Ai GROUP SUBMISSION

Review of the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022

2 DECMBER 2024

CONTENTS

ACRONYMS AND ABBREVIATIONS

ABCC	Australian Building and Construction Commission
ABS	Australian Bureau of Statistics
ACT	Australian Capital Territory
AHRC	Australian Human Rights Commission
Ai Group	Australian Industry Group
C&G	Construction and General (Division of the CFMEU)
CFMEU	Construction, Forestry and Maritime Employees Union (note acronym may have previously applied to a different constitution of the union)
CL Act	Fair Work Legislation Amendment (Closing Loopholes) Act 2023 (No. 120, 2023)
CL2 Act	Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024 (No. 2, 2024)
DEWR	Department of Employment and Workplace Relations
ERO	Equal Remuneration Order
EU	European Union
EM	Explanatory Memorandum
FCFCOA	Federal Circuit and Family Court of Australia
FDV	Family and Domestic Violence
FDV Leave	Family and Domestic Violence Leave
FW Act	Fair Work Act 2009 (Cth)
FWC	Fair Work Commission
FWO	Fair Work Ombudsman / Office of the Fair Work Ombudsman
HSR	Health and Safety Representative
IFA	Individual Flexibility Agreement
NLRA	National Labour Relations Act (US)

NLRB	National Labour Relations Board (US)
Review	Review of the Secure Jobs, Better Pay Act (unless another Review is identified)
ROs	Registered Organisations
ROs Act	Fair Work (Registered Organisations) Act 2009
ROC	Registered Organisations Commission
SJBP Act	Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022
SJBP Bill	Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, prior to its passage, assent and commencement
SMEs	Small and Medium-Sized Enterprises
UK	United Kingdom
UPL	Unpaid Parental Leave
WGEA	Workplace Gender Equality Agency
WHS	Work Health and Safety

PART A – INTRODUCTION

1. The Australian Industry Group (**Ai Group**) appreciates the opportunity to contribute to the review of the amendments contained in the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (**SJBP Act**), and Part 16A of the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (**CL Act**) which deals with right of entry to assist health and safety representatives (**HSRs**).

2. These amendments have ushered in a radical reshaping of elements of Australia's workplace relations system. In various respects they delivered on long standing desires of the union movement but were staunchly opposed by industry. Many elements of the changes remain of deep concern to employers.

3. On any reasonable assessment the changes also far exceeded the parameters of the workplace relations policy agenda that the Government took to the last election.

4. The Review is undertaken under s.4 of the (**SJBP Act**) and s.4A of the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (**CL Act**).[1]

5. Ai Group was heavily engaged with the process leading to the SJBP Act. We accordingly attach the following:

   - Submission to the Senate Education and Employment Legislation Committee Inquiry into the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (**Attachment B**);
   - Ai Group Response to Questions on Notice – Inquiry into the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (**Attachment C**).

   Many of the concerns raised about the SJBP Bill in such material remain salient considerations for this Review in the context of the final form of the legislation.

6. The key review parameters pertaining to the two acts are essentially the same. They relevantly provide:

   > (2) *Without limiting the matters that may be considered when conducting the review, the review must:*
   >
   > *(a) consider whether the operation of the amendments made by that Part is appropriate and effective; and*

[1] All legislative references / links are to the FW Act unless otherwise identified

(b) identify any unintended consequences of the amendments made by that Part; and

(c) consider whether amendments of the Fair Work Act 2009, or any other legislation, are necessary to:

(i) improve the operation of the amendments made by that Part; or

(ii) rectify any unintended consequences identified under paragraph (b).

7. The parameters governing the Review are clearly wide ranging. This is important. A thorough assessment of the changes is crucial, given the hurried and chaotic manner in which many of the radical changes were pushed through Parliament, with notoriously inadequate consultation and a near total absence of any compelling case for the change being made or industry support.

8. It must be acknowledged that the Review is being conducted only shortly after many of the new statutory provisions have commenced.

9. This timing of the Review is important as it will provide an appropriately prompt opportunity to assess the relevant amendments given the significance of the changes introduced. It does however mean that many of the difficulties that the amendments will undoubtedly cause have not yet had time to crystalise, much less be observed.

10. It is trite to observe that the impact of major changes to our workplace relations system will take time to be fully felt. As a result, many of the submissions that parties will advance in the Review must, by necessity, be somewhat speculative. This does not however mean that the Reviewers should refrain from reaching logically sustainable conclusions about the operation and merit of the relevant changes.

11. This submission provides detailed analysis of the key elements of the relevant legislative amendments and seeks to identify amendments that should be recommended. Sensible changes need to be made to many elements of the regime ushered through the relevant amendments in order to restore a degree of balance to the system and mitigate obvious problems that will evolve over time.

Structure of this submission

12. This submission is organised into three parts grouping together related amendments from a Bill that encompassed more than 30 separate Parts (the SJBP Act), along with the right of entry (ROE) amendments in Part 16A of the CL Act.

- Part A provides an introduction and outlines the structure of the Ai Group submission.

- Part B examines the amendments directed to bargaining and agreement making in Parts 12 to 23A of the SJBP Act.[2]
- Part C examines other amendments in the SJBP Act, not relating to bargaining, agreement making, agreement approval etc (Parts 1 to 12, and 24 to 28 of the SJBP Act). This includes, at the end of the submission, addressing:
    - Changes relating to registered organisations and the *Fair Work (Registered Organisations) Act 2009* (**ROs Act**) through Parts 1 and 2 of the SJBP Act.
    - Amendments relating to the building and construction industry, specifically the amendments in Parts 3, 23A and 25A of the SJBP Act.

13. Attachment A sets out the commencement of the various amendments in the SJBP Act.

14. Additional attachments contain reference information for the Reviewers referred to in this document:

- Attachment B (Submission to the Senate Education and employment Legislation Committee Inquiry into the SJBP Bill)
- Attachment C (AI Group response to questions on notice – Inquiry into SJBP Bill);
- Attachment D (Letter to DEWR); and
- Attachment E (Submission – Ai Group – Application for a Supported Bargaining Authorisation – Disability Services Industry – 15 March 2024).

[2] The amendments are technically contained in separate Parts of Schedule 1 of the amending Act, however for brevity we will refer to them as Parts of the SJBP Act.

PART B - BARGAINING AMENDMENTS

B.1 TERMINATION OF ENTERPRISE AGREEMENTS AFTER NOMINAL EXPIRY DATE

Summary of the amendments

15. The SJBP Act amendments have severely and unfairly limited the circumstances in which an employer can apply under s.225 of the FW Act to have an enterprise agreement terminated after its nominal expiry date. The FWC can only terminate an enterprise agreement under s.225 if it is satisfied that:

    - the continued operation of the enterprise agreement would be unfair for the employees covered by the agreement (s.226(1)(a));
    - the agreement does not, and is not likely to, cover any employees (s.226(1)(b)); or
    - all of the following apply (s.226(1)(c)):
        - The continued operation of the agreement would pose a significant threat to the viability of the business;
        - The termination of the agreement would be likely to reduce the potential for terminations of employees' employment due to redundancy or the employer's insolvency or bankruptcy; and
        - The employer has given the FWC a 'guarantee of termination entitlements', if the agreement contains termination entitlements for employees.

16. Additionally, the FWC must only terminate an enterprise agreement if it is satisfied it is appropriate in all the circumstances to do so (s.226(1A)).

Analysis

17. It can be seen from the following information extracted from the FWC's annual reports that the number of applications to terminate enterprise agreements under s.225 of the FW Act peaked in 2017/18 and has been falling ever since. The decline has accelerated since the SJBP Act amendments came into operation:

Applications under section 225 of the FW Act

Year	*Number of applications*
2015-16	311
2016-17	303
2017-18	388
2018-19	263
2019-20	323
2020-21	270
2021-22	236
2022-23	195
2023-24	136

18. Most s.225 applications relate to circumstances where there are no longer any employees covered by the enterprise agreement (s.226(1)(b)). The next most frequent ground for termination is that the continued operation of the agreement would be unfair to employees (s 226(1)(a)).

19. To highlight this, some relevant details of FWC s.225 decisions between 1 September 2024 and 15 November 2024 are set out in the following table. There were 13 FWC s.225 decisions in this period:

- 8 decisions were made to terminate agreements that did not cover any employees;
- 3 decisions were made to terminate agreements because it would be unfair on the employees to allow the agreements to continue to operate;
- 1 decision was made to terminate an agreement that posed a significant threat to the viability of the business (NB. The SDA did not oppose the termination);
- 1 application was rejected because the FWC was not satisfied that the agreement posed a significant threat to the viability of the business (NB. The AEU and the HSU opposed the termination);
- 12 of the 13 applications were not opposed by unions;
- The 1 application that was opposed by unions was rejected by the FWC and the agreement was not terminated.

FWC s.225 decisions – 1 September 2024 to 15 November 2023

Decision ref.	*Date of decision*	*Was agreement terminated*	*Any employees covered by the agreement?*	*Ground/s on which application was made*	*Did any union oppose the application?*
[2024] FWC 3161	15 November 2024	Yes	No	s 226(1)(b) – no employees	No
[2024] FWCA 3936	12 November 2024	Yes	No	s 226(1)(b) – no employees	No
[2024] FWCA 3546	11 November 2024	Yes	Yes	s 226(1)(c) – significant threat to the viability of the business	No
[2024] FWCA 3881	7 November 2024	Yes	No	s 226(1)(b) – no employees	No
[2024] FWCA 3701	24 October 2024	Yes	Yes	s 226(1)(a) – unfairness to employees	No
[2024] FWCFB 404	22 October 2024	**No**	Yes	s 226(1)(c) – significant threat to the viability of the business	**Yes**
[2024] FWCA 3595	14 October 2024	Yes	No	s 226(1)(b) – no employees	No
[2024] FWCA 3554	9 October 2024	Yes	No	s 226(1)(b) – no employees	No
[2024] FWCA 3520	7 October 2024	Yes	Yes	s 226(1)(a) – unfairness to employees	No
[2024]FWCA 3427	1 October 2024	Yes	No	s 226(1)(b) – no employees	No
[2024] FWCA 3371	25 September 2024	Yes	Yes	s 226(1)(a) – unfairness to employees	No
[2024] FWCA 3305	18 September 2024	Yes	No	s 226(1)(b) – no employees	No
[2024] FWCA 3284	17 September 2024	Yes	No	s 226(1)(b) – no employees	No

20. The SJBP Act amendments to s.225 of the FW Act were based on a flawed and incorrect assertion that many employers were applying to terminate expired enterprise agreements, or threatening to make such applications, as a bargaining tactic.

21. Prior to the SJBP Act amendments, the FWC's own analysis of decisions made to terminate expired enterprise agreements highlighted that less than three per cent of the applications were opposed by any party.[3] This tiny three per cent figure included applications made by unions that were opposed by the employer and applications made by an employer that were opposed by a union.

22. There have been only a handful of cases, since the FW Act was implemented in 2009 in which an enterprise agreement has been terminated by the FWC in response to an employer application that was vigorously contested by a union (i.e. the *Aurizon*, *Griffin Coal*, *Peabody*, *AGL* and *Murdoch University* cases). In each case, the application was made by the employer after a lengthy period of bargaining and the FWC was convinced that it would not be contrary to the public interest to terminate the expired agreement. Compelling circumstances were present in each case. For example, in a few of the cases, the enterprise agreement gave the employer no ability to implement redundancies other than for volunteers. Also, in most of the cases, the employer decided not to reduce the pay of the employees covered by the agreement that was terminated. The key issue was typically the employer's need for more flexibility to be competitive in the market, not cost reductions.

23. The unfairness associated with s.225 is exacerbated by the Closing Loopholes amendment to the intractable bargaining provisions to insert s 270A. (see section B.7 of this submission).

24. Section 225 provides almost no capacity for an employer to discontinue terms and conditions in an enterprise agreement that were entered into at a different time and that are no longer sustainable given changes to the operating environment for the relevant business. In addition, appropriate terms cannot be achieved via the intractable bargaining provisions, because of s. 270A.

25. The combined operation of sections 225 and 270A give unions an incentive to not reach a new enterprise agreement in circumstances where an expired enterprise agreement includes very generous terms. Unions can wait until the nine months' minimum bargaining period in s.235 has elapsed, safe in the knowledge that any intractable bargaining workplace determination cannot reduce the generosity and restrictions of any existing enterprise agreement term. Employers already commonly perceive that this is an approach increasingly being adopted by unions. This is grossly unfair to businesses and ultimately to employees. It also has adverse

[3] As cited in a July 2017 FWC submission to an inquiry by the Senate Education and Employment References Committee into Penalty Rates (Submission 14, Paragraph 76).

flow-on effects on consumers and others in the community, due to the continuation of unproductive enterprise agreement terms.

26. When s.225 was implemented, it was envisaged that employers who faced protracted or unproductive bargaining could seek an arbitrated outcome in the absence of capacity to seek a termination of the agreement. The implementation of s.270A means that statutory scheme is not operating as contemplated when the SJBP Act amendments were passed by Parliament. The change has, in effect, undermined the integrity of this suite of SJBP Act changes. This provides a powerful justification for revisiting the balance that was originally struck in s.225.

Ai Group's position and recommendations

27. The current grounds for termination of an enterprise agreement under s.225 are unfair to employers and unbalanced. They provide almost no capacity for an employer to apply to the FWC to have an enterprise agreement terminated, even where the agreement was made in very different trading circumstances to those that currently face the business. The "*significant threat to the viability of the business*" test is too onerous and results in unfairness to employers.

28. The FWC can terminate an enterprise agreement if it is satisfied that the continued operation of the agreement would be unfair to the employees covered by the agreement (s.226(1)(a)), but it does not have a similar power to address circumstances where the continued operation of an agreement would be unfair to the employer covered by the agreement.

29. The FW Act should be fair to <u>both</u> employers and employees.

30. The ability to have an enterprise agreement terminated on the grounds referred to in s.226(1)(c) are extremely and unduly narrow.

31. To achieve more balance and fairness we recommend that s.226(1)(a) is amended to add the underlined wording below:

> *(a) the FWC is satisfied that the continued operation of the agreement would be unfair for the employees <u>or employer</u> covered by the agreement; or*

32. The above amendment would still result in a high bar for the termination of an agreement under s.225. It would not affect the existing requirements that, when considering an application under s.225, the FWC must:

- Terminate the agreement only if it is satisfied that it is appropriate to do so;
- Consider the views of the employees, the employer and relevant union/s;

- Have regard to whether bargaining for a new enterprise agreement is occurring and whether the termination of the agreement would adversely affect the bargaining position of the employees.

B.2 SUNSETTING OF 'ZOMBIE' AGREEMENTS ETC

Summary of the amendments

33. The SJBP Act amendments have led to the sunsetting of agreement-based transitional instruments, Division 2B State employment agreements and enterprise agreements made during the 'bridging period' (from 1 July 2009 to 31 December 2009). All of these instruments were made prior to 1 January 2010.

34. The instruments ceased to operate on 6 December 2023 unless the instrument was terminated or replaced with a new enterprise agreement, or the period of operation of the instrument was extended by the FWC.

Analysis

35. Most 'zombie' agreements have now ceased to operate. Those that remain have only been extended by the FWC for a limited period (on application by an employer or a union), to allow the parties time to complete their negotiations for a new enterprise agreement and have the agreement approved. This is highlighted by the following recent decisions (amongst various others):

Applications to extend the default period for agreement-based transitional instruments

Decision ref.	*Date of Decision*	*Employer*	*Instrument extended until*	*Reason for extension*
[2024] FWCFB 424	8 November 2024	Justice Connect	14 November 2024	A new agreement comes into operation on 14 November 2024.
[2024] FWCFB 423	8 November 2024	Able Australia	6 June 2025	To allow the union and employer time to complete their negotiations for a new agreement.

Ai Group's position

36. The termination of zombie agreements has created difficulty for some employers. We nonetheless acknowledge that the SJBP amendments relating to the sunsetting of 'zombie' agreements are operating as envisaged and no further amendments to the relevant legislative provisions are proposed.

B.3 ENTERPRISE AGREEMENT APPROVAL

Summary of the proposed amendments

Principles-based approach

37. The SJBP Act amendments somewhat simplified the enterprise agreement approval requirements by implementing a principles-based approach.

38. The amendments removed the following previous prescriptive approval requirements:

- For proposed multi-enterprise agreements - the requirement for an employer to provide a notice of employee representational rights at least 21 days before requesting employees to vote (s.173);
- The requirement for an employer to take all reasonable steps to provide employees with access to the proposed enterprise agreement and any material incorporated by reference in the agreement, during the seven day 'access' period ending immediately before the start of the voting process (s.180(2) – (3));
- The requirement for an employer to take all reasonable steps to notify employees, by the start of the 'access period', of the time, place and method for the vote (s.180(4)).

39. The second and third of the above requirements were replaced with:

- A 'statement of principles' published by the FWC to give guidance to employers about how they can ensure the proposed enterprise agreement is genuinely agreed to by the employees (s.188B); and
- Modifications to the requirement for the FWC to be satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement, to reflect the principles-based approach.

40. An employer's adherence to the guidance in the statement of principles must be taken into account by the FWC when assessing applications to approve enterprise agreements (s.188(1)).

Sufficient interest and sufficiently representative

41. The SJBP Act amendments also implemented a new approval requirement, as part of the genuine agreement requirements, that the FWC must be satisfied that the employees requested to vote on the agreement: (s.188(2))

    - Have a sufficient interest in the terms of the agreement; and
    - Are sufficiently representative, having regard to the employees the agreement is expressed to cover.

Agreement of unions before proposed multi-enterprise agreements are voted on by employees

42. In addition, the SJBP Act amendments introduced a prohibition on employers requesting that employees approve an enterprise agreement by voting on it, unless each union bargaining representative has provided the employer with written agreement to the making of the request, or the FWC has made a voting request order permitting the employer to make the request (ss.180A, 240A and 240B).

Analysis

Principles-based approach

43. The FWC has published a Statement of Principles on Genuine Agreement Making (**Principles**).

44. In Ai Group's experience, the Principles have been worthwhile but are far from a panacea to all of the problems in our bargaining system. Further improvements could, and should, be made. In this respect, the SJBP Act amendments reflect a missed opportunity for more fulsome improvements. The principles-based approach has no doubt resulted in fewer enterprise agreements being rejected by the FWC due to non-compliance with various technical requirements than was previously the case.

45. Unfortunately, one of the biggest problems associated with the enterprise agreement approval process has not been addressed.

46. The original SJBP Bill would have repealed the strict requirement in s.180(5) of the FW Act for an employer to take all reasonable steps to explain the terms of a proposed agreement, and the effect of those terms, to the employees before they vote on the agreement. The original SJBP Bill left this issue to be dealt with through the principles-based approach. However, the SJBP Bill was amended by the Government during the Parliamentary process to leave s.180(5) in the FW Act in place and to include a new s.188(4)(a) which deems that the FWC cannot be satisfied that an agreement has been genuinely agreed to unless the FWC is satisfied that the employer has complied with s.180(5).

47. Some Members of the FWC have interpreted the requirement in s.180(5) to take "*all reasonable steps*" in an extremely onerous and impractical manner, particularly following the judgment of Flick J of the Federal Court of Australia in *CFMEU v One Key Workforce Pty Ltd* [2017] FCA 1266 which quashed a decision of the FWC to approve the *RECS (QLD) Pty Ltd Enterprise Agreement 2015*. Flick J's decision was upheld by the Full Federal Court on appeal (*One Key Workforce Pty Ltd v CFMEU* [2018] FCAFC 77).

48. Unions wishing to oppose the approval of an enterprise agreement made between an employer and its employees, frequently argue that s.180(5) has not been complied with, even if the employer has taken extensive steps to explain the terms of the proposed agreement to the employees.

49. The problems with s.180(5) have not markedly improved since the implementation of the SJBP Act amendments. Unions are still frequently using s.180(5) as a weapon against employers, as can be seen from the recent decision of the FWC in *Application by Seadar Contractors Pty Ltd* [2024] FWCA 2533. The following extract from the decision of Saunders DP highlights typical arguments pursued by unions:

> *[17] The CFMEU submits that the duty imposed on an employer under s.180(5) of the Act is to take all reasonable steps. The intensifying adjective "all" is significant in the statutory phrase must be given work to do. "All" means "the whole of ... the whole number of... the greatest possible". The adjective "reasonable" means "logical and rational" but not "excessive". Therefore, the ordinary meaning of the phrase "all reasonable steps" is, so the CFMEU contends, every step it would have been logical or rational for employer to take in the circumstances.*

50. Even though the union's argument in this case was rejected, and the enterprise agreement was ultimately approved, s.180(5) continues to be a problem. The above case is just one example. There are many other cases where similar arguments have been pursued by unions.

51. The FWC has included a lengthy section about the requirements of s.180(5) in its Principles (paragraphs [8] to [14]) but the utility of this is limited given the prescriptive requirements in the FW Act. Unlike the other sections in the Principles, the section about s.180(5) does not provide any flexibility for an employer to comply in a different manner to the prescribed manner.

Sufficient interest and sufficiently representative

52. So far, major problems have not arisen regarding the requirement for the FWC to be satisfied that the employees requested to vote on an agreement have a sufficient interest in the terms of the agreement and are sufficiently representative.

53. However, the new requirement has only been in operation for a short period.

54. In *AMWU v Sublime Infrastructure* [2024] FWCFB 432, a Full Bench of the FWC considered the new requirement in some detail and concluded that the requirement had not been met in the case. The Full Bench relevantly stated:

> *The only inference to be drawn from the course of events set out above is that the bargaining was undertaken so as to deliberately confine voting on the Agreement to two employees in circumstances in which it was known and intended that the Agreement would apply to a wider group of employees then employed by Sublime Air.*

55. Even though the circumstances surrounding the above case were unusual, there is the potential for enterprise agreement approval problems to arise where an enterprise agreement is made with a small group of current employees in circumstances where a much larger group will be employed at a later stage.

56. These circumstances are common in the construction industry because work on a project typically ramps-up over time. Also, the employees who are employed at the early stages of a construction project (e.g. employees engaged in earthworks) are not representative of all the types of employees who would be employed at later stages (e.g. employees involved in the fit-out). This should not be a barrier to the approval of an agreement. The requirement that an agreement apply to a 'fairly chosen group' protects employees against agreements covering an unfair cohort of employees.

57. The new approval requirement gives unions yet another weapon to use against employers when they wish to oppose the approval of an enterprise agreement.

Agreement of unions before proposed multi-enterprise agreements are voted on by employees

58. The prohibition on employers requesting that their employees vote to approve an enterprise agreement, unless each union bargaining representative has agreed in writing, or the FWC has made a voting request order, is not appropriate.

Ai Group's position and recommendations

59. For the reasons outlined above, we make the following recommendations:

- Sections 180(5) and 188(4A) of the FW Act should be repealed, leaving the requirement for an employer to explain the terms of an agreement to be addressed through the principles-based approach;
- Section 188(2), regarding the sufficient interest and sufficiently representative requirements, should be repealed; and

- Sections 180A, 240A and 240B, which impose unreasonable restrictions on employee votes to approve multi-enterprise agreements, should be repealed.

B.4 INITIATING BARGAINING

Summary of the proposed amendments

60. The SJBP Act amendments varied s.173 in the FW Act to remove the former requirement that unions must obtain a majority support determination to initiate bargaining for a single enterprise agreement in circumstances where the employer does not initiate or agree to bargain, and where:

    - The proposed agreement replaces an earlier single-enterprise agreement;
    - A single interest employer authorisation did not cease to be in operation because of the making of the earlier agreement;
    - No more than five years have passed since the nominal expiry date of the earlier agreement; and
    - The proposed agreement will cover the same, or substantially the same, group of employees as the earlier agreement.

61. In the above circumstances, a union can initiate bargaining simply by making a written request to the employer.

Analysis

62. Under the bargaining laws that existed between 1993 and 30 June 2009, bargaining was voluntary. Employees had the right to take protected industrial action in pursuit of an enterprise agreement and unions had the right to organise such industrial action. However, the employer was entitled to refuse to bargain. This voluntary bargaining system operated in conjunction with the award system which provided a fair and relevant set of wages and conditions for employers and employees who were not covered by an enterprise agreement.

63. When a mandatory bargaining system was introduced through the FW Act, the Labor Government implemented a requirement that the majority of employees must support the negotiation of an enterprise agreement if the employer does not initiate or agree to bargain. This was designed to protect the democratic rights of employees who may not wish to bargain and also to balance the interests of employees, unions and employers.

64. The 2012 Fair Work Act Review considered whether the provisions of the FW Act concerning majority support determinations were working effectively. The following extract from the final report is relevant. It highlights the view of the Review Panel (Professor Ron McCallum AO, the

Hon Michael Moore and Dr John Edwards) that majority support determinations are a significant feature of the bargaining regime and that the evidence firmly suggested that the provisions were working effectively:

> *6.3.2 Majority support determinations*
>
> *Prior to the FW Act, there was no obligation on employers to bargain collectively, even if such an arrangement was fully supported by employees. Majority support determinations require an employer to bargain when a majority of employees wish to do so. They are a significant feature of the bargaining regime.*
>
> *- - -*
>
> *In our view, the above evidence firmly suggests that the majority support determination provisions are successfully addressing employer reluctance to bargain in circumstances where a majority of employees wish to do so.*

65. Majority support determinations are intended to protect the interests of employees and employers by not requiring an employer to commence bargaining with a union unless it has been established that the majority of the employees who would be covered by the proposed agreement, wish to bargain.

66. The process is not onerous for unions. The FWC usually accepts petitions circulated by unions as a means of determining majority support and rarely orders a secret ballot.

67. Enterprise agreements can, and often do, have a nominal term of four years. When this four year period is added to the five year period in s.173(2A), it can be seen that a union is able to force an employer and its employees to bargain for up to nine years from when the previous enterprise agreement came into operation, regardless of whether the majority of employees wish to bargain.

68. A lot can change in a nine year period. The circumstances of the employer and its employees may be totally different. The SJBP Act amendments are undemocratic and unfair to both employees and employers.

Ai Group's position and recommendations

69. In circumstances where the employer does not agree to bargain, the relevant union/s should be required to obtain a majority support determination.

70. The SJBP amendments relating to the initiation of bargaining (i.e. ss. 173(2)(aa), 173(2A) and 230(2)(aa)) should be deleted from the FW Act.

71. If Ai Group's proposed approach is not supported by the Review, at the very least the five year period in s. 173(2A)(c) should be reduced to three years.

B.5 BETTER OFF OVERALL TEST

Summary of the proposed amendments

72. The SJBP Act amendments changed the Better Off Overall Test (**BOOT**) for enterprise agreements, in the following respects:

- Removal of the concept of a 'prospective award covered employee' and its replacement with the concept of a 'reasonably foreseeable employee' (s. 193(1), (3) and (5));
- The FWC must only have regard to patterns of work, kinds of work or types of employment if they are reasonably foreseeable at the test time. In considering what is 'reasonably foreseeable', the FWC must have regard to the nature of the enterprise/s to which the agreement relates (s. 193A(6) and (6A));
- Clarification that the BOOT must be applied as a global assessment, not on a line-by-line basis (s. 193A(2));
- The FWC must consider any views expressed by the employer, employees and bargaining representatives (s. 193A(3)); and
- The FWC must give primary consideration to any common views expressed by the employer and union bargaining representatives (s.193A(4)).

73. The SJBP Act amendments also:

- Gave the FWC a new power to amend an enterprise agreement to ensure the agreement passes the BOOT (ss.191A and 191B); and
- Introduced a BOOT reconsideration process which allows employers, employees or their representatives to apply to have the BOOT reconsidered by the FWC if there has been a change in patterns of work, kinds of work or types of employment engaged in, to which the FWC did not have regard when the BOOT was originally applied. If the FWC has a concern that the enterprise agreement does not pass the BOOT, the FWC may accept an undertaking from the employer which satisfies the concern or may amend the agreement to address the concern. (ss.227A – 227E).

Analysis

Reasonably foreseeable patterns of work, kinds of work and types of work

74. The changes made to the BOOT have addressed some of the problems that were occurring previously with the FWC considering, when assessing the BOOT, patterns of work, kinds of

work and types of employment that the relevant employer would not realistically engage in during the life of the enterprise agreement.

75. One infamous example is the FWC decision ([2019] FWCA 6900) regarding the *Officeworks Store Operations Agreement 2019*. The FWC required Officeworks to give undertakings about work in cool rooms and the serving of alcohol, even though the company's employees did not carry out these types of work and it was fanciful to consider they may do so during the life of the agreement.

76. In various decisions handed down since the SJBP amendments were implemented, FWC members have made specific findings that particular kinds of work or patterns of work were, or were not, reasonably foreseeable for the purposes of the BOOT:

- In *Application Buderim Kindergarten & Preschool Association Inc* [2023] FWCA 3776, Dobson DP made the following finding:

  [3]*.....I am consequently satisfied that per s.193A(6A) of the Act long day care services are not reasonably foreseeable for the purposes of s.193A(6) of the Act and the better off overall test. I am satisfied that it is reasonably foreseeable that the nature of the Applicant's organisation is that of a Sessional Kindergarten.*

- In *Application by Naismith Group of Companies Pty Ltd* [2024] FWC 1248, Coleman DP made the following finding and, as a consequence decided that the enterprise agreement did not pass the BOOT:

  [8] *In the present case, having regard to the nature of the enterprise to which the Agreement relates, I consider that it is reasonably foreseeable that under the Agreement employees could commonly work beyond 38 hours a week, and between 8 and 10 hours a day, during which time they would be paid overtime under the Distribution Award but not under the Agreement. I have had regard to the earnings that employees would receive at other times and the other benefits under the Agreement. However, I am not satisfied that each award covered employee and each reasonably foreseeable employee for the Agreement would be better off overall under the Agreement.*

Application of the BOOT

77. Ai Group is concerned that it appears the BOOT is still too often being applied by the FWC in a largely mathematical or with far too narrow a focus on a particular clause, rather than the relevant FWC Member reaching a more practical view on whether or not the proposed enterprise agreement results in the employees being better off overall in a genuinely holistic sense.

78. At the very least, the extent to which employers are still commonly being required to give undertakings for BOOT purposes, even in circumstances where the relevant agreement is very similar to one or more previous agreements that applied to the same group of employees and the agreement has been negotiated with one or more unions, is a continuing cause for concern.

79. A majority of enterprise agreements are also still being approved with undertakings, despite the SJBP Act amendments.

80. While many undertakings relate to potential or actual NES inconsistency issues, many also relate to BOOT issues.

81. The FWC's annual reports have not included the proportion of enterprise agreements approved with and without undertakings since the FWC's 2018-19 annual report. This annual report identified that, of the s.186 applications that were approved in 2018-19, **66 per cent** were approved with undertaking/s.

82. From 1 July 2019, the FWC began including the proportion of enterprise agreements approved with and without undertakings in its quarterly reports to the Minister.

83. The FWC is still requiring that undertakings are given for the majority of enterprise agreements that are approved, as can be seen from the following statistics extracted from the FWC's quarterly reports to the Minister, for the quarterly periods between 1 July 2019 and 31 March 2024. The latest quarterly report covers the period from 1 January 2024 to 31 March 2024.

FWC quarterly reports to the Minister – Enterprise agreements approved under s 186, with and without undertakings

Reporting period	*No of EAs approved without undertaking*	*No of EAs approved with undertakings*	*EAs approved with undertakings - %*
1 Jan – 31 Mar 2024	399	443	53%
1 Oct – 31 Dec 2023	517	613	54%
1 Jul – 30 Sep 2023	471	620	57%
1 Apr – 30 Jun 2023	490	454	48%
1 Jan – 31 Mar 2023	489	525	52%
1 Oct – 31 Dec 2022	612	540	47%
1 Jul – 30 Sep 2022	702	572	45%
1 Apr – 30 Jun 2021	628	438	41%
1 Jan – 31 Mar 2021	497	387	44%

Reporting period	*No of EAs approved without undertaking*	*No of EAs approved with undertakings*	*EAs approved with undertakings - %*
1 Oct – 31 Dec 2020	444	405	48%
1 Jul – 30 Sep 2020	360	356	50%
1 Apr – 30 Jun 2020	360	402	53%
1 Jan – 31 Mar 2020	440	522	54%
1 Oct – 31 Dec 2019	442	681	61%
1 Jul – 30 Sep 2019	447	805	64%

84. When the FWC requires an employer to give undertakings, there can be a number of adverse effects:

- The approval of the enterprise agreement is typically delayed;
- The effect of an undertaking is an alteration in the terms of the enterprise agreement reached between the employer and its employees; and
- An FWC requirement to give an undertaking can sometimes be misunderstood by the employees covered by the enterprise agreement as an indication that the employer has not complied with the bargaining laws.

85. Therefore, undertakings should only be required by the FWC where necessary. This is often not currently the case.

86. Also, there is a great deal of inconsistency with the undertakings that different FWC members are accepting.

87. The FWC's 2023-24 annual report identifies that in the reporting year, 95% of agreements that did not require undertakings were approved within 32 days. This performance is commendable but needs to be considered in the context that (in the reporting year) the majority of enterprise agreements were not approved without undertakings.

FWC power to amend an enterprise agreement to ensure the agreement passes the BOOT

88. The power for the FWC to amend an enterprise agreement so that it substantively differs from the terms agreed to by the employer has an obvious potential to visit an unfairness upon employers, if it is not wielded appropriately. An employer should never be subject to obligations under an agreement that they have not agreed to. The inclusion of the new provision was argued to provide a means for the FWC to assist parties as an alternative to relying upon an employer preparing an undertaking.

89. Anecdotally, it appears that most FWC members are continuing to rely upon undertakings rather than the utilising the new provisions. The use of the FWC's new power is a matter that should be closely monitored.

90. A search on the FWC's website identified the following relevant decisions where the FWC has exercised its powers under s.191A to amend an enterprise agreement to ensure it passes the BOOT:

    1. *Application by Ecotone Flora Fauna Consultants* [2024] FWCA 2576;
    2. *Application by GH Varley Pty Ltd* [2023] FWCA 3418;
    3. *Application by Horsham Rural City Council* [2023] FWCA 2869;
    4. *Application by Olex Australia Pty Ltd T/A Nexans Australia* [2024] FWCA 3069;
    5. *Application by EnergyAustralia Ecogen Pty Ltd T/A Ecogen Energy* [2024] FWCA 1774; and
    6. *Application by Burger Urge Pty Ltd T/A Burger Urge* [2024] FWCA 1387.

91. It is not clear in any of the above decisions why the relevant FWC member decided to vary the enterprise agreement rather than accepting undertaking/s from the employer. Also, in each of the above cases, it is not clear from either the FWC decision or the published version of the enterprise agreement what specific amendments were made by the FWC member to the enterprise agreement.

92. In some cases, it appears that the employer offered undertakings but for an unknown reason the FWC member decided to vary the enterprise agreement rather than accepting the undertakings.

93. Section 201(4) of the FW Act, as introduced through the SJBP Act amendments, states:

> *Approval decision to note amendments*
>
> *(4) If the FWC specifies an amendment in approving an enterprise agreement under subsection 191A(2), the FWC must note the amendment in its decision to approve the agreement.*

94. It is evident that the FWC is sometimes interpreting s.201(4) as not requiring the FWC to identify any specific amendments made to the enterprise agreement under s.191A in either the approval decision or in the published version of the enterprise agreement. In our view, this is not consistent with the intention of s.201(4).

95. The Revised Explanatory Memorandum for the SJBP Bill relevantly states:

> *773. These provisions are intended to operate similarly to the process for accepting undertakings in existing sections 190–191, while being more direct and reducing delays.*

96. When enterprise agreements are approved with undertakings, the specific undertakings are published with the enterprise agreement. A similar transparent approach should apply to any amendments made under s.191A.

97. The approach that the FWC is currently taking lacks transparency and could lead to unfairness, particularly to employers.

BOOT reconsideration process

98. In numerous enterprise agreement approval decisions, the FWC has noted that, should work patterns change, an application under s.227A to reconsider the BOOT could be made. However, to date, there have been very few s 227A applications.

99. Two applications under s.227A were dealt with by the FWC in *Application by Kintetic (Melbourne) Pty Ltd T/A Kinetic* [2023] FWCA 3966. The applications were dismissed because they were filed before the FWC had approved the relevant enterprise agreement and therefore one of the preconditions in s.227A(2) had not been met.

Ai Group's position and recommendations

100. Ai Group supports the changes that were made to s.193 (Passing the better off overall test) and the introduction of s.193A (Applying the better off overall test) through the SJBP Act amendments. The amendments have overcome some, but not all, of the problems that were occurring with the application of the BOOT by the FWC. The utility of such amendments, or their benefit to employers, should not however be overstated. In some respects, they did little more than clarify what should have been the approach under the previously applicable provisions.

Undertakings

101. To address the potentially excessive use of undertakings, we recommend that the threshold for when the FWC can effectively seek an undertaking should be lifted so that it is only available if the FWC member is satisfied that it is *necessary, rather* than in circumstances where it may have a mere concern that the agreement does not meet the requirements set out in sections 1896 and 187. The FWC's discretion to not accept an undertaking that addresses the relevant deficiency should also be curtailed.

102. This could be achieved by amending s 190, which deals with approval of agreements with undertakings, as follows:

Section 190(1) This section applies if:

(a) an application for the approval of an enterprise agreement has been made under subsection 182(4) or section 185; and

(b) the FWC ~~has a concern~~ is satisfied that the agreement does not meet the requirements set out in sections 186 and 187.

Section 190(2) The FWC must approve the agreement under section 186 if an employer offers an undertaking that addresses ~~meets~~ the concern identified under s.190(1)(b) and the approval of the agreement is not otherwise contrary to section s.190.

103. This would align the approach in s.190(1) with that adopted in s. 191A(2), in that sense that both would be directed at only facilitating changes that are 'necessary'.

FWC power to amend an enterprise agreement to ensure the agreement passes the BOOT

104. To address the lack of transparency that is currently occurring regarding the exercise of the FWC's powers under s.191A, we recommend that s.191A(2) and (4) are amended as follows:

(2) The FWC may approve the agreement under section 186 if the FWC is satisfied that an amendment specified by the FWC is necessary to address the deficiency and that any undertaking offered by the Employer would not address the deficiency.

- - -

Approval decision to note amendments

(4) If the FWC specifies an amendment in approving an enterprise agreement under subsection 191A(2), the FWC must note the amendment in its decision to approve the agreement, or in an attachment to the decision. The decision or attachment must identify:

(a) The enterprise agreement term prior to the amendment; and

(b) The enterprise agreement term after the amendment.

BOOT reconsideration process

105. The problems that the BOOT reconsideration process will create are, of course, yet to be fully demonstrated given their limited period of operation. It is nonetheless axiomatic that the BOOT reconsideration process results in unnecessary uncertainty for employers and employees. It also creates a disincentive to engaging in enterprise bargaining. The lack of justification for the provision is reinforced by the absence of its valid use since commencing operation. Sections 227A-227E should be repealed.

B.6 DEALING WITH ERRORS IN ENTERPRISE AGREEMENTS

Summary

106. The SJBP Act amendments give the FWC the power to vary an enterprise agreement to correct or amend obvious errors, defects or irregularities through a new section (s.218A) that was inserted into the FW Act.

Analysis

107. The SJBP Act amendments address a problem that arose due to the drafting of s.602 (Correcting obvious errors etc. in relation to the FWC's decisions) of the FW Act. Section 602 is a statutory version of the 'slip rule' used by courts to correct errors in court orders. In *Advantaged Care Pty Ltd v Health Services Union* [2021] FWCFB 453, a Full Bench of the FWC held that s.602 does not apply to enterprise agreements.

108. If an error is discovered after an enterprise agreement is lodged for approval but before the agreement is approved (e.g. the wrong version of the agreement was lodged), the FWC can correct this error using its powers under s.586 (Correcting and amending applications and documents etc.). However, if the error is discovered after the enterprise agreement has been approved, s.218A enables the FWC to vary the agreement to correct the error.

109. The FWC's decision in [2023] FWCA 1655 regarding the *BOC Limited Melbourne Operations Centre Collective Agreement 2022* highlights the use of s.218A. In this matter, the version of the enterprise agreement that was lodged with the FWC by the company contained an incorrect appendix. The error was not discovered until after the agreement was approved and had commenced operating. The FWC varied the agreement to include the correct appendix. The two relevant unions did not oppose the application.

Ai Group's position

110. Section 218A is operating effectively and no amendments to this section are required.

B.7 BARGAINING DISPUTES

Summary of the proposed amendments

111. The SJBP amendments give the FWC the power to arbitrate intractable bargaining disputes.

112. At least nine months must have elapsed since the nominal expiry date of the previous enterprise agreement or since the commencement of bargaining, whichever is later. In addition, the FWC must be satisfied that there is no reasonable prospect of agreement being reached.

113. The intractable bargaining provisions apply to single-enterprise agreements and multi-enterprise agreements.

114. A two-step process applies:

- *Step 1*: An employee bargaining representative or employer bargaining representative for a proposed enterprise agreement can apply to the FWC for an intractable bargaining declaration in relation to the agreement (ss.234 - 235A).
- *Step 2*: If the FWC has issued an intractable bargaining declaration (and agreement still has not been reached after any post-declaration negotiating period that the FWC implements), the FWC must make an intractable bargaining workplace determination as quickly as possible to resolve any matters on which agreement has not been reached (ss.269-271).

Analysis

Intractable bargaining declarations – main requirements

115. There are four main requirements for the making of an intractable bargaining declaration:

1. At least nine months has elapsed since the nominal expiry date of the previous enterprise agreement or since the commencement of bargaining, whichever is later;

2. The FWC has dealt with the dispute under s.240 (Application to the FWC for the FWC to deal with a bargaining dispute);

3. There is no reasonable prospect of agreement being reached if the FWC does not make the declaration; and

4. It is reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives for the agreement.

Minimum bargaining period – s.235(5) and (6)

116. Subsection 235(5) states that a nine-month period must have elapsed before the FWC can make an intractable bargaining declaration, commencing from the nominal expiry date of the past enterprise agreement, or from the date that bargaining starts for the new agreement, whichever is later. This is called the 'minimum bargaining period'.

117. Subsection 235(6) deems the nine months to start:

- For a single-enterprise agreement – at the notification time for the proposed agreement;
- For a supported bargaining agreement – on the day that the supported bargaining authorisation came into operation; and
- For a single interest employer agreement – on the day that the single interest employer authorisation came into operation.

No reasonable prospect of agreement being reached – s 235(2)(b)

118. Paragraph 235(2)(b) requires that "*there is no reasonable prospect of agreement being reached if the FWC does not make the declaration*".

119. In *United Firefighters' Union of Australia v Fire Rescue Victoria* [2023] FWCFB 180 (***UFU v FRV***), a Full Bench of the FWC made the following comments about the requirement in s.235(2)(b). The Full Bench emphasised that "*no reasonable prospect"* does not mean *"no prospect"* but rather *"requires an evaluative judgment that it is rationally improbable that an agreement will be reached":* [emphasis added]

> ***[29]*** *Section 235(2)(b) requires the Commission to make an evaluative judgment as to whether there is 'no reasonable prospect of agreement being reached' if an intractable bargaining declaration is not made. 'No reasonable prospect' is obviously not the same as 'no prospect' in that it does not require a 'certain and concluded determination' that an agreement cannot be reached if a declaration is not made but rather, on the ordinary meaning of the words used, requires an evaluative judgment that it is rationally improbable that an agreement will be reached. Paragraph [846] of the Revised Explanatory Memorandum (REM) for the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (SJBP Bill), which explains this provision, is consistent with this approach:*

> … *This does not require the FWC to be satisfied that an agreement could never be reached but rather that the chance of the parties reaching agreement themselves is so unlikely that it could not be considered a reasonable chance. It is unlikely that the FWC would reach such a state of satisfaction unless the parties had been bargaining for an extended period and had exhausted all reasonable efforts to reach agreement, but the provision leaves it up to the FWC to determine, in all the circumstances, whether it is satisfied that there is no reasonable prospect of the parties reaching agreement if the FWC does not make the declaration. …*

Reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives – s.235(2)(c)

120. Section 235(2)(c) requires that "*it is reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives for the agreement*".

121. With regard to the "*reasonable in all the circumstances*" requirement, in *UFU v FRV*, the Full Bench stated: [emphasis added]

> ***[30]*** *Satisfaction in respect of s 235(2)(c) requires the Commission to make a further evaluative judgment, namely that it is reasonable in all the circumstances to make the declaration sought, taking into account the views of the bargaining representatives for the agreement. The 'reasonable in all the circumstances' criterion requires an assessment of what is 'agreeable to reason or sound judgment' in the context of the relevant matters and conditions accompanying the case. The REM for the SJBP Bill gives examples of potentially relevant circumstances as follows:*
>
> > *This would provide scope for the FWC to, for example, consider the dispute in the context of the whole of the relationship of the parties, the history of the bargaining, the conduct of the parties, the prevailing economic conditions, and the bargaining environment.*

122. With regard to the need to take into account "the views of all the bargaining representatives", in *UFU v FRV* the Full Bench clarified the weight to be given to such views: [emphasis added]

> ***[31]*** *The requirement to take into account the views of the bargaining representatives means that their views must be treated as a matter of significance, but not necessarily a determinative consideration, in the assessment of whether it is reasonable in all the circumstances to make the determination sought.*

Outcomes of applications for intractable bargaining declarations

123. To date, in nearly all cases where an application for an intractable bargaining declaration has been determined by the FWC, the application has been granted. This can be seen from the following table. The exception is one application that was made by an employer (Ventia) which was strongly opposed by the relevant union.

