager
- Ms Joelle Leggett, Executive Director, Tribunal Support Branch
- Mr Jack Lambalk, Executive Director, Enabling Services Branch (via videoconference)
- Ms Katherine Scarlett, Director, Legal Services (via videoconference)

Appendix 3
Hearings into industrial relations-related bills

Hearings by the Senate Education and Employment Committees into industrial relations-related bills since the commencement of the *Fair Work Act 2009*

Inquiry (ordered by reporting date)	No. of hearings
47th Parliament (2022–Present)	
Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 [Provisions]	5
Fair Work Amendment (Equal Pay for Equal Work) Bill 2022	1
Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022	1
46th Parliament (2019–2022)	
Sex Discrimination and Fair Work Amendment (Respect at Work) Amendment Bill 2021	2
Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020	3
Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019	5*
Fair Work Amendment (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019	5*
45th Parliament (2016–2019)	
Fair Work Amendment (Right to Request Casual Conversion) Bill 2019 [Provisions]	1
Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018 [Provisions]	1
Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017	1
Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 [Provisions]	1
Fair Work Amendment (Pay Protection) Bill 2017	1
Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017 [Provisions]	2
Fair Work Amendment (Corrupting Benefits) Bill 2017 [Provisions]	2

Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 [Provisions]	2
Building and Construction Industry (Improving Productivity) Amendment Bill 2017	1
Fair Work Amendment (Gender Pay Gap) Bill 2015**	1
Building and Construction Industry (Improving Productivity) Bill 2013 [Provisions] Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [Provisions]	1
Fair Work (Registered Organisations) Amendment Bill 2014 [Provisions]	1
Fair Work Amendment (Respect for Emergency Services Volunteers) Bill 2016 [Provisions]	2
44th Parliament (2013–2016)	
Fair Work Amendment (Protecting Australian Workers) Bill 2016	0
Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2], Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No. 2]	1
Fair Work Amendment (Remaining 2014 Measures) Bill 2015	0
Fair Work (Registered Organisations) Amendment Bill 2014 [No. 2]	0
Construction Industry Amendment (Protecting Witnesses) Bill 2015	0
Fair Work Amendment (Bargaining Processes) Bill 2014	1
Fair Entitlements Guarantee Amendment Bill 2014	1
Fair Work Amendment Bill 2014	1
Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013	1
Fair Work (Registered Organisations) Amendment Bill 2013***	2
43rd Parliament (2010–2013)	
Fair Work Amendment Bill 2013	1
Fair Work Amendment (Small Business - Penalty Rates Exemption) Bill 2012	1
Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2012	0

Fair Work Amendment Bill 2012	1
Fair Work (Registered Organisations) Amendment Bill 2012 [Provisions]	1
Equal Opportunity for Women in the Workplace Amendment Bill 2012	1
Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011 [Provisions]	1
Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011	1

* Please note that these were separate inquiries conducted concurrently. None of these hearings were full-day hearings.

** Please note that this inquiry lapsed at the dissolution of the Senate on 9 May 2016 and was re-referred in the 45th Parliament.

*** Please note that this includes hearings held by both the legislation and references committees for the respective inquiries into this bill.