Applications for intractable bargaining declarations

Decision ref.	***Date of Decision***	***Applicant***	***Employer***	***Was the declaration opposed?***	***Outcome***
[2023] FWCFB 180	4 October 2023	UFU	Fire Rescue Victoria	No	Declaration made
[2023] FWC 3041	20 December 2023	Ventia	UFU	**Yes**	Application dismissed
[2024] FWC 91	12 January 2024	TWU	Cleanaway (re. Erskine Park)	No	Declaration made
[2024] FWCFB 127	7 March 2024	TWU	Cleanaway (Unanderra)	No	Declaration made
[2024] FWC 685	15 March 2024	Network Aviation	Network Aviation	No	Declaration made
[2024] FWC 2707	27 September 2024	Terminals Pty Ltd	Terminals Pty Ltd	No	Declaration made
[2024] FWC 2841	14 October 2024	Transgrid	Transgrid	No	Declaration made
[2024] FWC 3063	6 November 2024	CEPU	Endeavour Energy	No	Declaration made
[2024] FWC 3117	12 November 2024	ASMOF	Canberra Health Services	No	Declaration made

Post-declaration negotiating period – s.235A

124. Section 235A of the FW Act enables (but does not require) the FWC to specify a post-declaration negotiating period if an intractable bargaining declaration is made.

125. In *UFU v FRV*, the Full Bench specified a post-declaration negotiating period of two weeks to give the parties "an opportunity to resolve, or at least narrow, their differences as to what matters will need to be arbitrated".

Intractable bargaining workplace determinations

126. If an intractable bargaining declaration has been made, a Full Bench of the FWC must make an intractable bargaining determination as quickly as possible.

127. The determination must include the following terms, and no other terms:

- coverage terms;
- core terms (e.g. nominal expiry date);
- mandatory terms (e.g. dispute settling term);
- any terms that have been agreed between the parties; and
- terms dealing with the matters at issue

128. The Full Bench must take into account the following factors when deciding what terms to include in an intractable bargaining workplace determination:

> ***275 Factors the FWC must take into account in deciding terms of a workplace determination***
>
> *The factors that the FWC must take into account in deciding which terms to include in a workplace determination include the following:*
>
> *(a) the merits of the case;*
>
> *(c) the interests of the employers and employees who will be covered by the determination;*
>
> *(ca) the significance, to those employers and employees, of any arrangements or benefits in an enterprise agreement that, immediately before the determination is made, applies to any of the employers in respect of any of the employees;*
>
> *(d) the public interest;*
>
> *(e) how productivity might be improved in the enterprise or enterprises concerned;*

(f) the extent to which the conduct of the bargaining representatives for the proposed enterprise agreement concerned was reasonable during bargaining for the agreement;

(g) the extent to which the bargaining representatives for the proposed enterprise agreement concerned have complied with the good faith bargaining requirements;

(h) incentives to continue to bargain at a later time.

Closing Loopholes No. 2 amendments

129. Following the enactment of the SJBP Act amendments, the intractable bargaining provisions in the FW Act were further amended with effect from 27 February 2024 as a result of the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024*. It is necessary for the Reviewers to consider the operation of these elements of the Closing Loopholes No. 2 Act amendments given their inherent interconnection to the SJBP Act changes. These further amendments:

- Define the meaning of an '*agreed term'* for an intractable bargaining workplace determination to prevent bargaining representatives changing their position on matters that had been 'agreed' during the bargaining (s 274(3); and
- Require that where an enterprise agreement applies to employees who will be covered by an intractable bargaining workplace determination dealing with a particular matter, the determination cannot include terms less favourable to the employees or their bargaining representatives as compared to the particular term in the enterprise agreement dealing with that matter (s 270A).

130. Section 270A is blatantly one-sided and unfair to employers. It should be repealed.

131. When determining the terms of an intractable bargaining workplace determination, fairness dictates that the FWC should have the discretion to consider the merits of each party's position, rather than only being able to determine terms that are more favourable to employees and unions than the existing terms.

132. The unfairness associated with s.270A is exacerbated by the SJBP amendments to s.225 (Application for termination of an enterprise agreement after its nominal expiry date). See section B.1 of this submission.

133. Section 225 provides almost no ability for an employer to discontinue terms and conditions in an enterprise agreement that were entered into at a different time and are no longer sustainable given changes to the operating environment for the business.

134. The past enterprise agreement cannot be terminated as a result of s.225 and appropriate terms cannot be achieved via the intractable bargaining provisions, because of s. 270A.

135. Sections 225 and 270A give unions an incentive not to reach a new enterprise agreement in circumstances where the expired enterprise agreement includes very generous terms. They can wait until the nine-month minimum bargaining period has elapsed, safe in the knowledge that any intractable bargaining workplace determination cannot reduce the generosity of any existing enterprise agreement term. This is grossly unfair to businesses. It also has adverse flow-on effects on consumers and others in the community, due to the continuation of unproductive enterprise agreement terms.

TWU v Cleanaway (Erskine Park)

136. The first intractable bargaining workplace determination was made by a Full Bench of the FWC on 12 June 2024 ([2024] FWCFB 287). It related to the Cleanaway Erskine Park facility. The previous agreement expired in September 2022.

137. The following five matters were at issue between the parties:

- Ordinary hours of work.
- Weekend penalty rates.
- Wage increases.
- Consultation.
- Expiry date.

138. With regard to wage increases and the nominal expiry date:

- The TWU proposed wage increases of 24%, comprising 12% backpay and 6% pay rises in September 2024 and September 2025, with a nominal expiry date of 30 June 2026.
- Cleanaway proposed wage increases of 11%, comprising 6% from July 2024, 3% from July 2024, and 3% from July 2026, with a nominal expiry in mid-2027.
- In its decision, the FWC Full Bench granted the following wage increases and nominal expiry date

1 July 2023:	6%
1 January 2024:	5%
1 September 2024:	4%
1 September 2025:	4%

1 September 2026: 4%

Nominal expiry date: 30 June 2027

139. The first two backdated wage increases take into account the fact that the employees had not had a wage increase for nearly three years (since September 2021).

Supported bargaining agreements and single interest employer agreements

140. Intractable bargaining declarations and intractable bargaining workplace determinations should not be available for any type of multi-enterprise agreement.

141. Otherwise, the determination of wages and conditions at the multi-enterprise level, through intractable bargaining workplace determinations, will eventually lead to the award safety net becoming increasingly irrelevant.

Ai Group's position and recommendations

142. We recommend that the following amendments are made to the intractable bargaining provisions of the FW Act:

- Amend s.234, as follows:

234 Applications for intractable bargaining declarations

*(1) A bargaining representative for a proposed single-enterprise agreement, other than a greenfields agreement, may apply to the FWC for a declaration (an **intractable bargaining declaration**) under section 235 in relation to the agreement.*

Note: The consequence of an intractable bargaining declaration being made in relation to the agreement is that the FWC may, in certain circumstances, make an intractable bargaining workplace determination under section 269 in relation to the agreement.

(2) An application for an intractable bargaining declaration must not be made in relation to a proposed multi-enterprise agreement unless a supported bargaining authorisation or single interest employer authorisation is in operation in relation to the agreement.

- Repeal s 270A (Terms dealing with matters at issue)

B.8 INDUSTRIAL ACTION

Summary of the proposed amendments

143. The SJBP Act amendments make the following changes to the industrial action provisions in the FW Act.

- Allowing protected industrial action to be taken and organised in pursuit of a supported bargaining agreement or a single interest employer agreement (s.413(2));
- Requiring bargaining representatives to attend a conference conducted by the FWC during the Protected Action Ballot (**PAB**) period (i.e. the period before voting closes on the PAB which must not be shorter than 14 days). If a bargaining representative for a group of employees does not attend the conference, protected industrial action is not available for those employees (ss.448A and 409(6A));
- Requiring that PAB voting in relation to supported bargaining agreements and single-interest employer agreements takes place on an employer-by-employer basis (s.437A);
- Requiring that, before commencing employee industrial action for a single interest employer agreement or a supported bargaining agreement, bargaining representatives must provide a minimum of 120 hours' notice, i.e. 5 x 24-hour periods (ss.414(2)(a)(ii)); and
- Empowering the FWC to 'pre-approve' persons authorised to conduct PABs in addition to the Australian Electoral Commission (ss.444(1) and 468A).

Analysis

Allowing protected industrial action to be taken and organised in pursuit of a supported bargaining agreement or a single interest employer agreement

144. After only two years of operation of the SJBP Act amendments, there has not been sufficient time for the adverse effect of allowing protected industrial action to be taken in pursuit of a supported bargaining agreement or a single interest employer agreement to come to light. However, these adverse effects are entirely predictable and include:

- Lost productivity;
- Reduced profitability for businesses, resulting in fewer jobs for employees and more insolvencies;
- Lost wages for employees;
- A damage to Australia's reputation as a reliable trading partner; and

- Disruption to the supply of goods and services resulting in inconvenience or hardship for consumers and businesses, and for clients reliant on services.

145. Industrial action was permitted in the single interest employer bargaining steam prior to the SJBP amendments. However, prior to the amendments, the single interest employer bargaining stream was much narrower. Industrial action was not a problem due to the types of businesses that the former stream applied to (e.g. fast food industry franchisees within the same franchise group).

Requiring bargaining representatives to attend a conference conducted by the FWC during the PAB period

146. Industrial action should be a last resort. It typically results in lost revenue for businesses, lost wages for employees and disruption to suppliers, customers and others in the community. The requirement for the bargaining parties to attend a conference before the employees vote on the PAB enables the FWC to assist the parties to resolve outstanding issues, without the need to resort to industrial action.

147. The FWC convenes most s.448A conferences via Teams. Therefore, the requirement to participate in a conference is not particularly onerous for any party, if this approach is adopted.

148. In Ai Group's experience, s 448A conferences are often worthwhile. In some cases, these conferences have led to agreement being reached between the parties, or at least a narrowing of differences. This in turn has reduced the incidence of industrial action.

149. Some members report a degree of frustration over the conduct of these conferences in circumstances where there is agreement between all parties that there is little utility in attending the conference. Consideration should be given to how this can be addressed without undermining the objective of the new provisions. It is, at the very least, important that the FWC retains discretion to convene the conferences in a way that minimises any unnecessary burden on parties when appropriate (such as by enabling them to be conducted by phone).

150. Some uncertainty has also arisen over whether the conferences can be convened over multiple days. This should be permitted, at the FWC's discretion.

Requiring that PAB voting in relation to supported bargaining agreements and single-interest employer agreements takes place on an employer-by-employer basis

151. During the Parliamentary process, the SJBP Bill was amended to require that PAB voting in relation to supported bargaining agreements and single interest employer agreements takes place on an employer-by-employer basis.

152. The amendment resulted in an improvement on the approach in the original Bill, but Ai Group does not support industrial action rights applying to any form of multi-enterprise bargaining.

Requiring that before commencing employee industrial action for a single interest employer agreement or a supported bargaining agreement, bargaining representatives must provide a minimum of 120 hours' notice

153. The 120-hour notice period before industrial action can be taken under the supported bargaining stream and the single interest bargaining steam is far more reasonable than the standard three-day notice period that currently applies to bargaining at the enterprise level.

154. Coordinated industrial action taken across a large number of businesses has the potential to be very harmful to those businesses and the broader community. It is appropriate that a longer period of notice applies.

Empowering the FWC to 'pre-approve' persons authorised to conduct PABs in addition to the Australian Electoral Commission

155. To date, Ai Group has not identified any problems with the SJBP Act amendments that enable persons to be approved as "*eligible protected action ballot agents*".

156. The FWC has approved 8 applications to become protected action ballot agents in addition to the Australian Electoral Commission (AEC). This includes approval of Fair Vote Services Pty Ltd (FVS), which was notable as FVS relied on initial seed funding by way of a loan from the ACTU (see [2024] FWC 1775). FVS was approved following the FWC taking additional steps to satisfy itself that the organisation met the applicable requirements, including that ballots would be overseen and undertaken by fit and proper persons and the steps FVS would take to ensure its independence and separation from the interests and influence of those whose members are being balloted and their employers. In approving FVS as a protected action ballot agent, the FWC determined that its scheduled review of the approval (which must be undertaken at least every 3 years under the FW Act), should be undertaken after 18 to 24 months.

Ai Group's position and recommendations

157. Allowing protected industrial action to be taken at the multi-enterprise level is not appropriate. Protected industrial action should only be permitted in pursuit of a single-enterprise agreement.

158. Subsection 413(2) of the FW Act should be amended as follows:

> *(2) The industrial action must not relate to a proposed enterprise agreement that is a greenfields agreement, a supported bargaining agreement, a single interest employer agreement or a cooperative workplace agreement.*

159. Amendments should also be made to clarify that confernces convened in connection with PABO applications may, at the discretion of the FWC, be convened over multiple appearances.

B.9 MULTI-ENTERPRISE AGREEMENTS

B.9.1 OVERVIEW

160. Three bargaining streams existed prior to the SJBP Act amendments:

- The main bargaining stream, which enabled the making of single enterprise agreements (greenfields and non-greenfields) and multi-enterprise agreements (greenfields and non-greenfields);
- The low paid bargaining stream; and
- The single interest employer agreements stream.

161. As a result of the SJBP amendments, there are now four bargaining streams:

- The main bargaining stream, which enables the making of single enterprise agreements (greenfields or non-greenfields) and multi-enterprise agreements (greenfields and non-greenfields);
- The supported bargaining stream, which replaced the previous low paid bargaining stream;
- The single interest employer agreements stream; and
- The cooperative workplace agreements stream.

162. The SJBP amendments substantially expanded the supported bargaining stream and the single interest employer agreements stream, gave unions far more bargaining power, and took away many important rights of employers and individual employees.

163. The legislative provisions relating to the supported bargaining stream and the single interest employer agreements stream need to be substantially amended to ensure a fairer and more balanced bargaining system.

164. Already unions and some academics (who consistently side with the unions) are using the Review to argue for these two bargaining streams to be expanded even further. They want some of the remaining few protections in these streams to be abolished (e.g. the abolition of majority support determinations in the single interest employer streams). These unfair and unbalanced proposals need to be roundly rejected.

165. In the early 2000s, the Cole Royal Commission into the Building and Construction Industry considered in detail the arguments often raised in support of multi-employer bargaining, concluding that:

- Multi-employer bargaining denies employers the capacity for flexibility, innovation and competitiveness;
- It denies employees the capacity to reach agreement with their employer regarding their own employment conditions – including leave arrangements, participation in bonus schemes, flexible working hours and other mutually acceptable arrangements;
- It assumes that all businesses and their employees operate in the same fashion, have the same objectives, adopt common approaches to working arrangements and are content with uniformity;
- It assumes that third parties such as unions and employer associations understand better than either the employer or the employees what the business model of the enterprise is and what the wishes and desires of the employees are; and
- It assumes that employees are not capable of negotiating satisfactorily on their own behalf.[4]

166. The above conclusions of the Royal Commission are as relevant today as they were 20 years ago.

167. Critical objects of the FW Act, that were not disturbed by the SJBP amendments, are:

- *"Achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action"(s 3(f));*
- *"To provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits*" (s 171(a)).

168. It is essential that the above objects in the FW Act are preserved.

169. Australia's extremely poor productivity performance will not be addressed through an expansion in multi-enterprise bargaining. As recognised in the objective in s 171(a) of the FW Act (as reproduced above), agreements *"at the enterprise level"* are far more likely to deliver productivity benefits than agreements made at the multi-employer level.

170. Australia is the only country in the world that has a system of industry awards that, along with the National Employment Standards, set a fair and relevant safety net of wages and minimum

[4] Royal Commission into the Building and Construction Industry, Final Report, Volume 5, p.53.

conditions at the industry level. Awards play a similar role to the industry-wide agreements that operate in some Continental European countries. There is no point in having awards if they become largely irrelevant over time due to an expansion in multi-enterprise bargaining.

171. The multi-enterprise agreement provisions are even more harmful because the SJBP Act amendments:

- Have given unions the power to organise industrial action at the multi-enterprise level;
- Have given unions access to intractable bargaining determinations if a supported bargaining agreement or single interest employer agreement is not made within nine months of the FWC making a supported bargaining authorisation or single interest employer authorisation; and
- Have given unions the power to apply to extend supported bargaining agreements and single interest employer agreements to cover additional employers and employees, with limited rights for employers to oppose being 'roped in'.

172. The SJBP multi-enterprise bargaining provisions have only been in operation since 6 June 2023. Therefore, there has not been sufficient time for the provisions to have the productivity-killing effects that are bound to occur over time unless the provisions are substantially amended.

173. An analysis of the supported bargaining stream, the single interest employer agreements stream and the cooperative workplace agreements stream is set out in the following sections, together with proposed amendments to achieve more fairness and balance, and to temper the productivity-killing impacts.

B.9.2 SUPPORTED BARGAINING

Summary of the proposed amendments

174. The SJBP Act amendments converted the former low paid bargaining stream in the FW Act into the supported bargaining stream.

175. The supported bargaining process commences with one or more unions making an application to the FWC for a supported bargaining authorisation. If an authorisation is made, the employers covered by it are required to bargain for a supported bargaining agreement. A supported bargaining agreement is a type of multi-enterprise agreement under the FW Act.

176. Key elements of the supported bargaining stream include:

- Access to the stream has been substantially expanded, through a removal of many of the criteria that applied to the former low paid bargaining stream (s.243);

- Unions are not required to obtain a majority support determination, even if the relevant employers do not agree to bargain (s.173(2)(d));
- A supported bargaining declaration cannot be made in relation to a proposed enterprise agreement that would cover employees in the general building and construction industry (s.243A(4));
- Employees are able to take protected industrial action in pursuit of a supported bargaining agreement, and unions are able to organise such action (s.413(2));
- If an employer is specified in a supported bargaining authorisation the only kind of enterprise agreement the employer may make with the relevant employees is a supported bargaining agreement, and the employer must not initiate bargaining, agree to bargain, or be required to bargain with those employees for any other kind of enterprise agreement (s.172(7));
- Applications can be made by unions and employers to vary supported bargaining authorisations to add or remove employers, subject to various requirements (s.244);
- The FWC must not make a supported bargaining authorisation specifying an employee who is covered by a single-enterprise agreement that has not passed its nominal expiry date, unless the FWC is satisfied that the employer's main intention in making the agreement was to avoid being specified in a supported bargaining agreement (s.243A);
- Applications can be made by unions and employers to vary supported bargaining agreements to add employers, subject to various requirements (ss.216A – 216BC)); and
- If a single-enterprise agreement applies to an employee and a supported bargaining agreement that covers the employee comes into operation, the single-enterprise agreement ceases to apply to the employee and can never apply again (s.58(3)).

Analysis

Scope and objects

177. According to the Revised Explanatory Memorandum for the SJBP Bill, the supported bargaining stream is intended to apply to the following employees:

> *[**921**]. Part 20 would reform the low-paid bargaining provisions in Division 9 of Part 2-4 of the FW Act and create the supported bargaining stream. The proposed supported bargaining stream is intended to assist those employees and employers who may have difficulty bargaining at the single-enterprise level. For example, those in low paid industries such as aged care, disability care, and early childhood education and care who may lack the necessary skills, resources and power to bargain effectively. The*

supported bargaining stream will also assist employees and employers who may face barriers to bargaining, such as employees with a disability and First Nations employees.

178. The objects of Division 9 – Supported bargaining, of Part 2-4 of the FW Act are:

> ***241 Objects of this Division***
>
> *The objects of this Division are:*
>
> *(a) to assist and encourage employees and their employers who require support to bargain, and to make an enterprise agreement that meets their needs; and*
>
> *(c) to address constraints on the ability of those employees and their employers to bargain at the enterprise level, including constraints relating to a lack of skills, resources, bargaining strength or previous bargaining experience; and*
>
> *(d) to enable the FWC to provide assistance to those employees and their employers to facilitate bargaining for enterprise agreements.*

179. It can be seen from the objects in s.241 that the supported bargaining provisions are aimed at employers and employees "*who require support to bargain*" and have "*constraints*" on their "*ability to bargain at the enterprise level, including constraints relating to a lack of skills, resources, bargaining strength or previous bargaining experience*".

180. Importantly, the objects in ss.3(f) and 171(a) of the FW Act, which emphasise enterprise-level bargaining, were not disturbed by the SJBP Act amendments

181. Subsection 3(f) states:

> *(f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action;*

182. Subsection 171(a) of the FW Act states:

> *(a) To provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits;*

When the FWC must make a supported bargaining authorisation

183. The FWC must make a supported bargaining authorisation if it is satisfied that the following criteria in s.243(1) are met, and the very limited exceptions in s.243A do not apply:

Supported bargaining authorisation—main case

(1) The FWC must make a supported bargaining authorisation in relation to a proposed multi-enterprise agreement if:

(a) an application for the authorisation has been made; and

(b) the FWC is satisfied that it is appropriate for the employers and employees (which may be some or all of the employers or employees specified in the application) that will be covered by the agreement to bargain together, having regard to:

(i) the prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector); and

(ii) whether the employers have clearly identifiable common interests; and

(iii) whether the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process; and

(iv) any other matters the FWC considers appropriate; and

(c) the FWC is satisfied that at least some of the employees who will be covered by the agreement are represented by an employee organisation.

Note: This subsection is subject to section 243A (restrictions on making supported bargaining authorisations).

184. The above criteria are much too loose, leaving far too much work to be done by paragraph 243(1)(b)(iv) – *"any other matter the FWC considers appropriate".*

185. In dealing with an application for a supported bargaining authorisation, there are five key considerations for the FWC, as discussed below.

1. Is it "appropriate for the employers and employees….that will be covered by the agreement to bargain together" (s 243(1)(b))?

186. The first supported bargaining authorisation issued by the FWC related to the early childhood education and care (ECEC) sector. The employers listed in the unions' application consented to the making of the authorisation.

187. In its decision ([2023] FWCFB 176) (***Early Childhood Education Decision***), a Full Bench of the FWC made the following comments about the "appropriateness" issue [emphasis added]

[27] ……

(1) The former requirement in subsection (1)(b) that the Commission be satisfied that it is 'in the public interest to make the authorisation' has been replaced by one that the Commission be satisfied that 'it is appropriate for the employers and employees (which may be some or all of the employers or employees specified in the application) that will be covered by the agreement to bargain together'. This plainly reflects a substantially lower statutory threshold for the required exercise of power. The concept of the 'public interest' is one which 'directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation' and 'is often used in the sense of a consideration to be balanced against private interests or in contradistinction to the notion of individual interest'. A standard which requires positive satisfaction as to the public interest is plainly more stringent than one which involves the exercise of a more general discretion. An appropriateness standard connotes that which is 'fair and just' or 'suitable' or 'fitting' and involves, we consider, an evaluative assessment of a broader and less prescriptive nature.

188. The above comments of the Full Bench, about the lower threshold that applies to the "*appropriateness*" requirement, highlights the risk that supported bargaining authorisations will be made in circumstances where the relevant employers and employees are not in need of any special support to bargain.

2. Do low rates of pay prevail in the industry or sector (s 243(1)(b)(i))??

189. In the *Early Childhood Education Decision* ([2023] FWCFB 176), the Full Bench made the following comments about the meaning of 'low rates of pay':

[32] *We consider that, prima facie, 'low rates of pay' will prevail in an industry or sector if employees are predominantly paid at or close to the award rates of pay for their classification, since this is the lowest rate legally available to pay….*

190. The issue of what constitutes '*low rates of pay*' has not however been comprehensively considered. There is a risk that the concept of '*low rates of pay'* may not be properly construed as not including rates that reflect the minimum amount payable under the instrument by not objectively low (for example, certain professional classifications in awards are certainly not low rates of pay) or are not objectively low because of the capacity for employees to earn significant amounts once all earnings through award derived loadings, allowances and penalty rates are considered.

4. Would the likely number of bargaining representatives for the agreement be consistent with a manageable collective bargaining process (s.243(1)(b)(iii))?

191. In the Early *Childhood Education Decision*, the Full Bench made the following comments about s.243(1)(b)(iii): (emphasis added)

[36] *Fourth, s 243(1)(b)(iii) is concerned with whether the likely number of bargaining representatives is consistent with a 'manageable' — that is, workable or tractable — collective bargaining process. This requires an assessment to be made which is to some extent speculative or predictive, since the choice of bargaining representative by the relevant employers and employees may not be known at the time an application for an authorisation is considered, and weight has to be given to the scope of their capacity to choose, and change, their bargaining representatives under s 176 of the FW Act. However, the consideration required is what is 'likely' — that is, probable to happen — not what may possibly happen. Any past history of bargaining, representation at the hearing of the authorisation application, and any sameness or diversity of views amongst employees and employers concerning the prospect of multiemployer bargaining may all inform the assessment to be made. However, we do not consider that the prospect of an agreement being reached if an authorisation is made to be a significantly relevant consideration since s 243(1)(b)(iii) is concerned with the collective bargaining process, not the outcome.*

192. This requirement does very little to limit the operation of the supportive bargaining provisions to appropriate circumstances.

5. Any other matters the FWC considers appropriate (s 243(1)(b)(iii)).

193. Given the breadth and vagueness of the above four requirements, the only factors that could possibly result in any reasonable boundary for the operation of the supported bargaining provisions is the requirement that the FWC consider any other matters the FWC considers appropriate. Leaving so much work to be done by s.243(b)(iii) is highly unsatisfactory. The criteria for access to the supported bargaining provisions needs to be more tightly defined.

194. With regard to s 243(1)(b)(iv), in the *Early Childhood Education Decision*, the FWC Full Bench relevantly stated: (emphasis added)

[37] *Fifth, s 243(1)(b)(iv) gives the Commission a broad discretionary scope as to the relevance and weight of other matters to be taken into account. The applicable objects of the FW Act in ss 3, 171 and 241 will guide the Commission in identifying those matters which may appropriately be taken into account, as will the circumstances of the particular case.*

- - -

[41] *Secondly, the ACCI's submission that the asserted statutory preference for enterprise level bargaining should operate to defeat an application for a supported bargaining authorisation where a capacity for bargaining for a single-enterprise agreement is demonstrated must be treated with caution and cannot be accepted without qualification. We agree that the relevant parts of the objects of the FW Act in ss 3(f), 171(a) and 241(c)*

indicate that enterprise-level bargaining is intended to be the primary and preferred mode of agreement-making under the FW Act. We also agree that, where it is demonstrated that the employers and employees covered by a proposed supported bargaining authorisation have the capacity to bargain effectively at the enterprise level, this is a matter which may be taken into account under s 243(1)(b)(iv) as weighing against satisfaction that it is appropriate for the employers and employees to bargain together. However, this consideration should not be taken so far as to transform the appropriateness standard in s 243(1)(b) into a comparative 'more appropriate' standard whereby the Commission must be satisfied that supported bargaining under Division 9 of Part 4-2 is more appropriate than any other mode of bargaining available under that Part. This would constitute an impermissible and erroneous alteration to the statutory test.

195. In the *Early Childhood Education Decision*, the FWC took into account the following four additional matters for the purpose of s.243(1)(b)(iv):

- All the affected employers supported the application and none of the employees that would be affected advised the FWC that they opposed the making of the authorisation. This is of significance having regard to the prohibition upon employers engaging in bargaining for any type of agreement other than a supported bargaining agreement once an authorisation is in operation. This weighed in favour of making the authorisation (para [54]);
- Over 90 per cent of the workforce in the ECEC sector is female and making the authorisation would promote gender equality, consistent with the object in s 3(a) of the FW Act. This weighed in favour of making the authorisation (para [55]);
- There has been a relatively low uptake of enterprise bargaining in the ECEC sector due to factors, including that a large proportion of long day care operations are small in size and lack the management capacity and other resources to engage in bargaining, and funding and pricing constraints. This weighed in favour of making the authorisation (para [56]); and
- The inclusion of one very large employer, which had a substantially different character to the other employers, weighed against making the authorisation (para [57]).

196. In *ASU v ACTOSS* [2024] FWC 2036, Hampton DP also took into account four similar matters for the purposes of s 243(1)(iv):

- All the affected employers supported, or at least did not oppose the application, and none of the employees that would be affected advised the FWC that they opposed the making of the authorisation. This is of significance having regard to the prohibition upon employers engaging in bargaining for any type of agreement other than a

supported bargaining agreement once an authorisation is in operation. This weighed in favour of making the authorisation (para [58]);

- The significant majority of the workforce in the social and community services sector is female and making the authorisation would promote gender equality, consistent with the object in s 3(a) of the FW Act. This weighed in favour of making the authorisation (paras [59] and [60);
- There are barriers to making single enterprise agreements in the social and community services sector, including those associated with bargaining resources and funding. This weighed in favour of making the authorisation (para [61]); and
- All of the employers were heavily reliant upon Government funding. This weighed in favour of making the authorisation (para [62]).

197. In the *NSW Preschools Decision* [2024] FWC 2583, Wright DP, for the purposes of s.243(1)(iv), also took into account similar matters to those outlined above. Wright DP stated:

> ***[47]*** *In other decisions of this Commission which have determined applications under s.242 of the FW Act, other matters which have been considered under s.243(1)(b)(iv) which are relevant to the current application and which weigh in favour of making the authorisation are:*
>
> 1. *That the affected employers support the application and none of the employees that would be affected has advised that they oppose the making of the authorisation sought. This is of significance having regard to the prohibition upon employers engaging in bargaining for any type of agreement other than a supported bargaining agreement once an authorisation is in operation (s.172(7)(b)).*
> 2. *That granting the authorisation sought would open the prospect of improving rates of pay of a female dominated workforce, which would be consistent with that part of the object of the FW Act in s.3(a) concerned with the promotion of gender equality.*
> 3. *That there has been a relatively low uptake of enterprise bargaining in the sector.*
> 4. *That the making of the authorisation will more readily facilitate participation of funding bodies in the negotiations.*
>
> ***[48]*** *In relation to these matters, I find based on the evidence before me that the Employers support the application and none of the employees that would be affected has advised that they oppose the making of the authorisation sought. There has been a relatively low uptake of enterprise bargaining in the sector and no history of bargaining with any of the Employers. The Employers have identified that a multi-employer agreement will enable them to obtain*

support and representation from CELA which would not be available if they were to bargain enterprise by enterprise. The Employers also identify that the involvement of the New South Wales Government, given its role in funding and regulating the community pre-school sector is essential to the success of the bargaining. Finally I note the evidence is that around 92.1% of the ECEC workforce are women. There is no evidence before me which indicates that the position is any different in respect of the workforce of the employers who would be covered by the proposed multi-enterprise agreement.

[49] *In addition I note that the parties are in agreement that there are significant challenges attracting and retaining employees to the sector and that they have jointly identified that the making of a multi-employer agreement through the supported bargaining stream as a way of addressing these issues.*

[50] *All of these matters weigh in favour of granting the authorisation sought.*

The former low paid bargaining stream contained clear criteria for access

198. The very loose criteria in s.243 of the FW Act, for access to the supported bargaining stream, contrasts starkly with the following criteria in the former low paid bargaining stream:

- Whether it is in public interest for the FWC to make the authorisation;
- Whether granting the authorisation would assist low-paid employees who have not had access to collective bargaining or who face substantial difficulty bargaining at the enterprise level;
- The history of bargaining in the industry in which the employees who will be covered by the agreement work;
- The relative bargaining strength of the employers and employees who will be covered by the agreement;
- The current terms and conditions of employment of the employees who will be covered by the agreement, as compared to relevant industry and community standards;
- The degree of commonality in the nature of the enterprises to which the agreement relates, and the terms and conditions of employment in those enterprises;
- Whether granting the authorisation would assist in identifying improvements to productivity and service delivery at the enterprises to which the agreement relates;
- The extent to which the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process;
- The views of the employers and employees who will be covered by the agreement;

- The extent to which the terms and conditions of employment of the employees who will be covered by the agreement is controlled, directed or influenced by a person other than the employer, or employers, that will be covered by the agreement; and
- The extent to which the applicant for the authorisation is prepared to consider and respond reasonably to claims, or responses to claims, that may be made by a particular employer named in the application, if that employer later proposes to bargain for an agreement.

Majority support

199. In each of the other bargaining streams, if an employer does not agree to bargain, the relevant union/s need to satisfy the FWC that a majority of the employees of the employer want to bargain.

200. The process is not onerous for unions. The FWC usually accepts petitions circulated by unions as a means of determining majority support and rarely orders a secret ballot.

201. As discussed in section B.4 of this submission, when a mandatory bargaining system was introduced through the FW Act, the Labor Government implemented a requirement that the majority of employees must support the negotiation of an enterprise agreement if the employer does not initiate or agree to bargain. This was designed to protect the democratic rights of employees who may not wish to bargain and also to balance the interests of employees, unions and employers.

202. A majority support requirement should apply under the supported bargaining stream. This requirement applies to variations of supported bargaining agreements to add additional employers (ss.216B and 216BA), but it should also apply to the making and variation of supported bargaining authorisations. Recommended amendments to address this issue are set out below.

Union tactics

203. Three supported bargaining authorisations have been made by the FWC to date (as a result of the three decisions discussed above). Each of these related to groups of employers who supported the making of the authorisation. In each case the employers operated in a government-funded sector. The making of these applications ahead of any contested matters was no doubt a tactic of the unions aimed at achieving FWC decisions which interpret and apply the new legislative provisions and become precedents for later cases, through proceedings with no employer opposition, or only limited opposition.

204. Only recently have we seen unions start to use the supported bargaining provisions as a major weapon against employers. We below discuss three examples.

Problematic use of the supported bargaining provisions in the fast food sector

205. The SDA's application for a supported bargaining agreement with McDonald's franchisees in South Australia is a case in point. McDonald's Australia Limited and its franchisees have a history of effective bargaining. Also, there are a large number of enterprise agreements in the fast food industry. Neither the McDonald's franchisees nor their employees require any special support for bargaining. The SDA is one of Australia's largest unions and is clearly able to represent the McDonald's employees in bargaining. The ACTU has applied to intervene in the case in support of the SDA.

206. The application is being strongly opposed by all of the employers served with the SDA's application. Ai Group Workplace Lawyers, Mr Matthew Follett KC and Mr Andrew Pollock of Counsel are representing the employers in the case.

207. The SDA's application appears to be a thinly disguised attempt to avoid the need to obtain a majority support determination to commence bargaining for either a single-enterprise agreement (which can apply to a franchise group – see s.172) or an agreement in the single interest employer bargaining stream (which contains specific provisions for franchise groups – see s.249(2)).

208. The hearings before the Full Bench of the FWC will take place in February 2025.

Problematic example of the position in the disability sector

209. Applications for a multi enterprise bargaining authorisation in the disability sector in Victoria illustrate the substantial problems and unwarranted hardship created by the extended scope for MEB under the FW Act.

210. The Health and Community Services Union and the Australian Education Union have sought a supported bargaining authorisation against 19 disability services in regional Victoria.[5] This has already given rise to an exchange of 1,924 pages of submissions, witness statements and supporting materials to date. There have also been conciliation conferences and a hearing before a Full Bench. The FWC's decision remains pending.[6]

211. The proceedings have demonstrated the very significant and resource intensive nature of proceedings associated with the new scheme, and its adverse impacts on not for profit enterprises with limited resources that provide critical services to some of the most vulnerable in the community.

[5] Subsequently amended to 14 target respondents
[6] It is not clear how the timing of a decision in this matter will accord with the timing of this Review.

212. Ai Group has engaged with many of the respondent employers who are subject to the application and are staunchly opposed to it. Many simply do not have the capacity to engage effectively in the complex and costly proceedings associated with contesting an application for a supported bargaining authorisation.

213. We urge the Reviewers to closely consider the material that has been filed in the proceedings and the transcript of its conduct. Attached at **Attachment E** is a copy of Ai Group's written submission.

214. The merit of exposing employers to multi-employer bargaining is further undermined by the limited prospect of this application actually resulting in a new agreement or change to the funding regime that is the real barrier to bargaining in the disability sector. It is trite to observe that it is unlikely, to say the least, that there will be any wholesale uplift to NDIS funding arrangements because of a deal struck with this particular small cohort of employers.

Problematic example of the position in the childcare sector

215. As has been widely reported, a supported bargaining authorisation has been granted in the context of the part of the early education sector and it is understood that an agreement has been reached. Although it is unclear whether an application for approval of the agreement has yet been made to the FWC.

216. The benefit, or even utility, of the new supported bargaining laws should not be overstated by reference to these developments.

217. The prospect that the Government may fund a wage increase in this sector for employers covered by a new multi-enterprise agreement, but not others, has caused incredible concern in industry. This would result in deeply problematic distortions in the labour market and hardship for employers who were not a party to the agreement and therefore not able to provide a comparable wage increase (if they weren't able to secure comparable Government funding).

218. Ultimately, the Government has agreed to temporarily fund a wage increase for all employees in the sector, subject to various conditions.

219. At the time of drafting this submission, there is still significant uncertainty around how precisely the Government's new funding scheme will work. In particular, there is uncertainty over whether the promised funding will be sufficient to compensate employers for the wage increases they will need to provide, or whether they will need to make a 'co-contribution', and whether this will be viable given requirements that they also agree to cap their fees. There have also been conflicting views expressed by Government departments about how the relevant wage increases need to be calculated and implemented.

220. The Government (or various departments acting on its behalf) has given industry repeated assurances that they would not need to implement a multi-enterprise agreement in order to access funding support. Relevantly, it has been promised that parties could use IFAs operating in connection with an award or enterprise agreement to make relevant commitments to pass on wage increase in order to secure the funding that makes such uplifts possible.

221. Many employers in the sector are likely to use IFAs rather than a multi-enterprise agreement under the supported bargaining regime to deliver the wage increases. Part of the reluctance of some employers to use multi-enterprise bargaining (particularly through the supported bargaining system), is the difficulty of extricating themselves from the system if the Government funding ultimately proves to be inadequate to support the relevant wage increases. This deficiency is discussed further below. IFAs are of course also able to be implemented much more quickly and easily than a multi-enterprise agreement, and this is an important consideration given Government funding is available from 2 December 2024.

222. The developments in the sector demonstrate that it was not the expansion of multi-employer bargaining that is required to lift wages in Government-funded or subsidised sectors. It is, unsurprisingly, an increase in Government funding that was and is necessary. In the context of the early education sector, such a decision could have been made at any time and underpinned by simple requirement that employers pass on any funded wage increase through either an individual enterprise agreement, IFA or even a simple written contract commitment.

Interaction between supported bargaining agreements and single-enterprise agreements

223. The provisions which deal with the interaction between single-enterprise agreements and supported bargaining agreements are very unfair to employers and employees:

- If an employer is specified in a supported bargaining authorisation, the only kind of enterprise agreement the employer may make with the relevant employees is a supported bargaining agreement, and the employer must not initiate bargaining, agree to bargain, or be required to bargain with those employees for any other kind of enterprise agreement (s.172(7));
- The FWC must not make a supported bargaining authorisation specifying an employee who is covered by a single-enterprise agreement that has not passed its nominal expiry date, unless the FWC is satisfied that the employer's main intention in making the agreement was to avoid being specified in a supported bargaining agreement (s.243A); and
- If a single-enterprise agreement applies to an employee and a supported bargaining agreement that covers the employee comes into operation, the single-enterprise agreement ceases to apply to the employee and can never apply again (s.58(3)).

224. The Government and Parliament recognised the inappropriateness of the original SJBP Act provisions concerning the interaction rules between single-enterprise agreements and supported bargaining agreements. As a result, the FW Act was further amended (through the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024*) to provide a pathway for parties to transition out of a supported bargaining agreement to a new single-enterprise agreement.

225. Under the Closing Loopholes amendments, if a single-enterprise agreement comes into operation, the supported bargaining agreement that previously applied to an employee, ceases to apply to the employee and can never apply again (s 58(5)). However, the following conditions apply:

    1. The BOOT for the proposed single-enterprise agreement is assessed against the supported bargaining agreement, rather than against the relevant modern award (s.193(1)); and

    2. If the supported bargaining agreement has not reached the nominal expiry date, the employer cannot request employees to approve the proposed single-enterprise agreement by voting for it unless:

        - Each union covered by the supported bargaining agreement has provided the employer with written agreement to the making of the request (s.180B(2)(a)); or

        - A voting request order has been made by the FWC permitting the employer to make the request (ss.180B(2)(b) and 240B).

226. Despite the Closing Loopholes amendments, the legislative provisions relating to the interaction between single-enterprise agreements and supported bargaining agreements remain very unfair to employers. Indeed, the amendments have both entrenched this unfairness. By shifting the benchmark for the BOOT, they have undermined the statutory objective of promoting enterprise bargaining.

Variations to supported bargaining authorisations to add additional employers and employees (s 244)

227. Once a supported bargaining authorisation has been made by the FWC, a union can apply to the FWC to add additional employers and their employees to the authorisation, without the employer's consent. An employer and the majority of its employees can also agree to become covered by an existing supported bargaining authorisation. An application to vary the authorisation must be made to the FWC and the variation takes effect once the variation has been approved by the FWC.

228. To provide a fairer and more balanced approach, some recommended amendments to these provisions are set out below.

Variations to supported bargaining authorisations to remove employers and employees (s.244)

229. An employer can apply to the FWC to vary a supported bargaining authorisation to remove an employer and its employees. The FWC can vary the authorisation if, because of a change in the employer's circumstances, it is no longer appropriate for the employer to be specified in the authorisation.

230. To provide a fairer and more balanced approach, some recommended amendments to these provisions are set out below.

Variations to supported bargaining agreements to add additional employers and employees

231. Once a supported bargaining agreement has been made, a union can apply to the FWC to add additional employers and their employees to the agreement, without the employer's consent, provided that a majority of the employer's employees wish to be covered by the agreement (ss.216B and 216BA).

232. An employer and the majority of its employees can also agree to become covered by an existing supported bargaining agreement (ss.216A – 216AF).

Variations to supported bargaining agreements to remove employers and employees

233. See section B.9.4 of this submission.

Ai Group's position and recommendations

234. The supported bargaining provisions in the FW Act require substantial amendments for the reasons discussed above. We recommend the following amendments:

- **Insert the following new object in s.241:**

  (e) to avoid discouraging enterprise-level collective bargaining;

- **Amend s.243(1), as follows:**

Supported bargaining authorisation—main case

(1) The FWC must make a supported bargaining authorisation in relation to a proposed multi-enterprise agreement if:

(a) an application for the authorisation has been made; and

(b) *the FWC is satisfied that it is appropriate for the employers and employees (which may be some or all of the employers or employees specified in the application) that will be covered by the agreement to bargain together for a supported bargaining agreement, having regard to:*

(i) whether the employers and employees require support from the FWC to bargain; and

(ii) whether there are constraints on the ability of the employers and employees to bargain at the enterprise level, including constraints relating to a lack of skills, resources, bargaining strength or previous bargaining experience; and

(iii) the history of bargaining within the relevant industry or sector; and

~~(i)~~(iv) the prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector); and

~~(ii)~~(v) whether the employers have clearly identifiable common interests; and

(vi) The views of the employers and employees who will be covered by the agreement; and

(vii) whether the enterprises to which the agreement relates are substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory and is foreseeable that the supported bargaining may result in a change to that funding arrangement; and

(viii) Whether granting the authorisation would assist in identifying improvements to productivity and service delivery at the enterprises to which the agreement relates; and

(iii)(ix) whether the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process; and

(iv)(x) any other matters the FWC considers appropriate; and

(c) *the FWC is satisfied that at least some of the employees who will be covered by the agreement are represented by an employee organization; and*

(d) the FWC is satisfied that, for each employer who will be covered by the agreement, a majority of the employees who are employed by the employer at a time determined by the FWC want to bargain for the agreement.

Note: This subsection is subject to section 243A (restrictions on making supported bargaining authorisations).

- **Amend s.243(2), as follows:**

Common interests

(2) For the purposes of subparagraph (1)(b)(ii), ~~examples of common interests that employers may have include the following~~ in considering whether the employers have clearly identifiable common interests, the FWC must take into account:

(a) ~~a~~ the geographical location of the enterprises to which the agreement will relate;

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

(c) ~~being~~ whether the enterprises to which the agreement will relate are substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory.

- **Amend s.413(2), as follows:**

(2) The industrial action must not relate to a proposed enterprise agreement that is a greenfields agreement or a ~~cooperative workplace~~ multi-enterprise agreement.

- **Delete s.172(7)** (Requirement for employer specified in supported bargaining authorisation).
- **Delete s.243A(3)** (re. an employer's main intention in making a single-enterprise agreement).
- **Amend s.244(2)** (Variation of supported bargaining authorisation to remove employer), as follows:

(2) If an application is made under subsection (1), the FWC must vary the authorisation to remove the employer's name if the FWC is satisfied that~~, because of a change in the employer's circumstances,~~ it is no longer appropriate for the employer to be specified in the authorisation.

- **Amend s.244(4)** (Variation of supported bargaining authorisation to add employer)

(4) If an application is made under subsection (3), the FWC must vary the authorisation to add the employer's name if the FWC is satisfied that it is in the public interest to do so and appropriate, taking into account:

(a) if the employer's employees are in an industry, occupation or sector declared by the Minister under subsection 243(2B)—the declaration; and

(b) if paragraph (a) of this subsection does not apply—the matters set out in paragraph 243(1)(b); and

(ba) the views of the employer and the employees; and

(c) any other matters the FWC considers appropriate.

(4A) Despite subsection (4), the FWC must not vary the authorisation ~~if subsection 243A(1) (employees covered by single-enterprise agreement that has not passed nominal expiry date) would prevent the FWC from making a supported bargaining authorisation specifying the employees~~ to add an employer's name unless the FWC is satisfied that a majority of the employees who are employed by the employer at a time determined by the FWC want to bargain for the agreement.

B.9.3 SINGLE INTEREST EMPLOYER AUTHORISATIONS AND AGREEMENTS

Summary of the proposed amendments

235. The SJBP Act amendments made major changes to the previous single interest bargaining stream in the FW Act to substantially expand the scope of the stream.

236. Previously, single interest employer agreements were a type of 'single-enterprise agreement' under the FW Act. Now they are a type of multi-enterprise agreement.

237. The single interest employer bargaining process commences with one or more unions making an application to the FWC for a single interest employer authorisation. If an authorisation is made, the employers covered by it are required to bargain for a single interest employer agreement.

238. Key elements of the single interest employer bargaining stream include:

- Access to the stream has been substantially expanded, through a removal of many of the requirements that applied to the former single interest employer bargaining stream (ss.247 and 249);
- If an employer does not consent to the making of the authorisation, the authorisation cannot apply to that employer:
    - If the employer employs less than 20 employees (s.249(1B)(a));
    - If the FWC is not satisfied that the majority of the relevant employees of the employer want to bargain for the agreement (s.249(1B)(d));

- If the employer and its relevant employees are covered by an enterprise agreement that has not passed its nominal expiry date (s.249(1B)(e) and (1D)(a)); or
- If the employer and a union that is entitled to represent the industrial interests of one or more of the employees have agreed in writing to negotiate a single-enterprise agreement that would cover the employer and the employees (s.249(1D)(b).

- A single interest employer authorisation cannot be made in relation to a proposed enterprise agreement that would cover employees in the general building and construction industry (s.249A).
- The FWC may refuse to vary a single interest employer authorisation to add an employer and employee, if: (s.216DC(3B))
  - the employers are bargaining in good faith for a proposed enterprise agreement that will cover the employers and the relevant employees;
  - the employers and the relevant employees have a history of effectively bargaining in relation to one or more enterprise agreements that have covered the employers and the relevant employees; and
  - on the day that the FWC will approve the variation, less than nine months have passed since the most recent nominal expiry date of an agreement referred to above.
- Employees are able to take protected industrial action in pursuit of a single interest employer agreement, and unions are able to organise such action (s.413(2));
- Applications can be made by unions and employers to vary single interest employer authorisations to add or remove employers, subject to various requirements (s.251);
- If an employer is specified in a single interest employer authorisation, the only kind of enterprise agreement the employer may make with the relevant employees is a single interest employer agreement, and the employer must not initiate bargaining, agree to bargain, or be required to bargain with those employees for any other kind of enterprise agreement (s.172(5));
- Applications can be made by unions and employers to vary single interest employer agreements to add employers, subject to various requirements (ss.216D – 216DF));
- If a single interest employer agreement applies to an employee and a single-enterprise agreement that covers the employee comes into operation, the single interest employer agreement ceases to apply to the employee and can never apply again (s.58(4)).

Analysis

Scope and objects

239. The previous single interest bargaining stream in the FW Act was intentionally very narrow, as can be seen by the fact that the resulting agreement was categorised as a single-enterprise agreement under the FW Act rather than a multi-enterprise agreement.

240. Under the SJBP Act amendments, the expression 'single interest' in the legislation has become a misnomer. The concept of a 'single interest' has become that of 'common interests' – with a very broad definition of such interests and a reverse onus of proof applying for employers with 50 or more employees.

241. Section 10 (Single interest employer authorisations) of Part 2-4 of the FW Act does not include any specific objects. Importantly, the objects in ss.3(f) and 171(a) of the FW Act, which emphasise enterprise-level bargaining, were not disturbed by the SJBP Act amendments:

- Subsection 3(f) states:

  (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action;

- Subsection 171(a) of the FW Act states:

  (a) To provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits;

242. The relationship between the multi-enterprise bargaining provisions in the FW Act and the objects which emphasise enterprise-level bargaining, was considered by a Full Bench of the FWC in *Application by APESMA* [2024] FWCFB 253 (***Application by APESMA***). The proceedings related to an application by the Association of Professional Engineers, Scientists and Managers Australia for a single interest employer authorisation relating to four major coal mining companies – Peabody, Ulan, Whitehaven and Delta Coal.

243. The Full Bench noted that the legislation still gives some priority to single enterprise agreements: (emphasis added)

> **[36]** *The immediate tension in the positions of the parties concerns the emphasis that is given by the objects to bargaining for and the making of single enterprise agreements, rather than multi-employer enterprise agreements.*
>
> - - -

Considerations arising from the statutory objects

[45] *There is force in the propositions made by both the ACTU and the MCA/Respondent Employers. The FW Act and its objects should be understood as changing the emphasis from agreement making at the level of a single business or part of a single business to bargaining at an enterprise level. In that light, the inclusion and 'promotion' of multi-enterprise bargaining is consistent with the existing objects as understood in that way. There is also force in the proposition that some priority is given by the FW Act to single enterprise bargaining. This is evident from the limitations that are placed upon the making of multi-enterprise authorisations such as those set out in ss.249(1D) and 250(3) of the FW Act.*

[46] *As a result, we consider that the import of the objects of the FW Act for present purposes is that the legislation promotes collective bargaining which achieves productivity and fairness through collective bargaining at the level of the enterprise, including where authorised and subject to the express provisions giving some priority to single enterprise agreements, at a multi-enterprise level.*

When the FWC must make a single interest employer authorisation

244. The FWC must make a single interest employer authorisation if it is satisfied that the criteria in s.249 are met. The key requirements include the following:

    1. The employers:

        a. carry on similar business activities under the same franchise (s 249(2)); or

        b. the employers are common interest employers, as defined in s 249(3) and (3A);

    2. If the employers are common interest employers – "*the operations and business activities of each of those employers are reasonably comparable with those of the other employers that will be covered by the agreemen*t" (s 249(1)(b)(vi));

    3. If the application for the authorisation is made by a union, and if an employer covered by the authorisation has 50 or more employees:

        a. It is presumed that – the operations and business activities of the employer are reasonably comparable with those of the other employers that will be covered by the agreement, unless the contrary is proved (s 249(1AA)); and

        b. It is presumed that – the employer is a common interest employer, unless the contrary is proved (s 249(3AB));

    4. If an employer does not consent to the making of the authorisation, the authorisation cannot apply to that employer if:

a. The employer employs less than 20 employees (s 249(1B)(a));

b. The FWC is not satisfied that the majority of the relevant employees of the employer want to bargain for the agreement (s 249(1B)(d));

c. The employer and its relevant employees are covered by an enterprise agreement that has not passed its nominal expiry date (s 249(1B)(e) and (1D)(a));

d. The employer and a union that is entitled to represent the industrial interests of one or more of the employees have agreed in writing to negotiate a single-enterprise agreement that would cover the employer and the employees (s 249(1D)(b).

Common interest employers

245. Subsections 249(3) and (3A) of the FW Act state:

Common interest employers

(3) The requirements of this subsection are met if:

(a) the employers have clearly identifiable common interests; and

(b) it is not contrary to the public interest to make the authorisation.

(3A) For the purposes of paragraph (3)(a), matters that may be relevant to determining whether the employers have a common interest include the following:

(a) geographical location;

(b) regulatory regime;

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

246. The meaning of s 249(3) and (3A) was considered by a Full Bench of the FWC in *IEU v Catholic Education of WA* [2023] FWCFB 177 (***IEU v CEWA***). This case concerned an application for a single interest employer authorisation relating to a group of Catholic education employers in Western Australia. Each of the employers consented to the application.

247. The Full Bench adopted a similarly broad meaning for the expression 'common interest' as was adopted by the Full Bench in the *Early Childhood Education Decision* regarding a supported bargaining authorisation. This can be seen from the following extract from *IEU v CEWA*: (emphasis added)

[31] *In Application by UWU, AEU and IEU, the Full Bench said the following in relation to the expression 'common interests' in s 243(1)(b)(ii) in connection with applications for supported bargaining authorisations:...the expression 'common interests' used in s 243(1)(b)(ii) in connection with the employers the subject of an authorisation application is one of wide import, and on its ordinary meaning extends to any joint, shared, related or like characteristics, qualities, undertakings or concerns as between the relevant employers. The diversity of the non-exhaustive list of 'examples' of common interests in s 243(2) gives contextual support to the breadth of meaning which we assign to the expression. The common interests must be 'clearly identifiable', that is, plainly discernible or recognisable, but need not be self-evident.*

[32] *Given, as earlier stated, the commonality of language used in s.243(1)(b)(ii) and (2) and s.249(3)(a) and (3A), we consider this approach may equally be applied here. On this basis, the matters in the SAF set out above would readily satisfy the requirement for clearly identifiable common interests between the relevant employers in s.249(3)(a). As for s. 249(3)(b), it is sufficient to say that there is nothing before us to indicate that it would be contrary to the public interest to make the authorisation sought. A fuller exploration of the proper construction and application of the expression 'not contrary to the public interest' in s 249(3)(b) may await a case in which this consideration is in contest.*

248. In the *Application by APESMA,* the Full Bench cited the above extract from *IEU v CEWA* and determined that three of the four employers (Peabody, Ulan and Whitehaven) had clearly identifiable common interests. These three employers have filed an application in the Federal Court of Australia seeking to have the FWC's decision overturned.

249. The FWC Full Bench was not satisfied that Delta Coal had clearly identifiable common interests. The Full Bench reached the following conclusions about Delta Coal's operations:

[376] *The sole commercial purpose of Delta Coal (and the Colliery) is to supply thermal coal to Delta Electricity. The purpose of Delta Coal is not to make profits but to cover its costs of providing a reliable supply of thermal coal to Delta Electricity. Delta Coal receives a fixed price per tonne of coal supplied. The price set for the supply of coal does not reflect the market price for coal from time to time and does not cover the operating costs of the Colliery. The Colliery does not export coal and does not have any intention to export coal.*

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[664] *Unlike Peabody, Delta Coal's Chain Valley mining operation essentially exists for a different purpose compared to the operations of the other Respondent Employers and this is a factor that, in our view, carries significant weight. That is, this relevantly impacts upon how it conducts its business activities.*

[665] *There are other factors that distinguish Delta Coal's Chain Valley mining operation from the mining operations of the other Respondent Employers. In particular:*

- *it is located location close to a major regional centre and its workforce is locally based;*
- *it uses a different method of mining in that it does not use the longwall mining method and uses the bord and pillar method of mining, a more labour intensive method of mining involving manual installation of bolts, mesh, concrete and ventilation and which and its use of continuous miners rather than large, capital intensive automatic coal miners used in longwall mining;*
- *it does not have a coal preparation plant and unlike in the longwall mining method, coal extracted at the Chain Valley Colliery is not washed; its operations do not involve transportation of coal over long distances and to ports for exportation. Rather, extracted coal from Delta Coal's Chain Valley Colliery is transported directly to the Vales Point Station, via the Mannering Colliery where it is often used immediately at the Vales Point Station;*
- *it can more readily be subject to regulations made under the ES Act in respect of its supply of thermal coal to the Delta Parent Company*.

250. Despite the above conclusions reached about Delta Mining's operations, the comments of the Full Bench in both *IEU v CEWA* and *Application by APESMA*, about the breadth of the concept of 'common interests', give employers no comfort that single interest employer authorisations will not be made in circumstances where businesses are little more than competitors in the same markets. This is highly inappropriate.

The "reasonably comparable" requirement

251. Paragraph 249(1)(b)(vi) states:

> (b) the FWC is satisfied that:
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> - - -
>
> (vi) if the requirements of subsection (3) are met – the operations and business activities of each of the employers are reasonably comparable with those of the other employers that will be covered by the agreement.

252. In the *Application by APESMA*, the Full Bench made the following comments about the "reasonably comparable" requirement, including noting that it is likely more stringent that the requirement for common interests in s.249(3): (emphasis added)

[550] *In IEU v CEWA the Full Bench made the observation that it was apparent that the requirement for comparability of operations and business activities is likely more stringent than the requirement for common interests in s.249(3) of the FW Act. In that matter no party attempted to prove that the requirement in s.249(1)(b)(vi) had not been met but the Full Bench went on to say that as each of the respondent employers in that matter shared the following in common, that was sufficient to demonstrate necessary comparability:*

- *they were principally engaged in the provision of primary and/or secondary education in a school setting;*
- *they operated in the state of Western Australia;*
- *they operated schools that are registered under the School Education Act 1999 (WA) (**SE Act**);*
- *they were the employers of one or more employees to whom the Educational Services (Schools) General Staff Award 2020 applies;*
- *they engaged in Roman Catholic religious instruction;*
- *they received funding from the Government of the Commonwealth of Australia for the purpose of delivering education;*
- *they received funding from the Government of the State of Western Australia for the purpose of delivering education; and*
- *they employed one or more persons who are principally employed to provide, or to assist in providing, educational instruction or who are employed in any other capacity, and who are not employed as teachers.*

[551] *The factors in the above list turn to a range of matters, including*

- *the general nature of the services provided;*
- *the setting in which those services are provided (in that case a school);*
- *the particular nature of the services (in that this involved a particular type of religious instruction);*
- *where the business operates (i.e. Western Australia);*
- *the regulatory regime within which they operate (i.e. the SE Act);*
- *the modern award that applies to them and their employees;*
- *how they were funded; and*
- *that they employed persons to deliver the services or assist in their delivery.*

[552] *We understand that the Full Bench listed these matters as providing the context for the reasonably comparable factors. We observe that it is the 'operations and business activities' of each of the employers that are the subject of a particular application that the Commission is required to consider in determining whether they are 'reasonably comparable' and such an assessment will depend upon the evidence before the Commission in each case.*

[553] *In IEU v CEWA the observations of the Full Bench drew out the 'similarities' between the employers the subject of that application. In circumstances where an employer seeks to rebut the presumption that the operations and business activities of each of the employers that are the subject of a particular application are reasonably comparable, the employer evidence will likely turn to differences between those employers. However, in order to determine whether those differences are enough to displace the presumption that the operations and business activities of each of the employers that are the subject of a particular application are reasonably comparable, both differences and similarities will be relevant to the assessment. This necessitates a comparative exercise.*

The rebuttable presumption in s.249(1AA) and (3AB)

253. As mentioned above, if the application for the authorisation is made by a union and an employer covered by the authorisation has 50 or more employees:

- It is presumed that – the operations and business activities of the employer are reasonably comparable with those of the other employers that will be covered by the agreement, unless the contrary is proved (s 249(1AA)); and
- It is presumed that – the employer is a common interest employer, unless the contrary is proved (s 249(3AB)).

254. In *Application by APESMA*, the FWC Full Bench considered the rebuttable presumption in s.249(1AA) and (3AB) of the FW Act, and highlighted the high bar that applies, i.e. the need for "proof": (emphasis added)

[213] *If the matters in s.249(1AA) and s.249(3AB) are satisfied, this creates a rebuttable presumption that the requirements in s.249(1)(b)(vi) and (3) are met unless the contrary is proved. The application was made by a bargaining representative under s.248(1)(b) and each of the Respondent Employers has conceded that as at the date of the application, being 6 December 2023, they employed 50 or more employees. In these circumstances the burden of proving the contrary proposition in each case lies with the party seeking to establish this; in this case, each of the Respondent Employers.*

[214] *We consider that the rebuttable presumption, which is stated as 'unless the contrary is proved', must be applied according to its own terms. That is, there is an onus on the*

Respondent Employers, to establish that the relevant test in each case has not been met. We will return to how this approach is to be applied to each of the relevant tests involved.

255. For employers with 50 or more employees, the rebuttable assumption is bound to lead to a great deal of unfairness. This is because an employer is unlikely to have access to detailed information about the operations of the other businesses which have been served with the union/s' application for the authorisation.

256. Businesses will be required to seek orders from the FWC to require other businesses served with the union/s' application to produce documents or information if they seek to "prove" they do not have "common interests" and/or that their operations and business activities are not "reasonably comparable" to the other businesses. It is unlikely that an employer would otherwise have sufficient information about:

- The operations of each of the other businesses;
- The business activities of each business;
- The structure of each business;
- The number of employees of each business;
- The award coverage and classifications of the employees of each business;
- The various markets in which each businesses operates;
- The plant and equipment used by each business;
- The profitability of each business and how each business is funded; and
- The geographic locations where each business operates.

257. For public companies, some of the above information is likely to be available publicly (which is not a given) but the vast majority of businesses are not public companies.

258. Even if orders to produce are made by the FWC and served on each of the other businesses served with the union/s' application, a great deal of time is likely to be required before all the relevant information is gathered and analysed. In many cases, other businesses are likely to oppose notices to produce given that some of the information required is likely to be commercially sensitive.

259. There is no guarantee that the FWC would be prepared to adjourn the application for the single interest employer authorisation, to enable this necessary information gathering and analysis process to be completed.

260. The rebuttable presumption is unfair and unworkable. It should be abolished.

Majority support

261. If an employer does not consent to the making of the single interest employer authorisation, the authorisation cannot apply to that employer if the FWC is not satisfied that the majority of the relevant employees of the employer want to bargain for the agreement (s 249(1B)(d)).

262. The process is not onerous for unions. The FWC usually accepts petitions circulated by unions as a means of determining majority support and rarely orders a secret ballot.

263. As discussed in section B.4 of this submission, when a mandatory bargaining system was introduced through the FW Act, the Labor Government implemented a requirement that the majority of employees must support the negotiation of an enterprise agreement if the employer does not initiate or agree to bargain. This was designed to protect the democratic rights of employees who may not wish to bargain and also to balance the interests of employees, unions and employers.

264. The majority support requirement is a central element of the single interest employer bargaining steam and needs to be maintained.

The former single interest employer provisions contained clear criteria for access

265. The very loose criteria in s.249 of the FW Act, for access to the single interest employer bargaining stream, contrasts starkly with the following criteria that applied prior to the SJBP amendments:

- The employer had to agree to bargain for a single interest employer agreement before such an agreement could be made and could not be coerced.;
- Except in the case of franchisees, the Minister had to issue a single interest employer authorisation before a single interest employer agreement could be made;
- The following criteria had to be taken into account by the Minister when deciding whether to make a single interest employer authorisation:
    - the history of bargaining of each of the relevant employers, including whether they have previously bargained together;
    - the interests that the relevant employers had in common, and the extent to which those interests were relevant to whether they should be permitted to bargain together;
    - whether the relevant employers were governed by a common regulatory regime;

- whether it would be more appropriate for each of the relevant employers to make a separate enterprise agreement with their employees; and
- the extent to which the relevant employers operate collaboratively rather than competitively;
- whether the relevant employers were substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory; and
- any other matter the Minister considered relevant.

Interaction between single interest employer agreements and single-enterprise agreements

266. The following provisions which deal with the interaction between single interest employer agreements and single-enterprise agreements undermine the encouragement of genuine enterprise level bargaining and are very unfair to employers and employees:

- If an employer is specified in a single interest employer authorisation the only kind of enterprise agreement the employer may make with the relevant employees is a single interest employer agreement, and the employer must not initiate bargaining, agree to bargain, or be required to bargain with those employees for any other kind of enterprise agreement (s.172(5));
- If an employer does not consent to the making of the authorisation, the authorisation cannot apply to that employer;
    - If the employer and its relevant employees are covered by an enterprise agreement that has not passed its nominal expiry date (s.249(1B)(e) and (1D)(a)); or
    - If the employer and a union that is entitled to represent the industrial interests of one or more of the employees have agreed in writing to negotiate a single-enterprise agreement that would cover the employer and the employees (s.249(1D)(b).
- The FWC may make a single interest employer authorisation that does not include one or more employers and their employees, if: (s.251(3))
    - the employers are bargaining in good faith for a proposed enterprise agreement that will cover the employers and the relevant employees;
    - the employers and the relevant employees have a history of effectively bargaining in relation to one or more enterprise agreements that have covered the employers and the relevant employees; and

- on the day that the FWC will make the authorisation, less than nine months have passed since the most recent nominal expiry date of an agreement referred to above.

267. The Government and Parliament recognised the inappropriateness of the original SJBP Act provisions concerning the interaction rules between single-enterprise agreements and single interest employer agreements. As a result, the FW Act was further amended (through the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024*) to provide a pathway for parties to transition out of a single interest employer agreement to a new single-enterprise agreement.

268. Under the Closing Loopholes amendments, if a single-enterprise agreement comes into operation, the single interest employer agreement that previously applied to an employee, ceases to apply to the employee and can never apply again (s 58(4)). However, the following conditions apply:

- The BOOT for the proposed single-enterprise agreement is assessed against the supported bargaining agreement, rather than against the relevant modern award (s.193(1)); and
- If the supported bargaining agreement has not reached the nominal expiry date, the employer cannot request employees to approve the proposed single-enterprise agreement by voting for it unless:
  - Each union covered by the supported bargaining agreement has provided the employer with written agreement to the making of the request (s.180B(2)(a)); or
  - A voting request order has been made by the FWC permitting the employer to make the request (ss.180B(2)(b) and 240B).

269. Despite the Closing Loopholes amendments, the legislative provisions relating to the interaction between single-enterprise agreements and supported bargaining agreements remain very unfair to employers as they unduly control an employer's ability to strike a single enterprise agreement once an authorisation is made. This is a powerful dissuader for employers to willing engage in multi-enterprise bargaining and is in itself creating a barrier to bargaining. These issues were ventilated with Government prior to the SJBP Act amendments being made and we attach at **Attachment C**, a letter that set out these concerns.

270. Employers subject to a single interest employer authorisation or agreement should be able to enter into a single enterprise agreement, at any stage, and in exchange for doing so then be able to exit the multi enterprise bargaining system. In these circumstances the BOOT should at all times be applied against the relevant Award safety net as properly determined by the FWC.

Variations to single interest employer authorisations to add additional employers and employees

271. Once a single interest employer authorisation has been made by the FWC, a union can apply to the FWC to add additional employers and their employees to the authorisation if any of the employees of the new employer are members of the union. An employer and the majority of its employees can also agree to become covered by an existing single interest employer authorisation. An application to vary the authorisation must be made to the FWC and the variation takes effect once the variation has been approved by the FWC. (s.251).

Variations to single interest employer authorisations to remove employers and employees

272. An employer can apply to the FWC to vary a single interest employer authorisation to remove the employer and its employees. The FWC can vary the authorisation if, because of a change in the employer's circumstances, it is no longer appropriate for the employer to be specified in the authorisation. (s 251)

273. To provide a fairer and more balanced approach, some recommended amendments to these provisions are set out below.

Variations to single interest employer agreements to add additional employers and employees

274. Once a single interest employer agreement has been made, a union can apply to the FWC to add additional employers and their employees to the agreement if any of the employees of the new employer are members of the union. An employer and the majority of its employees can also agree to become covered by an existing single interest employer agreement. An application to vary the agreement must be made to the FWC and the variation takes effect once the variation has been approved by the FWC. (ss.216 -216DF).

275. It is already apparent that unions intend to adopt the tactic of reaching single interest employer agreements with a group of accommodating employers and then applying to vary that agreement to add a potentially large number of additional employers.

276. This tactic, and the risks that it presents for employers and the broader community, are highlighted by a single interest employer agreement that was recently reached between the AMWU a group of eight employers in the heating, ventilation and air-conditioning (**HVAC**) sector.

277. The single interest employer authorisation in the matter was made by Wright DP in *Application by the AMWU* [2024] FWC 395. Wright DP found that the contractors had clearly identifiable common interests for the following reasons identified in the AMWU's submissions:

[43] *The AMWU submitted that the enterprises are functionally identical so the criterion of 'reasonable comparability' is comfortably satisfied. The enterprises operated by the Employers:*

a. principally operate in New South Wales;

b. are of like size;

c. operate, and compete within, a specific sub-sector of the metal trades industry;

d. are subject to the same regulatory regime;

e. are in large part covered by the same award, with limited enterprise bargaining;

f. are members of the HVAC Manufacturing Installation Association; and

g. share a common labour pool.

278. On 14 June 2024, the FWC approved a single interest employer agreement covering the AMWU and the eight employers. The agreement is called the *AMWU On-site Construction HVAC Workers NSW Enterprise Agreement 2023-2027*. It contains very generous and inflexible conditions that would be very damaging for employers in most parts of the HVAC sector if they are roped-in to the agreement. In media comments, the AMWU has already signalled its intention to seek to flow on the provisions to other businesses in the HVAC sector.

279. The agreement includes the following entitlements:

- Very generous wage rates;
- 6% per annum wage increases;
- Contributions of between $120 and $150 per employee per week into the Protect redundancy fund;
- 36-hour week;
- Paid meal breaks for all employees;
- Double time for overtime;
- Daily fares and travel allowance;
- Quarterly four-hour paid union meetings;
- 10 days per year of union training leave for delegates;
- Union picnic day;

- Casual conversion after three months; and
- A shared labour pool between the 8 companies with each company required to give priority to using labour supplied by the other companies before engaging supplementary labour.

280. To provide a fairer and more balanced approach, some recommended amendments to the provisions relating to the variation of single interest employer agreements are set out below.

Variations to single interest employer agreements to remove employers and employees

281. See section B.9.4 of this submission.

Ai Group's position and recommendations

282. The single interest employer bargaining provisions in the FW Act require substantial amendments for the reasons discussed above. We recommend the following amendments:

- **Amend** s.249(1) to add a new paragraph (c), as follows:

  (c) The FWC is satisfied that it is appropriate for the employers to bargaining together for a single interest employer agreement, having regard to:

  (i) the history of bargaining of each of the relevant employers, including whether they have previously bargained together;

  (ii) whether it would be more appropriate for each of the relevant employers to make a separate enterprise agreement with their employees;

  (iii) the extent to which the relevant employers operate collaboratively rather than competitively; and

  (iv) any other matter the FWC considers appropriate.

- **Amend** s.249(3A), as follows:

  (3A) For the purposes of paragraph (3)(a), matters that may be relevant to determining whether the employers have a common interest include the following in considering whether the employers have clearly identifiable common interests, the FWC must take into account:

  (a) geographical location;

  (b) regulatory regime;

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

- **Delete** s.249(1AA) and (3AB) (Rebuttable presumption)
- **Amend** s.413(2), as follows:

(2) The industrial action must not relate to a proposed enterprise agreement that is a greenfields agreement or a cooperative workplace multi-enterprise agreement.

- **Amend** s.251(2A) (Variation of single interest employer authorisation to remove employer), as follows:

(*2A) The requirements of this subsection are met if the FWC is satisfied that:*

(a) the employers specified in the authorisation and the bargaining representatives of the employees of those employers have had an opportunity to express to the FWC their views (if any) on the application; and

(b) ~~because of a change in the employer's circumstances,~~ it is no longer appropriate for the employer to be specified in the authorisation.

- Reinstate the ability of employers and employees to strike an enterprise agreement that applies to the exclusion of a multi-enterprise agreement; and
- Permit an employer and its employees to make a single-enterprise agreement while subject to an authorisation for multi-enterprise bargaining.

B.9.4 VARYING ENTERPRISE AGREEMENTS TO REMOVE EMPLOYERS AND THEIR EMPLOYEES

Summary of the proposed amendments

283. The SJBP Act amendments varied the FW Act to enable an employer and its employees to jointly make a variation to a single interest employer agreement, supported bargaining agreement or a cooperative bargaining agreement so they cease to be covered, provided that each union covered by the agreement agrees to the variation (s.216EB).

Analysis

284. The SJBP Act amendments, as originally implemented, gave each union covered by an in-term single interest employer agreement or supported bargaining agreement the power to prevent an employer and its employees from ceasing to be covered by the agreement. This was due to:

- The requirement in s.216EB(d) that each union covered by the agreement must have agreed to the variation; and
- The interaction rules between multi-enterprise agreements and single-enterprise agreements.

285. The Government and Parliament recognised the inappropriateness of the original SJBP Act provisions and the FW Act was further amended (through the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024*) to provide a pathway for parties to transition out of a single interest employer agreement or a supported bargaining agreement to a new single-enterprise agreement.

286. If a single-enterprise agreement comes into operation, the single interest employer agreement or supported bargaining agreement that previously applied to an employee, ceases to apply to the employee and can never apply again (s.58(4) and (5)). However, the following conditions apply:

- The BOOT for the proposed single-enterprise agreement is assessed against the single interest employer agreement or supported bargaining agreement, rather than against the relevant modern award (s.193(1)); and
- If the single interest employer agreement or supported bargaining agreement has not reached the nominal expiry date, the employer cannot request employees to approve the proposed single-enterprise agreement by voting for it unless:
    - Each union covered by the single interest employer agreement, or a supported bargaining agreement, has provided the employer with written agreement to the making of the request (s.180B(2)(a)); or
    - A voting request order has been made by the FWC permitting the employer to make the request (ss.180B(2)(b) and 240B).

Ai Group's position and recommendations

287. Even though a new pathway out of an in-term single interest employer agreements and supported bargaining agreements has been implemented since the enactment of the SJBP Act amendments, the union veto in s.216EB(d) remains highly inappropriate and should be removed.

288. We recommend that s 216EB(d) is varied as follows, incorporating wording found in subsection (1) of section 211 (When the FWC must approve a variation of an enterprise agreement) of the FW Act:

(d) *there are no serious public interest grounds for not approving the variation* ~~*each employee organisation covered by the agreement, that is entitled to represent the industrial interests of one or more affected employees, agrees to the variation*~~.

B.9.5 COOPERATIVE WORKPLACE AGREEMENTS

Summary of the proposed amendments

289. The SJBP Act amendments introduced cooperative workplace agreements – a type of 'multi-enterprise agreement' under the FW Act.

290. Cooperative workplace agreements are agreements reached between a group of employers and their employees. Unless the cooperative workplace agreement is a greenfields agreement, at least some of the employees covered by the agreement must be represented by a union in bargaining for the agreement. A cooperative workplace agreement cannot be a greenfields agreement.

291. Industrial action cannot be taken in pursuit of a cooperative workplace agreement.

Analysis

292. To date, there appears to have been little interest amongst employers, unions and employees in cooperative workplace agreements, outside of the banking and finance industry.

293. An FWC Full Bench decision ([2023] FWCFB 237) of 5 December 2023 extended the default period for 101 transitional instruments that applied to franchisees of the Bendigo and Adelaide Bank, for a period of six months. The application for an extension was made by the Finance Sector Union. The decision notes that the employers were bargaining for a cooperative workplace agreement to replace all the transitional instruments and an additional 51 enterprise agreements:

> ***[3]*** *The employers covered by the Agreements are, for the most part, small community banks which are run by a volunteer board of directors. The banks operate on a profit-with-purpose, social enterprise model in which all profits are returned to the community in which they operate. Many of them are in remote and regional communities around the country. Each of the employers is a franchise of the Bendigo and Adelaide Bank Ltd (BABL).*
>
> ***[4]*** *BABL has been appointed as a bargaining representative for each of the 101 employers to whom the Agreements that are the subject of the present application apply. They are also a bargaining representative for a further 51 employers who are also covered by agreements which are not the subject of this application. BABL has been appointed as a bargaining representative for these employers for the purpose of negotiating a Cooperative Workplace Agreement to replace all 162 of these agreements.*

294. The *Bendigo Community Bank Cooperative Workplace Agreement 2023-2026* was approved by the FWC on 22 March 2024. At the time it was made, it applied to 153 employers, but the agreement was varied on 2 August 2024 and 23 October 2024 to add additional employers.

295. In a decision of 9 May 2024, Bell DP of the FWC dealt with an application to vary a multi-enterprise agreement that was made approximately 12 months prior to the cooperative workplace agreement provisions commencing operation. The application was made on the basis that the agreement was a cooperative workplace agreement. DP Bell decided ([2024] FWCA 1690) that the agreement was a cooperative workplace agreement because of the following provision in s 12 of the FW Act:

> ***cooperative workplace agreement****: a multi-enterprise agreement is a cooperative workplace agreement if there was no supported bargaining authorisation or single interest employer authorisation in operation in relation to the agreement immediately before the agreement was made.*

296. Based on Bell DP's decision, multi-enterprise agreements made prior to the operation of the SJBP Act amendments are now deemed to be cooperative workplace agreements.

Ai Group's position

297. The cooperative agreement provisions are operating effectively and no amendments are required.

B.9.6 EXCLUDED WORK

Summary of the proposed amendments

298. The SJBP Act amendments exclude employees undertaking '*general building and construction work*' from the supported bargaining stream, the single interest employer bargaining stream and cooperative workplace agreements.

299. '*General building and construction work*' is defined in s 25B of the FW Act.

Analysis

300. At this stage it appears that there have been very few FWC decisions that have considered the meaning of the exclusion.

301. In *Application by the AMWU* [2024] FWC 395, Wright DP considered the meaning of the exclusion, as it relates to heating, ventilation and air-conditioning work and decided that the exclusion did not apply to the proposed single interest employer agreement.

[46] *Section 249A prevents the Commission from making a single interest authorisation if the proposed agreement would cover employees in relation to general building and construction work.*

[47] *Section 23B of the FW Act defines general building and construction work as follows:*

- - -

[48] *I am satisfied that the proposed agreement would not cover employees in relation to general building and construction work because the exception under s.23B(1)(b)(xii) applies given that the work is in connection with the installation, major modernisation, servicing, repair or maintenance of air-conditioning and ventilation.*

302. Pattern bargaining is entrenched within many parts of the construction industry, and this results in many similar problems to those typically created by multi-enterprise bargaining. The problems were identified by the Royal Commission into the Building and Construction Industry (see section B.9.1 of this submission).

303. A large number of construction industry employers are coerced into signing pattern enterprise agreements due the threat that they will be excluded from construction sites if they do not. Given the inadequacies in Australia's workplace relations and competition laws, the unions are able to readily use pattern bargaining to achieve highly generous and highly inflexible pattern agreements that result in excessive construction costs for the community.

Ai Group's position

304. Whilst not addressing the main problems that exist with bargaining in the construction industry, the exclusion remains important and needs to be retained, particularly given the unlawful and inappropriate conduct of the Construction, Forestry and Maritime Employees Union (**CFMEU**) which led to the union being placed into administration.

PART C - NON-BARGAINING AMENDMENTS

C.1 OBJECTS OF THE FAIR WORK ACT (AND PART 5 – WORK VALUE CONSIDERATIONS)

Summary of the amendments

305. Part 4 of the SJBP Act amended the overall object of the FW Act (s.3) and objects for specific parts, s.134 (the modern awards objective) and s.284 (the minimum wages objective).

306. It expanded the existing object of the FW Act at section 3 by adding references to promoting job security and gender equity.

307. It also inserted more comprehensive, stand-alone objectives relating to gender equality to the FW Act's modern awards objective at section 134 and the minimum wages objective at section 284. These more comprehensive gender equality objectives replace the previous and more narrow reference to the principle of equal remuneration for work of equal or comparable value in support of gender equality.

308. Finally, it inserted a reference to 'the need to improve access to secure work across the economy' to the FW Act's modern awards objective at section 134.

309. Part 5 of the SJBP Act introduced subsection 157(2B) to clarify that the FWC's consideration of work value reasons must be free of assumptions based on gender and must include consideration of whether historically the work being assessed has been undervalued because of such assumptions.

Analysis

310. The amended objects of the FW Act at section 3, are relevant if there is a matter before the FWC or a relevant Court that involves the exercise of discretion and/or where it is relevant to interpreting the FW Act.

311. In respect of the expanded gender equity objective to the FW Act's modern awards objective and minimum wages objective, the FWC must have regard to this in determining matters to which the modern awards objective and/or minimum wages objective applies. Specifically, the FWC must take into account the new expanded gender equity provision, in addition to existing criteria, in making decisions:

    - that ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions; and

- establishing and maintaining a safety net of fair minimum wages.

312. Following the changes to the objects in the SJBP Act (and a request from the Minister for the Minister for Employment and Workplace Relations which specifically referenced changes to the objects), the FWC undertook the Modern Awards Review 2023-24, which reported on 18 July 2024. That review looked at the concepts of job security, work and care, making awards easier to use, and the Arts and Culture sector[7].

313. The modern award review saw the FWC:

- Issue discussion/research papers addressing the matters to which the review was directed, including job security.
- Take submissions in response to the discussion papers, and submissions in reply to maters raised by other review participants.
- Convene a series of conferences to discuss issues raised in the discussion papers and submissions.
- Issue a final report to conclude the review process, which provided recommendations about possible next steps if parties sought variations to modern awards and proposed that the FWC take steps on its own motion to vary awards / examine particular matters following the Modern Awards Review.

314. Amendments to s.3(a) and s.134(1)(aa) were canvassed in submissions and consultations[8]. The FWC's consideration of these matters also canvassed the Expert Panel's approach in the Annual Wage Review 2023–24[9],which took into account the new objects. Consideration in the discussion papers, submissions and consultations traversed part time employment[10], the use of IFAs[11], minimum standards for casual employees[12], and fixed term contracts[13].

315. Ultimately, the Modern Awards Review did not result in substantial amendments to the Award system.

316. In the Annual Wage Review 2023-24 decision, the Full Bench stated that it would (and did) "*immediately after the conclusion of the Annual Wage Review initiate proceedings pursuant to s 157 of the FW Act to consider whether the minimum wage rates for the relevant classifications in identified awards should be increased on work value grounds in order to remedy potential gender undervaluation*." These proceedings are to be dealt with to

[7] Modern Awards Review 2023-24 Final Report
[8] Modern Awards Review 2023-24 Final Report [43]
[9] [2024] FWCFB 3500
[10] Modern Awards Review 2023-24 Final Report [51]-[54]
[11] Modern Awards Review 2023-24 Final Report [55]-[58]
[12] Modern Awards Review 2023-24 Final Report [59]-[63]
[13] Modern Awards Review 2023-24 Final Report [64-][69]

completion in a time-critical manner in accordance with the priorities and the "*imperatives of ss.134(1)(ab) and 284(1)(aa) of the FW Act*".

317. A particular issue that has arisen as a consequence of the gender undervaluation proceedings is the lack of commitment by Government to fund any increases awarded through this process notwithstanding the dependency of many of these sectors (e.g., children's services, care sector, health sector) on Government funding or support to meet the costs of increased minimum conditions. In the absence of such commitment, this may have frankly devastating impacts on some employers and significant social and economic consequence more broadly, some of which may undermine women's full participation in the workforce.

318. We note in this respect the Federal Government's recent submissions in the Gender Undervaluation – Priority Awards Review,[14] in which it stated:

> [**44**]: *The Commonwealth has not made any decision regarding funding (or other policy and program adjustments) to support any wage increases at this time and is unable to commit to doing so prior to the current December 2024 hearings. Some programs may see wage movements automatically incorporated into funding allocation, while others may lead to pressure on service providers to reallocate existing resources to wages until program parameters and funding can be reconsidered. The latter may be the more prevalent outcome.*
>
> …
>
> [**46**]: *The Commonwealth supports the Commission's review process and the broader task of identifying and addressing gender undervaluation in the modern awards system. However, the Commonwealth's position is that any wage increases arising from the gender-based undervaluation identified by the Commission should be implemented in a measured and responsible manner that manages workforce, fiscal and macroeconomic risks …* [emphasis added].

319. It is trite to observe that the impact of a fundamental reassessment of the quantum of relevant award rates in the context of gender equity is a matter that may have profound impacts upon employees and employers, as well as the broader community and economy. Such matters must be carefully weighed in any variation of minimum rates. This should include the potential for any dis-employment effects to flow from the grant of unsustainable increases, as well as the impact on employers, many of whom may be not-for-profit entities directly or indirectly reliant upon Government funding or subsidy arrangements (such as those in the disability sector or engaged in the provision of early education services). These additional impacts must be considered alongside the gender equity objectives.

[14] Federal Government submission to the gender undervaluation – priority awards review, 27 September 2024.

320. By way of example, we note the importance of assessing the impact of an increase to minimum wages prescribed by the S*ocial, Community, Home Care and Disability Services Industry Award 2010* (**SCHCDS Award**) on employers. Many employers covered by this award are not-for-profit organisations that rely heavily, if not exclusively, on government funding. For instance, disability services are primarily funded through the National Disability Insurance Scheme (**NDIS**). We note the following extract from our initial submissions concerning the SCHCDS award in the Gender Undervaluation Proceedings:

- *The NDIS is characterised by pricing limits, which are stipulated in the NDIS Pricing Arrangements and Price Limits 2024-25 (**Pricing Arrangements**). Those limits effectively impose a cap on the amounts that providers can charge for their services, thereby preventing them from passing on additional costs.*
- *The Pricing Arrangements are derived from the NDIS Disability Support Worker Cost Model 2024-25 (**Cost Model**). The Cost Model is based on a series of assumptions and is used by the National Disability Insurance Agency (**NDIA**) to estimate the costs to disability service providers of providing the relevant services and inform its pricing decisions.*
- *The NDIA has been found to be 'aggressive' in its price regulation activities in 'trying to set the absolute minimal cost to control the cost to government of the NDIS as a whole'. This can be seen in various aspects of the Cost Model, which entirely omits certain Award-derived entitlements, underestimates the true cost of others (such as overtime) and assumes a degree of labour optimisation and rostering efficiency that is simply divorced from the operational realities of organisations that provide the relevant services. This is, in large part, a product of the consumer-directed care model that underpins the provision of the relevant services, which has resulted in greater fragmentation in work patterns, as employers are now 'less able to organise the work in a manner that is most efficient' to them.*
- *The impact of these various factors is clear. Employers in the disability sector have been under significant strain since the rollout of the NDIS. Indeed, the circumstances of many providers appears to be worsening. A survey of 432 organisations (99% of which provided services under the NDIS) conducted by National Disability Services (State of the Sector Report) revealed that 2023 was 'the worst year for financial viability' of providers in the eight years the survey has been run. Thirty-four percent of respondents reported making a loss, while 18% reported just breaking even.25 This was a significant increase from the previous two surveys in 2021 and 2022, where 19% and 23% of providers respectively reported making a loss.*
- *Accordingly, the Commission should not in this proceeding move to award any increase to minimum wages payable in the disability services sector unless a clear commitment has been made by the Commonwealth Government to fund such increases, in their*

entirety. Employers must not be left to simply absorb the additional costs associated with wage increases, having regard to the various matters set out above.

321. Similar problems arise in the context of the new work-value considerations (which must be considered by the FWC when varying modern awards and associated rates). For example, in a recent FWC Full Bench decision[15] of 4 November 2022, the FWC determined to award aged care workers a 15% wage increase under the FW Act's current work value provisions the Full Bench observed:

[60]…The likely impact on employers of the interim increase we propose to award will be ameliorated to the extent of Government funding support for that increase. The extent of funding support is unknown at present.

[61] Given the funding arrangements in the aged care sector, the Joint Employers and the Commonwealth sought an opportunity to make further submissions regarding the timing of the implementation of any minimum wages increases arising from these proceedings

322. The Full Bench also referred to the Australian Government's submission in the proceedings made on 8 August 2022.[16] Relevant sections of the Government's submission are underlined below.

The Commonwealth will provide funding to support any increases to award wages made by the Commission in this matter and that will help deliver a higher standard of care for older Australians. The Commonwealth would also welcome an opportunity to work with the Commission and the parties regarding the timing of implementation of any increases, taking into account the different funding mechanisms that support the payment of aged care workers' wages …

With regard to fairness for employers, the Commonwealth submits that the particular contemporary context of Government funding for the aged care sector means employers are unlikely to experience significant detrimental impacts as a result of increases to modern award minimum wages in the sector. *Such wage increases could therefore not be considered to be unfair to aged care employers …*

The cost to business of increasing aged care sector wages would likely be substantial, depending on the quantum and phasing of wage increases. *However, as the primary funder of aged care services, the Government has committed to ensuring that the outcome of the aged care work value case is funded. The Commonwealth submits that the Commission can therefore proceed on the basis that the impact on business of significant*

[15] [2022] FWCFB 200 at [60]
[16] [2022] FWCFB 200 at [905]

increases to award minimum rates in the case will not be material.'

323. The Commonwealth's submission[17] and the Full Bench's decision highlights the impact and importance of Government funding in minimizing the adverse impacts on employers in the aged care and community sector. The Full Bench's consideration of the impact on employers and the community from a large wage increase, was also framed by, and no doubt arose from, the application of the modern awards objective.

324. With these changes, the Government has created a statutory catalyst for the potential grant of wage increases in sectors which are dependent upon Government funding. However, the Government has not at the same time committed to meeting the costs associated such rises. This is irresponsible and blatantly unfair. It places employers, many of whom are small and not for profit organisations providing crucial services to vulnerable people, in an impossible position. The approach of the Government demonstrates the imperative to have a countervailing objective which balances the importance of promoting gender equity with practical necessity of ensuring that any changes to minimum conditions are sustainable.

325. It cannot be assumed that the FWC will refrain from increasing employer costs merely because they are not funded or affordable. Indeed, past decisions suggest these will not be 'determinative' considerations.

Ai Group's positioning and recommendations

Gender equity

326. We contend that the FW Act, and in particular the modern awards objective and minimum wages objective, should be amended specifically to require the FWC to consider whether or not the Government has given a clear commitment to fund increases to minimum wages or award variations in sectors where such funding is relied upon by employers. If such a commitment is not given, this should be factor that must weigh in favour of the FWC not granting an increase and/or limiting any increases.

C.2 EQUAL REMUNERATION (PART 5) – EQUAL REMUNERATION ORDERS

Summary of the amendments

327. Part 5 of the SJBP Act changed the way the FWC considers equal remuneration in proceedings for equal remuneration orders under the FW Act.

[17] See also: Federal Government submission to the gender undervaluation - priority awards review, September 27, 2024

328. The SJBP Act expands the circumstances in which the FWC may make an equal remuneration order under the FW Act.

329. Equal remuneration orders are orders that the FWC can make where there is not equal remuneration for work of equal or comparable value. An equal remuneration order may only increase, rather than reduce, rates of remuneration. An employer must not contravene an equal remuneration order. For employees to whom the order applies, the order prevails over any less beneficial term that is contained in a modern award or enterprise agreement.

330. Equal remuneration for work of equal or comparable value is a defined concept in the FW Act. The SJBP Act amendments did not change the previous definition which provided that it is "*equal remuneration for men and women workers for work of equal or comparable value*" (s.302(2)). However, it did enable the FWC to consider a broader range of factors in any assessment of whether there is equal remuneration for work of equal or comparable value. This was reinforced by the new statutory note which was inserted in the definition of equal remuneration for work of equal or comparable value in the FW Act's definition section (s.12).

331. In expanding the circumstances in which the FWC may make equal remuneration orders, the FW Act now specifically provides that:

    (a) The FWC may initiate proceedings at its own motion, rather than only on application by an interested party. This is a particularly significant change when coupled with the creation of a new Expert Panel(s) relating to pay equity and the community and care sector, and its enhanced functions.

    (b) In deciding whether there is equal remuneration for work of equal or comparable value, the FWC may take into account:

        - comparisons within and between occupations and industries to establish whether the work has been undervalued based on gender, where such a comparison need not be limited to similar work and or with an historically male-dominated occupation or industry;
        - whether historically the work has been undervalued based on gender;
        - any fair work instrument or State industrial instrument; and
        - any other consideration, relevant or otherwise, in deciding whether there is equal remuneration for work for equal or comparable value.

332. In addition, the FWC is not required to find gender discrimination in order for the gender undervaluation to be established.

Analysis

333. The changes to equal remuneration orders have broadened the FWC's discretion and removed the application of previous principles determined by various Full Benches of the FWC to be relevant (e.g., the need to establish a male comparator) in considering applications for equal remuneration orders.

334. While conferring greater discretion on the FWC to determine whether there is equal remuneration for work of equal or comparable value, the FWC's previous discretion in relation to the making of an order has been removed and the FWC is now required to make an order if satisfied that there is not equal remuneration for work of equal or comparable value.

335. However, unlike the FW Act's work value provisions (which at least to some degree operate in conjunction with the modern awards objective and minimum wage objective), there is a very problematic absence in the SJBP Act enhanced equal remuneration provisions of any specific consideration around the impact on employers, the community and the industry affected. The FWC ought to be required to balance such considerations in weighting applications for equal remuneration orders and determining how to frame any remedy. This would be, for example, highly relevant to consideration of the development of any transitional arrangements implemented under any such orders (to the extent that such transitional arrangements are permissible under the scheme).

Ai Group's positioning and recommendations

336. Ai Group supports the principle of equal remuneration for work of equal and comparable value.

337. The FWC's ability to make equal remuneration orders is a direct and targeted intervention to address cases of gender pay inequity resulting from the undervaluation of women's work.

338. However, in order to protect the viability of employers, the sectors in which they operate and on which vulnerable people in the community rely, Ai Group suggests the following amendments:

Insert a new subsection 302(4):

> *…(c) the impact of any proposed order on affected employers; whether employers rely, in whole or in part, on Government-funding arrangements; and the impact on the community.*

339. Section 302(4) already requires the FWC to consider mandatory factors such as previous annual wage reviews in deciding whether to make an equal remuneration order. This proposed amendment would add to those considerations.

340. This proposed modest amendment would not narrow the FWC's consideration of whether there is equal remuneration for work of equal or comparable value and nor would it negate the provision at section 302(5) requiring it to make an equal remuneration order if equal remuneration was not found. It would however ensure a more holistic assessment of matters such as the quantum of any order or the timing of its implementation (including any transitional arrangements).

341. Clearly the impact on employers, how certain industry sectors and employers are funded and the integrity of services to the vulnerable, should be relevant considerations in FWC decisions to significantly increase minimum award rates across industries.

C.4 PAY SECRECY (PART 7)

Summary of the amendments

342. Part 7 of the SJBP Act inserted a provision into the FW Act that prohibits an employer from entering into a contract of employment or other written agreement with an employee, that contains a term that is inconsistent with the new workplace rights relating to the disclosure of remuneration.

343. The new protected workplace rights relating to the disclosure of information are as follows:

- An employee can disclose their remuneration to anyone;
- An employee can ask any other employee (including an employee employed by a different employer) about their remuneration; and
- An employee can choose not to disclose their remuneration to anyone.

344. These workplace rights extend to former and prospective employees. The workplace right also extends to disclosure of other terms and conditions of the employee's employment that are reasonably necessary to determine remuneration outcomes, such as hours of work arrangements and likely employer incentive and bonus schemes.

345. The creation of these workplace rights relating to remuneration disclosure expanded the application of the FW Act's General Protections such that an employer is prohibited from taking adverse action against an employee because of these new rights.[18]

346. Penalties for contravening the FW Act's General Protections are up to $99,000 per contravention for a body corporate employer.

[18] See section 340 of the FW Act for the broad framing of workplace rights which includes for instance an employee also proposing to exercise, or not exercise a workplace right.

347. However, an employer who enters such a contract of employment with a pay secrecy clause could be liable for maximum penalty of $990,000 (if it is a serious contravention).

348. In addition to the significant penalties on employers, the terms of any contract of employment or fair work instrument that contained a pay secrecy clause would be of no effect.

Analysis

A broad exemption should be applied to pre-commencement contracts

349. In accordance with the application and transitional provisions, if an employee had an existing employment contract that contained a pay secrecy clause:

- The employer will not contravene section 333D of the FW Act (the prohibition on pay secrecy terms being introduced into employment contracts) only by virtue of the existing contract.
- The contractual provisions on pay secrecy will continue to have effect (despite section 333C, FW Act), until the contract is varied.
- The employee will not have a workplace right under section 333B of the FW Act to ask about, and disclose, remuneration and related conditions, until the contract is varied.

350. In practice, there is frequently uncertainty over the whether a contract has been varied so as to trigger the application of s.333C. For example, the question as to whether a remuneration or wage increase granted to an employee amounts to a variation to the contract will very much depend on the circumstances but will not always be well understood by employers and employees. A further difficulty is that an employer cannot unilaterally vary a contractual provision to remove the offending part absent the agreement of the employee to do so. These issues mean the transitional arrangement places the employer in an untenable position, where it may unwittingly contravene the prohibition and have no way to address the contravention.

The prohibition does not address the causes of the gender gap

351. Proposed legislative provisions seeking to ban pay secrecy clauses are not new. An earlier version of the SJBP Bill's pay secrecy provisions was the *Fair Work Amendment (Gender Pay Gap) Bill* introduced by the Australian Greens Senator Larissa Waters back in 2015. The intended objective behind banning pay secrecy at that time was to support improved gender pay equity by creating greater pay transparency. Similarly, the banning of pay secrecy clauses featured in Labor's *Australian Women* pre-election policy as a gender equity strategy.

352. While Ai Group supports the policy intent of improving gender pay equity, the blunt pay secrecy prohibitions do not target the cause of the gender pay gap and nor are they limited to gender pay equity.

353. The causes of the gender pay gap have been consistently well-established as comprising of three factors:[19]

- Extended time of out of the workforce by more women than men where women undertake a greater share of unpaid domestic and caring work;
- Gender-based segregation along industry and occupational lines; and
- Unlawful discrimination.

354. These pay secrecy prohibitions do not directly or meaningfully address any of these causes of the gender pay gap, which are based on broad structural and cultural factors about gender inequity and disparity.

355. Even if one was to accept that the prohibition may assist in establishing unlawful discrimination as a contributor to pay inequity, the prohibition goes far beyond that and is not limited to disclosure for that purpose. Instead, the pay secrecy right provides unlimited disclosure rights for employees and blunt prohibitions that cover all reasons, including those unrelated to gender, as to why some employers seek pay secrecy clauses.

356. In Ai Group's experience, pay secrecy provisions are not universally contained in employment contracts. They are not utilised in all industries. The employers or industry sectors that use them often have a particular reason for doing so that relates to their business operations and commercial interests.

357. One such reason would include the protection of an employer's commercially sensitive information that would be revealed if remuneration details became public information. For instance, an employer's pricing model for its services may be costed on employee remuneration and appropriate mark-ups, which if revealed to clients or competitors, could be information used against that employer commercially.

358. While Ai Group supports the policy objective of better gender pay equity, it continues to be our view that such a blunt prohibition will not deliver meaningful results in narrowing the gender pay gap[20] and a range of unintended consequences will arise. These are set out below.

[19] KPMG, *She's Price(d)less Report;* the economics of the gender pay gap, 2022

[20] See also Media Release, Australian Greens, 22.10.21 with the comment from Sen.Waters: "…*this move is not the panacea to close the persistent gender pay gap. The latest gender pay gap stats released yesterday show we need to ensure women-dominated occupations are remunerated in a way that better reflects their value to society.*

Potential adverse impact on employees

359. It continues to be our view that these provisions may cause adverse impacts to employees, including giving rise to privacy concerns about their personal information in the public domain and exposure to conflict with others at work. Such adverse impacts are explained below.

360. *First,* an untested policy premise behind this provision appears to be that there *i*s inappropriate pay inequity across employee remuneration and that the disclosure of pay will expose disparity. There are many circumstances however where employees are in fact paid at the same or comparable rate for the same or similar work performed or where any disparity exists for legitimate reasons (e.g., skills, experience, performance etc).

361. *Secondly*, the right enables an employee to disclose his/her remuneration to anyone and in an unqualified public fashion. This may result in unintended privacy concerns arising for other employees. An employee's revelation and comfort with disclosing their remuneration publicly, for example on social media, may not be supported by other co-workers with the same title and who may be paid *the same.*

362. *Thirdly,* the right protects a range of unwelcome requests by employees about the remuneration information of others. In circumstances where such requests were persistent or threatening, neither an employer, nor the employee receiving the request, has a right to stop the conduct without risk of contravening the General Protections of the FW Act. This is because to do so would likely amount to unlawful adverse action by the employer because the employee has exercised a workplace right, or because the request to stop would prevent the exercise of a workplace right to request that another share their remuneration.

363. In effect, the new workplace right for an employee to request another's remuneration details and an employee's workplace right not to disclose their remuneration will inevitably generate workplace conflict over which an employer can do very little. Employers should not be constrained in this way.

364. *Fourthly,* the phrase "or other written agreement" in s.333D has the potential to capture settlement agreements that may be negotiated between the employer and employee (or former employee) and any legal representatives in resolving claims about the employee's employment. Generally, such agreements are not contracts of employment but are entered into to resolve a claim in preference to the pursuit of litigation. These settlement agreements are often used to facilitate a monetary payment to employees (or former employees) by their employer without admission of liability and where the quantum of such payments are typically agreed as confidential. The term 'remuneration' in the FW Act provisions is not defined and there is real risk that settlement monies paid by an employer could be construed as such.

365. The banning of confidentiality clauses in legal written settlement agreements (that are not contracts of employment) facilitating the payment of monies are likely to be detrimental to employees who may prefer for a negotiated outcome than pursuing proceedings in a court or tribunal. For instance, a very high proportion of unfair dismissal applications are resolved through negotiated settlement agreements involving the payment of money with confidentiality clauses, instead of parties pursuing the matter in the Commission. Similarly, many underpayment claims are settled in a manner that that sees the parties enter into a Deed of Release that contains confidentiality provisions. In many such cases it is highly arguable that there is no underpayment or that it is less than asserted. The use of a Deed of Release in these circumstances provide a powerful incentive to the employer and employees resolve their differences in a manner which is advantageous to an employee. The prohibition on confidentiality clauses in such cases would no doubt prompt many employers to be less likely to agree to a settlement.

366. A general protections claim was made in June 2023 alleging a breach of the pay secrecy prohibitions, by way of alleged retribution against an employee disclosing her pay.

- The matter was subsequently settled by mediation without contested proceedings or a decision. [21]
- This complaint addressed only one dimension of the pay secrecy scheme, not taking retributory actions where someone reveals their pay, and did not appear do so under the 'right to ask' framework.

Ai Group's positioning and recommendations

367. We recommend the transitional provisions be amended to provide a blanket exemption for contracts entered into prior to the commencement of the SJBP provisions.

368. Ai Group supports the narrowing of the gender pay gap, but we do not support blunt and blanket prohibitions on pay secrecy coupled with the creation of unqualified workplace rights that have the potential to cause a conflict of rights with others. We recommend that the provisions be amended as follows:

- An employer must be permitted to undertake reasonable management action to resolve workplace conflict arising from employee requests for remuneration details from others.
- In relation to s.333B, the term *remuneration* should exclude monies paid by the employer to the employee as part of any settlement arrangement relating to actual or

[21] https://www.comcourts.gov.au/file/Federal/P/MLG929/2023/actions

threatened legal or tribunal proceedings against an employer that the employee agrees is confidential.

- After s.333D insert new sub-section 333D(2):

  An employer does not contravene this section if the prohibition does no more than is necessary to protect the legitimate commercial interests it has in respect of the provision of commercial services to third parties.

A corresponding exception to the contravention should also be made to Part 3-1 General Protections.

C.5 ANTI-DISCRIMINATION AND SPECIAL MEASURES (PART 9)

Summary of the amendments

369. Part 9 of the SJBP Act introduced three new protected grounds of breastfeeding, gender identity and intersex status to the list of existing protected grounds in the FW Act that cannot be the subject of a discriminatory term in a modern award or enterprise agreement.

370. The three new protected grounds are additional grounds protected from discrimination under the FW Act's General Protections and feature in the existing list of protected attributes that the FWC is to take regard to in preventing and eliminating discrimination in exercising its functions.

371. The amendment also introduced the concept of special measures to achieve equality such that a term of an enterprise agreement may include special measures to achieve equality without that term being discriminatory and therefore unlawful. For example, a term that has the purpose of achieving substantive equality for employees who are female and who have a disability.

372. The amendments to the FW Act for the formulation of special measures to achieve equality is broadly consistent with how the concept is framed by the AHRC in its special measure guidelines.

Ai Group's positioning and recommendations

373. Ai Group does not have any comments on these provisions.

C.6 FIXED TERM CONTRACT LIMITATIONS (PART 10)

Summary of the amendments

374. Part 10 of the SJBP Act prohibits an employer from engaging an employee on a fixed term contract with a period of more than two years (including extensions or renewals) or which may be extended or renewed more than once, or entering into more than two successive fixed-term contracts with the same employee for the same or substantially similar work.

375. There are a number of narrow exceptions, but the employer has the burden of proving that the exception applies.

376. The exceptions are:

- The employee is engaged under the contract to perform only a distinct and identifiable task involving specialised skills;
- The employee is engaged under the contract in relation to a training arrangement;
- The employee is engaged under the contract to undertake essential work during a peak demand period;
- The employee is engaged under the contract to undertake work during emergency circumstances or during a temporary absence of another employee;
- In the year the contract is entered into the amount of the employee's earnings under the contract is above the high income threshold for that year (which is currently $175,000);
- The contract relates to a position for the performance of work that:
    - is funded in whole or in part by government funding or of a kind prescribed by the regulations;
    - the funding is payable for a period of more than 2 years; and
    - there are no reasonable prospects that the funding will be renewed after the end of that period;
    - The contract relates to a governance position that has a time limit under the governing rules of a corporation or association of persons; or
- Where a modern award that covers the employee includes a term that permits the contract.

377. A civil penalty of up to $990,000 may be imposed if an employer, small or large, engaged an employee under a fixed term contract in breach of the restrictions and if it is a serious contravention.

378. Where a fixed term contract is contrary to these provisions, the employment contract would continue as if the fixed termination date had no effect. The employee would be entitled to notice of termination and redundancy pay under the FW Act.

379. Employers must give all new employees who are employed on a fixed term contract a Fixed Term Contract Information Statement published by the FWO (together with other relevant Information Statements, depending on the nature of their employment). A civil penalty of up to $990,000 may also be imposed if an employer, small or large, failed to give a new employee the Fixed Term Contract Information Statement and it was a serious contravention.

380. Anti-avoidance provisions were also inserted prohibiting a person doing the following:

- terminating an employee's employment for a period;
- delaying re-engaging an employee for a period;
- not re-engaging an employee and instead engaging another person to perform the same, or substantially similar, work for the person as the employee had performed for the person;
- changing the nature of the work or tasks the employee is required to perform for the person; or
- otherwise altering an employment relationship.

381. The General Protections provisions in Part 3-1 also prohibit the taking of adverse action by an employer against an employee (which includes an employee on a fixed term contract) because of a workplace right in relation to fixed term contract limitations.

382. While the limitations do not apply to contracts entered before commencement, those previous contracts may be relevant to any consecutive contract entered into after that date.

Analysis

Member feedback

383. Ai Group maintains one of Australia's largest and longest standing information and advisory services for employers through our Workplace Advice Line.

384. The limitations on fixed term employment have dominated queries to our information service in 2023 and 2024 and have for the past two quarters been the single largest area of queries following amending legislation. This shows a surprising level of interest and concern regarding these amendments, and suggest the potential for these changes to have a substantial impact in practice on our members.

385. Our members have raised many concerns, particularly in relation to the exemptions which appear to be excessively narrow and unclear. For example:

    What type of change to a contract amounts to a **renewal** or **extension** or entry into a **new contract**?

    - Would a change to a pay rate, position or location during a fixed term **trigger** the provisions?
    - What does an '**identifiable period'** mean and, if it includes specified task contracts, how is the duration determined in advance for the purposes of these provisions?
    - When is an employee employed to perform only a **distinct and identifiable task involving specialised skills**? Relatedly, how does an employer determine that it does not have the skills but needs those skills for that specified task?
    - When are there **no reasonable prospects** that **government** (or prescribed) **funding** for 2 or more years will be renewed after that end of that period'. The problems associated with this have already led to temporary exceptions being further particularised through regulations.

    We do not here suggest that such questions are 'unanswerable'. We instead raise concerns that the provisions are unnecessarily complex and confusing for lay persons.

386. Ai Group's Workplace Advice Line also provides guidance to employers on risks associated with ending employment of employees engaged on fixed/maximum term contracts, including risks associated with potential redundancies and unfair dismissal. Employers have communicated considerable discomfort at having to hire employees on an ongoing basis due to fixed term contract restrictions, where they know the employment will not be able to be sustained beyond a set period. There is feeling amongst many members that the use of expressly agreed fixed term employment arrangements was fairer and more transparent. Employers were of course also concerned about the expanded exposure to unfair dismissal applications and redundancy costs because of the new laws

Government – funded contracts

387. The exclusions are far too narrow and are having major unwarranted adverse implications for a large number of businesses.

388. Many businesses are partially or fully funded through contracts with Federal, State, Territory and Local Governments. However, the relevant exemption only applies in very limited circumstances and only where "*there are no reasonable prospects that the funding will be renewed after the end of that period*". This test will rarely be met.

389. It is common for Government-funded service providers (e.g. those providing community services, education services, employment services, health services, business advisory services, etc., to the community on behalf of Governments) to be required to re-apply for funding at the end of the contractual term. In a large proportion of cases, there would be some prospects of the funding being renewed at the end of the current term, but this would be by no means certain. The changes have led to substantial disruption and difficulty for such businesses.

390. Many of the affected businesses are not-for-profit organisations which are providing vital services to the community.

391. Under the current terms, even if the funding was unlikely to be renewed at the end of the period, this would not be enough. There would have to be no reasonable prospects of the funding being renewed in order for the exemption to apply.

392. Typically, Government contracts do not include any compensation to the contracted service provider for any redundancy pay that would be payable to the employees working on the Government contract. It would appear that the Federal Government has not allocated any funds in the Budget for these substantial additional costs. Similarly, it is likely that State, Territory and Local Governments would have failed to budget for these additional costs.

393. In addition to the adverse implications for Government funded businesses, there will be adverse effects on many private sector businesses. It is reasonably common for employees to be engaged under fixed-term arrangements when engaged to carry out work on specific commercial contracts between their employer and a client of their employer.

Project work

394. It is common for employees to be engaged on a fixed term basis when engaged to work on particular projects. The amendments disturb many such employment arrangements to the detriment of businesses and employees, particularly because many projects continue for more than two years.

395. The concept of specified task employment (as referred to in ss.123(1) and 386(2)) has been interpreted very narrowly by Courts and the FWC to relate only to specific tasks carried out by an employee and not to an employer's task or project. Hence, specified task employment is uncommon and fixed term employment is more common.

396. In *Drury v BHP Refractories* (1995) 62 IR 467, Chief Justice Wilcox of the Industrial Court of Australia (which was superseded by the Federal Court of Australia) made the following comments about specified task employment:

> *"The contract of employment must be for a specified task; it must be a contract under which the employee is to carry out a specified task. The words "for a specified task" have nothing to do with the employer's task, or project*."

Visa workers

397. There is a particularly glaring and significant omission from the legislated exclusions in s.333F of the FW Act, for visa workers.

398. There are various scenarios in which migrant workers are able to work and reside in Australia on a temporary or fixed term basis, which can exceed 2 years.

399. At least the following visa types for working and skilled visas run for more than 2 years on a fixed term basis, and allow non-citizens to work in Australia during that period.

- Temporary Skill Shortage Visa (subclass 482) – generally for up to 4 years duration, 5 years for Hong Kong passport holders.
- Temporary Graduate visa (subclass 485) - Post-Higher Education Work stream - usually between 2 and 3 years, Hong Kong and British National Overseas passport holders may stay for 5 years.
- Skilled Employer Sponsored Regional (Provisional) visa (subclass 494) – which provides work and residence rights after 5 years.

400. The visa system and visa sponsorship are predicated on an employee being employed with their sponsoring employer for the duration of their visa facilitated work rights in Australia.

401. There can be scenarios in which new sponsors are required part way through a visa period, however these are understood to have generally been rare situations and typically unexpected.

402. The fixed term contract restrictions are clearly incompatible with the abovementioned visa requirements.

403. In the case of the subclass 494 visas, there is a clear avenue to permanent residence after 3 years. It would seem particularly nonsensical and damaging to someone trying to work and live in Australia on ongoing basis to throw them out of work after two years on a technicality due to restrictions on fixed term employment and to force them to navigate not only the

difficult problem of securing permanent residence, but also securing re-employment as a visa worker.

404. Many different visas allow for extensions due to changing circumstances, or for example where somebody wants to stay and move to a different visa type. However, this seems incompatible with very strict limitations on scope to extend fixed term work.

405. Overall, there appears a strong consensus in industry that visa work should be the subject of an additional exception to the restrictions on fixed term employment.

Cadetships, placements, clerkships and graduate programs:

406. It was welcome that s.333F(1)(b) excludes employees engaged under a fixed term contract in relation to a training arrangement from the restrictions in s.333E. This followed Ai Group and others identifying to Government potential anomalies relating to apprenticeships and traineeships.

407. However, there are other anomalous and damaging circumstances, directly analogous to apprenticeships and traineeships, not covered by the existing exclusion that should also be excluded from any blanket restrictions or limitations on fixed term contracting.

408. A number of professions and technical, scientific and engineering qualifications require periods of industry placement, or cadetships, for an employee to graduate and be able to enter the industry as a professional in due course. In many circumstances young people who are studying will be employed in their holidays on a repeated basis with the one employer across the period of their studies. This is very much a training arrangement in the ordinary sense of the word, but it is not subject to a legislated / prescribed model in the same way as apprenticeships and training ships. Of concern to many employers is that such arrangements do not fall foul of the consecutive contract provisions (s.333E(5)).

409. A similar concern may arise in relation to law clerking / summer clerkships which again provide a version of paid work experience for entry into a profession based on repeated fixed term contracts. Such work is inherently fixed term because firstly the person studying / seeking limited duration employment does not yet have the professional qualifications necessary to be employed full time. Secondly, they have not yet being subject to a recruitment process for an ongoing role. From the employer's point of view, they may offer such employment firstly as a matter of collective support for their industry and profession, and secondly to set up relationships with potential newer generations of employees – in circumstances where no decisions have yet taken on ongoing hiring.

410. These scenarios are analogous to the basis on which employers offer apprenticeships and traineeships - they are time bound periods of employment to enable younger people to become familiar with work and workplaces, and to sustain industries and professions (as apprenticeships do trades) through generational renewal.

Medical Research

411. One particular area of anomalous, damaging, and clearly unintended consequences of the restrictions on fixed term employment is in the medical research industry.

412. Medical research, like many areas of government and non-government funded activity is not funded on an open-ended basis – whether funded by government, charitable and philanthropic entities or private sector entities.

413. Funding rounds or contracts are time limited and are subject to recontracting or contract renewal, but with no certainty as to that renewal. Medical research programmes are commonly undertaken over a number of years but are subject to needing to bid or apply for refunding during that period.

414. We understand this is how programmes operate in this industry throughout the world. Whilst there may be tenured academics working on such programmes, there is also significant fixed term hiring directly contingent on research grants and funding. Such programmes do not neatly fit within the assumptions regarding 2-year limits to fixed term contracting which gave rise to Part 10 of the SJBP Act, or with the basis on which the industry has been addressed in regulations, particularly the most recent regulations made less than a month prior to this review.

415. The incompatibility between this industry, reliant on fixed term contracting, and the limitations in Part 10 of the SJBP Act is a notorious problem. The Government has since the imposition of fixed term limitations through the SJBP Act, put in place two separate regulations seeking to modify the negative impacts of the blanket restrictions on this particular industry, most recently through Regulation 2.15 of the Fair Work Regulations 2009.

416. The problem is:

- An exclusion that was providing some measure of relief and certainty for employers and employees in the industry (the December 2023 regulation) was replaced with a new regulation (the 1 November 2024 regulation) which is very complicated, provides less clarity and seems far less in accord with how the medical research industry operates.
- There is now a far more complicated, contingent and less appropriate and effective philanthropic exclusion through the regulations.

- A new / revised medical research exclusion was implemented through the 1 November 2024 regulations made less than a month prior to this Review, which is proving to be inadequate and opens up new ambiguities and anomalies. If this regulation was intended to offer greater certainty in this industry, and to address problems and concerns, it has not been more effective.

417. The operation of the current medical research exemption by time-limited regulations is causing significant uncertainty and problems for the industry, which inherently relies on fixed term employment, and often on recurrent or repeated fixed term employment, linked to grants and funding which are not open ended and provide no capacity to support open ended (permanent) employment. Such grants and funding requirements also often fail to account for the payment of redundancy pay where a medical research employer is forced into ongoing hiring and needs to terminate a position at the expiry of a funding round.

418. In addition, as with many of the funded sectors, previous funding and the duration of previous funding provides no guarantee of future funding.

419. Problems and uncertainties raised with Ai Group also include:

- The lack of any exception for commercial or industry funding for medical research. This is a serious omission, with the exceptions only addressing instances of philanthropic and government funding, and doing so inadequately. Commercial funding is also provided for research projects with defined start and end dates, and medical research bodies should be permitted to also engage employees on fixed-term contracts to undertake this limited term work, as they are for otherwise funded limited term work.
- Limiting the engagement of employees on fixed-term contracts to a maximum of 7 years, as the recent remaking of regulations now dictates, is restrictive and impractical as employees may move from one project to another, in the same lab or a different lab, and the availability of work remains of an inherently temporary nature. This is also a concern because:
    - This replaced the earlier exception regulation for philanthropically funded work which did not have a 7 year limit.
    - The industry was relying on this this earlier exception, which provided a measure of the necessary flexibility and adaptation to circumstances. It did not require the alignment of the term of the contract with the funding term and there was no 7 year limit on tenure.
- The existing government funding exception (s.333F(2)) requires that the funding concerned is provided for at least 2 years. There are some grants that only provide funding for one year.

- Situations in which the head of a laboratory has a philanthropic fellowship or funding and uses the fellowship funds to employ staff on that project are now ambiguous, as are scenarios in which donations are made and are allocated to a particular project nominated by the donor.

420. We understand there was concern at the very rapid revision of regulations which were broadly working, and further restrictions / narrowing of exceptions being imposed with only a very short period for the industry to consider and respond.

421. We also understand the industry has more detailed feedback on the uncertainties, inadequacies and impracticalities created by Regulation 2.15 of the Fair Work Regulations 2009, in particular from paragraph (7) onwards. In particular, the various cumulative thresholds for fixed term employment such as 5 and 7 years in this regulation seem entirely arbitrary and will have unintended consequences.

422. The Review should take the concerns of this industry particularly seriously, and seek to ensure that any continuing operation of the fixed term employment limitations do not compromise or harm the undertaking of medical research in Australia.

Adverse effects on employees

423. The changes are operating as a major barrier to employing people under fixed term contracts and to taking on additional staff. Given the blunt and inappropriate restrictions, in many cases, employers will decide not to take on additional employees (and instead, for example, import more products from overseas).

424. It is likely that a large number of employees on fixed-term contracts will have their employment terminated at the expiry of their current fixed term contracts. It is unrealistic to expect that this will not occur despite the anti-avoidance provisions in the FW Act.

Ai Group's positioning and recommendations

425. We make the following recommendations:

- Add an additional exception to s.333F to exempt from the limitations on fixed term employment all visa workers, for the duration of their visas and any extensions to their visas. his may need flexibility to account for situations where an employee renews a visa, or seeks to extend their work in Australia by moving to another visa type.
- An additional and ongoing legislated exemption should be included in s.333F for funded medical and health research.

426. Amend s.333F(1) as follows:

> *(1) Subsection 333E(1) does not apply in relation to a contract of employment entered into by a person and an employee if:*
>
> *(a) the employee is engaged under the contract to perform ~~a distinct and identifiable task~~ work involving specialised skills; or*
>
> *(aa) the employee is engaged under the contract to work on a specific project that has a completion date or an expected completion date;*
>
> *(ab) the employee's right to work is subject to a non-ongoing visa;*
>
> *(b) the employee is engaged under the contract in relation to a training arrangement, industry placement, experience programme, clerkship or cadetship; or*
>
> *…*
>
> *(f) the contract relates to a position for the performance of work that:*
>
> *(i) is funded in whole or in part by government funding or funding of a kind prescribed by the regulations for the purposes of this subparagraph; and*
>
> *(ii) the funding is payable for a period of more than 1 year ~~2 years~~;*
>
> *(iii) ~~there are no reasonable prospects that the~~ it is uncertain whether the funding will be renewed after the end of that period; or*
>
> *(g) the contract relates to a governance position that has a time limit*
>
> *…*
>
> *(i) it is reasonably foreseeable that the employer will not need the job that the employee has been engaged to carry out to be performed by anyone at the date specified in the contract as the date that the employee's employment will end; or*

427. There would also be merit in amending the legislation to provide greater clarity as to what constitutes a specialised skill. It may be best for this to be achieved through legislation identifying a non-exhaustive list of examples.

C.7 FLEXIBLE WORKING ARRANGEMENTS REQUESTS (PART 11) AND EXTENDED PARENTAL LEAVE (PART 25B)

Summary of the amendments

428. Part 11 of the SJBP Act amended the National Employment Standards (**NES**) to expand the circumstances in which an employee may request flexible working arrangements under s.65 of the FW Act to include two additional grounds:

- where they or a member of their immediate family or household, experiences family or domestic violence, to align the definitions with those used in the entitlement to family and domestic violence leave.; and
- where the employee is pregnant.

429. It also expanded an employer's obligations when dealing with an eligible request for flexible working arrangements under s.65 by requiring that the employer:

- Responds in writing within 21 days of having received the request.
- In the written response, satisfies additional requirements, depending on whether it:
    - Grants the request – in which case the response must state so.
    - Following discussion, grants an alternative arrangement, in which case the response must set out the agreed alternative arrangement.
    - Refuses the request, in which case the response must include:
        - details of the reasons for the refusal;
        - alternative arrangements the employer could facilitate or confirming there are no such alternative arrangements; and
        - set out the effect of the dispute resolution mechanism available under the FW Act.
- An employer may only refuse the request if the employer:
    - Discussed the request with the employee.
    - Genuinely tried, but been unable, to reach agreement with the employee.
    - Had regard to the consequences of the refusal for the employee.
    - Refused the request on reasonable business grounds, of which a non-exhaustive list is set out in the FW Act.

430. The FWC was given compulsory arbitration powers where an employer has refused an employee's request for flexible working arrangements or where the employer has not provided a written response to the request within 21 days. If the FWC is satisfied that there is no reasonable prospect of the dispute being resolved, the FWC may make:

- an order that the employer grant the employee's original request for flexible working arrangements; or
- an order that the employer make other specified changes to the employee's working arrangement to accommodate the employee's circumstances.

431. In addition, Courts may impose a civil penalty on an employer for refusing an employee's request for flexible working arrangements. The maximum penalty for a body corporate, based on the current value of a penalty unit, would be $99,000.

432. Part 25B amended the unpaid parental leave (**UPL**) provisions in the FW Act by:

- Imposing additional obligations on employers when responding to a request to extend a period of unpaid parental leave beyond 12 months.
- Introducing a new statutory dispute resolution mechanism into the FW Act for the resolution of disputes regarding unpaid parental leave extension requests under the NES – similar to those which apply to flexible working arrangement requests.

433. Ai Group does not seek to address the amendments to the scope of who may request changes in working arrangements. Instead, we seek to contribute to the Review's consideration of changes to the prescribed procedures for employers in responding to requests for changes in working arrangements (Items 458 of Part 11 of the SJBP Act onwards, and Part 25B of the SJBP Act in regard to requests to extend UPL).

Analysis

Previous right to request provisions in the FW Act

434. Key features of the previous right to request provisions in s.65 of the FW Act were:

- An employee was able to make a request for flexible working arrangements under s.65 if the employee meets the eligibility requirements set out in this section of the Act (e.g. the employee has completed at least 12 months' continuous service), and if the request relates to one of the specified circumstances (e.g. if the employee is the parent of a child who is school age or younger).
- The request had to be in writing and set out the details of the change sought and the reasons for the change.

- An employer was required to respond to the employee's request in writing within 21 days, stating whether or not the request is granted.
- An employer was only able to refuse the request on reasonable business grounds, and if the request is refused, the employer must provide written details of the reasons for the refusal.
- The FWC was only able to deal with a dispute about whether an employer had reasonable business grounds to refuse an employee's request for flexible working arrangements, if the parties have agreed in a contract of employment, enterprise agreement or other written agreement to the FWC dealing with the matter.
- An employer's decision to refuse a request on reasonable business could not be challenged in a Court (s.44(2)) which mean that civil penalties could not be imposed on an employer for refusing a request for flexible working arrangements.

History and rationale for the right to request provisions in the FW Act

435. The previous right to request provisions in the FW Act could be traced back to the 2005 decision of the Australian Industrial Relations Commission (**AIRC**) in the *Family Provisions Test Case*. After conferences and hearings which continued over a two-year period, the AIRC adopted a model award clause giving employees the right to request an extension in the period of unpaid parental leave and/or to return to work on a part-time basis following parental leave. An employer had the right to refuse an employee's request if reasonable in the circumstances.

436. The right to request provisions in the NES were the subject of a lengthy consultation process during the development of the FW Act. The issue of whether compulsory arbitration should be available in respect of the right to request provisions was heavily contested between employer groups at the time. Ultimately, the Rudd Labor Government announced that Fair Work Australia (now the FWC) would not be empowered to impose requested working arrangements on an employer.

437. The following question and answer was included in the Government's NES Discussion Paper that was distributed during the FW Act development process:

Can Fair Work Australia impose a flexible working arrangement on an employer?

No. The proposed flexible working arrangements NES sets out a process for encouraging discussion between employees and employers. The NES recognises the need for employers to be able to refuse a request where there are 'reasonable business grounds'. Fair Work Australia will not be empowered to impose the requested working arrangements on an employer."

438. In Ai Group's 2008 submission in response to the NES Discussion Paper, we said:

Ai Group supports the approach set out on page 12 of the NES discussion paper, whereby:

- *The provisions of Division 3 of the NES are intended to encourage discussion between employers and employees;*
- *Fair Work Australia would not have the power to impose any requested work arrangements upon employers.*

Such an approach is educative and is more likely to achieve positive outcomes than a heavy-handed prescriptive approach.

439. The intent of the right to request provisions is outlined in the Explanatory Memorandum for the *Fair Work Bill 2008.* Clause 258 states that "*the intention of these provisions is to promote discussion between employers and employees about the issue of flexible working arrangements*".

440. Clause 270 in the Explanatory Memorandum highlights that employees who do not have a formal entitlement often make informal requests for flexible working arrangements:

270. An employee who is not eligible to request flexible working arrangements under this Division (e.g. because they do not have the requisite service) is not prevented from requesting flexible working arrangements, However, such a request would not be subject to the procedures in this Division.

441. In 2012, an Expert Panel comprising Professor Ron McCallum AO, retired Federal Court Judge the Hon Michael Moore and economist Dr John Edwards, conducted a major review of the FW Act. Despite the unions' arguments for the FWC to have compulsory arbitration powers under the right to request provisions, after thorough consideration of the issue, the Panel declined to recommend such a change. The following extracts from the Panel's final report are relevant:[22] [Emphasis added]

5.1.1 Right to request flexible working arrangements

Forward with Fairness provided that the Government would 'guarantee' a right for parents to request flexible work arrangements until their child reaches school age, which could only be refused on reasonable business grounds. The NESDP provided that 'whether a business has reasonable business grounds for refusing a request for flexible

[22] *Towards more productive and equitable workplaces - An evaluation of the Fair Work legislation Final report*, 18 November 2012, p.95-99.

working arrangements will not be subject to third party involvement under the NES', on the basis that United Kingdom experience suggested that simply encouraging discussion was successful in promoting flexible arrangements. Accordingly, the intention of the standard was 'to promote discussion and agreement between employers and employees about the issue of flexible working arrangements'. The Explanatory Memorandum (EM) provides that it was envisaged that FWA would provide guidance as to what constitutes reasonable business grounds, and provides that they may include the effect on the workplace including financial impact, efficiency, productivity and customer service; the inability to organise work amongst existing staff; the inability to replace the employee or the practicality of arrangements that would need to be put in place to accommodate the request.

- - -

The Panel has considered the question of whether a decision to refuse a request for flexible working arrangements should be able to be appealed. Section 146 outlines the requirements for dispute settling terms under modern awards and includes a note that FWA or a person must not settle a dispute about whether an employer had reasonable business grounds to refuse a request for flexible working arrangements under s. 65(5) or a request for extending unpaid parental leave under s. 76(4). While providing an appeal mechanism may help ensure that a request for flexible working arrangements is given proper consideration and that a refusal is indeed due to reasonable business grounds, this still would not provide a guarantee that a right to request would eventually succeed.

FWA's previously noted survey results indicate that employers are taking requests seriously and that in most cases employees can negotiate flexible arrangements despite the absence of an appeal mechanism. Given that the policy rationale of the provision is to facilitate discussion about flexible working arrangements, the Panel is not convinced on the weight of evidence that the policy is currently not meeting its objective and therefore does not recommend that such an appeal mechanism is adopted. In this regard the Panel is also mindful that employees may negotiate for a right to appeal a refusal of a request for flexible working arrangements under an enterprise agreement dispute settling procedure.

While the Panel has declined to recommend an appeal mechanism, it recognises the experience of some stakeholders with employers refusing a right to request without due consideration. The Panel therefore recommends that the FW Act be amended to provide an additional requirement that a request can only be refused after the employer has held at least one meeting with the employee to discuss the request. The Panel's view is that such a meeting should already form part of considering a right to

request in most workplaces; however, we consider that codifying the requirement will ensure a conversation about, and due consideration of, such requests in workplaces not currently meeting this standard. The Panel considers that this would be consistent with the overall policy intentions of the legislation and will help meet the specific policy intent of facilitating conversations about flexible working arrangements.

> ***Recommendation 5:*** *The Panel recommends that s. 65 be amended to extend the right to request flexible working arrangements to a wider range of caring and other circumstances, and to require that the employee and the employer hold a meeting to discuss the request, unless the employer has agreed to the request.*

442. In 2015, the Productivity Commission conducted a major inquiry into Australia's Workplace Relations Framework. Once again, the unions argued for the FWC to be given a compulsory arbitration power under the right to request provisions. Once again, such a power was not recommended. The following extracts from the Productivity Commission's final report are relevant:

> ***Box 16.7 – The right to request a change in work arrangements and the extension of parental leave***
>
> *Some participants have claimed that there are flaws in the FW Act provisions relating to the right to request a change in work arrangements (s. 65) or to obtain an extension of parental leave (s. 76).*
>
> *The ACTU argued that the current provisions make it far too easy for employers to deny these requests…. The ACTU submitted that:*
>
> *- - -*
>
> *In 2003, United Kingdom lawmakers made it a statutory duty for employers to follow certain procedures in considering similar requests. In addition, they established a right of appeal, which appears to have increased the likelihood that employers approved requests (ACTU sub. 167, p. 171).*

However, in making judgments about the desirability or best timing of any such changes to the NES, several (sometimes overlooked) considerations are relevant.

The likely behavioural responses by people to any such measures needs be assessed, since these responses can sometimes undermine their prime objectives. A particular concern is that any obligations perceived to be costly by employers and that predominantly affect only one group of employees, may unwittingly lead to employment discrimination. In the particular,

proposals for improved leave access discussed in box 16.7, the ACTU noted that ' … [d]espite the issue being significant to all working parents, it is mostly women who are affected by the need to balance work and family' (sub. 167, p. 170). There is therefore a risk that women may find their career and hiring prospects reduced by some employers without any real capacity to detect this. Moreover, to the extent that the provisions are seen as largely oriented to women, men may be reticent about even requesting to use such provisions.

Solving this dilemma would require a number of changes. These include addressing any misperceptions about the actual costs of such flexibility measures, increased public awareness of employers that use flexibility as a strategy to attract talented people, the diffusion of such flexibility arrangements in enterprise agreements, advocacy more generally, and changing social mores that make it acceptable for men also to request such leave. Regulatory measures that provide avenues for complaints or appeals by people denied reasonable flexibility (box 16.7) could help, but this may arise primarily from the fact that such regulations would signal the unacceptability of certain conduct by employers. The regulations themselves would most likely be only weakly enforceable given the difficulty of establishing what is reasonable.

The FWC General Manager's reports

443. Under s.653 of the FW Act, the General Manager of the FWC is required to provide a research report every three years on the operation of the NES provisions relating to requests for flexible working arrangements under s.65(1) of the Act, including reporting on:

- the circumstances in which employees make such requests;
- the outcome of such requests; and
- the circumstances in which such requests are refused.

444. The last General Manager's Report (dated November 2021, covering period between 2018 and 2021) reported that:

> ***5.1.5 Granting and refusing requests***
>
> *Most interviewees that responded commented that requests were agreed by employers or agreed following negotiations. Refusals were rare, particularly among employers who provide greater access to flexibility than the statutory provisions.*
>
> *Requests were refused when there were rostering difficulties, the need for staff availability at opening hours or when the business welcomed clients, as finding staff to cover particular hours or days could be difficult, with some employers preferring not to have too many individual alterations to rosters.*

Some interviewees mentioned that employers resisted requests to work from home prior to the pandemic because employees were not set up to work remotely and/or were concerned about supervision. Others referred to concerns about performance as a basis for refusal, although in one instance this was dealt with as a separate performance issue which was not reasonable grounds for refusal.

In accordance with the interviews, the quantitative survey found that requests were refused when there was either no capacity of, or it was impractical to, change to working arrangements of other employees to accommodate the request. Other reasons included impact on customer service, significant loss of efficiency/productivity if the changes were implemented and that the requested arrangements could not be accommodated within an existing shift.

Ai Group's positioning and recommendations

Time period for the employer's response

445. Under s.65A(1) and 76A(1) an employer must respond to an employee request in writing within 21 days.

446. It is not proposed that there be any change to the quantum of days in which responses should in usual circumstances (and the significant majority of circumstances) be given, however there should be some flexibility in an employer's time frame for responding to employees in exceptional circumstances.

447. We recommend that s.65A(1) and 76A(1) be amended to provide that an employer should, where reasonably warranted due to exceptional circumstances be allowed more than 21 days to respond to an employee request.

448. Examples of circumstances where additional time may be justified would include:

- An emergency, serious illness or period away from the workplace for unavoidable personal reasons of the proprietor or decision maker on employment matters.
- Some emergency, crisis or other existential event impacting the business, such as a fire, substantial machinery breakdown, or radical disruption to an industry or operations that renders an employer not able to realistically make required assessment about whether the changed arrangement can be accommodated.

449. Adopting this approach, 21 days would remain the standard expectation and requirement for employers to respond to employee requests. This proposal is not designed to encourage delays in responding to employee requests. However, there are various provisions in the FW Act that recognise that in exceptional circumstances expected deadlines cannot be fairly

expected to apply, and this exceptional circumstance avenue should be applied to responding to rights to request flexible work and extended UPL.

Having regard to the consequences of refusal for the requesting employee

450. Section 65A(3)(c) requires employers to have had regard to the consequences of refusing requests for the requesting employee in their consideration of whether or not to grant the request.

451. This is a clearly foreseeable area of disputation which the Review Panel has an opportunity to identify and address with a mind to minimising such disputes.

452. Employers can only have limited knowledge of such consequences at any time, as does any decision maker charged with making decisions which may have consequences for any individual. To the extent such as consideration could ever be reasonable, it must rely on information that the decision maker has access to.

453. In this case there has to be some responsibility on the requesting employee to tell the employer why they need the arrangement and why it is important to their personal circumstances. If that is not considered possible then the consideration in 65A(3)(c) would need to be re-examined.

454. There's an inherent asymmetry of information under the present approach following these amendments. The employer has the liability for the information on the consequences of refusing a request, but the employee has the information (or may in fact be in circumstances in which they are not themselves fully aware of the consequences).

455. The more practical approach is to limit what can reasonably be expected of employers to what they know or can reasonably be expected to know. For example, the Review Panel could recommend the following amendment to s.65A(3)(c):

(3) The employer may refuse the request only if:

(c) the employer has had regard to the consequences of the refusal for the employee <u>based on information provided to the employer by the employee in support of the request</u>; and

456. Employers can be responsible for a significant number of employees, and whilst they might retain some broad knowledge of someone's personal or familial circumstances:

- No institution or organisation is going to keep track of the personal circumstances of all those who work with it, or changes in those circumstances.

- Employers don't keep up to date information on employees' particular personal circumstances, outside perhaps personal interactions in the smallest of businesses.
- Our laws impose numerous limitations on what it is reasonable for employers to know and retain information on, including potentially extended application of privacy law. This further limits what employers can know of the consequences of refusals for particular personal circumstances of employees.
- Employer responsibilities in regard to the consequences of responses to requests have can only ever be a function of what the employer can legitimately know or be expected to know. If employees want their requests met, they will need to provide employers with information sufficient to equip them to make informed decisions.

Having regard to the consequences of refusal for the requesting employee

457. Under s.65A(6)(d) an employer refusing a request must as part of their written response to the requesting employee "*set out the effect of sections 65B and 65C*."

458. This is an unnecessary obligation that should not fairly be put on an employer. Such obligations are not consistently required in comparable areas of the law, and fail to properly take into account the educative role of registered organisations of employees and the expanding range of information that the FWC and FWO provides.

Arbitration

459. Ai Group set out at length in our 2022 Senate Committee submission on the SJBP Bill (see Attachment B) the basis on which rights to request had at all previous points properly prescribed processes for consideration, but not been subject to arbitration.[23] This was intrinsic to the development of the right to request model and its overwhelmingly effective operation in Australia in relation to flexible work and extended parental leave.

460. It remains the case that the rights to request were altered fundamentally by the SJPB Act, and the impact of those changes is still to be determined. As Ai Group indicated during the original passage of the SJBP changes:

> *The proposed FWC compulsory arbitration power is not appropriate.*
>
> *It would impede the rights of employers to manage their businesses in a productive and efficient manner. The FWC is not well-placed to determine the operational impacts on businesses of flexible working arrangements requested by individual employees.*

[23] Ai Group (2022) Submission to the Senate Employment and Education Legislation Committee inquiry into the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 202 (Submission 23), pp.32-36

The proposed power is inconsistent with the Rudd Labor Government's rationale for implementing the right to request provisions. The right to request provisions were intended to be facilitative, not punitive. As set out in the Explanatory Memorandum for the Fair Work Bill, the provisions were intended to "promote discussion between employers and employees about the issue of flexible working arrangements".

The proposed power is unnecessary given that every day in hundreds of workplaces, requests for flexible working arrangements are made, and the vast majority are granted. In most cases, the formal NES right to request provisions are not needed or used. Most employers try very hard to accommodate reasonable requests from their employees for flexible working arrangements. The FWC General Manager's research reports confirm this.[24]

461. It is also notable that the UK approach, upon which the Australian process was deliberately modelled prior to its diverging in the SJBP Act, does not provide a right of arbitration. The UK system makes clear that:

    Employees can complain to an employment tribunal if the employer:

    - did not handle the request in a 'reasonable manner'
    - wrongly treated the employee's application as withdrawn
    - dismissed or treated an employee poorly because of their flexible working request, for example refused a promotion or pay rise
    - refused an application based on incorrect facts

    Employees cannot complain to a tribunal just because their flexible working request was refused.[25]

462. Arbitration should be removed from the dispute resolution provisions in s.66C and s.76C, and the FW Act return to the approach that preceded the SJBP Act regarding disputes concerning requests for flexible working arrangements and requests to extend UPL.

463. We strongly encourage the Review Panel to review the previous detailed material Ai Group provided in support of a non-arbitral approach to such requests. There was never sufficient evidence to support FWC arbitration of rights to request, or to overturn employer decision making on what businesses can and cannot accommodate.

[24] Ai Group Submission to the Senate Education and Employment Legislation Committee, inquiry into the Fair Work Legislation Amendment (Secure Jobs Better Pay) Bill 2022, p.38
[25] https://www.gov.uk/flexible-working/appeals

464. Instead, evidence was of an overwhelmingly successful model which was resolving the vast majority of requests by agreement (consistent with overall aims of the FW Act linked to cooperative workplace relations), and repeated independent conclusions against arbitration of such matters.

465. We emphasise the following key points:

- The SJBP effectively overturned decisions made by the FWC which repeatedly accepted that employers should have a right to refuse requests where necessary.
- The SJBP Act ignored / trampled over the approach developed through tripartite consultation on the NES that led to the FW Act in 2009. The then Labor Government was quite clear that "*the NES recognises the need for employers to be able to refuse a request where there are 'reasonable business grounds'. Fair Work Australia will not be empowered to impose the requested working arrangements on an employe*r."
- There was no evidence or data to support departing from this approach. The reports of the General Manager of the FWC on the use of flexible work for example provided evidence of overwhelmingly successful accommodations of rights to request.
- The previous Labor Government's Fair Work Review Panel found that:

  "*FWA's previously noted survey results indicate that employers are taking requests seriously and that in most cases employees can negotiate flexible arrangements despite the absence of an appeal mechanism. Given that the policy rationale of the provision is to facilitate discussion about flexible working arrangements, the Panel is not convinced on the weight of evidence that the policy is currently not meeting its objective and therefore does not recommend that such an appeal mechanism is adopted. In this regard the Panel is also mindful that employees may negotiate for a right to appeal a refusal of a request for flexible working arrangements under an enterprise agreement dispute settling procedure*."

466. A consideration of the performance of the right to request and the design and operation of the progenitors of the Australian approach prior to the SJBP amendments, favours a conclusion that:

- Employers were overwhelmingly only refusing requests where they genuinely had grounds to do so. Reporting from the General Manager of the FWC for 2018-21 clearly supports such a conclusion.
- There was no proper basis for adding arbitration to the process for considering and resolving disputes regarding requests for flexible working arrangements or extended unpaid parental leave.

467. The system should return to an approach that provides for co-operative workplace relations. This is not provided for through the centralised setting of terms and conditions by the FWC in the context of disputes.

468. As an alternative, if arbitration is not removed from the dispute resolution provisions ins s. 66C and 76C, there should be recourse to arbitration only where the FWC concludes there is no reasonable prospect of the matters in dispute being resolved through further dialogue, mediation and conciliation. We suggest the following amendment to s. 65B:

s.65B(4) If a dispute is referred under subsection (3):

(a) the FWC must first deal with the dispute by means other than arbitration, unless there are exceptional circumstances; and

(b) the FWC may deal with the dispute by arbitration in accordance with section 65C only where there is no reasonable prospect of the matter being settled by means other than arbitration.

Working from home review

469. The Review Panel should note a parallel / pending process relating to one of the principal contemporary areas of requests for flexible work; the FWC's pending Work From Home case.[26] Given that the FWC is already set to examine capacities to work from home and the issues raised, there can be no case for recommendations to be made in this review based on additional demands to work from home.

C.8 ENHANCING THE SMALL CLAIMS PROCESS (PART 24)

Summary of the amendments

470. Part 24 of the SJBP Act increased the jurisdictional cap on the FW Act's small claims process from $20,000 to $100,000.

Analysis

471. There has long been a small claims avenue for the recovery of small underpayments, in s.548 of the FW Act.

472. The Federal Circuit and Family Court of Australia (**FCFCOA**) Annual Report for 2023/24 provides a useful explanation of the changes in Part 24:

[26] https://www.fwc.gov.au/hearings-decisions/major-cases/previous-major-cases/clerks-private-sector-award-work-home-case

"The Fair Work Act 2009 (Cth) makes provision for certain proceedings to be dealt with as small claims proceedings. As a result of the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth), on 1 July 2023 the monetary cap for recovering unpaid entitlements under the small claims process increased from $20,000 to $100,000.

An applicant may request that an application for compensation be dealt with under the small claims division:

- *if the compensation sought is not more than $100,000 and the compensation is for an entitlement mentioned in subsection 548(1A) of the Fair Work Act 2009 (Cth), and*
- *in connection with a dispute relating to casual conversion mentioned in subsection 548(1B) of the Fair Work Act 2009 (Cth) (see: www.fairwork.gov.au/casualconversion).*

When dealing with a small claim application, the Court is not bound by the rules of evidence but may inform itself of any matter in any manner as it thinks fit. A party to a small claims application may not be represented by a lawyer without the leave of the Court. Rules in relation to the conduct of proceedings in the Fair Work Division are found in Chapter 4 of the Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021.

The Court is committed to ensuring that small claims applications can be determined quickly and inexpensively. To this end, the Court has established a national small claims list conducted by registrars. This dedicated list is managed by experienced registrars who aim to finalise these matters on the first hearing date. The Court appreciates the significant work undertaken by registrars who exercise extensive delegations in respect of the small claims jurisdiction.

The main aims are to:

- *ensure that both parties attend court at the first hearing with all relevant material. This is facilitated by having a notice with the listing that indicates the matter may be dealt with and determined on the first return date*
- *provide information to applicants that advises them of the type of material they may need to provide in support of their claim*
- *have registrar mediators available to mediate matters on the day of the hearing where appropriate, and*
- *keep it simple – an application form with instructions which guides the applicant on a step-by-step basis, and a pro forma affidavit of service.*

Applications in connection with a dispute in relation to casual conversion are listed before a judge due to this being a new jurisdiction of the Court. However, the same principles and aims of the small claims list are applicable to these matters in a listing before a judge."

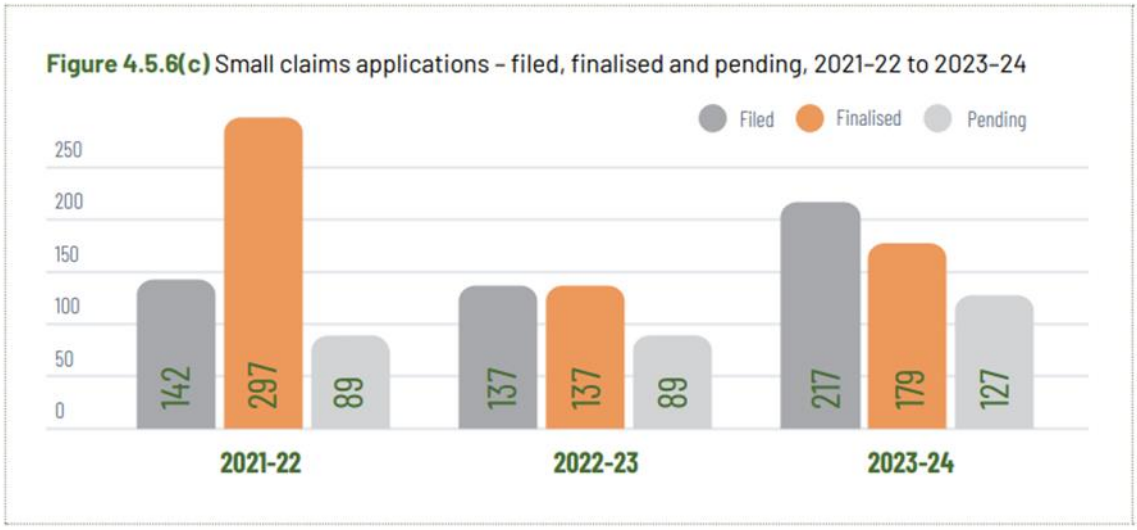
473. Some of the specific rules may differ in other Courts that are able to apply the small claims process, including lower level state and territory courts.

474. Our primary concern is the five-fold increase in what constitutes a 'small claim.' That is, the magnitude (and extent) of underpayment claims that can now proceed without full legal rigour and examination being attached to them (i.e. the modified hearing arrangements in s.548(3)-(9)).

475. The relative balance of interests and capacities that was reflected in the creation of the small claims process, and in the unique treatment of such claims before the courts, has been radically changed through the adoption of such a high a definition of a small claim.

476. $100,000 is not an insignificant potential liability for any employer respondent to an underpayment claim, and it is not a level of claim that should be able to proceed (subject to any agreement between applicant and respondent to the contrary) without access to rigorous scrutiny and the protections offered by legal representation, rules of procedure and evidence[27].

477. The Federal Court's Annual Report for 2023/24 indicates that the number of small claims being filed has increased in the first full year since the amendments:



[27] See s.548(3)

Ai Group's positioning and recommendations

478. It was appropriate that there be an increase in the threshold for underpayment claims, after some years of being set at $20,000. However, as Ai Group pointed out during the passage of the SJBP Bill, the increase from $20,000 to $100,000 was unjustified and inappropriate.

479. We recommends as follows:

Reduce the definition of a small claim: The amount in s 548(2)(a), defining a small claim should be reduced to either:

- The $40,000 Ai Group identified as a reasonable level at the time of the amendments, which was double the preceding $20,000 small claim limit: or
- Some other sensible and realistic amount that is compatible with the concept of a small claim and how such claims proceed under s548, and that is consistent with community expectations of when claims should be subject to rules of evidence and procedure and when respondents should legitimately have rights to access legal representation. For example, 12 months at the 3rd decile / 75th percentile of total cash earnings for employees working under awards would be small claims threshold of $61,152.[28]

C.9 NATIONAL CONSTRUCTION INDUSTRY FORUM (PART 25A)

480. The functions of this forum are to provide advice to Government in relation to workplace relations, skills and training, safety, productivity and diversity and gender equality in the building and construction industry.[29]

481. There is little confidence within industry in the likelihood of this forum delivering any tangible improvements.

482. At best, it seems premature to form any view that the forum has been, or will be effective given:

- The high profile revelations in the building and construction industry rapidly overtook the work of the Forum, leading to placement of the Construction and General Division of the Construction, Forestry and Maritime Employees Union and its branches into administration but no coherent response from the forum.[30]

[28] ABS, Employee Earnings and Hours, Australia, May 2023 Method of setting pay – derived from Data Cube 5. - https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/employee-earnings-and-hours-australia/latest-release

[29] Sections 789GZC and GZD

[30] https://ministers.ag.gov.au/media-centre/statement-cfmeu-administration-23-08-2024

- Part 25A commenced only from 1 July 2023, more than 6 months after the passage of the legislation, and less than 18 months prior to this review.
- The Forum did not meet until 20 Oct 23 (essentially 12 months ago) and has met on only three occasions since then.
- Membership of the forum was expanded as recently as 18 September 2024[31] and has only met once on 16 October 2024. [32] Further, the forum only includes some of the relevant industry representatives and does not include any 'peak council'.
- Only at its most recent meeting, did the Forum agree to produce a blueprint for change in the industry, and this will not be available until well into 2025.[33] At this point, there is no detail available beyond a one-page media release announcing an intention to produce the blueprint.

483. Given the scandalous development associated with behaviours of the CFMEU it is trite to observe that current workplace relations laws, including those that have provided for the establishment of the forum, represent a blatantly inadequate regulatory framework for addressing the issues in the construction industry.

C.10 RIGHT OF ENTRY TO ASSIST HSRS (PART 16A OF CLOSING LOOPHOLES ACT)

Summary of the amendments

484. The Review is also examining Part 16A of Schedule 1 of the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (**Closing Loopholes Act**), conducting the review required by s.4A of that Act.

485. According to the Review website:

> *Part 16A of the Closing Loopholes Act amends section 494 of the Fair Work Act 2009 (Fair Work Act) to give effect to 'Recommendation 8: Workplace entry of union officials when providing assistance to an HSR' of the '2018 Review of the model WHS laws' conducted by Marie Boland. Recommendation 8 provided that Safe Work Australia work with relevant agencies to consider how to achieve the policy intention that a union official accessing a workplace to provide assistance to a health and safety representative is not required to hold an entry permit under the Fair Work Act or another industrial law, taking into account*

[31] https://ministers.dewr.gov.au/watt/address-national-press-club
[32] https://www.dewr.gov.au/download/16552/national-construction-industry-forum-meeting-communique-16-october-2024/38397/national-construction-industry-forum-meeting-communique-16-october-2024/pdf
[33] https://www.dewr.gov.au/download/16552/national-construction-industry-forum-meeting-communique-16-october-2024/38397/national-construction-industry-forum-meeting-communique-16-october-2024/pdf

the interaction between Commonwealth, state and territory laws. In our response to the Consultation Regulation Impact Statement in August 2019, Ai Group objected strongly to that recommendation.

Analysis

486. Ai Group did not address the changes in Part 16A in our 9 October 2023 submission to the Senate Education and Employment (Legislation) Inquiry into the Closing Loopholes Bill, as these amendments were only introduced during final debate in the Senate in early December 2023.

487. The haste and lack of proper examination of these amendments at the time of their passage underscores the importance of this Review properly considering these changes and not solely in the context of the Powell decision of 2017[34], or the Boland Review recommendations in 2018, but also in the context of developments and considerations in 2024/25 and beyond. In particular, the future for these provisions needs to be considered in the wake of revelations regarding the alleged activities of various branches and officials of the CFMEU, and the developments that led to the appointment of an administrator to run the union.[35]

488. Employers recognise that:

- HSR's may seek assistance in relation to performing their functions in workplaces (set out in s.68 of the model Work Health and Safety Act adopted by most jurisdictions and s.58 of the Victorian Occupational Health and Safety Act), such as technical, scientific or WHS expertise.
- Advisers chosen by HSRs may need to access workplaces to assist HSRs in performing their functions, regardless of whether an employer / PCBU agrees there is a WHS concern, the gravity or immediacy of that concern, or the HSR's framing of that concern.
- Employers should generally not seek to determine (i) which expertise an HSR wishes to apply to a particular WHS concern, or (ii) their choice of adviser.

489. However, difficulties arise when current or former union officials, who would not be able to enter for industrial purposes, seek to enter workplaces to assist HSRs.

[34] Australian Building and Construction Commissioner v Powell [2017] FCAFC 89; 251 FCR 470; 268 IR 113
[35] https://www.fairwork.gov.au/newsroom/news/role-of-cfmeu-administrator#:~:text=The%20Construction%20and%20General%20Division%20(C%26G%20Division)%20of%20the%20CFMEU,a%20scheme%20for%20the%20administration.

490. There is an inconsistency between the unrestricted breadth of persons an HSR may ask to assist them and the checks, balances, disciplines and accountabilities which attach to right of entry for industrial purposes under the FW Act.

491. There is a genuine risk that those who are denied entry for industrial purposes or sanctioned for misusing entry powers, may seek to exercise comparable powers under WHS legislation to assist HSRs, with even less accountability.

492. Associated with this is the risk that union officials may seek to agitate industrial matters whilst being present in the workplace to assist HSRs. This is the reality of what is reportedly occurring all too often.

493. There also needs to be an acknowledgement that circumstances have changed markedly, in the construction industry in particular, since the passage of these amendments.

- Significant risks are created by unfettered rights to enter workplaces for any persons in 2024, highlighted by former CFMEU officials continuing to engage with union members on sites, including delegates and HSRs.
- A number of now former CFMEU officials are continuing to take an active interest in industrial and safety matters despite no longer holding positions with the union or entry powers.

494. Many union officials have experience in WHS matters and can contribute to resolving concerns and disputes. However, the blanket exemption of union officials from permit requirements in s.494(4) is excessively broad, and does not sufficiently take into account the scope for misuse of entry, particularly in light of various officials and employees of the CFMEU having their employment with the union terminated during the current administration arrangements.

495. The current arrangements for persons to enter to assist HSRs fail to take into account the various alarming developments and media revelations which gave rise to the following:

- "*The Construction and General Division (C&G Division) of the CFMEU was placed into administration on 23 August 2024 for a period of up to 5 years. This took effect after the Attorney-General, the Hon Mark Dreyfus KC MP, made a determination to establish a scheme for the administration*."[36]
- Applications to the Federal Court for "declarations under section 323 of the *Fair Work (Registered Organisations) Act 2009* (Cth) that the Construction and General (C&G) Division of the Construction, Forestry and Maritime Employees Union (**CFMEU**) excluding the divisional branches for Western Australia and the Australian Capital

[36] https://www.fairwork.gov.au/newsroom/news/role-of-cfmeu-administrator#:~:text=Mark%20Irving%20KC%20has%20been,Maritime%20Employees%20Union%20(CFMEU).

Territory (Administered Division), and each of its divisional branches for Victoria-Tasmania, New South Wales, Queensland-Northern Territory and South Australia, (Administered Divisional Branches), have ceased to function effectively, and there are no effective means under their rules by which they can be enabled to function effectively, and for orders approving a scheme under which:

- All offices in the Victoria-Tasmania Divisional Branch, South Australia Divisional Branch, New South Wales Divisional Branch and Queensland-Northern Territory Divisional Branch would be declared vacant (Vacant Branch Offices)
- All other offices held by the persons previously in the Vacant Branch Offices, under the CFMEU's National rules or the C&G Division's rules, would also be declared vacant.
- All offices in the Administered Division, including Divisional Executive, Divisional Conference and Divisional Trustees, would be declared vacant…"[37]

Ai Group's position and recommendations

496. We recommend the following changes:

- Section 494(4) be amended to exclude:
  - Officials who have had their permits suspended[38] or revoked[39], or have conditions imposed on their entry permits;[40]
  - Any person who has been denied a permit under s.513 of the FW Act.
- Specifically, in relation to former CFMEU officials and employees:
  - Section 454(4) should be amended to exclude any former officials or employees of branches of the CFMEU who have been dismissed, sanctioned, etc throughout the placing of various branches of the union into administration.
  - The FW Act should prohibit any person from entering the workplace to assist an HSR who has been dismissed or suspended from any position, paid or unpaid, elected or non-elected in the construction divisions of the CFMEU subject to administration. This prohibition on entry to assist an HSR should apply for the period the union is under administration, and for individuals, for the period of any sanctions that may be imposed against them. There should also be scope

[37] https://cg.cfmeu.org/sites/cg.cfmeu.org/files/uploads/20240812%20Notice%20for%20publication%2024006449%2852314839.1%29.pdf

[38] Under Paragraph 508(2)(b) of the FW Act

[39] Under Paragraph 508(2)(c) of the FW Act

[40] Under Paragraphs 508(2)(a), (da), (e) or (ea) of the FW Act

for the FWC to order a lifetime ban on a person being able to enter workplaces to assist HSRs where appropriate (perhaps along with a lifetime ban on being able to apply for a right of entry permit). This would likely only be applicable following the gravest and most unacceptable conduct.

- Changes to sanctions:
    - Impose suitable liabilities for civil penalties on any persons who seek to enter premises to assist an HSR:
        - Contrary to an order of the FWC, or the terms of the FW Act.
        - Where an entry permit has been revoked, suspended or had conditions attached to which would not allow that entry for industrial purposes.
        - Where that person has been denied an entry permit, for either industrial or safety purposes, during the past 5 years, or remains subject to any conditions or sanctions regarding entry into workplaces.
        - In any of the circumstances in which s.494(4) does not apply.
        - Where, in the case of a building and construction workplace and a current, former or suspended official of a construction industry union
    - Civil penalties should apply to those seeking entry, not to the HSRs seeking assistance.

497. This is not recommended only for circumstances linked to a person seeking entry who may not be allowed entry, but to address any disputes created by entry to assist any HSR and how the person entering conducts themselves. It is also recommended for all workplaces, not restricted to the building and construction industry.

498. To be clear, any capacity to order or direct a person invited to assist an HSR off a work site would be a serious matter. It would need to automatically be considered by the FWC and subject to disputes and orders. It is not being suggested that employers be able to do this without being able to justify the basis on which they are doing so.

499. In support of a capacity for employers to deny entry to someone assisting an HSR, it is important to recall:

- Employees have rights to cease unsafe work at any time.
- HSR's have rights to direct cessation of unsafe work.[41]

[41] See Work Health and Safety Act (Cth), ss.83 to 89.

- Employees and HSRs can call in jurisdictional WHS inspectors rapidly, and these inspectors have powers to issue notices and take other rapid actions regarding genuinely unsafe work.

500. This ensures that where work is genuinely unsafe, there are mechanisms available to address them, and not expose employees to risk, while any disputes on entry to assist an HSR are being resolved.

C.11 ABOLITION OF THE ABCC (PART 3)

501. Despite running to 38 pages of amendments and amending various pieces of legislation, the effect of Part 3 of the SJBP Act was relatively straightforward. It:

- Abolished the ABCC.
- Repealed the Code for the Tendering and Performance of Building Work 2016 (**the Building Code 2016**).
- Repealed the higher penalties for breaches of workplace laws in the building and construction industry.

502. Ai Group made very clear in 2022 that, "*…the case for maintaining the ABCC is overwhelming and there is no case for abolishing it*".

503. The establishment of the ABCC was a central recommendation of the Royal Commission into the Building and Construction Industry. In his final report, Royal Commissioner Cole found that: "*There is widespread disrespect for, disregard of, and breach of the law in the building and construction industry*". The Royal Commission specifically recommended that "*there should be an independent monitoring and prosecuting authority in the industry to monitor conduct, and uphold the rule of law*".

504. The subsequent Royal Commission into Trade Union Governance and Corruption also identified the critical need to retain the ABCC. Its final report concluded: "*Having regard to all of the available material, the argument that there is no need for an industry specific regulator cannot be sustained*".

505. Following more than a decade of ping pong policy making in this area, in which the ABCC has been variously established, abolished, reestablished and re-abolished, we are now in a situation in which:

- Th building and construction industry is in 2024 facing some of the most significant challenges to integrity and lawfulness in industrial relations and the operation of registered organisations in Australia's history.

- There are allegations of infiltration into industry unions by organised crime figures that are near unprecedented in the history of Australian industrial relations.
- The Government has taken the extraordinary step of placing branches of the union into administration and continues to actively seek information on the extent of lawless and contempt for the rule of law in the industry.
- At the time of drafting this submission, various arms of government are actively seeking whistleblowers and others who could provide information on further illegal and unlawful activities.
- The Government acknowledges the reticence of many in the industry to come forward with what they may know about further criminal activity under threat of violence or commercial harm.
- There is no basis to conclude that the conclusions and recommendations of multiple Royal Commissions regarding lawlessness in the Building and Construction industry have in any way diminished or been alleviated, such that the ABCC is no longer required. In e absence of the ABCC, we are no closer to rectifying than problems of the sector than we were 10 or 20 years ago and there is no compelling plan, let alone meaningful mechanism, in place for achieving this. Some may argue that given the revelations of 2024 the building and construction industry has never been further removed from mainstream, normal, lawful industrial relations.
- Given the revelations which led to the placing of some branches of the CFMEU into administration in 2024, there is every reason to think that contemporary observance of the law, sound conduct and integrity of operations amongst industry unions is worse than it has been in the past.
- These challenges, belligerent contempt for the rule of law and community expectations, and alleged linkages to organised crime, are being met with a deliberately watered down, less empowered, less resourced, generalist regulator that is not properly equipped to address the uniquely unacceptable and damaging behaviours in the building and construction industry which have not only been found to be entrenched and pervasive by multiple Royal Commissions but powerfully depicted through media revelations across recent months.
- Penalties for unacceptable conduct in the industry have been watered down, in the face of both court decisions finding ‘intimidating and threatening conduct’, as well as recent media revelations of pervasive criminal conduct which led the Government to place divisions of the CFMEU into 5 years of administration.

- Australia is no longer giving effect to the remedial recommendations of multiple royal commissions to address findings of unacceptable and damaging conduct which falls woefully short any reasonable standard of industrial relations representation or operation by a registered organisation.
- Australia is no longer imposing building code requirements at a time of major delays and cost overruns in government funded infrastructure projects in particular.

506. This Review has been tasked with reviewing all parts of the SJBP Act changes, including the abolition of the ABCC. This should see consideration of:

- Whether the abolition has hampered the regulation of the disgraceful conduct in the building and construction industry and whether measures implemented in its absence have provided an adequate response to recent revelation and well known entrenched problems.
- Whether, based on the current state of the industry and the extent of illegal and corrupt conduct which led to the appointment of the CFMEU administrator, Australia needs the ABCC or a comparable stand-alone body. This should, of course, include a consideration of whether the temporary appointment of an administrator, reliance of the FWO (with its current powers) and the formation of the Construction Industry Forum are effective long term substitutes for maintenance of a powerful industry specific regulator.
- Whether there should be a recommendation to government to reintroduce the ABCC, or another similarly empowered and resourced stand-alone regulator for the building and construction industry.
- If the ABCC or a comparable body is not reintroduced, what other properly targeted and effective bodies and measures should be introduced.
- The adequacy and effectiveness of FWO regulation in the absence of a stand-alone construction industry regulator, and the FWOs capacities to effectively respond to unacceptable conduct, particularly in light of the media revelations regarding branches of the CFMEU across recent months.
- Whether there needs to be new powers afforded to the FWC and new offences or rules implemented under the FW Act to address the impugned practices of the CFMEU and potentially broader problems in the industry.
- The reimposition of the higher penalties provided for the in the legislation previously administered by the ABCC, particularly in light of ongoing Court findings against industry unions and continuing judicial frustration at union recidivism.

507. In approaching such considerations, the Review Panel does not need to independently identify that there are unique considerations, cultures and challenges in the building and construction industry. This Review need only recall:

- The findings of multiple Royal Commissions which have been clearly validated by revelations union conduct in this industry in 2024.
- The inclusion in the SJBP Act of Parts 23A and Part 25A, and the exclusion of the industry from access to multi-employer instruments, and the need for a specialist forum to advice government on workplace relations and related matters.
- Clearly generalised arrangements that apply to other industries are not adequate or appropriate for building and construction, as the FW Act and SJBP amendments clearly acknowledge this (although the don't appropriate remedy the problem). This was also widely pointed out at the time of the abolition of the ABCC.

Watered down enforcement in the face of entrenched unacceptable conduct

508. The unacceptable and damaging conduct which gave rise to multiple Royal Commissions and recommendations for specific investigatory and policing responses has been rendered even more stark, alarming and pressing by the wider national scandal regarding the conduct and management of various branches of the CFMEU.

509. An entrenched culture of violence, threats, intimidation, and widespread and deliberate contempt for the law is alarming enough. Revelations of such conduct being linked to organisations and individuals involved in serious organised crime takes these concerns to another level. It is clear that the wider community, the majority of industry participants including many employees, and the wider industrial relations community are appalled by the revelations and allegations which have come to light regarding branches of the CFMEU - as was Government given its move to place various parts of the union into administration.

510. Australia's response to sustained and deliberate law breaking and active contempt for parliament's parameters for lawful industrial representation and respect for freedom of association was watered down through the abolition of the ABCC, and remains wholly inadequate to address entrenched cultures and unacceptable approaches by some officials and branches of construction unions.

511. In 2024 alone Courts have (most often through cases brought by the former ABCC):

- Awarded $168,000 in penalties against the CFMEU and one of its officials for improper conduct that included "*obnoxious, bullying interactions*" at a construction site in Melbourne. Relevantly:

- The improper conduct included calling a WorkSafe Victoria inspector "*corrupt*", a "*disgrace*" and a "*lapdog*" to the site's construction contractor and also calling Victorian Police officers a "*disgrace*" and a "*lapdog*" to the contractor.
- There was a finding that the conduct of CFMEU officials "*bespoke a thuggish assertion of control over how the site should operate*" and that "*they sought to appropriate unto themselves an authority that they plainly did not possess; and, when challenged, their response was to bully their interlocutors with unwarranted insults and abuse*".

- Awarded $247,540 in penalties against the CFMEU and its officials for unlawful conduct at a construction site in Adelaide. This included findings of "*direct, forceful and personal verbal abuse*" and conduct that was "*at best irresponsible and at worst demonstrates a complete disregard for [the safety of various individuals*." The judge in this matter found that a CFMEU official had engaged in "*physically threatening behaviour*" that was "*intended to intimidate*" and could "*only be described as thuggish*".
- Awarded increased penalties on appeal for unlawful conduct by a right of entry permit holder, for breaching s.499 (failing to comply with an occupational health and safety requirement) and s.500 (acting in an improper manner). The increased penalties were awarded in part after considering the CFMEU's history of failing to comply with various provisions of the Fair Work Act.
- Awarded penalties for comparable breaches in a parallel case, for conduct described as "*deliberate and intentionally defiant*".

512. Many of these investigations and prosecutions, of which there have been many more in 2024, were commenced by the former ABCC. It is far from clear that the replacement arrangements within the FWO are capable of investigating and prosecuting such conduct, or would have effectively pursued such matters.

513. Taking account of such unacceptable conduct and ongoing adverse decisions from the Courts, there is no basis on which to continue to apply a watered down approach to compliance, investigation and enforcement in building and construction, to have fewer boots on the ground to enforce the law, or to maintain reduced powers and capacities for those we charge with enforcing the law.

514. Where the desired result is not forthcoming, and genuine problems and unacceptable approaches are entrenched and pervasive, the reaction cannot be to take less action, and having regulators exercise reduced powers, with fewer resources.

515. This Review should again recall and act on judicial frustrations from our courts over the two decades at seeing officials come before them repeatedly from the same branches of the same union, following comparable conduct, and where such conduct regularly involves threats, intimidation and abuse.

516. Almost a decade ago, Jessup J traversed a litany of damming findings on how the CFMEU conducts itself, which remain completely relevant, including:

> *A number of findings involving unlawful behaviour by officials related to the CFMEU have been made in recent years ... [His Honour then cited 12 cases] ... ... These various cases illustrate that the federal body has not been effective in ensuring that officials act in accordance with the law.*
>
> *... the history tends to suggest that the Union has, with respect to anti-coercion and similar provisions of industrial laws, what the High Court in Veen described as 'a continuing attitude of disobedience of the law'.*
>
> *the litany of contraventions ... [and] the many prior contraventions of relevant statutory proscriptions by the Union ... indicating a propensity, on the part of the Union, to engage in proscribed conduct.*
>
> *There is also a need for any penalty to have a specific deterrent effect on the CFMEU. It has, as I have already outlined, a deplorable record of contraventions of the BCII Act and similar legislation. The union has not displayed any contrition or remorse for its conduct. The contravention is serious... Substantial penalties for misconduct, prior to that presently under consideration, have not caused the CFMEU to desist from similar unlawful conduct.*
>
> *It is fair to describe the CFMEU record as dismal. Since 1999, the CFMEU has had penalties imposed on it by a Court on numerous occasions. ...The record indicates an attitude of indifference by the CFMEU to compliance with the requirements of the legislation ... It also indicates that deterrence must be a prominent consideration in the fixing of penalties in the present cases.*
>
> *The present conduct of one of its officials adds to this depressing litany of misbehaviour. It evidences an ongoing disregard for the rule of law and highlights the need for the imposition of meaningful penalties within the limits imposed by the Act.*
>
> *In seeking to achieve its desired outcomes the CFMEU had available to it lawful processes which it could have pursued. It chose, instead, to prosecute its objectives by means which it must have known or, at least, should have known, were unlawful. Not for the first time the CFMEU sought to impose its will by means of threats and coercion against employers. Its approach was one of entitlement: it was free, despite legal constraint, to deploy its considerable resources in order to achieve its industrial objectives. The concept of the rule of law was anathema to it.*

The CFMEU's long history of its officials conducting themselves unlawfully ... calls for a significant component of specific deterrence.

I am bound to say that the conduct referred to in the schedule bespeaks an organisational culture in which contraventions of the law have become normalised.

The circumstances of these cases were not identical to those in the present case. They, nonetheless, bespeak a deplorable attitude, on the part of the CFMEU, to its legal obligations and the statutory processes which govern relations between unions and employers in this country. This ongoing willingness to engage in contravening conduct must weigh heavily when the need for both specific and general deterrence is brought to account.

517. There has also been a specific recognition from the bench of the need for higher penalties if the Courts are to have any hope of discouraging unlawful conduct:

But for the past history of contraventions on the part of the CFMEU, a penalty would have been imposed of $175, 000; when that past history is taken into account it is considered that the penalty should be $225, 000. Approached in this manner, the reasoning at least has the advantage of transparency. The penalty of $225,000 is proportionate to the contraventions that have been found to have occurred. Rather than the penalty of $225,000 being seen as an increase in the penalty "because of prior convictions", it is more correctly characterised as a penalty that may better serve the objective of deterrence.

518. It seems abundantly clear that unacceptable, damaging cultures and practices in the industry continue, and remain of such magnitude and negative impact that they cannot be addressed through generalist inspection and enforcement.

519. The FWO is also separately addressing a review and recommendations of its operations, including both cultural and budget savings considerations. This report emphasised risk aversion as a key concern in the operation of the FWO. This accords with the basis on which successive Royal Commissions recommended the separation of building and construction industry enforcement into a stand-alone industry body, separated from general time and wages inspection and compliance.

Ai Group position and recommendations

520. The current regulatory regime has failed and is not providing industry confidence that there are appropriate protections in place to avoid a continuation of the entrenched problems in the sector.

521. The primary recommendation must be to restore the ABCC or a comparably empowered and tasked stand-alone specialist investigatory and regulatory agency for the building and construction industry sector.

522. We also recommend the following:

- The ABCC or a similarly directed and empowered standalone agency should be re-established, once again giving effect to the remedial recommendations of multiple royal commissions and being equipped to address uniquely entrenched and unacceptable conduct and behaviours in the industry.
- If there is to continue to not be an ABCC, or a comparable stand-alone specialist body for the industry that is similarly directed and empowered, a distinct specialised division should be re-established within the FWO with responsibility for the building and construction industry, and the necessary resources and powers to bring actions to combat unacceptable conduct in the industry.
- There should again be higher penalties which can be applied to wrongdoing in the construction industry, sufficient to again start to provide deterrence to deliberate strategies of calculated law breaking. Penalties must be sufficient to ensure unions in the industry cannot treat financial penalties imposed by our courts as a mere cost of doing business.
- The Government should reimpose building code requirements, with similar scope of application to that of the former building code. The content and form of code requirements going forward should be the subject of a separate inquiry, report and consultation with the NWRCC. Such a dedicated code for the Building and Construction Industry should operate separately to any other government purchasing requirements or the making of the Secure Australian Jobs Code foreshadowed prior to the 2022 election, which should exclude industrial relations requirements for building and construction work.
- At a minimum, and as an interim step towards more significant reform measures, changes described in recent correspondence from major industry associations to the Government (which was widely publicised) need to be implemented without delay.

Crucially, there needs to be urgent consideration given to addressing the notorious perception that some unions within the building industry systematically misuse right of entry powers related to WHS and over state (or indeed falsify) safety concerns in order to leverage industrial outcomes. Safety in this industry is of paramount importance. Unions should play a crucial role in helping to promote and indeed ensure the maintenance of appropriate standards, but as it stands there is widespread belief that this legitimate role is all-too-often being abused.

ATTACHMENT A – SJBP ACT COMMENCEMENT DATES

1. The *Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022* received Royal Assent on 6 December 2022. The amendments commenced in stages across a 12-month period from 7 December 2023 as follows[42].

Date	Amendment
7 December 2022 (the day after Royal Assent)	• Objects of the Fair Work Act, modern awards objective, minimum wages objective • Equal remuneration • Prohibiting pay secrecy • Anti-discrimination and special measures • Termination of enterprise agreements after the nominal expiry date • Sunsetting of "zombie" agreements • Initiating bargaining • Dealing with errors in enterprise agreements • Communications to be available in multiple languages
6 March 2023	• Prohibiting sexual harassment in connection with work • Expert Panels • Absorb the functions of the Registered Organisations Commission
6 June 2023	• Flexible work and unpaid parental leave requests • Enterprise agreement approval and the Better off overall test • Bargaining disputes, industrial action, supported bargaining, single-interest employer authorisations, varying enterprise agreements to remove employers and their employees, and co-operative workplaces
6 December 2023, or an earlier date to be fixed by proclamation	• Fixed term contracts

[42] Reproduced from https://www.fwc.gov.au/about-us/new-laws/secure-jobs-better-pay-act-whats-changing

Attachment B

Ai GROUP SUBMISSION

Senate Education and Employment Legislation Committee

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

11 November 2022

Introduction

The Australian Industry Group (**Ai Group**) welcomes the opportunity to make a submission to the Senate Education and Employment Legislation Committee's inquiry into the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (**Bill**).

The Bill would make major changes to a large number of provisions in the *Fair Work Act 2009* (**FW Act**), including sweeping changes to Australia's enterprise bargaining laws. Given the breadth of the proposed changes it is vital that there is time for the impacts of the Bill to be thoroughly analysed and understood by businesses and others within the community. This truncated inquiry does not provide a sufficient opportunity for such analysis to be undertaken. Nor does the short timeframe for the inquiry pay sufficient respect to the important role that Parliamentary Committees have in scrutinising Bills and making recommendations to improve the operation of legislative amendments before they are enacted.

The current economic and business environment is very challenging for businesses – small and large. Businesses are endeavouring to cope with high inflation, rapidly rising interest rates, low economic growth, stagnated productivity, supply chain pressures, intense competition, and labour and skill shortages. The imposition of hastily developed ill-conceived legislative changes upon them at this time would adversely impact investment, competition and jobs growth.

The problem with the enterprise bargaining system is the 'minefield' of technicalities that the enterprise bargaining approval process has become, not the absence of a multi-employer bargaining system. The excessively technical approval process is largely addressed in the Bill. The wide expansion in the multi-employer bargaining provisions and the associated industrial action rights are not needed and not warranted.

Ai Group has major concerns about many aspects of the Bill. Key concerns include:

- The proposed expansion of multi-employer bargaining would reduce productivity, investment and jobs.
- The proposed widespread expansion in industrial action rights would be very damaging for businesses and the community.
- Currently, the single interest bargaining stream in the FW Act is very narrow, as was intended when introduced by the Rudd Labor Government. It was clearly not intended to be a stream for widespread multi-employer bargaining, as proposed in the Bill. In effect, the expression 'single interest' in the legislation would become a misnomer. The criteria in the Bill for access to the stream is far too loose. The provisions would no doubt be used by unions to achieve industry sector agreements in a wide range of sectors.

- The criteria for access to the supported bargaining stream is also far too loose. There is the risk that the provisions would be misused by unions in a wide range of industry sectors beyond those low paid sectors which the provisions are purportedly aimed at.

- The provisions in the Bill which deal with the interaction between single-enterprise agreements and supported bargaining agreements are very unfair to employers and employees. Employers and their employees will be able to be readily forced by unions into supported bargaining agreements and once covered by such agreements, it will be virtually impossible to bargain directly with their own employees.

- 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 a replacement agreement, even if the employer and the majority of its employees do not wish to bargain, is unfair and inappropriate.

- 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.

- The proposed new restrictions on the termination of enterprise agreements are unworkable and need to be amended.

- The restrictions on fixed term contracts are unnecessary and inappropriate. They would have harsh effects on businesses and employees.

- The proposed FWC arbitration power under the NES right to request flexible working arrangements provisions is not appropriate. Neither is subjecting employers to a penalty of up to $66,600 if their reason for refusing an employee's request is ultimately held to be unreasonable.

- 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).

- As framed, the proposed unqualified workplace rights relating to pay disclosure, and more specifically the right to request information about another person's remuneration are blunt measures that fail to adequately enable employers to manage potential workplace conflict flowing from such provisions or protect commercially sensitive information.

- The Bill's enhanced equal remuneration provisions do not require sufficient consideration of the extent to which large wage increase can be absorbed by employers, funding arrangements or individual households or how this can be addressed.

Our views on various key provisions in the Bill are outlined in this submission, together with various proposed amendments to improve workability and reduce the adverse effects on businesses, employees and the community.

The proposed expansion of multi-employer bargaining would be harmful for Australia

Australia has had a harmonious workplace relations environment for the past 15 years and it is important that this is not lost or threatened.

Genuine enterprise bargaining and the requirement for secret ballots to authorise industrial action have led to a substantial decrease in industrial action, to the benefit of businesses, employees and the community.

Australia's international reputation as a reliable trading partner has been damaged in the past due to stoppages of work across multiple employers. For example, in a 2002 inquiry the Productivity Commission noted that the estimated cost of lost production from two industrial disputes in the automotive industry that stopped production across the automotive assembly plants and many automotive component suppliers were up to $630 million.[1] This cost would be more than $1 billion in today's money.

Multi-employer bargaining is typically harmful for productivity.

In the Productivity Commission's recent *5 Year Productivity Inquiry: A more productive labour market – Interim report 6* (released on 13 October 2022), the Productivity Commission said:[2]

> *Despite mechanisms in the FW Act allowing multi-employer bargaining, it is rarely used. There were 48 current multi-employer agreements in March 2022, or just 0.4 per cent of all agreements (DEWR, 2022). The strict administration requirements and/or restrictions placed on the available options likely reduce the appeal of multi-employer bargaining for both employees and employers, contributing to their lack of use. As such, <u>any changes to the FW Act to increase the use of multi-employer and industry/sector wide bargaining are likely to have uncertain implications for productivity (depending largely on the approach taken) and should be undertaken with caution and be subjected to detailed, rigorous and transparent analysis</u>.*
>
> *One stream of multi-employer bargaining relates to low-paid employees who have*

[1] Productivity Commission, *Review of Automotive Assistance*, final report, p.53.

[2] Pages 62-63.

historically not participated in enterprise bargaining (box 2.7). The FWC may provide a low-paid authorisation if a set of criteria is met. However, the current criteria to access a low-paid authorisation may limit the uptake of multi-employer bargaining. While some of the criteria have a strong basis (such as taking into account the bargaining power of the parties), the relevance of others, such as the history of bargaining, is less obvious and may be open to modification. Expanding access to low-paid streams by softening requirements for the FWC to consider less relevant criteria, provided they give primacy to the public interest, could remove red tape with a marginal impact to productivity.

However, removing restrictions on protected industrial action and bargaining orders would pose significant risks to productivity and real wages if it led to wider industrial action, with impacts on the broader economy. In the extreme, multi-employer agreements could morph into industry-wide agreements, undermining competition across industries, weakening the growth prospects of the most productive enterprises in any industry, and creating wage pressures that cascade into other industries. Given that industrial action is the most important source of leverage for employee bargaining, the overall level of industrial disruption could also be expected to increase. Stoppages do not just reduce the output and productivity of the businesses affected, but have flow-on effects through disrupted supply chains. And while cultural attitudes, institutions and laws that underpinned industry-wide determination of wages and conditions have changed over time, and the high levels of industrial disputation observed in the 1980s have largely disappeared (PC 2015b, p. 861ff), these developments occurred in the context of gradual moves towards a more flexible workplace relations system.

In the early 2000s, the Cole Royal Commission into the Building and Construction Industry considered in detail the arguments often raised in support of multi-employer bargaining. The Royal Commission's conclusions remain relevant:

- It denies employers the capacity for flexibility, innovation and competitiveness.
- It denies employees the capacity to reach agreement with their employer regarding their own employment conditions – including leave arrangements, participation in bonus schemes, flexible working hours and other mutually acceptable arrangements.
- It assumes that all businesses and their employees operate in the same fashion, have the same objectives, adopt common approaches to working arrangements and are content with uniformity.
- It assumes that third parties such as unions and employer associations understand better than either the employer or the employees what the business model of the enterprise is and what the wishes and desires of the employees are.

- It assumes that employees are not capable of negotiating satisfactorily on their own behalf.[3]

There are some obvious problems with the current enterprise bargaining laws that need to be addressed, including the unworkable Better Off Overall Test and the overly prescriptive and technical requirements for the approval of an enterprise agreement. Pleasingly, these problems are addressed in the Bill. Addressing these problems will make genuine enterprise bargaining more attractive for employers. An expansion in multi-employer bargaining is not warranted or appropriate.

Australia has a system of industry awards that set a safety net of wages and minimum conditions across numerous industries. Awards play a similar role to the industry-wide agreements that operate in some Continental European countries. 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.

The proposed widespread expansion in multi-employer bargaining would harm productivity, investment and jobs. Accordingly, the Bill needs to be substantially amended.

Ai Group's views on each specific Part of the Bill are outlined in the following sections.

Part 1 – Abolition of the Registered Organisations Commission

Summary of the proposed amendments

The Bill would abolish the Registered Organisations Commission (**ROC**) and transfer its functions to the FWC. The role of the Registered Organisation Commissioner would be carried out by the General Manager of the FWC.

The ROC is responsible for compliance and enforcement in relation to unions and registered employer associations. It also has an important advisory role.

Analysis

Unlike most other peak councils, Ai Group is a registered organisation in its own right. We are governed under the *Fair Work (Registered Organisations) Act 2009*, the legislation that the ROC is responsible for enforcing. Ai Group's predecessor organisations were first registered in the NSW industrial relations system in 1902 and federally in 1926. We have maintained continuous registration ever since.

[3] Royal Commission into the Building and Construction Industry, Final Report, Volume 5, p.53.

The ROC is carrying out a very important role, as can be seen by the unacceptable and unlawful conduct that was uncovered by the Heydon Royal Commission in respect of a small number of unions and union officials. Registered organisations which comply with the law and have appropriate standards of governance have nothing to fear from the ROC.

Ai Group has regular dealings with the ROC and we have always found the organisation and its staff to be competent, fair and responsive.

The ROC has implemented many initiatives to assist registered organisations with compliance, including fact sheets, templates, checklists, a compliance calculator, E-learning modules, webinars and podcasts.

It is of significant concern that the Federal Government plans to abolish the ROC without allocating any additional resources to the Fair Work Commission (**FWC**) in the October 2022-23 Budget to take over its functions. The registered organisations section within the FWC is currently very small, with limited funding. This section sits within the FWC General Manager's department and should not be confused with the tribunal functions of the FWC. The additional resources that the Government has allocated to the FWC in the Budget are for activities other than registered organisation compliance.

Unless appropriate resources are provided for registered organisation compliance and enforcement activities (e.g. for litigation) there is the risk of criminal and inappropriate conduct taking place once again, as occurred within the Health Services Union several years ago.

The following extract from October 2022-23 Budget Paper No. 2 is relevant:

Transfer functions of the Registered Organisations Commission to the Fair Work Commission

Payments ($m)

	2021-22	2022-23	2023-24	2024-25	2025-26
Fair Work Commission	-	3.7	7.5	7.6	7.7
Fair Work Ombudsman and Registered Organisations Commission Entity	-	-3.7	-7.5	-7.6	-7.7
Total – Payments	-	-	-	-	-

The Government will abolish the Registered Organisations Commission and transfer its functions to the Fair Work Commission, with costs of the measure to be met from within the existing resourcing of the Fair Work Commission.

Ai Group's position and recommendations

1. We do not support the abolition of the ROC.

2. If the ROC is to be abolished and its responsibilities transferred to the FWC, it is important that the expertise and resources of the ROC are not lost. Therefore:

- Relevant staff of the ROC should be offered positions with the FWC;
- The education materials, tools and other resources that are currently made available on ROC's website, should be made available through the Registered Organisations section on the FWC's website; and
- Additional funding needs to be provided to the FWC to enable it to carry out the functions currently being carried out by the ROC.

3. We urge the Committee to recommend that if the ROC's functions are transferred to the FWC, that the FWC be provided with additional funding to enable it to carry out the functions effectively.

Part 2 – Additional registered organisations enforcement options

Summary of the proposed amendments

The Bill would trigger standard provisions for the infringement notice and enforceable undertakings schemes under the *Regulatory Powers (Standard Provisions) Act 2014* (**Regulatory Powers Act**) in relation to registered organisation compliance and enforcement. The Regulatory Powers Act contains a standard suite of investigative, compliance monitoring and enforcement powers which may be applied to other Commonwealth laws. For the Regulatory Powers Act to apply, its powers must be 'triggered' by another Act.

Ai Group's position and recommendations

1. Ai Group does not oppose the infringement notice and enforceable undertaking schemes applying to registered organisation compliance activities. However, as discussed above, we are concerned that the Federal Government has not allocated any additional resources to the FWC in the October 2022-23 Budget for registered organisation compliance and enforcement activities. Section 316B in the Bill provides for the appointment of infringement officers. However, the Federal Government has not allocated any funding in the Budget for these new positions.

2. We urge the Committee to recommend that if the ROC's functions are transferred to the FWC, that the FWC be provided with additional funding to enable it to carry out the functions effectively.

Part 3 – Abolition of the Australian Building and Construction Commission

Summary of the proposed amendments

The Bill would:

- Abolish the Australian Building and Construction Commission (**ABCC**);
- Repeal the *Code for the Tendering and Performance of Building Work 2016* (**Building Code 2016**);
- Repeal the provisions in the *Building and Construction Industry (Improving Productivity) Act 2016* (**BCIIP Act**) which provide much higher penalties than those in the FW Act for building industry participants who engage in unlawful industrial action, unlawful picketing, unlawful coercion, breaches of right of entry laws, etc;
- Amend the name of the BCIIP Act to the *Federal Safety Commissioner Act 2022*, with the Act continuing to regulate the Work Health and Safety Accreditation Scheme and the Office of the Federal Safety Commissioner; and
- Implement transitional arrangements to facilitate the orderly winding up of the ABCC and the transfer of various functions to the FWO.

Analysis

ABCC

The establishment of the ABCC was a central recommendation of the Royal Commission into the Building and Construction Industry. In his final report, Commissioner Cole said: "*There is widespread disrespect for, disregard of, and breach of the law in the building and construction industr*y". The Royal Commission decided that "*there should be an independent monitoring and prosecuting authority in the industry to monitor conduct, and uphold the rule of law*".[4]

The Royal Commission into Trade Union Governance and Corruption also identified the critical need to retain the ABCC. The final report includes the following conclusion: "*Having regard to all of the available material, the argument that there is no need for an industry specific regulator cannot be sustained"*.[5]

The CFMMEU (Building and Construction Division) continues to show a blatant disregard for industrial laws and treats the fines that are imposed on it as the cost of doing business. There is a very long list of scathing comments from judges about the CFMMEU's lawbreaking, including the following recent comments from Judge Egan of the Federal Circuit and Family Court on 3 February 2022 when imposing a penalty of around $120,000 for breaches of the FW Act on the QPAC project in Brisbane:

[4] *Royal Commission into the Building and Construction Industry*, Feb 2003, Final Report, Vol.1, p.155.

[5] *Royal Commission into Trade Union Governance and Corruption*, Dec 2015, Volume 5, para. 97.

> *…[T]he CFMMEU's appalling and disgraceful record of established contraventions continues, unabashed and unabated. There can be no doubt that the CFMMEU is a rogue union untroubled by its ongoing bad behaviour. It seems that it prides itself on its recidivism.*[5]

Since 2005 more than $20 million in fines have been imposed on the CFMMEU for unlawful conduct, yet it continues to treat the law with contempt.

The ABCC is a very effective regulator and its activities are not directed at unions. It focusses on ensuring that all participants in the construction industry comply with the law, and it adopts a balanced approach. In addition to actions against the CFMMEU, the ABCC has pursued many actions against businesses.

The case for maintaining the ABCC is overwhelming and there is no case for abolishing it.

Building Code 2016

A key recommendation of both the Gyles Royal Commission in New South Wales and the Cole Royal Commission was the importance of using the substantial purchasing power of Governments to stimulate reform and ensure that construction industry participants operate within the law.

Unions in the construction industry routinely use the commercial risk faced by contractors as a lever to secure industrial concessions. Without proper regulation, this results in restrictive work practices and cost burdens which drive up project costs to the detriment of Governments, industry and the wider community. The importance of an appropriate Building Code in breaking this cycle cannot be understated.

The Building Code 2016 (before it was recently gutted by the Federal Government) imposed a commercial risk on contractors that prevented them from capitulating to unreasonable demands of unions. The unions understood the importance of Code-compliance to contractors and therefore they were less likely to make unreasonable demands.

The Code provided important benefits to workers and subcontractors by ensuring that:

- Businesses paid their workers correctly;
- Businesses did not engage in sham contracting;
- Businesses complied with their duties to maintain safe workplaces;
- Subcontractors were paid what they are owed in a timely manner; and
- Businesses did not breach migration laws.

There is no case for abolishing an effective Building Code.

Higher penalties in the BCIIP Act

Given the ongoing serious lawbreaking by the CFMMEU (Building and Construction Division), that has major adverse impacts on businesses and the community, there is no case for removing the higher penalties that currently apply to building industry participants.

The argument that the same penalties should apply to everyone fails to take into account that, unlike other most organisations in the community, the CFMMEU (Building and Construction) Division continues to treat industrial laws with contempt.

The substantial reduction in penalties that would result from the Bill will do nothing to achieve the necessary change in conduct by the CFMMEU (Building and Construction Division).

Ai Group's position and recommendations

1. Ai Group opposes the abolition of the ABCC. We also oppose the abolition of an effective building code and the repeal of the higher penalties that currently apply under the BCIIP Act.

2. If, despite Ai Group's views, the ABCC is to be abolished:

    - The FWO should receive the same level of funding as the ABCC was receiving;
    - A specialised division should be established within the FWO with responsibility for the building and construction industry;
    - Relevant staff of the ABCC should be offered positions with the FWO; and
    - The education materials, tools and other relevant resources that are currently made available on ABCC's website, should be made available to building industry participants through a Building and Construction section of the FWO's website.

Part 4 – Objects of the Fair Work Act

Summary of the proposed amendments

The Bill expands the existing object of the FW Act at section 3 by adding references to promoting job security and gender equity.

The Bill also adds more comprehensive, stand-alone objectives relating to gender equality to the FW Act's modern awards objective at section 134 and minimum wages objective at section 284. These more comprehensive gender equality objectives replace the existing and more narrow reference to the principle of equal remuneration for work of equal or comparable value in support of gender equality.

Further, the Bill adds a reference to 'the need to improve access to secure work across the economy' to the FW Act's modern awards objective at section 134.

Analysis

The Bill's amendments to the objects of the FW Act at section 3, will be relevant if there is a matter before the FWC or a relevant Court that involves the exercise of discretion and/or where there is a matter of statutory interpretation about a particular section in the FW Act. The FWC or relevant Court will have regard to the Bill's expanded objects of promoting gender equality and job security, in forming a decision.

In respect of the expanded gender equity objective to the FW Act's modern awards objective and minimum wages objective, the FWC must have regard to this in determining matters to which the modern awards objective and/or minimum wages objective applies. Specifically, the Bill will require the FWC to take into account the new expanded gender equity provision, in addition to existing criteria, in making decisions:

(a) that ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions; and

(b) establishing and maintaining a safety net of fair minimum wages.

The Bill will require the FWC to take into account the need to improve access to secure work across the economy in making decisions that ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions.

Ai Group's position and recommendations

Ai Group does not raise any issues with these provisions of the Bill.

Part 5 – Equal remuneration

Summary of the proposed amendments

The Bill expands the circumstances in which the FWC may make an equal remuneration order.

Equal remuneration orders are orders that the FWC can make where there is not equal remuneration for work of equal or comparable value. An equal remuneration order may only increase, rather than reduce, rates of remuneration. An employer must not contravene an equal remuneration order. For employees to whom the order applies, the order prevails over any less beneficial term that is contained in a modern award or enterprise agreement.

Equal remuneration for work of equal or comparable value is a defined concept in the FW Act. The Bill does not change the current definition which provides that it is "*equal remuneration for men and women workers for work of equal or comparable value*" (s.302(2)). However, it does enable the FWC to consider a broader range of factors in any assessment of whether there is equal remuneration for work of equal or comparable value. This is reinforced by the Bill's proposed

statutory note to the definition of equal remuneration for work of equal or comparable value in the FW Act's definition section (s.12).

In expanding the circumstances in which the FWC may make equal remuneration orders, the Bill specifically provides that:

(a) The FWC may initiate proceedings at its own motion, rather than on application by an interested party, as is currently the case. This is a particularly significant change when coupled with the creation of a new Expert Panel(s) relating to pay equity and the community and care sector, and its enhanced functions discussed further below.

(b) In deciding whether there is equal remuneration for work of equal or comparable value, the FWC may take into account:

    i) comparisons within and between occupations and industries to establish whether the work has been undervalued based on gender, where such a comparison need not be limited to similar work and or with an historically male-dominated occupation or industry;

    ii) whether historically the work has been undervalued based on gender;

    iii) any fair work instrument or State industrial instrument; and

    iv) any other consideration, relevant or otherwise, in deciding whether there is equal remuneration for work for equal or comparable value.

In addition, the FWC is not required to find gender discrimination in order for gender undervaluation to be established.

In effect, the Bill broadens the FWC's discretion and removes the application of previous principles determined by various Full Benches of the FWC to be relevant (e.g., the need to establish a male comparator) in considering applications for equal remuneration orders.

While conferring greater discretion on the FWC to determine whether there is equal remuneration for work of equal or comparable value, the Bill removes the current discretion in relation to the making of an order and will instead, require the FWC make an order if satisfied that there is not equal remuneration for work of equal or comparable value.

The Bill's section 157(2)A) seeks to add to the FW Act's current work value provisions at section 157(2). The Bill introduces two new mandatory considerations for the FWC to consider in work-value matters before it. These are that the work value reasons are free of assumptions based on gender and include consideration of whether historically the work has been undervalued because of gender based assumptions.

Ai Group's position and recommendations

Ai Group supports the principle of equal remuneration for work of equal and comparable value.

The FWC's ability to make equal remuneration orders is a direct and targeted intervention to address cases of gender pay inequity resulting from the undervaluation of women's work.

We further support the continued role for the FWC in making equal remuneration orders, including more modest changes to expand the circumstances in which orders can be made.

We consider that these provisions will be more far more effective than the Bill's multi-employer bargaining provisions (including the supported bargaining stream) in rectifying any gender based undervaluation of wages in the low-paid care sectors of the economy by delivering appropriately determined wage increases.

We have identified, however, that the Bill's significantly loosened criteria for the FWC to make equal remuneration orders, when combined with applications for very significant quantums of wage increases, could create significant harm to employers and the community in various sectors.

Many employers in the care sectors rely on Government-funding arrangements and/or household income of clients or their family to support services to vulnerable persons in the community. It would be very problematic if the Bill's equal remuneration provisions resulted in the provision of unsustainable higher-cost care that becomes out of reach of many Australian households or which imposed unsustainable cost pressures on employers in these sectors.

A recent FWC Full Bench decision[6] of 4 November 2022 determined to award aged care workers a 15% wage increase under the FW Act's current work value provisions. In that decision the Full Bench observed:

> [60]…The likely impact on employers of the interim increase we propose to award will be ameliorated to the extent of Government funding support for that increase. The extent of funding support is unknown at present.
>
> [61] Given the funding arrangements in the aged care sector, the Joint Employers and the Commonwealth sought an opportunity to make further submissions regarding the timing of the implementation of any minimum wages increases arising from these proceedings

The Full Bench also referred to the Australian Government's submission in the proceedings made on 8 August 2022.[7] Relevant sections of the Government's submission is underlined below.

> The Commonwealth will provide funding to support any increases to award wages made by the Commission in this matter and that will help deliver a higher standard of care for older Australians. The Commonwealth would also welcome an opportunity to work with the Commission and the parties regarding the timing of implementation of any increases, taking into account the different funding mechanisms that support the payment of aged care workers' wages …

[6] [2022] FWCFB 200 at [60]
[7] [2022] FWCFB 200 at [905]

> **With regard to fairness for employers, the Commonwealth submits that the particular contemporary context of Government funding for the aged care sector means employers are unlikely to experience significant detrimental impacts as a result of increases to modern award minimum wages in the sector.** Such wage increases could therefore not be considered to be unfair to aged care employers …
>
> **The cost to business of increasing aged care sector wages would likely be substantial, depending on the quantum and phasing of wage increases.** However, as the primary funder of aged care services, the Government has committed to ensuring that the outcome of the aged care work value case is funded. The Commonwealth submits that the Commission can therefore proceed on the basis that the impact on business of significant increases to award minimum rates in the case will not be material.'

The Commonwealth's submission and the Full Bench's decision highlights the impact and importance of Government funding in minimizing the adverse impacts on employers in the aged care and community sector. The Full Bench's consideration of the impact on employers and the community from a large wage increase, was also framed by, and no doubt arose from, the application of the modern awards objective.

However, unlike the FW Act's work value provisions, there is a very problematic absence in the Bill's enhanced equal remuneration provisions of any specific consideration around the impact on employers, the community and the industry affected. The potential for significant harm and detriment to the community has not been adequately safeguarded by these provisions in the Bill, particularly given the creation of new FWC panels to make equal remuneration orders for potentially large increases as has been sought by a variety of union applicants.

In order to protect the viability of employers, the sectors in which they operate and on which vulnerable people in the community rely, Ai Group suggests the following amendments:

Insert a new subsection 302(4):

> *…(c) the impact of any proposed order on affected employers; whether employers rely, in whole or in part, on Government-funding arrangements; and the interests of those in need in the community.*

Section 302(4) already requires the FWC to consider mandatory factors such as previous annual wage reviews in deciding whether to make an equal remuneration order. This proposed amendment would add to those considerations.

This proposed and modest amendment would not narrow the FWC's consideration of whether there is equal remuneration for work of equal or comparable value and nor would it negate the Bill's provision at section 302(5) requiring it to make an equal remuneration order if equal remuneration was not found. It would however ensure a more holistic assessment of matters such as the quantum of any order or the timing of its implementation (including any transitional arrangements).

Clearly the impact on employers, how certain industry sectors and employers are funded and integrity of services to the vulnerable, should be relevant considerations in FWC decisions to significantly increase minimum award rates across industries.

It is an essential consideration that must be explicitly written into the Bill to ensure that the interests of the community are protected. This consideration would not weigh against the grant of an increase, provided the relevant arm of Government agreed to provide a corresponding increase in funding.

Part 6 – Expert panels

Summary of the proposed amendments

The Bill creates two new Expert Panels to be constituted within the FWC: a pay equity panel and a care and community sector panel.

The Bill removes the current maximum of 6 Expert Panel Members that may sit within the FWC and replaces it with no limitation on the number of Expert Panel Members that may hold office under the FW Act.

The constitution of the Expert Panels must include Expert Panels Members or other FWC Members who have who have knowledge of, or experience in one or both of fields of gender pay equity or anti-discrimination. The Expert Panel constituted for the Care and Community Sector must also include an Expert Panel Member or FWC Member with experience or knowledge of the Care and Community Sector. The definition of Care and Community Sector is not defined in the Bill.

Certain matters before the FWC could only be determined by the Expert Panels. These would include work value cases concerning substantive gender pay equity matters and/or relating to the Care and Community Sector, equal remuneration orders and certain modern award variation powers (such as updating named parties to modern awards, removing ambiguity or correcting an error, dealing with award matters on referral by the Australian Human Rights Commission (AHRC)).

The Bill requires the President to give priority to FWC members with the required knowledge and experience in appointing Expert Panel members.

Significantly, the Bill empowers the President of the FWC to direct an Expert Panel to undertake an investigation and prepare a report on any matter that is relevant to the new functions of the Expert Panel. The report must be published on the FWC's website.

Ai Group's position and recommendations

Ai Group supports the objective of building subject matter expertise within the FWC.

Over the years it has, at times, been common practice for the FWC to create various specialist or industry panels to build expertise and knowledge within the FWC that can benefit an informed and efficient resolution of disputes between industrial parties. The Bill now requires this approach in respect of certain gender pay equity and care and community matters to be determined by the relevant Expert Panel.

In respect of the Care and Community Sector Panel, it is important that any Expert Panel Member also be familiar with the varying employment and service models in the sector, including detailed understanding of various funding arrangements in the sector.

The creation of the new Expert Panels must be considered in the context of the Bill's enhanced equal remuneration and work value provisions that, in effect, enable the FWC to grant such orders in a broader range of circumstances.

The pay equity Expert Panel will have considerable influence in formulating new approaches to the equal remuneration for work of equal or comparable value principle that will inform not only the granting of equal remuneration orders, but any modern award variations under the modern awards objective (s.134(1)(ab) and adjustment to minimum wages under the minimum wages objective (s.284(1)(a)).

Given that Expert Panel members will be empowered to significantly adjust and increase minimum rates of pay and other terms and conditions in modern awards and workplaces, it is essential that knowledge of, or experience in workplace relations or labour economics is required in addition to the fields of gender pay equity and anti-discrimination.

We suggest the following amendment to the Bill's section 620(1)(B)(b):

> 620(1)(B)(b)
> At least 2 Expert Panel Members or other FWC Members who have knowledge of, or experience in *workplace relations or economics and*, one or other of the following fields:
> (a) Gender pay equity;
> (b) Anti-discrimination.

A corresponding amendment should also be made to the constitution of the Care and Community Sector Expert Panel at section 602(1)(D)(b).

Part 7 – Prohibiting pay secrecy

Summary of the proposed amendments

The Bill prohibits an employer from entering into a contract of employment or other written agreement with an employee, that contains a term that is inconsistent with the Bill's new workplace rights relating to the disclosure of remuneration. Under the Bill, an employee will be provided with new protected workplace rights:

(a) To disclose the employee's remuneration to anyone;

(b) To ask any other employee (including an employee employed by a different employer) about their remuneration; and

(c) To not disclose the employee's remuneration to anyone.

The Bill extends these workplace rights to former and prospective employees. The workplace right also extends to disclosure of other terms and conditions of the employee's employment that are reasonably necessary to determine remuneration outcomes, such as hours of work arrangements and likely employer incentive and bonus schemes.

The creation of these new workplace rights relating to remuneration disclosure results in the Bill expanding the application of the FW Act's General Protections such that an employer is prohibited from taking adverse action against an employee because of these new rights.[8]

Penalties for contravening the FW Act's General Protections are up to $66,600 per contravention.

However, an employer who enters such a contract of employment with a pay secrecy clause could be liable for maximum penalty of $660,000.

In addition to the significant penalties on employers, the terms of any contract of employment or fair work instrument that contained a pay secrecy clause would be of no effect.

Analysis

The prohibition does not address the causes of the gender gap

Proposed legislative provisions seeking to ban pay secrecy clauses are not new. An earlier version of the Bill's pay secrecy provisions was the *Fair Work Amendment (Gender Pay Gap) Bill* introduced by the Australian Greens Senator Larissa Waters back in 2015. Under both the Bill presently before Parliament and this former Bill, the intended objective behind banning pay secrecy was to support improved gender pay equity by creating greater pay transparency. The banning of pay secrecy clauses featured in Labor's *Australian Women* pre-election policy as a gender equity strategy.

While Ai Group supports the policy intent of improving gender pay equity, the Bill's blunt pay secrecy prohibitions do not target the cause of the gender pay gap and nor are they limited to gender pay equity.

The causes of the gender pay gap have been consistently well-established as comprising of three factors:[9]

[8] See section 340 of the FW Act for the broad framing of workplace rights which includes for instance an employee also proposing to exercise, or not exercise a workplace right.
[9] KPMG, *She's Price(d)less Report;* the economics of the gender pay gap, 2022

- Extended time of out of the workforce by more women than men where women undertake a greater share of unpaid domestic and caring work;
- Gender-based segregation along industry and occupational lines; and
- Unlawful discrimination.

The Bill's pay secrecy prohibitions do not directly or meaningfully address any of these causes of the gender pay gap, which are based on broad structural and cultural factors about gender inequity and disparity.

Even if one was to accept that the prohibition may assist in establishing unlawful discrimination as a contributor to pay inequity, the prohibition goes far beyond that and is not limited to disclosure for that purpose. Instead, the Bill provides unlimited disclosure rights for employees and blunt prohibitions that cover all reasons, including those unrelated to gender, as to why some employers seek pay secrecy clauses.

In Ai Group's experience, pay secrecy provisions are not universally contained in employment contracts. They are not utilised in all industries. The employers or industry sectors that use them often have a particular reason for doing so that relates to their business operations and commercial interests.

One such reason would include the protection of a business's commercially sensitive information that would be revealed if remuneration details became public information. For instance, an employer's pricing model for its services may be costed on employee remuneration and appropriate mark-ups, which if revealed to clients or competitors, could be information used against that employer commercially.

While Ai Group supports the policy objective of better gender pay equity, we do not consider that such a blunt prohibition will deliver meaningful results in narrowing the gender pay gap.[10] Instead, we consider that a range of unintended consequences will arise. These are set out below.

Potential adverse impact on employees

It should not be assumed that the Bill's pay secrecy provisions would only have beneficial impacts upon employees. The Bill may cause adverse impacts to employees, including giving rise to privacy concerns about their personal information in the public domain and exposure to conflict with others at work. Such adverse impacts are explained below.

Firstly, an untested policy premise behind this provision appears to be that there *i*s inappropriate pay inequity across employee remuneration and that the disclosure of pay will expose disparity.

[10] See also Media Release, Australian Greens, 22.10.21 with the comment from Sen.Waters: "…*this move is not the panacea to close the persistent gender pay gap. The latest gender pay gap stats released yesterday show we need to ensure women-dominated occupations are remunerated in a way that better reflects their value to society.*

There are many circumstances however where employees are in fact paid at the same or comparable rate for the same or similar work performed or where any disparity exists for legitimate reasons

The Bill enables an employee to disclose his/her remuneration to anyone and in an unqualified public fashion. This may result in unintended privacy concerns arising for other employees. An employee's revelation and comfort with disclosing their remuneration publicly, for example on social media, may not be supported by other co-workers with the same title and who may be paid *the same.*

Secondly, the Bill would protect a range of unwelcome requests by employees about the remuneration information of others. In circumstances where such requests were persistent or threatening, neither an employer or the employee receiving the request has a right to stop the conduct without risk of contravening the General Protections of the FW Act. This is because to do so would likely amount to adverse action by the employer because the employee has exercised a workplace right, or because the request to stop would prevent the exercise of a workplace right to request that another share their remuneration.

In effect, the Bill's new workplace right for an employee to request another's remuneration details and an employee's workplace right not to disclose their remuneration may foreseeably generate workplace conflict over which an employer can do very little. Employers should not be constrained in this way.

Thirdly, the phrase "or other written agreement" in section 333D has the potential to capture settlement agreements that may be negotiated between the employer and employee (or former employee) and any legal representatives in resolving claims about the employee's employment. Generally, such agreements are not contracts of employment but are entered into to resolve a claim in preference to the pursuit of litigation. These settlement agreements are often used to facilitate a monetary payment to employees (or former employees) by their employer without admission of liability and where the quantum of such payments are typically agreed as confidential. The term remuneration in the Bill's provisions is not defined and there is real risk that settlement monies paid by an employer could be construed as such, particularly in relation to the treatment of such payments by taxation laws.

The banning of confidentiality clauses in legal written settlement agreements (that are not contracts of employment) facilitating the payment of monies are likely to be detrimental to employees who may prefer for a negotiated outcome than pursuing proceedings in a court or tribunal. For instance, a very high proportion of unfair dismissal applications are resolved through negotiated settlement agreements involving the payment of money with confidentiality clauses, instead of parties pursuing the matter in the Commission. The prohibition on confidentiality clauses in such cases would no doubt prompt many employers to be less likely to agree to a settlement.

Ai Group's position and recommendations

Ai Group supports the narrowing of the gender pay gap, but we do not support blunt and blanket prohibitions on pay secrecy coupled with the creation of unqualified workplace rights that have the potential to cause a conflict of rights with others.

If, despite our concerns the workplace rights and prohibition on pay secrecy clauses are to remain in the Bill, then it is essential that the following amendments be made:

1. The new workplace rights in the Bill should be removed. They have the potential to cause conflict in the workplace based on the unqualified protection afforded to employee interactions with each other and others. In particular, the unfettered right to ask about another's remuneration will result in difficult to manage conflict or intimidation within workplaces. Employers would likely be prevented from resolving that conflict based on the scope of the adverse action prohibitions that would prevent an employer from asking an employee to cease making requests for the remuneration details of others.

Ai Group also proposes the following amendments, in the alternative:

2. If the workplace rights are to remain in the Bill, it should also provide, in effect, that an employer may take reasonable management action to resolve workplace conflict arising from employee requests for remuneration details from others.

3. In relation to section 333B the term *remuneration* should exclude monies paid by the employer to the employee as part of any settlement arrangement relating to actual or threatened legal or tribunal proceedings against an employer that the employee agrees is confidential.

4. After section 333D insert new sub-section 333D(2)

   An employer does not contravene this section if the prohibition does no more than is necessary to protect the legitimate commercial interests it has in respect of the provision of commercial services to third parties.

   A corresponding exception to the contravention should also be made to Part 3-1 General Protections.

Part 8 – Prohibiting sexual harassment in connection with work

Summary of the proposed amendments

The prohibition against sexual harassment

The Bill introduces a prohibition against sexual harassment in the FW Act. The prohibition is framed such that a person must not sexually harass another person who is a:

- worker in a business or undertaking; or

- seeking to become a worker in a business or undertaking; or
- is a person conducting a business or undertaking.

To be prohibited, the sexual harassment must be in connection with the harassed person being in one of these three categories.

The terms 'worker' and 'person conducting a business or undertaking' are aligned with definitions in WHS laws and extend beyond an employer and employee. That is, a worker is also a contractor, a subcontractor, a trainee, a student on work experience or a volunteer.

The prohibition against sexual harassment is a civil remedy provision and carries a maximum penalty of $66,000.

An employer or principal may be vicariously liable for a person who sexually harasses another person (in one of the three categories above) if the alleged harasser is an employee or agent of the employer or principal.

An employer or principal would not be vicariously liable if it proves that it took all reasonable steps to prevent the employee or agent from contravening the prohibition.

While section 527E of the Bill provides for vicariously liability, the Bill makes clear that the FW Act's sections 550 and 793 regarding accessorial liability for individuals and liability for bodies corporate still also apply and are not limited by the proposed vicarious liability provision.

The FWC's sexual harassment dispute jurisdiction

The Bill creates a new dispute jurisdiction within the FWC to deal with sexual harassment disputes on application. In exercising its jurisdiction, the FWC may make a stop sexual harassment order or otherwise deal with the dispute.

Either the person aggrieved or an industrial association entitled to represent the industrial interests of the aggrieved person may apply to the FWC. The Bill also enables joint applications to the FWC in certain circumstances.

Unlike the FW Act's current dispute jurisdiction to issue stop sexual harassment orders, it appears the applicant need not be a current employee. An applicant may have up to 2 years to make a dispute application after the alleged contravention.

To issue a stop sexual harassment order, the FWC must be satisfied that the aggrieved person has been sexually harassed and that there is a risk the aggrieved person will continue to be sexually harassed in contravention of the prohibition. In making a stop sexual harassment order, the FWC may make any order it considers appropriate, other than an order for the payment of a pecuniary amount (monetary compensation).

Section 527J(3) of the Bill also provides for a range of matters that the FWC must take into account such whether there are any final or interim outcomes arising from an investigation into the matter.

The FWC's current powers to issue stop sexual harassment as part of the anti-bullying jurisdiction has been expanded to include sexual harassment in legislative amendments last year.

A contravention of a stop sexual harassment order is also a civil remedy provision.

If an application does not include an application for the FWC to make a stop sexual harassment order, the FWC may exercise dispute resolution functions under section 527R of the Bill and the FW Act's established provisions (s.595) concerning the FWC's power to deal with disputes. However, any dispute conference must be conducted in private.

If a dispute remains unresolved and the FWC is satisfied that all reasonable attempts to resolve the dispute will be unsuccessful, the FWC must issues a certificate to that effect and advise the parties if it considers that any further Court application or arbitration would have no reasonable prospects of success.

Once a certificate has been issued by the FWC, the dispute may be determined by FWC arbitrating the matter by consent, or by a sexual harassment court application.

In applying for the FWC to arbitrate the dispute by consent with the respondent, an aggrieved person does not need to be party to the arbitration; a notifying party can be the relevant union absent the aggrieved person.

Through arbitration, the FWC may make a range of orders including an order for the payment of compensation to an aggrieved person, an order for the payment of lost remuneration and an order requiring a person to perform any reasonable act to redress loss or damage suffered by an aggrieved person.

A contravention of an arbitration order is a civil remedy provision.

If a sexual harassment court application is pursued, this must be made within the required timeframes after the relevant certificate has been issued by the FWC. A sexual harassment court application is an application to a court for orders in relation to the alleged contravention.

Concurrent applications

An applicant may only make a simultaneous application for the FWC to deal with the sexual harassment dispute and court application if the court application includes an application for an interim injunction.

The Bill removes the prohibition of proceedings commencing under work, health and safety laws if an application to the FWC for a stop sexual harassment order is made.

Importantly, the Bill at section 734B does not permit concurrent applications to the FWC or a sexual harassment court application with an application or complaint under the Australian Human Rights Commission Act 1986 (Cth) or anti-discrimination law. An exception to this is where a FWC dispute application only nominates a stop sexual harassment order (where the FWC is unable to order monetary compensation).

Ai Group's position and recommendations

The Bill's creation of the sexual harassment prohibition reflects the Government's commitment to implement recommendation 28 of the Sex Discrimination Commissioner's *Respect@Work* Report.

The Bill has aligned key terms in the prohibition with both WHS laws and recent amendments to the *Sex Discrimination Act 1984 (Cth).*

Relevantly, the Government's *Anti-Discrimination and Human Rights Legislation Amendment (Respetc@Work Bill) 2022 (***Respect@Work Bill**) is also before Parliament. A copy of Ai Group's submission to the Senate Committee Inquiry into the Respect@Work Bill is here.

The Respect@Work Bill introduces, amongst other things, a new positive duty on employers to take reasonable and proportionate measures to eliminate, as far as possible, unlawful sex discrimination, sexual harassment and victimization. This is a different concept to a prohibition.

Ai Group does not oppose the FWC's new sexual harassment dispute jurisdiction (indeed the FWC already deals with sexual harassment in stop sexual harassment orders and termination of employment matters), but we do not support a further increase in the number of different complaints jurisdictions that apply differing legal frameworks in how employers should address and respond to sexual harassment.

Businesses operating nationally and across borders are already required to contend with in excess of 8 separate pieces of anti-discrimination legislation dealing with sexual harassment in different terms and with an associated complaints conciliation function and tribunal process. The Bill, in conjunction with the *Respect@Work Bill* will exacerbate rather than remedy the complexity associated with the multiple frameworks under which employers must contend, notwithstanding that the *Respect@Work* Report unequivocally found that the legal framework relating to workplace sexual harassment was too complex for employers to clearly navigate.

In our submission to the *Respect@Work Bill* we have sought amendments to the *Australian Human Rights Commission Act 1986 (Cth)* that would prevent compulsory conciliation by the AHRC in light of its obvious conflict in acquiring compliance and enforcement functions in relation to the positive duty in addition to its broad inquiry functions. This point is made all the more compelling now that we have the FWC's jurisdiction expanded to include sexual harassment disputes beyond stop sexual harassment orders.

Part 9 – Anti-discrimination and special measures

Summary of the proposed amendments

The Bill introduces three new protected grounds of breastfeeding, gender identity and intersex status to the list of existing protected grounds that cannot be the subject of a discriminatory term in a modern award or enterprise agreement.

The three new protected grounds would also be additional grounds protected from discrimination under the FW Act's General Protections, and would feature in the existing list of protected attributes that the FWC is to take regard to in preventing and eliminating discrimination in exercising its functions.

The Bill also introduces the concept of special measures to achieve equality such that a term of an enterprise agreement may include special measures to achieve equality without that term being discriminatory and therefore unlawful. For example, a term that has the purpose of achieving substantive equality for employees who are female and who have a disability.

The Bill's formulation of special measures to achieve equality is broadly consistent with how the concept is framed by the AHRC in its special measure guidelines.

Ai Group's position and recommendations

Ai Group does not oppose these provisions of the Bill.

Part 10 – Fixed term contracts

Summary of the proposed amendments

The Bill would prohibit an employer from engaging an employee on a fixed term contract with a period of two or more years (including extensions) or which may be extended more than once.

A number of exceptions would apply but an employer would have the burden of pricing that an exception applied.

The exceptions are:

- The employee is engaged under the contract to perform only a distinct and identifiable task involving specialised skills;
- The employee is engaged under the contract in relation to a training arrangement;
- The employee is engaged under the contract to undertake essential work during a peak demand period;
- The employee is engaged under the contract to undertake work during emergency circumstances or during a temporary absence of another employee;

- In the year the contract is entered into the amount of the employee's earnings under the contract is above the high income threshold for that year (which is currently $162,000);
- The contract relates to a position for the performance of work that:
    - is funded in whole or in part by government funding or of a kind prescribed by the regulations;
    - the funding is payable for a period of more than 2 years; and
    - there are no reasonable prospects that the funding will be renewed after the end of that period;
- The contract relates to a governance position that has a time limit under the governing rules of a corporation or association of persons; or
- Where a modern award that covers the employee includes a term that permits the contract.

A civil penalty of up to $666,000 would apply if an employer, small or large, engaged an employee under a fixed term contract in breach of the restrictions in the Bill.

Where a fixed term contract contravenes the provisions, the employment contract would continue as if the fixed termination date had no effect. The employee would be entitled to notice of termination and redundancy pay under the FW Act.

The Bill also require that employers give all new employees who are employed on a fixed term contract a Fixed Term Contract Information Statement that would be published by the FWO. A civil penalty of up to $666,000 would also apply if an employer, small or large, failed to give a new employee the Information Statement.

Under the terms of the original Bill, the fixed term contract provisions would apply to contracts of employment entered into on or after the date of Royal Assent. However, on 9 November 2022 the Government introduced an amendment into Parliament [Sheet ZD197] which would result in the provisions operating from a date to be Proclaimed, or 12 months after Royal Assent, whichever occurs first.

The Government's 9 November 2020 amendments [Sheet ZD197] would also:

- Clarify that an employer cannot enter into more than two fixed term contracts with an employee that cumulatively do exceed two years in duration; and
- Prohibit an employer from failing to re-engage an employee in order to avoid the prohibition.

Analysis

Relevant statistics

The following statistics show that the proportion of employees on fixed term contracts is relatively stable and is not increasing.

Year	Proportion of all employees (%)
2008	3.7%
2009	3.8%
2010	3.9%
2011	4.2%
2012	3.9%
2013	3.8%
2014	3.7%
2015	3.9%
2016	4.1%
2017	4.0%
2018	3.9%
2019	3.6%

Source: 2008-2013: ABS *Forms of Employment* (Cat No. 6359.0); 20142019: ABS *Characteristics of Employment, August 2019* (Cat. No. 6333.0) Unpublished Tablebuilder data.

Adverse operational impacts on businesses

The exclusions in the Bill are far too narrow. Consequently, the Bill would have major adverse implications for a large number of businesses.

Many businesses are partially or fully funded through contracts with Federal, State, Territory and Local Governments. The relevant exemption in the Bill only applies in very limited circumstances and only where "there are no reasonable prospects that the funding will be renewed after the end of that period". This test will rarely be met.

It is common for Government-funded service providers (e.g. those providing community services, education services, employment services, health services, business advisory services, etc, to the community on behalf of Governments) to be required to re-apply for funding at the end of the contractual term. In a large proportion of cases, there would be some prospects of the funding being renewed at the end of the current term but this would by no means be certain. The Bill would lead to substantial disruption to the operations of such businesses.

Many of the affected businesses are not-for-profit organisations which are providing vital services to the community.

Under the terms of the Bill, even if the funding was unlikely to be renewed at the end of the period, this would not be enough. There would have to be no reasonable prospects of the funding being renewed in order for the exemption to apply.

Typically, Government contracts do not include any compensation to the contracted service provider for any redundancy pay that would be payable to the employees working on the Government contract. It would appear that the Federal Government has not allocated any funds in the Budget for these substantial additional costs. Similarly, it is likely that State, Territory and Local Governments would have failed to budget for these additional costs.

In addition to the adverse implications for Government funded businesses, there will be adverse effects on many private sector businesses. It is reasonably common for employees to be engaged under fixed-term arrangements when engaged to carry out work on specific commercial contracts between their employer and a client of their employer.

Project work

It is common for employees to be engaged on a fixed term basis when engaged to work on particular projects. As drafted, the Bill would disturb many such employment arrangements to the detriment of businesses and employees. Many projects continue for more than two years.

The concept of specified task employment (as referred to in ss.123(1) and 386(2)) has been interpreted very narrowly by Courts and tribunals to relate only to specific tasks carried out by an employee and not to an employer's task or project. Hence, specified task employment is uncommon and fixed term employment is more common.

In *Drury v BHP Refractories* (1995) 62 IR 467, Chief Justice Wilcox of the Industrial Court of Australia (which was superseded by the Federal Court of Australia) made the following comments about specified task employment:

> *The contract of employment must be for a specified task; it must be a contract under which the employee is to carry out a specified task. The words "for a specified task" have nothing to do with the employer's task, or project.*

Adverse effects on employees

Undoubtedly, the legislative provisions would operate as a major barrier to employing people under fixed term contracts and to taking on additional staff. Given the blunt and inappropriate restrictions in the Bill, in many cases, employers will decide not to take on additional employees (and instead, for example, import more products from overseas) or they will employ more casual employees.

It is likely that a large number of employees on fixed-term contracts will be terminated at the expiry of their current fixed term contract. It is unrealistic to expect that this will not occur despite the anti-avoidance provisions in the Bill.

Ai Group's position and recommendations

1. Ai Group opposes Part 10 of the Bill. The proposed provisions are unnecessary and inappropriate, and they would have harsh effects on businesses and employees.

2. If, despite, our opposition, Part 10 of the Bill is to proceed, the following amendments to the exceptions in Item 441, s.333F are necessary:

333F Exceptions to limitations

(1) Subsection 333E(1) does not apply in relation to a contract of employment entered into by a person and an employee if:

(a) the employee is engaged under the contract to perform ~~a distinct and identifiable task~~ <u>work</u> involving specialised skills; or

(aa) <u>the employee is engaged under the contract to work on a specific project that has a completion date or an expected completion date</u>;

(b) the employee is engaged under the contract in relation to a training arrangement; or

(c) the employee is engaged under the contract to undertake ~~essential~~ work during a peak demand period; or

(d) the employee is engaged under the contract to undertake work during <u>urgent or</u> emergency circumstances or during a temporary absence of another employee; or

(e) in the year the contract is entered into the amount of the employee's earnings under the contract is above the high income threshold for that year; or

(f) the contract relates to a position for the performance of work that:

(i) is funded in whole or in part by government funding or funding of a kind prescribed by the regulations for the purposes of this subparagraph; and

(ii) the funding is payable for a period of more than <u>1 year</u> ~~2 years~~;

(iii) ~~*there are no reasonable prospects that the*~~ *it is uncertain whether the funding will be renewed after the end of that period; or*

(g) *the contract relates to a governance position that has a time limit under the governing rules of a corporation or association of persons; or*

(h) *a modern award that covers the employee includes terms that permit any of the circumstances mentioned in subsections 333E(2) to (4) to occur; or*

(i) *it is reasonably foreseeable that the employer will not need the job that the employee has been engaged to carry out to be performed by anyone at the date specified in the contract as the date that the employee's employment will end; or*

(i) *the contract is of a kind prescribed by the regulations for the purposes of this paragraph.*

3. The civil penalties of up to $666,000 are far too harsh and unbalanced. At the very least, the tenfold penalties for 'serious contraventions' should be removed.

4. The extremely broad 'anti-avoidance' provisions in Item 441, s.333H, including the Government's amendment to the Bill introduced into Parliament on 9 November 2022 [Sheet ZD197] to add a new paragraph 333H(1)(ba), are inappropriate. The provisions would create substantial risks for an employer virtually every time the employer decides to discontinue an employee's employment at the expiry of a fixed term contract. An employer should have the right to decide whether or not to re-engage an employee at the expiry of a fixed term contract, particularly given the major change that the Bill would make to existing employment arrangements,

   If 'anti-avoidance' provisions are to be included, those provisions should be modelled on s.66L of the Act which relates to casual employees. This approach would result in the following amendments to s.333H of the Bill:

333H ~~Anti-avoidance~~ Other rights and obligations

(1) *An employer must not terminate an employee's employment, in order to avoid any right or obligation under this Division*

~~*(a) terminate an employee's employment for a period;*~~

~~*(b) delay re-engaging an employee for a period;*~~

~~*(ba) not re-engage an employee and instead engage another person to perform the same, or substantially similar, work for the person as the employee had performed for the person;*~~

~~*(c) change the nature of the work or tasks the employee is required to perform for the person;*~~

~~*(d) otherwise alter an employment relationship*~~.

Note: The general protections provisions in Part 3-1 also prohibit the taking of adverse action by an employer against an employee (which includes an employee on a fixed term contract) because of a workplace right of the employee under this Division.

~~*(2) For the purposes of subsection (1), a person takes action for a particular reason if the reasons for the action include that reason.*~~

Part 11 – Flexible work

Summary of the proposed amendments

The Bill would amend the National Employment Standards (**NES**) to expand the circumstances in which an employee may request flexible working arrangements under s.65 of the FW Act, where they or a member of their immediate family or household, experiences family or domestic violence, to align the definitions with those used in the entitlement to family and domestic violence leave.

The Bill would also expand an employer's obligations when dealing with requests for flexible working arrangements under s.65 by requiring that the employer:

- 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.

The Bill would give the FWC compulsory arbitration powers where an employer has refused an employee's request for flexible working arrangements or where the employer has not provided a written response to the request within 21 days. If the FWC is satisfied that there is no reasonable prospect of the dispute being resolved, the FWC may make:

- An order that the employer grant the employee's original request for flexible working arrangements; or
- An order that the employer make other specified changes to the employee's working arrangement to accommodate the employee's circumstances.

In addition, the Bill would enable a Court to impose a civil penalty on an employer for refusing an employee's request for flexible working arrangements. The maximum penalty for a body corporate, based on the current value of a penalty unit, would be $66,600.

The new provisions would commence operation six months after Royal Assent.

Analysis

Existing right to request provisions in the FW Act

Key features of the current right to request provisions in s.65 of the FW Act are:

- An employee may make a request for flexible working arrangements under s.65 if the employee meets the eligibility requirements set out in this section of the Act (e.g. the employee has completed at least 12 months' continuous service), and if the request relates to one of the specified circumstances (e.g. if the employee is the parent of a child who is school age or younger).

- The request must be in writing and must set out the details of the change sought and the reasons for the change.

- An employer must respond to the employee's request in writing within 21 days, stating whether or not the request is granted.

- An employer may only refuse the request on reasonable business grounds, and if the request is refused, the employer must provide written details of the reasons for the refusal.

- The FWC can only deal with a dispute about whether an employer had reasonable business grounds to refuse an employee's request for flexible working arrangements, if the parties have agreed in a contract of employment, enterprise agreement or other written agreement to the FWC dealing with the matter.

- An employer's decision to refuse a request on reasonable business grounds cannot be subject to challenge in a Court (s.44(2)). Therefore, civil penalties cannot currently be imposed on an employer for refusing a request for flexible working arrangements.

History and rationale for the right to request provisions in the FW Act

The existing right to request provisions in the FW Act can be traced back to the 2005 decision of the Australian Industrial Relations Commission (**AIRC**) in the *Family Provisions Test Case*. After conferences and hearings which continued over a two-year period, the AIRC adopted a model award clause giving employees the right to request an extension in the period of unpaid parental leave and/or to return to work on a part-time basis following parental leave. An employer had the right to refuse an employee's request if reasonable in the circumstances.

The right to request provisions in the NES were the subject of a lengthy consultation process during the development of the FW Act. The issue of whether compulsory arbitration should be available in respect of the right to request provisions was heavily contested between employer groups at the time. Ultimately, the Rudd Labor Government announced that Fair Work Australia (now the FWC) would not be empowered to impose requested working arrangements on an employer.

The following question and answer was included in the Government's NES Discussion Paper that was distributed during the FW Act development process:

> ***Can Fair Work Australia impose a flexible working arrangement on an employer?***
>
> *No. The proposed flexible working arrangements NES sets out a process for encouraging discussion between employees and employers. The NES recognises the need for employers to be able to refuse a request where there are 'reasonable business grounds'. Fair Work Australia will not be empowered to impose the requested working arrangements on an employer.*"

In Ai Group's 2008 submission in response to the NES Discussion Paper, we said:

> *Ai Group supports the approach set out on page 12 of the NES discussion paper, whereby:*
>
> - *The provisions of Division 3 of the NES are intended to encourage discussion between employers and employees;*
> - *Fair Work Australia would not have the power to impose any requested work arrangements upon employers.*
>
> *Such an approach is educative and is more likely to achieve positive outcomes than a heavy-handed prescriptive approach*.

The intent of the right to request provisions is outlined in the Explanatory Memorandum for the *Fair Work Bill 2008.* Clause 258 states that "*the intention of these provisions is to promote discussion between employers and employees about the issue of flexible working arrangements*".

Clause 270 in the Explanatory Memorandum highlights that employees who do not have a formal entitlement often make informal requests for flexible working arrangements:

> *270. An employee who is not eligible to request flexible working arrangements under this Division (e.g. because they do not have the requisite service) is not prevented from requesting flexible working arrangements, However, such a request would not be subject to the procedures in this Division*.

In 2012, an Expert Panel comprising Professor Ron McCallum AO, retired Federal Court Judge the Hon Michael Moore and economist Dr John Edwards, conducted a major review of the FW Act. Despite the unions' arguments for the FWC to have compulsory arbitration powers under the right to request provisions, after thorough consideration of the issue, the Panel declined to recommend such a change. The following extracts from the Panel's final report are relevant:[11] (Emphasis added)

5.1.1 Right to request flexible working arrangements

Forward with Fairness provided that the Government would 'guarantee' a right for parents to request flexible work arrangements until their child reaches school age, which could only be refused on reasonable business grounds. The NESDP provided that 'whether a business has reasonable business grounds for refusing a request for flexible working arrangements will not be subject to third party involvement under the NES', on the basis that United Kingdom experience suggested that simply encouraging discussion was successful in promoting flexible arrangements. Accordingly, the intention of the standard was 'to promote discussion and agreement between employers and employees about the issue of flexible working arrangements'. The Explanatory Memorandum (EM) provides that it was envisaged that FWA would provide guidance as to what constitutes reasonable business grounds, and provides that they may include the effect on the workplace including financial impact, efficiency, productivity and customer service; the inability to organise work amongst existing staff; the inability to replace the employee or the practicality of arrangements that would need to be put in place to accommodate the request.

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The Panel has considered the question of whether a decision to refuse a request for flexible working arrangements should be able to be appealed. Section 146 outlines the requirements for dispute settling terms under modern awards and includes a note that FWA or a person must not settle a dispute about whether an employer had reasonable business grounds to refuse a request for flexible working arrangements under s. 65(5) or a request for extending unpaid parental leave under s. 76(4). While providing an appeal mechanism may help ensure that a request for flexible working arrangements is given proper consideration and that a refusal is indeed due to reasonable business grounds, this still would not provide a guarantee that a right to request would eventually succeed.

FWA's previously noted survey results indicate that employers are taking requests seriously and that in most cases employees can negotiate flexible arrangements

[11] *Towards more productive and equitable workplaces - An evaluation of the Fair Work legislation Final report*, 18 November 2012, p.95-99.

despite the absence of an appeal mechanism. Given that the policy rationale of the provision is to facilitate discussion about flexible working arrangements, the Panel is not convinced on the weight of evidence that the policy is currently not meeting its objective and therefore does not recommend that such an appeal mechanism is adopted. In this regard the Panel is also mindful that employees may negotiate for a right to appeal a refusal of a request for flexible working arrangements under an enterprise agreement dispute settling procedure.

While the Panel has declined to recommend an appeal mechanism, it recognises the experience of some stakeholders with employers refusing a right to request without due consideration. The Panel therefore recommends that the FW Act be amended to provide an additional requirement that a request can only be refused after the employer has held at least one meeting with the employee to discuss the request. The Panel's view is that such a meeting should already form part of considering a right to request in most workplaces; however, we consider that codifying the requirement will ensure a conversation about, and due consideration of, such requests in workplaces not currently meeting this standard. The Panel considers that this would be consistent with the overall policy intentions of the legislation and will help meet the specific policy intent of facilitating conversations about flexible working arrangements.

> ***Recommendation 5:*** *The Panel recommends that s. 65 be amended to extend the right to request flexible working arrangements to a wider range of caring and other circumstances, and to require that the employee and the employer hold a meeting to discuss the request, unless the employer has agreed to the request.*

In 2015, the Productivity Commission conducted a major inquiry into Australia's Workplace Relations Framework. Once again, the unions argued for the FWC to be given a compulsory arbitration power under the right to request provisions. Once again, such a power was not recommended. The following extracts from the Productivity Commission's final report are relevant:

Box 16.7 – The right to request a change in work arrangements and the extension of parental leave

Some participants have claimed that there are flaws in the FW Act provisions relating to the right to request a change in work arrangements (s. 65) or to obtain an extension of parental leave (s. 76).

The ACTU argued that the current provisions make it far too easy for employers to deny these requests…. The ACTU submitted that:

- - -

In 2003, United Kingdom lawmakers made it a statutory duty for employers to follow certain procedures in considering similar requests. In addition, they established a right of appeal, which appears to have increased the likelihood that employers approved requests (ACTU sub. 167, p. 171).

However, in making judgments about the desirability or best timing of any such changes to the NES, several (sometimes overlooked) considerations are relevant.

The likely behavioural responses by people to any such measures needs be assessed, since these responses can sometimes undermine their prime objectives. A particular concern is that any obligations perceived to be costly by employers and that predominantly affect only one group of employees, may unwittingly lead to employment discrimination. In the particular, proposals for improved leave access discussed in box 16.7, the ACTU noted that ' … [d]espite the issue being significant to all working parents, it is mostly women who are affected by the need to balance work and family' (sub. 167, p. 170). There is therefore a risk that women may find their career and hiring prospects reduced by some employers without any real capacity to detect this. Moreover, to the extent that the provisions are seen as largely oriented to women, men may be reticent about even requesting to use such provisions.

Solving this dilemma would require a number of changes. These include addressing any misperceptions about the actual costs of such flexibility measures, increased public awareness of employers that use flexibility as a strategy to attract talented people, the diffusion of such flexibility arrangements in enterprise agreements, advocacy more generally, and changing social mores that make it acceptable for men also to request such leave. Regulatory measures that provide avenues for complaints or appeals by people denied reasonable flexibility (box 16.7) could help, but this may arise primarily from the fact that such regulations would signal the unacceptability of certain conduct by employers. The regulations themselves would most likely be only weakly enforceable given the difficulty of establishing what is reasonable.

The FWC General Manager's reports

Under s.653 of the FW Act, the General Manager of the FWC is required to provide a research report every three years on the operation of the NES provisions relating to requests for flexible working arrangements under s.65(1) of the Act, including reporting on:

- the circumstances in which employees make such requests;
- the outcome of such requests; and
- the circumstances in which such requests are refused.

The last General Manager's Report (dated November 2021, covering period between 2018 and 2021) reported that:

> ***5.1.5 Granting and refusing requests***
>
> *Most interviewees that responded commented that requests were agreed by employers or agreed following negotiations. Refusals were rare, particularly among employers who provide greater access to flexibility than the statutory provisions.*
>
> *Requests were refused when there were rostering difficulties, the need for staff availability at opening hours or when the business welcomed clients, as finding staff to cover particular hours or days could be difficult, with some employers preferring not to have too many individual alterations to rosters.*
>
> *Some interviewees mentioned that employers resisted requests to work from home prior to the pandemic because employees were not set up to work remotely and/or were concerned about supervision. Others referred to concerns about performance as a basis for refusal, although in one instance this was dealt with as a separate performance issue which was not reasonable grounds for refusal.*
>
> *In accordance with the interviews, the quantitative survey found that requests were refused when there was either no capacity of, or it was impractical to, change to working arrangements of other employees to accommodate the request. Other reasons included impact on customer service, significant loss of efficiency/productivity if the changes were implemented and that the requested arrangements could not be accommodated within an existing shift.*

Ai Group's position and recommendations

1. We do not oppose Items 446 to 457 regarding family and domestic violence.
2. We do not oppose Items 458 to 459 reregarding the expanded obligations on an employer when dealing with requests for flexible working arrangements under s.65. This represents a meaningful strengthening of the regulatory regime.

3. We oppose Item 463 (ss.65B and 65C) in the Bill. These provisions should be removed from the Bill.

   The proposed FWC compulsory arbitration power is not appropriate.

   It would impede the rights of employers to manage their businesses in a productive and efficient manner. The FWC is not well-placed to determine the operational impacts on businesses of flexible working arrangements requested by individual employees.

   The proposed power is inconsistent with the Rudd Labor Government's rationale for implementing the right to request provisions. The right to request provisions were intended to be facilitative, not punitive. As set out in the Explanatory Memorandum for the *Fair Work Bill*, the provisions were intended to "*promote discussion between employers and employees about the issue of flexible working arrangements*".[12]

   The proposed power is unnecessary given that every day in hundreds of workplaces, requests for flexible working arrangements are made, and the vast majority are granted. In most cases, the formal NES right to request provisions are not needed or used. Most employers try very hard to accommodate reasonable requests from their employees for flexible working arrangements. The FWC General Manager's research reports confirm this.

4. We oppose Items 460 to 463 (s.44) in the Bill. These provisions should be removed from the Bill.

   Exposure to a penalty of up to $66,600 for businesses, small and large, if an employee's request for flexible working arrangements is ultimately held by a Court to be unreasonable, is unfair and inappropriate.

   These Items in the Bill would result in the following illogical amendments to s.44. There is no logical rationale for treating refusals of requests under s.65 and those under s.76 (i.e. requests to extend a period of unpaid parental leave) differently. Neither should be subject to a civil penalty or other orders of Courts.

   44 Contravening the National Employment Standards

   (1) An employer must not contravene a provision of the National Employment Standards.

   Note: This subsection is a civil remedy provision (see Part 4-1).

   (2) However, an order cannot be made under Division 2 of Part 4-1 in relation to a contravention (or alleged contravention) of subsection ~~65(5) or~~ 76(4).

   Note 1: Subsection~~s 65(5) and~~ 76(4) state<u>s</u> that an employer may refuse ~~a request for flexible working arrangements, or~~ an application to extend unpaid parental leave, only on reasonable business grounds.

[12] Clause 258.

Note 2: Modern awards and enterprise agreements include terms about settling disputes in relation to the National Employment Standards (other than disputes as to whether an employer had reasonable business grounds under subsection ~~65(5) or~~ 76(4)).

Part 12 – Termination of enterprise agreements after nominal expiry date

Summary of the proposed amendments

The Bill would severely limit the circumstances in which an employer can apply under s.225 to have an enterprise agreement terminated after its nominal expiry date. The FWC could only terminate an enterprise agreement under s.225 if satisfied that:

- the continued operation of the enterprise agreement would be unfair for the employees covered by the agreement; or
- the agreement does not, and is not likely to, cover any employees; or
- there is the potential for the employees' employment being terminated on grounds of redundancy or because of the employer's insolvency or bankruptcy.

With regard to the third of the above grounds, the FWC would need to be satisfied that:

- The continued operation of the agreement would pose a significant threat to the viability of the business;
- The termination of the agreement would be likely to reduce the potential for terminations of employees' employment due to redundancy or the employer's insolvency or bankruptcy; and
- The employer has given the FWC a 'guarantee of termination entitlements' if the agreement contains termination entitlements for employees.

Analysis

It can be seen from the following information extracted from the FWC's annual reports that the number of applications to terminate enterprise agreements under s.225 of the FW Act has falling in recent years. The number of s.225 applications peaked in 2017/18.

Applications under section 225 of the FW Act	
Year	***Number of applications***
2015-16	311

2016-17	303
2017-18	388
2018-19	263
2019-20	323
2020-21	270
2021-22	236

Only a tiny proportion (around 3%) of enterprise agreements that are terminated under s.225 are opposed by a union.[13] However, this does not mean that all of those agreements would meet the extremely narrow criteria in the Bill.

To provide just one of many relevant examples, an application was made by HammonCare in 2020 for the termination of the *Tinonee Gardens The Multicultural Village Limited, NSWNMA and HSU NSW Enterprise Agreement 2017 – 2020*. The FWC decision in the matter ([2020] FWCA 4048) notes that:

- HammondCare acquired the residential aged care facility from the previous provider, which triggered a transfer of business under the FW Act for those employees who accepted an offer of employment with HannanCare.
- Around 100 transferring employees were employed by HannanCare.
- HammondCare was seeking to implement a uniform set of terms and conditions of employment for all of its residential aged care employees in New South Wales.
- 14 staff consultation meetings were held to provide employees with the opportunity to ask questions in relation to the proposed termination of the enterprise agreement.
- The employees pay rates would not decrease if the agreement was terminated and the employees would continue to receive more favourable long service leave provisions.
- The Health Services Union of Australia and the New South Wales Nursing and Midwifery Federation were covered by the enterprise agreement and were invited by the FWC to provide their views on the application. Neither union opposed the application.

[13] Workplace relations policy and research paper - *Termination of enterprise agreements*, Actus Workplace Lawyers, 19 August 2022. Also, in a July 2017 submission to an inquiry by the Senate Education and Employment References Committee into Penalty Rates, the FWC reported that: *"Analysis of applications to terminate enterprise agreements in 2015–16 showed that less than 3 per cent of applications were contested"* (Submission 14, Paragraph 76).

Examples like the above highlight that the criteria in the Bill is too narrow and would lead to unfairness for employers and employees.

Ai Group's position and recommendations

1. Ai Group opposes Part 12 of the Bill. There is no justification for amending s.226 of the FW Act, when only a tiny proportion of applications made under this section are opposed by one or more unions. Only a handful of enterprise agreements have been terminated under s.225 as a result of proceedings that were vigorously contested by unions.

2. If despite, Ai Group's views, Parliament supports the tightening of the termination requirements in s.226, the Bill should be amended to also enable the FWC to terminate an enterprise agreement under s.225 in circumstances where:

    - The employees covered by the proposed termination will not be disadvantaged, on an overall basis, by the termination;
    - The majority of employees support the termination of the agreement; and
    - No unions with members amongst the employees covered by the agreement, oppose the termination.

Part 13 – Sunsetting of "zombie" agreements etc

Summary of the proposed amendments

The Bill would sunset agreement-based transitional instruments (Schedule 3), Division 2B State employment agreements (Schedule 3A) and enterprise agreements made during the 'bridging period' (from 1 July 2009 to 31 December 2009). All of these instruments were made prior to 1 January 2010.

The instruments would cease to operate 12 months after the legislative amendments commence unless the instrument is terminated or replaced with a new enterprise agreement, or the period of operation of the instrument is extended by the FWC.

Employers are required to give affected employees at least six months' notice of the automatic sunsetting.

Ai Group's position

Ai Group has not identified any concerns about the provisions in Part 13.

Part 14 – Enterprise agreement approval

Summary of the proposed amendments

The Bill would simplify the enterprise agreement approval requirements by implementing a principles-based approach.

The Bill would remove the following existing approval requirements:

- The requirement for an employer to take all reasonable steps to provide employees with access to the proposed enterprise agreement and any material incorporated by reference in the agreement, during the 7 day 'access' period ending immediately before the start of the voting process;

- The requirement for an employer to take all reasonable steps to notify employees, by the start of the 'access period', of the time, place and method for the vote;

- For proposed single interest employer agreements, supported bargaining agreements and cooperative workplace agreements - the requirement for an employer to provide a notice of employee representational rights at least 21 days before requesting employees to vote.

The above requirements would be replaced with:

- A requirement for the FWC to be satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement; and

- A 'statement of principles' that the FWC would be required to publish to give guidance to employers about how they can ensure employees have genuinely agreed.

An employer's adherence to the guidance in the statement of principles would be taken into account by the FWC when assessing applications to approve enterprise agreements.

The Bill would also amend the FW Act to provide that the FWC cannot be satisfied that an enterprise agreement has been genuinely agreed to unless the FWC is satisfied that the employees requested to vote on the agreement:

- Have a sufficient interest in the terms of the agreement; and

- Are sufficiently representative, having regard to the employees the agreement is expressed to cover.

On 9 November 2022, the Government introduced an amendment into Parliament [Sheet ZD197] to add a new s.180A (Item 506A) and related items s.188(2A) (Item 506B) and s.207A (Item 511A), that would prevent an employer requesting that employees vote to approve or vary a multi-enterprise agreement until the employer has obtained written approval from each union bargaining representative.

The Government's amendment [Sheet ZD197] also reinstated into the Bill the problematic existing requirement that an employer must take <u>all</u> reasonable steps to explain the terms of a proposed enterprise agreement to employees before they vote on the agreement.

Analysis

Principles-based approach

Enterprise agreement-making under the current provisions of the FW Act has become a 'minefield'. It is not surprising that the number of current enterprise agreements has more than halved since the FW Act was implemented. In the fourth quarter of 2010 there were nearly 25,000 current enterprise agreements.[14] As at 30 June 2022 (the latest available statistics), there were 11,053 current enterprise agreements. [15]

Far from facilitating enterprise agreement making, the current laws operate as a barrier and disincentive to enterprise agreement-making. The problem is not a lack of access to multi-employer bargaining, but rather the large number of highly technical, procedural requirements for making an enterprise agreement under the FW Act.

The overly technical requirements have enabled external parties that had little or no involvement in the negotiation of an enterprise agreement to frustrate the approval of many enterprise agreements, despite the agreements being supported by the vast majority of the relevant employees.

Common problems that are currently occurring relate to:

- The content of the Notice of Employee Representational Rights;
- The timeframe for issuing the Notice of Employee Representational Rights;
- The requirements relating to the explanation of the terms of the agreement to the employees;
- The requirement to give employees a copy of materials incorporated by reference into the agreement;
- A lack of clarity about the cohort of casual employees entitled to vote on the agreement; and
- The requirement that 'genuine agreement' is reached, with a lack of clarity about what is required in this respect.

The proposed principles-based approach could go a long way towards addressing the problems that are currently occurring. Of course, much will depend upon the content of the statement of principles (in particular, whether the content is prescriptive or facilitative), and the approach that

[14] See Table 1 in the Department of Employment's *Report on Enterprise Bargaining*, February 2017.

[15] See Chart 7 in the Attorney-General Department's *Trends in Federal Enterprise Bargaining Report* for the June Quarter 2022.

the FWC takes in assessing whether genuine agreement has been reached in the context of the statement of principles.

Voting cohorts

The requirement that the employees who vote on an agreement must be "sufficiently representative, having regard to the employees the agreement is expressed to cover", will be unworkable in some circumstances. For example, on construction projects, different types of work are carried out at different stages of the project. The employees who are employed at the early stages of the project would not be representative of all the types of employees who would be employed at later stages. This should not be a barrier to the approval of an agreement. The existing requirement that an agreement apply to a 'fairly chosen group' protects employees against agreements covering an unfair cohort of employees.

Casual voting cohorts

The Bill proposes some changes to voting cohorts but fails to address the biggest problem that is currently occurring regarding voting cohorts. In fact, the provisions in the Bill could exacerbate the problems with this issue because the cohort of casuals who are entitled to vote would become even less clear.

Determining which casuals are entitled to vote on an enterprise agreement has become a 'minefield' for employers, given that many employers have casuals on their books who work infrequently. Some enterprise agreements covering major employers and a large number of employees have been rejected by the FWC because a small number of casuals were inadvertently not given the opportunity to vote on an enterprise agreement, even though the majority of employees supported the agreement and the outcome of the vote would not have changed.

In interpreting the existing provisions, the majority of the Full Court of the Federal Court in *NTEIU v Swinburne University of Technology* [2015] FCAFC 98 (***Swinburne***) decided that only casual employees who are employed at the time the employer requests that employees vote on a proposed enterprise agreement are eligible to vote. In *CFMMEU v Nooton Pty Ltd t/a Manly Fast Ferry* [2018] FWCFB 7224, a Full Bench of the FWC decided that:

- The effect of the Full Court's interpretation in *Swinburne* is that an employer should only make a request under s.181(1) to employees who are employed at the time, as opposed to those who are not employed at the time but who might otherwise be regarded as usually employed; and

- A person who is a casual employee but who is not working on a particular day or during a particular period, is unlikely to be employed on that day or during that period.

The above principles are not readily applied in practice and even the FWC has struggled to apply them, leading to enterprise agreements being rejected. For example, see the decision of Mansini

DP in *Application for approval of the Kmart Australia Ltd Agreement 2018* [2019] FWC 6105, which was subsequently overturned on appeal.

The Government's proposed ss.180A and 188(2A)

The Government's proposed amendment [Sheet ZD197] to add a new s.180A (Item 506A) and related items s.188(2A) (Item 506B) and s.207A (Item 511A), is not appropriate. These provisions would prevent an employer from requesting that employees vote to approve or vary a multi-enterprise agreement until the employer has obtained written approval from each union bargaining representative.

The provisions would result in the following outcomes that would be unfair on both employees and employers:

- One union with members in an enterprise could prevent the employers and employees in the enterprise voting upon, and hence being covered by a multi-enterprise agreement, even though the other unions with members in that workplace supported the agreement applying to the enterprise.

- Union/s with only a small number of members in an enterprise could prevent the employers and employees in the enterprise voting upon, and hence being covered by, a multi-enterprise agreement, even though the employer and the vast majority of employees support the agreement applying to the enterprise.

- The unions involved in the establishment of a multi-enterprise agreement could orchestrate the vote to approve the agreement so that only, say, heavily unionised enterprises voted to approve the initial agreement. Once the agreement was voted up in terms favourable to the unions, the unions could apply to vary the agreement to include the additional employers and employees that had been excluded from influencing the terms of the initial agreement.

Explanation of the terms of the agreement to the proposed employees

The existing requirement in s.180(5) of the FW Act for an employer to take all reasonable steps to explain the terms of a proposed agreement, and the effect of those terms, to the employees before they vote on the agreement has proved to be very problematic. It is one of they key reasons why the existing enterprise agreement approval process has become a 'minefield' of technicalities. Some Members of the FWC have interpreted the existing requirement in s.180(5) to take "all reasonable steps" in an extremely onerous and impractical manner.

The Government's amendment [Sheet ZD197] would reinstate this problematic existing approval requirement. As provided for in the original Bill, this issue should be dealt with by the FWC in the proposed statement of principles. The amendment greatly undermines the utility of the simplified approval process contemplated by the Bill in its original form.

Ai Group's position and recommendations

1. Ai Group supports the proposed principles-based approach but we urge the Committee to recommend that the FWC consult with peak councils of employers and employees when developing its 'statement of principles'. We also urge the Committee to recommend that the principles are facilitative, rather than prescriptive.

2. Ai Group opposes the proposed s.188(2) in Item 509 of the Bill for the reasons outlined above. If, despite Ai Group's opposition, the section remains in the Bill, it should be amended as follows to improve workability.

> *Sufficient interest and sufficiently representative*
>
> *(2) In considering whether the FWC is satisfied that ~~The FWC cannot be satisfied that~~ an enterprise agreement has been genuinely agreed to by the employees covered by the agreement, the FWC may consider whether ~~unless the FWC is satisfied that~~ the employees requested to approve the agreement by voting for it:*
>
> *(a) have a sufficient interest in the terms of the agreement; and*
>
> *(b) are sufficiently representative, having regard to the employees the agreement is expressed to cover.*

3. The statutory note referring to the Federal Court's *One Key Workforce v CFMMEU* decision in s.188(2) should be removed from the Bill. Some of the interpretations of the FW Act adopted in this decision, and the changed approach of the FWC as a result of the decision, have led to some of the problems that are currently being experienced (i.e. the highly technical approach). The inclusion of a reference to the decision in the FW Act could be interpreted as an intention that other aspects of the decision continue to be relevant, beyond the 'authenticity' issue referred to in the Note.

4. With regard to the casual voting cohort problem discussed above, we propose the following amendment to s.181(1) in the FW Act, which would provide clarity and fairness to all parties:

> *(1) An employer that will be covered by a proposed enterprise agreement may request the following employees ~~employed at the time~~ who will be covered by the agreement to approve the agreement by voting for it:*
>
> *(a) the employees employed at the time the request is made, other than as casual employees;*
>
> *(b) the casual employees who performed work at any time between the time that the request is made and the start of the voting process for the agreement.*

5. The Bill should not be amended to include the Government's proposed s.180A (Item 506A) and related items s.188(2A) (Item 506B) and s.207A (Item 511A) [Sheet ZD197], for the reasons outlined above.

6. The Bill should not be amended to include the Government's proposed s.216AAA, 216DAA and 216CAA [Sheet ZD197] regarding explaining the terms of a proposed agreement to employees. If these sections are to be included in the Bill, despite Ai Group's opposition, the words 'all reasonable steps' should be replaced with 'reasonable steps'.

Part 15 – Initiating bargaining

Summary of the proposed amendments

The Bill would simplify the process for initiating bargaining for a proposed enterprise agreement (other than a proposed greenfields agreement, a cooperative workplace agreement, a supported bargaining agreement or a single interest employer agreement). The new process would apply where a proposed enterprise agreement:

- Would replace an existing agreement that has a nominal expiry date within the past five years; and
- Has a scope substantially similar to the proposed agreement.

The Bill would enable a union to initiate bargaining simply by making a written request to the employer. It would not be necessary for the employer to obtain the agreement of the employer to bargain or to obtain a majority support determination from the FWC.

Analysis

The provisions in the Bill are unnecessary because the current process for initiating bargaining is already very simple if a union and employer agree to bargain.

Under the current provisions, a union is able to make a written request to an employer to bargain and if the employer agrees to bargain, bargaining formally commences (see s.173(2) of the current Act). If the employer refuses to bargain, the union needs to apply to the FWC for a majority support determination (or a scope order or low paid authorisation).

The current provisions are intended to protect the interests of employees and employers by not requiring an employer to commence bargaining with a union unless it has been established that the majority of the employees who would be covered by the proposed agreement, wish to bargain.

The proposed provisions are not fair or appropriate because employers would be forced to bargain for replacement agreement even if most of its employees opposed the negotiation of such an agreement.

Ai Group's position and recommendations

For the above reasons, Ai Group opposes the provisions in Part 15 of the Bill. We urge the Committee to recommend that the Bill is amended to remove Part 15.

Part 16 – Better off overall test

Summary of the proposed amendments

Proposed enterprise agreements are required to pass a better off overall test (**BOOT**) which involves a comparison with the terms of the relevant modern award/s. The Bill would amend the BOOT to:

- Clarify that the BOOT must be applied as a global assessment, not on a line-by-line basis;
- Clarify that the FWC must only have regard to the patterns or kinds of work, or types of employment that were reasonably foreseeable at the time the BOOT is applied;
- Require the FWC to consider any views expressed by the employer, the employees and the bargaining representatives;
- Require the FWC to give primary consideration to any common views expressed by the employer and union bargaining representatives;
- Empower the FWC to amend or remove terms in the enterprise agreement to ensure the agreement passes the BOOT; and
- Implement a new BOOT 'reconsideration process' which would allow employers, employees or their representatives to apply to have the BOOT reconsidered by the FWC if there has been a change in patterns or kinds of work, or types of employment engaged in, to which the FWC did not have regard when the BOOT was originally applied. If the FWC has a concern that the enterprise agreement does not pass the BOOT, the FWC may accept an undertaking from the employer which satisfies the concern or may amend the agreement to address the concern.

Under the terms of the original Bill, the BOOT amendments in Part 16 would apply in relation to enterprise agreements made on and after the date of Royal Assent. However, on 9 November 2022 the Government introduced an amendment into Parliament [Sheet ZD197] that would result in the provisions operating from a date to be Proclaimed, or 6 months after Royal Assent, whichever occurs first.

Analysis

The current BOOT is widely recognised as being unworkable. It is often applied by the FWC on the basis of hypothetical, far-fetched scenarios, rather than on the basis of work patterns, kinds of work or types of employment that are currently in operation in the business or are reasonably likely to operate.

The No Disadvantage Test that applied under the *Industrial Relations Act 1988* and the *Workplace Relations Act 1996* was far more practical and appropriate. It enabled the Commission to weigh up the provisions in an enterprise agreement in a sensible, practical manner and decide whether the agreement disadvantaged the employees. For example, in *Tweed Valley Fruit Processors Pty Ltd v Australian Industrial Relations Commission* [1996] IRCA 149, the Full Court of the Federal Court expressed the following views about the No Disadvantage Test:

> *Given the need to balance a range of factors the determination of whether or not the no disadvantage test has been met in a particular case will largely be a matter for the impression and judgment of the Commission member at first instance.*

The biggest problems with the current BOOT are:

- The need for the FWC to consider 'prospective employees'. This has led to the FWC taking into account hypothetical, far-fetched scenarios relating to the types of employees that could be employed, and the work patterns they could work, even if there is little or no likelihood of this occurring.

- The approach that the FWC often takes when considering the patterns or kinds of work, or types of employment, that the employees covered by the agreement could work. Again, this has led to the FWC taking into account hypothetical, far-fetched scenarios, even if there is little or no likelihood of such patterns or kinds of work, or types of employment, applying in the business.

- The lack of weight that the FWC gives to the views expressed by the employer, the employees and registered union bargaining representatives about whether an agreement passes the BOOT.

The current BOOT has led to many employers abandoning the enterprise agreement making process and reverting to the relevant modern awards, to the detriment of the employers and their employees.

The current unworkable BOOT gives external parties that have little or no involvement in the negotiation of an enterprise agreement, a great deal of ammunition to challenge the approval of an enterprise agreement, despite the fact that the agreement is supported by the overwhelming majority of employees covered by the agreement.

The FWC's 2021-22 Annual Report (dated 21 September 2022) advises that:

- 4,517 applications were made to the FWC in the 2021-22 year for the approval of an enterprise agreement.[16]

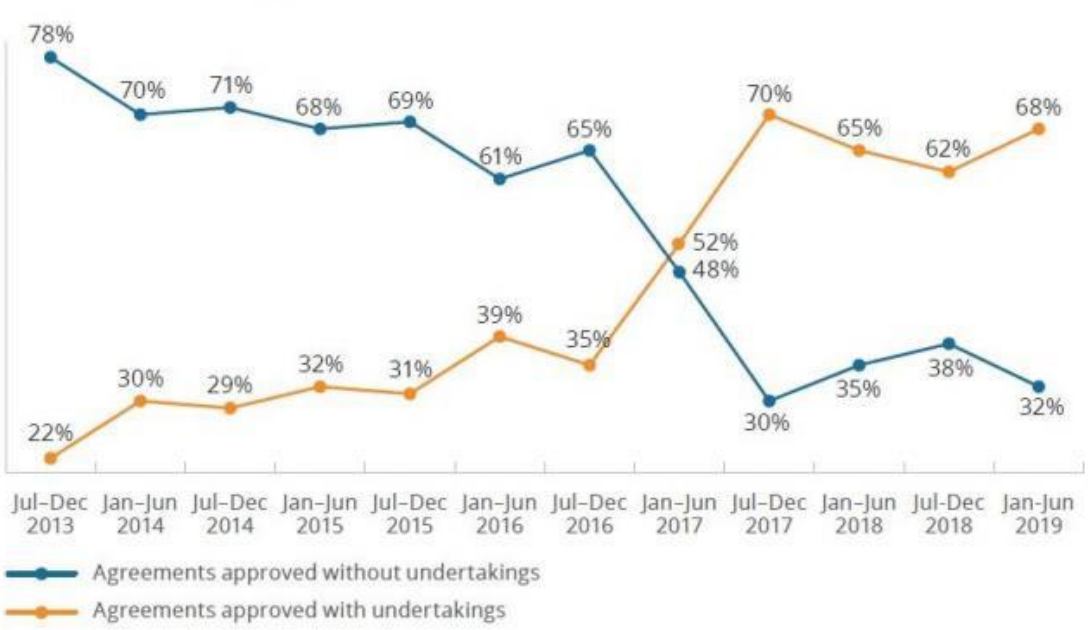
- 2,293 agreements were approved without undertakings.[17]

It can be seen that if every one of the applications that were made to the FWC in the 2021-22 year to approve an enterprise agreement had resulted in an agreement being approved, only around 50% of agreements would have been approved in the terms agreed upon between the parties. However, some of the applications lodged were formally rejected by the FWC and some were no doubt withdrawn (as is relatively common as a result of the FWC contacting the employer and highlighting that the agreement will not be approved for various compliance reasons). When this is taken into account, it is clear that less than 50% of enterprise agreements were approved without undertakings in the 2021-22 year.

The effect of an undertaking is an alteration in the terms of the enterprise agreement reached between the employer and its employees. In many cases, the undertakings that are given relate to hypothetical, far-fetched scenarios that are very unlikely to arise.

The FWC stopped including information on the number of agreements approved with and without undertakings in its 2019-20 annual report and this information has not been included in subsequent annual reports. However, the following chart from the FWC's 2018-19 Annual Report highlights the problem:

Chart 2: Enterprise agreements approved with and without undertakings



[16] FWC Annual Report 2021-22, p.57.

[17] FWC Annual Report 2021-22, p.34.

The proposed BOOT 'reconsideration process' in the Bill addresses the removal of the requirement for the FWC to consider 'prospective employees' in a practical way. This would give the FWC the power to reassess the BOOT if there had been a change in patterns or kinds of work, or types of employment engaged in, since the BOOT was originally applied, including by employees engaged in since the agreement was originally approved.

Ai Group supports the changes to the BOOT, with one exception. Sections 191A and 213A in Items 525 and 532 of the Bill empower the FWC to vary an enterprise agreement, or amend a variation made by the employer/s and the employees, if it is concerned that the agreement or proposed variation does not pass the BOOT. The FWC can do this regardless of whether the employer/s support the FWC's proposed amendment. This is not appropriate given that the employer/s will be required to meet the costs associated with the amendment.

Presently, it is common for an FWC Member to invite an employer to give one or more undertakings to meet the Member's concerns about BOOT issues. The employer then has the option of giving the proposed undertaking, offering an alternative undertaking, making further submissions about why the undertaking is not necessary, or declining to accept the undertaking (typically resulting in the enterprise agreement not being approved).

The powers in ss.191A and 213A of the original Bill would give FWC Members a sweeping power to vary the terms of agreements reached between employers and their employees, in ways that could substantially alter the agreed terms and potentially result in significant operational, competitiveness or other problems for businesses.

We acknowledge that the Government introduced an amendment to the Bill into Parliament on 9 November 2022 [Sheet ZD197] that would:

- Only enable the FWC to vary an enterprise agreement, or amend a variation made by the employer/s and employees, where this "is necessary to address the concern";
- Require that the FWC seek the views of the employer, the employees and the bargaining representatives about any proposed amendment to the agreement or variation.

The amendment is welcome, but it does not completely address our concerns.

Ai Group's position and recommendations

To address the concerns expressed above, we propose the following amendments to ss.191A and 213A:

191A FWC may approve an enterprise agreement with amendments

- - -

(4) The FWC must not amend the agreement unless the FWC is satisfied that the employer or employers covered by the agreement agrees to the amendment.

213A FWC may approve variation with amendments

\- - -

(4) The FWC must not amend the variation unless the FWC is satisfied that the employer or employers covered by the agreement agrees to the amendment.

Part 17 – Dealing with errors in enterprise agreements

Summary of the proposed amendments

The Bill would give the FWC the power to vary enterprise agreements to correct or amend obvious errors, defects or irregularities.

The Bill would also empower the FWC to validate a decision to approve an enterprise agreement or variation, in circumstances where the wrong version of the document was inadvertently submitted to the FWC for approval.

Analysis

The Bill addresses a problem that has arisen due to the drafting of s.602 of the FW Act. This section is a statutory version of the 'slip rule' used by courts to correct errors in court orders. In *Advantaged Care Pty Ltd v Health Services Union* [2021] FWCFB 453, a Full Bench of the FWC held that s.602 does not apply to enterprise agreements.

Ai Group's position and recommendations

Ai Group supports Part 17 of the Bill.

Part 18 – Bargaining disputes

Summary of the proposed amendments

The Bill would give the FWC the power to arbitrate 'intractable bargaining disputes' where there is no reasonable prospect of the parties reaching an enterprise agreement.

The proposed process would enable an employee or employer bargaining representative for a proposed enterprise agreement to apply to the FWC for an 'intractable bargaining declaration' in relation to the agreement. The FWC would be required to issue the declaration if satisfied that:

- There is no reasonable prospect of agreement being reached;

- The FWC has dealt with the dispute under s.240 of the Act (NB. The FWC is able to conciliate, mediate, make a recommendation or express an opinion, but can only arbitrate if all parties agree);

- The applicant for the intractable bargaining declaration has participated in the s.240 process; and

- It is reasonable in all the circumstances for the FWC to make the declaration, taking into account the views of all the bargaining representatives for the agreement.

If an intractable bargaining declaration is made, the FWC would need to decide whether to implement a post-declaration negotiating period to assist the parties to reach agreement. Following any such negotiating period, the FWC would make an intractable bargaining workplace determination to resolve any matters on which agreement had not been reached by the parties.

The Bill would repeal the existing provisions in the FW Act relating to serious breach declarations and associated workplace determinations. These provisions have not been used to date.

The Government introduced an amendment to the Bill into Parliament on 9 November 2022 [Sheet ZD197] that would prevent the FWC arbitrating until the "end of the minimum bargaining period", with such period defined as the earliest of:

- 6 months after the nominal expiry date of any existing enterprise agreement that applies to the employees; or

- 3 months after the first application is made under s.240 for the FWC to deal with the dispute.

Analysis

The proposed provisions would provide access to arbitration during the negotiation of enterprise agreements that apply to individual employers (other than greenfields agreements) and certain types of multi-employer agreements (i.e. supported bargaining agreements and single interest employer agreements).

The proposed provisions are not appropriate. They would, in effect, lead to a return of a compulsory arbitration system for setting over-award wages and conditions for thousands of employees.

Australia had a compulsory arbitration system for 90 years. By the early 1990s it had become incompatible with Australia's open economy and was replaced with a system of enterprise bargaining. In our open economy, Australia's interests are best served by employers and employees reaching agreement on wages, conditions and workplace flexibilities which suit their own unique circumstances. Compulsory arbitration of bargaining disputes is clearly inconsistent

with the whole notion of enterprise bargaining. The outcome of arbitration is not an enterprise agreement, but rather a determination which all parties must comply with.

When compulsory arbitration is available, there is less incentive to search for a solution which is acceptable to all parties. Unions are likely to pursue speculative, ambit claims in order to achieve a favourable outcome. For example, a union might seek a wage increase of 12% per annum where an employer is offering 4%, with the aim of achieving an 8% arbitrated outcome.

Determinations made by the FWC would flow on to other businesses and industry sectors as more and more determinations are made. The FWC typically aims to achieve consistency in decision-making.

Flow-on would also occur because unions would regard arbitrated outcomes as a new floor for subsequent claims. This would fuel inflation.

The FWC already has the power to assist parties to resolve bargaining disputes through s.240 of the Act. In circumstances where an enterprise agreement is not reached, employees have access to a strong safety net of minimum wages and employment conditions and often over-award benefits.

Given the need to maintain a fair and relevant safety net for employees, compulsory arbitration is available for award conditions. It is also available where a dispute is threatening to damage the economy or an important part of it, or where the health, safety or welfare of the population is threatened. In these circumstances the interests of the community outweigh the interests of the bargaining parties. In addition, compulsory arbitration is available where industrial action is causing significant harm to the bargaining parties, and in the low paid bargaining stream. The FW Act has stretched to the limit the list of circumstances where compulsory arbitration should be available under our enterprise bargaining system. Any further expansion is not appropriate.

The Bill does not provide any guidance to the FWC on how it should determine whether or not there is a 'reasonable prospect of agreement being reached', other than the proposed 'minimum bargaining period' in the Government's amendment to the Bill [Sheet ZD197]. Conceivably, a union could advise the FWC close to the commencement of bargaining that it is not prepared to accept a wage outcome of less than 10% per annum given the current high inflation rate, and the employer/s could advise the FWC that such an outcome is not acceptable in any circumstances. Faced with these positions, the FWC might immediately decide at the end of the 'minimum bargaining period' that 'there is no reasonable prospect of agreement being reached' and issue an 'intractable bargaining declaration'. The risk of a return to a centralised system of wage arbitration for a large number of employers and employees is obvious.

Further, the availability of arbitration in the single-interest bargaining steam would, in effect, allow the unions to achieve sector-wide arbitrated outcomes. The proposed single interest bargaining stream in the Bill is vastly broader than the existing single interest stream, as discussed below in relation to Part 21 of the Bill.

The ability to access in the sing-interest bargaining stream is particularly problematic given the foreseeable difficulty of agreements being reached with multiple employers who would not have shared objectives or motivations (particularly if they are to any extent competitors). Such practical considerations mean that it is highly foreseeable that the stream would frequently result in applications for arbitrated outcomes rather than genuine agreements.

Ai Group's position and recommendations

1. We strongly oppose intractable bargaining declarations and determinations being available for any form of agreement other than supported bargaining agreements. We are not opposed to arbitration being available for 'intractable bargaining disputes' in the supported bargaining stream, given that arbitration is available in the existing low paid bargaining stream.

2. The Bill should be amended to provide more guidance to the FWC on when it may consider that there is 'no reasonable prospect of agreement being reached', beyond the 'minimum bargaining period', including:

    - When the bargaining representatives for the employer and the employees agree that there is no reasonable prospect of agreement being reached;
    - When the bargaining representatives for the employer and the employees agree that there would be no utility in having further meetings to discuss the proposals of each party;
    - Where no progress has been made in the bargaining for several months;
    - When the parties have had a large number of bargaining meetings; and
    - When the FWC has decided that the s.240 process has been exhausted and there would be no utility in scheduling further conferences.

3. The legislation should expressly state that an applicant for an intractable bargaining declaration:

    - Must have 'genuinely tried to reach an agreement'; and
    - Have been bargaining in good faith, including by bargaining in conformity with the good faith bargaining obligations in s.228 of the Act.

Part 19 – Industrial action

Summary of the proposed amendments

The original Bill would make four key changes to the industrial action provisions in the FW Act.

- Bargaining representatives would be required to attend a conference conducted by the FWC during the Protected Action Ballot (**PAB**) period (i.e. the period before voting closes on the PAB which must not be shorter than 14 days). If a bargaining representative for a group of employees does not attend the conference, protected industrial action would not be available for those employees.

- The period in which industrial action can commence would be lengthened from 30 days to three months, but this period would not be able to be extended. Another PAB would need to be conducted before any further industrial action is taken.

- Before commencing employee industrial action for a single interest employer agreement or a supported bargaining agreement, bargaining representatives would need to provide a minimum of 120 hours' notice (i.e. 5 x 24 hour periods).

- The FWC would have the power to 'pre-approve' persons authorised to conduct PABs in addition to the Australian Electoral Commission.

On 9 November 2022, the Government introduced amendments to the Bill into Parliament [Sheet ZD197] which would:

- Remove the three-month proposal in the second dot point above and retain the existing arrangements in the FW Act;

- Require that PAB voting in relation to supported bargaining agreements and single-interest employer agreements takes place on an employer-by-employer basis (other than for single interest employer agreements relating to existing single interest employer authorisations); and

- Implement the provisions in Part 19 from a date to be Proclaimed, or 6 months after Royal Assent, whichever occurs first.

Analysis

Effects of enabling industrial action to be taken in the supported bargaining stream and the single interest bargaining stream

The most significant change to industrial action rights under the Bill would not result from Part 19 of the Bill but rather through allowing protected industrial action to be taken in pursuit of a supported bargaining agreement or a single interest employer agreement.

The supported bargaining stream would replace the existing low paid bargaining stream, where industrial action is not permitted. Even though industrial action is permitted in the current single interest bargaining steam, the existing stream bears no relationship to the extremely broad single

interest stream in the Bill. Industrial action is not a problem in the existing single interest stream given the narrow operation of the stream and the types of businesses that have used the stream (e.g. fast food industry franchisees within the same franchise group).

Ai Group's views on the parts of the Bill (Parts 20 and 21) that deal with the supported bargaining steam and the single interest bargaining stream are set out in the relevant sections of this submission.

Proposed requirement for a conference to be held

Industrial action should be a last resort. It typically results in lost revenue for businesses, lost wages for employees and disruption to customers. The requirement to attend a conference before the employees vote on the PAB would enable the FWC to assist the parties to resolve outstanding issues, without the need to resort to industrial action.

The FWC would no doubt convene most of these conferences via Teams, given that it is now using this technology extensively for conferences and hearings. The new requirement will not be particularly onerous for any parties.

Proposed 120-hour notice period

The proposed 120-hour notice period before industrial action could be taken under the supported bargaining stream and the single interest bargaining steam is far more reasonable than the standard three-day notice period that currently applies to bargaining at the enterprise level. These streams involve multi-employer bargaining. The effects of coordinated industrial action taken across a large number of businesses will be very harmful to those businesses and to the broader community. Fairness to businesses, suppliers, customers and the broader community dictates that a reasonable period of notice is provided of industrial action that will be taken.

Proposal in the original Bill to lengthen the period within which industrial action can be taken

Currently, under s.459(3) of the FW Act, industrial action must be commenced within 30 days of the declaration of the PAB results. The FWC can extend the period by up to a further 30 days (i.e. up to a maximum period of 60 days) if the Protected Action Ballot Order applicant applies for an extension.

As mentioned above, the original Bill would have extended this period to three months, but the Government has introduced an amendment to retain the existing provisions in the FW Act. Ai Group does not support the extension that was proposed in the original Bill to three months. It would be unfair to employees who may be opposed to industrial action being taken and who may want to express their views in a further PAB after 30 or 60 days.

Government amendment to the Bill to implement employer-by-employer voting in PABs for multi-employer agreements

On 9 November 2022, the Government introduced amendments to the Bill into Parliament (Item 577, s.437A) [Sheet ZD197 which would require that PAB voting in relation to supported bargaining agreements and single-interest employer agreements takes place on an employer-by-employer basis (other than for single interest employer agreements relating to existing single interest employer authorisations). The amendment is an improvement on the approach in the original Bill, but Ai Group does not support industrial action rights applying to multi-employer bargaining.

Ai Group's position and recommendations

1. Industrial action should not be permitted in negotiations for multi-enterprise agreements. Therefore, the following amendments should be made to Items 577 and 578 in the original Bill:

577 Subsection 413(2)

Repeal the subsection, substitute:

Type of proposed enterprise agreement

(2) The industrial action must not relate to a proposed enterprise agreement that is:

(a) a greenfields agreement; or

(b) a supported bargaining agreement;

(c) a single interest employer agreement; or

~~(b)~~(d) a cooperative workplace agreement.

578 Paragraph 437(2)(b)

Repeal the paragraph, substitute:

(b) a supported bargaining agreement;

(c) a single interest employer agreement; or

~~(b)~~(d) a cooperative workplace agreement.

2. Ai Group does not oppose the proposals in the Bill to, first, require a conference during the PAB period, second, to implement a 120-hour notice period in certain circumstances and, third, to enable pre-approval of persons authorised to conduct PABs.

3. With regard to the Government's amendment to the Bill [Sheet ZD197] to require employer-by-employer voting in PABs relating to supported bargaining agreements and single interest

employer agreements (Item 577, s.437A) this is an improvement on the approach in the original Bill, but Ai Group does not support industrial action rights applying to multi-employer bargaining.

Part 20 – Supported bargaining

Summary of the proposed amendments

The supported bargaining stream in the Bill would replace the existing low paid bargaining stream in the FW Act.

According to the Explanatory Memorandum for the Bill, the supported bargaining stream is intended to apply to the following employees:

> *938. The supported bargaining stream is intended to assist those employees and employers who may have difficulty bargaining at the single-enterprise level. For example, those in low paid industries such as aged care, disability care, and early childhood education and care who may lack the necessary skills, resources and power to bargain effectively. The supported bargaining stream will also assist employees and employers who may face barriers to bargaining, such as employees with a disability and First Nations employees.*

The process commences with one or more unions making an application to the FWC for a 'supported bargaining authorisation'. If an authorisation is made, the employers covered by it are required to bargain for a supported bargaining agreement. A supported bargaining agreement is a type of 'multi-enterprise agreement' under the Act.

Unlike the existing low paid bargaining stream, the employees covered by a supported bargaining authorisation have the right to take industrial action in pursuit of the proposed supported bargaining agreement, subject to complying with the industrial action provisions of the Act.

On 9 November 2022, the Government introduced amendments to the Bill into Parliament [Sheet ZD197] which would exclude employees in relation to "general building and construction work" from the supported bargaining stream. The definition is far too narrow, as discussed in the section of this submission relating to Part 23A of the Bill.

Analysis

A union that is a bargaining representative for any employee who would be covered by a proposed supported bargaining agreement or who is eligible to represent any employee covered under the proposed agreement, could apply to the FWC for a supported bargaining authorisation.

When the FWC must make a supported bargaining authorisation

The FWC must make a supported bargaining authorisation if it is satisfied that:

- It is appropriate for the employers and employees that will be covered by the agreement to bargain together, having regard to:
    - the prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector); and
    - whether the employers have clearly identifiable common interests; and
    - whether the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process; and
    - any other matters the FWC considers appropriate; and
- The FWC is satisfied that at least some of the employees who will be covered by the agreement are represented by a union.
- The following matters are identified in the Bill as potentially relevant when the FWC determines whether the employers have a common interest:
    - a geographical location;
    - the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises; and
    - being substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory.

It can be seen that the criteria for access to the supported bargaining stream is very broad. For example, there is no requirement that the employees are necessarily low paid or that the employers are Government funded. There is not even any requirement for the FWC to take into account the views of the employers and employees who would be covered by the authorisation.

The criteria is far too loose. There is the risk that the provisions would be misused by unions in a wide range of industry sectors beyond those sectors which the provisions are purportedly aimed at.

The very loose criteria in the Bill contrasts starkly with the existing criteria in the low paid bargaining stream of the Act (as implemented by the Rudd Labor Government) which requires the FWC to take into account:

- Whether granting the authorisation would assist low-paid employees who have not had access to collective bargaining or who face substantial difficulty bargaining at the enterprise level;
- The history of bargaining in the industry in which the employees who will be covered by the agreement work;

- The relative bargaining strength of the employers and employees who will be covered by the agreement;

- The current terms and conditions of employment of the employees who will be covered by the agreement, as compared to relevant industry and community standards;

- The degree of commonality in the nature of the enterprises to which the agreement relates, and the terms and conditions of employment in those enterprises;

- Whether granting the authorisation would assist in identifying improvements to productivity and service delivery at the enterprises to which the agreement relates;

- The extent to which the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process;

- The views of the employers and employees who will be covered by the agreement;

- The extent to which the terms and conditions of employment of the employees who will be covered by the agreement is controlled, directed or influenced by a person other than the employer, or employers, that will be covered by the agreement; and

- The extent to which the applicant for the authorisation is prepared to consider and respond reasonably to claims, or responses to claims, that may be made by a particular employer named in the application, if that employer later proposes to bargain for an agreement that: would cover that employer, and would not cover the other employers specified in the application.

Three notable applications have been made by unions under the low paid bargaining stream:

- In 2011, the FWC granted a union application for a low paid authorisation applicable to aged care workers.[18] The authorisation was granted but the union decided not to pursue the matter, apparently because the FWC decided that employees covered by existing enterprise agreements should be excluded.

- In 2013, the FWC rejected an application for a low paid authorisation for nurses in medical practices because the FWC decided that the nurses were not low paid.[19]

- In 2014, the FWC rejected an application for a low paid authorisation for security workers because the FWC decided that there are a large number of enterprise agreements in the

[18] *United Voice and the AWU* [2011] FWAFB 2633.

[19] *Australian Nursing Federation v IPN Medical Centres Pty Limited and Others* [2013] FWC 511.

security industry and employees in the industry do not face any special difficulties in reaching enterprise agreements.[20]

The reason why the low paid bargaining steam has been underutilised is because unions have chosen not to make applications under it since 2014. As is evident from the above cases, if the unions had made an application for a group of employees who were genuinely low paid and genuinely unable to secure an enterprise agreement, the application would have had good prospects of success.

Interaction between supported bargaining agreements and single-enterprise agreements

The provisions in the Bill which deal with the interaction between single-enterprise agreements and supported bargaining agreements are very unfair to employers and employees:

- The Bill provides that if a single-enterprise agreement applies to an employee and a supported bargaining agreement that covers the employee comes into operation, the single-enterprise agreement ceases to apply to the employee and can never apply again (Item 590, s.58(3));

- If an employer is specified in a supported bargaining authorisation the only kind of enterprise agreement the employer may make with their employees who are specified in the authorisation is a supported bargaining agreement, and the employer must not initiate bargaining, agree to bargain, or be required to bargain with those employees for any other kind of enterprise agreement (Item 592, s.172(7));

- The FWC must not make a supported bargaining authorisation specifying an employee who is covered by a single-enterprise agreement that has not passed its nominal expiry date (Item 611, s.243A).

It can be seen that employers and their employees will be able to be readily forced by unions into supported bargaining agreements and once covered by such agreements, it will be virtually impossible to bargain directly with their own employees. The provisions in Part 22 of the Bill, which relate to employers and employees ceasing to be covered by multi-employer agreements (including supported bargaining agreements) exacerbate the unfairness for employers and employees. (See the section of this submission relating to Part 22).

Variations to supported bargaining authorisations to add additional employers and employees

Once a supported bargaining authorisation has been made by the FWC, a union can apply to the FWC to add additional employers and their employees to the authorisation, without the employer's consent. An employer and the majority of its employees can also agree to become covered by an existing supported bargaining authorisation. An application to vary the

[20] *United Voice* [2014] FWC 6441.

authorisation must be made to the FWC and the variation takes effect once the variation has been approved by the FWC.

Variations to supported bargaining authorisations to remove employers and employees

An employer can apply to the FWC to vary a supported bargaining authorisation to remove an employer and its employees. The FWC can vary the authorisation if, because of a change in the employer's circumstances, it is no longer appropriate for the employer to be specified in the authorisation.

Variations to supported bargaining agreements to add additional employers and employees

Once a supported bargaining agreement has been made, a union can apply to the FWC to add additional employers and their employees to the agreement, without the employer's consent. An employer and the majority of its employees can also agree to become covered by an existing supported bargaining agreement. An application to vary the agreement must be made to the FWC and the variation takes effect once the variation has been approved by the FWC.

Variations to supported bargaining agreements to remove employers and employees

See the section of this submission relating to Part 22 of the Bill.

Ai Group's position and recommendations

1. Ai Group does not see a need to alter the existing low paid bargaining provisions in the FW Act. There are many other provisions in the Bill that are designed to increase wages for low paid employees, including the expansion in the equal remuneration and work value provisions and the amended criteria for modern awards and annual wage reviews. If, despite Ai Group's opposition, Parliament supports the conversion of the existing low paid bargaining stream into a supportive bargaining stream, the following amendments are important.

2. Item 611, s.243(1)(b)(1) in the Bill (re. when the FWC must make a supportive bargaining authorisation), should be amended as follows:

    (b) the FWC is satisfied that it is appropriate for the employers and employees (which may be some or all of the employers or employees specified in the application) that will be covered by the agreement to bargain together, having regard to:

        (i) the prevailing pay and conditions within the relevant industry or sector, as compared to relevant industry and community standards; ~~(including~~;

        (ii) whether low rates of pay prevail in the relevant industry or sector~~)~~; and

        ~~(ii)~~(iii) whether the employers have clearly identifiable common interests; and

(iv) *the views of the employers and employees who will be covered by the agreement;*

~~(iii)~~(v) *whether the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process; and*

~~(iv)~~(vi) *any other matters the FWC considers appropriate; and*

3. Item 611, s.243(2) in the Bill should be amended as follows:

Common interests

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

(a) *a geographical location;*

(b) *the degree of commonality in the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises;*

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

4. Delete Item 590, s.58(3) in the Bill (re. special rule—supported bargaining agreement replaces single-enterprise agreement).

5. Delete Item 592, s.172(7) in the Bill (Requirement for employer specified in supported bargaining authorisation).

6. The criteria in s.244(2) of the existing FW Act (which is retained in the Bill) is too narrow. The FWC should be empowered to remove an employer from an authorisation if the FWC is satisfied that it is no longer appropriate for the employer to be specified in the authorisation. There should be no requirement that there be a change in the employer's circumstances.

7. The provisions of the Bill which relate to employers and employees ceasing to be covered by multi-enterprise agreements are unfair and need to be amended. See the section of this submission relating to Part 22 of the Bill.

8. On 9 November 2022, the Government introduced amendments to the Bill into Parliament [Sheet ZD197] which would exclude employees in relation to "general building and construction work" from the supported bargaining stream. The definition is far too narrow, as discussed in the section of this submission relating to Part 23A of the Bill.

9. Industrial action should not be permitted in negotiations for multi-enterprise agreements. Therefore, amendments should be made to Items 577 and 578 in the Bill, as proposed in the section of this submission relating to Part 19 of the Bill.

Part 21 – Single interest employer authorisations

Summary of the proposed amendments

The Bill would make major changes to the current 'single interest' bargaining stream in the FW Act to substantially expand the scope of the stream.

Currently, single interest employer agreements are a type of 'single-enterprise agreement' under the Act, despite the fact that they are multi-employer agreements.

The employees covered by a single interest employer declaration would have the right to take industrial action in pursuit of a single interest employer agreement, subject to complying with the industrial action provisions of the Act.

On 9 November 2022, the Government introduced amendments to the Bill into Parliament [Sheet ZD197] which would:

- Result in single interest employer agreements becoming a type of multi-enterprise agreement, rather than a single-enterprise agreement as these agreements currently are under the FW Act;
- Implement a requirement that, for an employer specified in a single interest employer authorisation:
    - the only kind of enterprise agreement the employer may make with their employees who are specified in the authorisation is a single interest employer agreement;
    - the employer must not initiate bargaining, agree to bargain, or be required to bargain with those employees for any other kind of enterprise agreement;
- Enable the FWC to make, or refuse to vary, a single interest employer authorisation to ensure that the authorisation does not include one or more employers and their employees, if:
    - the employers are bargaining in good faith for a proposed enterprise agreement that will cover the employers and the relevant employees, or substantially the same group of the relevant employees;
    - the employers and the relevant employees have a history of effectively bargaining in relation to one or more enterprise agreements that have covered the employers

and the relevant employees, or substantially the same group of the relevant employees; and

- on the day that the FWC will make the authorisation, less than 6 months have passed since the most recent nominal expiry date of an agreement referred to above.

- Exclude employees in relation to "general building and construction work" from the single interest bargaining stream.

Analysis

Currently, the single interest bargaining stream in the FW Act is very narrow. It was intended be so when introduced by the Rudd Labor Government, as can be seen by the fact that the resulting agreement is currently categorised as a 'single-enterprise agreement' under the FW Act rather than a 'multi-enterprise agreement'.

It was clearly not intended to be a stream for widespread multi-employer bargaining, as proposed in the Bill. In effect, the expression 'single interest' in the legislation would become a misnomer. The concept of a 'single interest' would become that of a 'common interest' – with a very broad definition of such an interest.

'Single interest employers' are currently defined in the FW Act as employers engaged in joint ventures or common enterprises, related bodies corporate, and employers specified in a 'single interest employer authorisation'. Such authorisations can currently be issued by the FWC only in two circumstances:

- First, where the employers are franchisees or related bodies corporate within the same franchise group; and

- Second, where the Minister has declared that the employers can bargain together after taking into account criteria specified in the Act. The criteria include whether the enterprises are substantially Government funded, whether they have a common regulatory regime, and whether they work collaboratively rather than competitively. For example, the Victorian public hospitals have obtained such a declaration.

The FWC's 2021-22 Annual Report shows that there were only 7 applications for a single interest employer declaration in the past year. Even though industrial action is currently able to be taken in the single interest bargaining stream, this has not been problematic because of the narrow scope of the provisions.

The original Bill, taking into account the amendments introduced by the Government on 9 November 2022 [Sheet ZD197], would substantially expand the single interest bargaining provisions, as follows:

1. The FWC must make a single interest employer authorisation if it is satisfied that:

- At least some of the employees who will be covered by the agreement are represented by a union.

- The employers and the unions have had an opportunity to express their views on the authorisation.

- The employers have clearly identifiable common interests and it is not contrary to the public interest to make the authorisation.

- If the application is made by a union, each employer has either consented to the application or the requirements in point 2 below are met.

2. For applications made by unions, the following conditions apply other than to an employer who has consent to the application:

    - The employer must not be a small business employer.

    - The employer must not have made an application for a single interest employer authorisation that has not yet been decided.

    - The employer must not be named in an existing single interest employer authorisation or supported bargaining authorisation.

    - A majority of the employees who are employed by the employer and who will be covered by the agreement must want to bargain for the agreement.

    - The employer must not be covered by an enterprise agreement that has not passed its nominal expiry date at the time when the FWC will make the authorisation.

    - The employer and a union that is entitled to represent the industrial interests of one or more of the employees of the employer that will be covered by the agreement, must not have agreed in writing to bargain for a proposed single-enterprise agreement that would cover the employer and those employees, or substantially the same group of those employees.

The following matters are identified in the Bill as potentially relevant when the FWC determines whether the employers have a common interest:

- geographical location;

- regulatory regime;

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

It can be seen that the concept of 'common interests' is very broad. For example, manufacturers in the same city or regional town are in this same geographical location, they are covered by the same regulatory regime and minimum terms and conditions of employment (i.e. the FW Act and modern awards).

The criteria is far too loose. The provisions would no doubt be used by unions to achieve industry sector agreements in a wide range of sectors.

The very loose criteria in the Bill contrasts starkly with the existing criteria in the single interest bargaining stream. Currently, employers need to agree to bargain for a single interest employer agreement and cannot be coerced. Also, when the Minister is deciding whether to make a single interest employer authorisation, the Minister must take into account:

- the history of bargaining of each of the relevant employers, including whether they have previously bargained together;
- the interests that the relevant employers have in common, and the extent to which those interests are relevant to whether they should be permitted to bargain together;
- whether the relevant employers are governed by a common regulatory regime;
- whether it would be more appropriate for each of the relevant employers to make a separate enterprise agreement with its employees;
- the extent to which the relevant employers operate collaboratively rather than competitively;
- whether the relevant employers are substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory;
- any other matter the Minister considers relevant.

The provisions in the Bill would result in potentially thousands of private sector firms and hundreds of thousands of employees becoming covered by 'single interest employer agreements' given the very broad concept of 'common interests' and the other loose criteria in the Bill.

The unions' argument that productivity would be enhanced by creating a level playing field on over-award wages and conditions is nonsense. Businesses in sectors like manufacturing are competing with overseas firms, not just locally. Also, the interests of businesses and employees are not served by preventing employers and their employees reaching agreement on innovative employment terms, either in a genuine enterprise agreement or in common law employment contracts, and forcing them to adhere to 'one-size fits all' multi-employer union agreements in the form of so called 'single interest employer agreements'.

Even if an employer is not covered by an initial single interest employer agreement, the unions will be able to apply to the FWC to readily extend the agreement to cover additional employers. This would enable the unions to reach agreement with a few employers on the terms of a single interest employer agreement (perhaps those that already have highly restrictive and uncompetitive provisions in their enterprise agreements) and then extend the agreement to hundreds of other employers.

This tactic is similar to the tactic that the manufacturing unions adopted during a major industry-wide bargaining campaign in 2000 (which they called 'Campaign 2000'). They reached agreement with a group of 14 mechanical contracting firms on a pattern agreement and then organised industry-wide strikes in an endeavour to force thousands of manufacturing employers to become covered by the agreement. The unions ultimately failed but not before widespread strikes, disruption, extensive litigation and unlawful action that ultimately led to three senior union officials being convicted of contempt for breaching a Federal Court order.

It is important that Parliament does not forget the lessons of the past due to the relatively harmonious workplace relations environment that has existed over the past 15 years. Such an environment could easily evaporate if inappropriate changes are made to workplace laws.

On 9 November 2022, the Government introduced amendments to the Bill into Parliament [Sheet ZD197] which would exclude employees in relation to "general building and construction work" from the single interest bargaining stream. The definition is far too narrow, as discussed in the section of this submission relating to Part 23A of the Bill.

Interaction between single interest employer authorisations and single-enterprise agreements

The Bill initially provided that the FWC must not make a single interest employer authorisation specifying an employer who is covered by a single-enterprise agreement that has not passed its nominal expiry date (Item 634, s.249(3A)(d)). However, as soon as an enterprise agreement reaches its nominal expiry date, the unions would be able to apply to have the employer covered under a single interest employer authorisation.

On 9 November 2022, the Government introduced an amendment to the Bill (Item 636A) [Sheet ZD197] that would enable the FWC to make, or refuse to vary, a single interest employer authorisation to ensure that the authorisation does not include one or more employers and their employees, if:

- the employer is bargaining in good faith for a proposed enterprise agreement that will cover the employer and the relevant employees, or substantially the same group of the relevant employees;

- the employer and the relevant employees have a history of effectively bargaining in relation to one or more enterprise agreements that have covered the employer and the relevant employees, or substantially the same group of the relevant employees; and

- on the day that the FWC will make the authorisation, less than 6 months have passed since the most recent nominal expiry date of an agreement referred to above;

The amendment is worthwhile but it should not just give the FWC the discretion to exclude these employers and employees from the authorisation, it should prevent the FWC including them in the authorisation.

Also, on 9 November 2022, the Government introduced amendment to the Bill [Sheet ZD197] that would implement a requirement that, for an employer specified in a single interest employer authorisation:

- the only kind of enterprise agreement the employer may make with their employees who are specified in the authorisation is a single interest employer agreement;

- the employer must not initiate bargaining, agree to bargain, or be required to bargain with those employees for any other kind of enterprise agreement.

This amendment is extremely inappropriate and needs to be deleted.

An employer and its employees should be free to reach their own single-enterprise agreement, rather than being forced into being covered by a multi-enterprise agreement.

Interaction between single interest employer agreements and single-enterprise agreements

If an employer becomes covered under a single interest employer agreement for a group of employees, any existing enterprise agreement that applies to those employees would no longer apply (s.58 of the FW Act).

Variations to single interest employer authorisations to add additional employers and employees

Once a single interest employer authorisation has been made by the FWC, a union can apply to the FWC to add additional employers and their employees to the authorisation if any of the employees of the new employer are members of the union. An employer and the majority of its employees can also agree to become covered by an existing single interest employer authorisation. An application to vary the authorisation must be made to the FWC and the variation takes effect once the variation has been approved by the FWC.

Variations to single interest employer authorisations to remove employers and employees

A union or an employer can apply to the FWC to vary a single interest employer authorisation to remove an employer and its employees. The FWC can vary the authorisation if, because of a

change in the employer's circumstances, it is no longer appropriate for the employer to be specified in the authorisation.

Variations to single interest employer agreements to add additional employers and employees

Once a single interest employer agreement has been made, a union can apply to the FWC to add additional employers and their employees to the agreement if any of the employees of the new employer are members of the union. An employer and the majority of its employees can also agree to become covered by an existing single interest employer agreement. An application to vary the agreement must be made to the FWC and the variation takes effect once the variation has been approved by the FWC.

Variations to single interest employer agreements to remove employers and employees

See the section of this submission relating to Part 22 of the Bill.

Ai Group's position and recommendations

1. Ai Group strongly opposes the proposed expansion in the single interest bargaining stream. The provisions in the Bill have no merit, for the reasons outlined above. The concept of a 'single interest' would become a misnomer. The provisions in the Bill are clearly designed to allow the unions to force a large number of competing, private sector business to become covered by multi-employer agreements. This would have a large, negative impact on productivity, investment and jobs.

2. If the Minister no longer wishes to be responsible for issuing single interest employer authorisations, the Minister's role could be readily transferred to the FWC by repealing s.247 in the current FW Act and making the following amendments to Item 634, s.249(3) in the original Bill. This approach would not result in a widespread, inappropriate expansion in the single interest bargaining stream and would retain key concepts and requirements in the existing stream.

Employers that may bargain together for the agreement

(3) The requirements of this subsection are met if the FWC is satisfied of all of the following:

(a) if the application has been made by a bargaining representative of an employee who will be covered by the agreement:

(i) <u>the employers that will be covered by the agreement have agreed to bargain together</u>; ~~each employer has either consented to the application or is covered by subsection (3A);~~ ~~and~~

(ii) no person coerced, or threatened to coerce, any of the employers to agree to bargain together; and

~~(ii)~~(iii) a majority of the employees who are employed by the employers at a time determined by the FWC and who will be covered by the agreement want to bargain with the employers that will be covered by the agreement;

(b) it is appropriate for the employers to be permitted to bargain together, taking into account all of the following matters:

(i) the history of bargaining of each of the relevant employers, including whether they have previously bargained together;

(ii) the interests that the relevant employers have in common, and the extent to which those interests are relevant to whether they should be permitted to bargain together;

(iii) whether the relevant employers are governed by a common regulatory regime;

(iv) whether it would be more appropriate for each of the relevant employers to make a separate enterprise agreement with its employees;

(v) the extent to which the relevant employers operate collaboratively rather than competitively;

(vi) whether the relevant employers are substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory; and

(vii) any other matter the FWC considers relevant;

(c) the group of employees who will be covered by the agreement was fairly chosen;

(d) at least some of the employees that will be covered by the agreement are represented by an employee organisation;

(e) the employers and the bargaining representatives of the employees of those employers have had an opportunity to express to the FWC their views (if any) on the authorisation;

(f) it is not contrary to the public interest to make the authorisation.

~~(3A) An employer is covered by this subsection if the FWC is satisfied of all of the following:~~

~~*(a) the employer is not a small business employer;*~~

~~*(b) the employer has not made an application for a single interest employer authorisation that has not yet been decided in relation to the employees that will be covered by the agreement;*~~

~~*(c) the employer is not named in a single interest employer authorisation or supported bargaining authorisation in relation to the employees that will be covered by the agreement;*~~

~~*(d) the employer is not covered by an enterprise agreement that has not passed its nominal expiry date or passed its expiry date less than two years ago, at the time that the FWC will make the authorisation.*~~

3. The Government's amendment to the Bill (Item 627C) [Sheet ZD197] which would implement a requirement that, for an employer specified in a single interest employer authorisation:

    a. the only kind of enterprise agreement the employer may make with their employees who are specified in the authorisation is a single interest employer agreement; and

    b. the employer must not initiate bargaining, agree to bargain, or be required to bargain with those employees for any other kind of enterprise agreement;

    is inappropriate and needs to be deleted.

- The Government's amendment to the Bill (Item 636A) [Sheet ZD197] that would enable the FWC to make, or refuse to vary, a single interest employer authorisation to ensure that the authorisation does not include one or more employers and their employees, if:

    - the employers is bargaining in good faith for a proposed enterprise agreement that will cover the employer and the relevant employees, or substantially the same group of the relevant employees;

    - the employer and the relevant employees have a history of effectively bargaining in relation to one or more enterprise agreements that have covered the employer and the relevant employees, or substantially the same group of the relevant employees; and

    - on the day that the FWC will make the authorisation, less than 6 months have passed since the most recent nominal expiry date of an agreement referred to above;

should not just give the FWC the discretion to exclude these employers and employees from the authorisation, it should prevent the FWC including them in the authorisation.

4. The criteria in s.251(2) (Item 637) in the Bill is too narrow. The FWC should be empowered to remove an employer from an authorisation if the FWC is satisfied that it is no longer appropriate for the employer to be specified in the authorisation. There should be no requirement that there be a change in the employer's circumstances.

5. On 9 November 2022, the Government introduced amendments to the Bill into Parliament [Sheet ZD197] which would exclude employees in relation to "general building and construction work" from the single interest bargaining stream. The definition is far too narrow, as discussed in the section of this submission relating to Part 23A of the Bill.

6. The provisions of the Bill which relate to employers and employees ceasing to be covered by single interest employer agreements or multi-enterprise agreements (including supported bargaining agreements and cooperative bargaining agreements) are unfair and need to be amended. See the section of this submission relating to Part 22 of the Bill.

Part 22 – Varying enterprise agreements to remove employers and their employees

Summary of the proposed amendments

Part 22 would amend the FW Act to enable an employer and its employees to jointly make a variation to a single interest employer agreement or multi-enterprise agreement (including a supported bargaining agreement and a cooperative bargaining agreement) so they cease to be covered. The variation would take effect if approved by the FWC.

Analysis

It is appropriate that the legislation include a straightforward process enabling an employer and its employees to agree to vary a single interest employer agreement or a multi-enterprise agreement to no longer be covered by the agreement. For example, the parties may wish to negotiate a genuine enterprise agreement that has terms tailored to the needs of the business and its employees.

It is extremely inappropriate for the agreement of each union that is covered by the single interest employer agreement or the multi-enterprise enterprise agreement to have a veto over such variations, as currently prescribed in the Bill.

Under the FW Act, enterprise agreements are made between employers and employees (other than greenfields agreements where there are no employees at the time the agreement is made). A union is entitled to be covered by an agreement if it has even one member in the workforce covered by the agreement).

As currently drafted, a union with one member could prevent an enterprise agreement that applies to 10,000 employees ever being varied to remove the employer and employees from the coverage, even after the agreement has passed the nominal expiry date.

The unfair approach in the Bill is in stark contrast to the current provisions in the FW Act that enable an employer and its employees to agree to vary the terms of an enterprise agreement or agree to terminate an enterprise agreement, as can be seen below:

- **Subsection 211(2) in the existing FW Act:**

  Approval of variation by the FWC

  (1) If an application for the approval of a variation of an enterprise agreement is made under section 210, the FWC must approve the variation if:

  (a) the FWC is satisfied that had an application been made under subsection 182(4) or section 185 for the approval of the agreement as proposed to be varied, the FWC would have been required to approve the agreement under section 186; and

  (b) the FWC is satisfied that the agreement as proposed to be varied would not specify a date as its nominal expiry date which is more than 4 years after the day on which the FWC approved the agreement;

  unless the FWC is satisfied that there are serious public interest grounds for not approving the variation.

  Note: The FWC may approve a variation under this section with undertakings (see section 212).

- **Section 223 in the existing FW Act:**

  When the FWC must approve a termination of an enterprise agreement

  If an application for the approval of a termination of an enterprise agreement is made under section 222, the FWC must approve the termination if:

  (a) The FWC is satisfied that each employer covered by the agreement complied with subsection 220(2) (which deals with giving employees a reasonable opportunity to decide etc.) in relation to the agreement; and

  (b) The FWC is satisfied that the termination was agreed to in accordance with whichever of subsection 221(1) or (2) applies (those subsections deal with agreement to the termination of different kinds of enterprise agreements by employee vote); and

  (c) The FWC is satisfied that there are no other reasonable grounds for believing that the employees have not agreed to the termination; and

(d) The FWC considers that it is appropriate to approve the termination taking into account the views of the employee organisation or employee organisations (if any) covered by the agreement.

- **Section 216EB in the Bill:**

When the FWC must approve variation of single interest employer agreement or multi-enterprise agreement to remove employer and employees

If an application for the approval of a variation of a single interest employer agreement or a multi-enterprise agreement is made under section 216EA, the FWC must approve the variation if the FWC is satisfied that:

(a) the employer mentioned in paragraph 216E(1)(a) complied with subsection 216E(5) (which deals with giving employees a reasonable opportunity to decide etc.) in relation to the variation; and

(b) the affected employees have voted, by ballot or by an electronic method, on whether to approve the variation and, of those who cast a valid vote, a majority approved the variation; and

(c) there are no other reasonable grounds for believing that a majority of the affected employees who cast a valid vote did not approve the variation; and

(d) each employee organisation covered by the agreement, that is entitled to represent the industrial interests of one or more affected employees, agrees to the variation.

Ai Group's position and recommendations

It is essential that the extremely inappropriate union veto in s.216EB(d) is removed. The following provision modelled on s.211(2) is proposed:

(d) there are no serious public interest grounds for not approving the variation.

Part 23 – Cooperative workplaces

Summary of the proposed amendments

Part 23 of the Bill deals with cooperative workplace agreements' – a type of 'multi-enterprise agreement' under the FW Act.

Cooperative workplace agreements are agreements reached between a group of employers and their employees. At least some of the employees covered by the agreement must be represented by a union in bargaining for the agreement (except for greenfields agreements).

Industrial action cannot be taken in pursuit of a cooperative workplace agreement.

The original Bill also dealt with FWC exclusion orders and related provisions, but on 9 November 2022, the Federal Government introduced amendments to the Bill into Parliament [Sheet ZD197] to remove these provisions.

Ai Group's position and recommendations

1. The provisions of the Bill which relate to employers and employees ceasing to be covered by multi-enterprise agreements are unfair and need to be amended. See the section of this submission relating to Part 22 of the Bill.

Part 23A – Excluded work

Summary of the proposed amendments

On 9 November, the Government introduced amendments to the Bill into Parliament [Sheet ZD197] which would insert a new Part 23A into the Bill.

Employees undertaking 'general building and construction work' would be excluded from the supported bargaining stream, the single interest bargaining stream and cooperative workplace agreements.

Ai Group's position and recommendations

Ai Group supports 'building and construction work' being excluded but the definition is far too narrow.

Electricians, plumbers, sprinkler pipe fitters, air-conditioning tradespersons, lift mechanics, refrigeration mechanics and numerous other classifications undertake extensive and vital work on construction projects, and would not fall within the definition.

Giving the unions the ability to organise sector-wide industrial action would have a devastating impact on construction projects – including building projects.

There is no sound reason why all work on building projects should not be excluded from the supported bargaining stream and the single interest bargaining stream, and no sound reason why civil construction work and metal and engineering construction work should also not be excluded.

Expressly referring to coal miners, electrical contractors etc as not being covered by the exclusion could be interpreted as implying that highly paid, highly unionised employees like these are intended to be included under the supported bargaining stream and single interest bargaining stream, which would be extremely damaging.

The following amendments need to be made to the exclusion from the supported bargaining stream and the single interest bargaining stream:

23B Meaning of ~~general~~ building and construction work

*(1) Work is **~~general~~ building and construction work** if:*

(a) the work is done, onsite, ~~in the industry of general building and construction within the meaning of paragraph 4.3(a) of the Building and Construction General On-site Award 2020 as in force at the applicable time~~; by an employee covered by:

(i) the Building and Construction Industry On-site Award 2020; or

(ii) the Electrical, Electronic and Communications Contracting Award 2020; or

(iii) the Joinery and Building Trades Award 2020; or

(iv) the Mobile Crane Hiring Award 2020; or

(v) the Plumbing and Fire Sprinklers Award 2020.

~~and~~

~~(b) the work is not any of the following:~~

~~(i) work in the industry of civil construction within the meaning of paragraph 4.3(b) of the Building and Construction General On-site Award 2020 as in force at the applicable time;~~

~~(ii) work in the industry of metal and engineering construction within the meaning of paragraph 4.3(c) of the Building and Construction General On-site Award 2020 as in force at the applicable time;~~

~~(iii) work in manufacturing and associated industries and occupations within the meaning of clause 4.8 of the Manufacturing and Associated Industries and Occupations Award 2020 as in force at the applicable time;~~

~~(iv) the work of an employee who is covered by the Joinery and Building Trades Award 2020, as in force at the applicable time, in relation to the work;~~

~~(v) work in the industry of electrical services, within the meaning of clause 4.3 of the Electrical, Electronic and Communications Contracting Award 2022 as in force at the applicable time, provided by electrical, electronics and communications contractors and their employees;~~

~~*(vi) work that is plumbing, or fire sprinkler fitting, within the meaning of clause 4.2 of the Plumbing and Fire Sprinklers Award 2020 as in force at the applicable time;*~~

~~*(vii) work in the black coal mining industry within the meaning of clause 4.2 of the Black Coal Mining Industry Award 2020 as in force at the applicable time;*~~

~~*(viii) work in the mining industry within the meaning of clause 4.2 of the Mining Industry Award 2020 as in force at the applicable time;*~~

~~*(ix) work in the quarrying industry within the meaning of clause 4.3 of the Cement, Lime and Quarrying Award 2020 as in force at the applicable time;*~~

~~*(x) work in the concrete products industry within the meaning of clause 4.2 of the Concrete Products Award 2020 as in force at the applicable time;*~~

~~*(xi) work in the premixed concrete industry within the meaning of clause 4.2 of the Premixed Concrete Award 2020 as in force at the applicable time;*~~

~~*(xii) work in connection with the installation, major modernisation, servicing, repair or maintenance of lifts and escalators, or air conditioning or ventilation.*~~

*(2) The **applicable time** is the start of the day before this section commences.*

Part 24 – Enhancing the small claims process

Summary of the proposed amendments

The Bill increases the jurisdictional cap on the FW Act's small claims process from $20,000 to $100,000.

A feature of the small claims jurisdiction is that courts are not required to adopt a formal process, consider the rules of evidence or permit legal representation or representation by industrial associations who must generally seek leave to appear. Only the applicant may choose whether a claim can made in the small claims division.

A court is not empowered to order a pecuniary penalty in determining a small claims matter.

Analysis

There is no apparent reasonable or basis to support the magnitude of the increase from $20,000 to $100,000. An increase of four times the current monetary cap significantly exceeds the level of annual CPI increases since the $20,000 cap was set. Other small claims divisions in local courts around Australia are generally capped at $20,000.

A claim for $100,00 is obviously not a 'small claim' by any reasonable assessment. The prospect of needing to meet a claim $100,000 is a considerable imposition for any business, but may obviously represent a crippling prospect for a small business. The deliberate lack of formal process and legal rigour around an expanded small claims process is inappropriate in the context of a claim that could result in such a significant financial impact on a party. The proposed amendments are patently inappropriate and unfair.

Many contested underpayments concern issues of complex interaction between fair instruments or where there are competing interpretations of provisions in modern awards or enterprise agreements. Some of these matters are of significant public interest and may be more appropriately dealt with a general division of the relevant court. For example, there have been several High Court decisions in recent years concerning the accrual of personal/carers leave, casual employment and independent contractors.

While there is merit in reviewing remedial processes for alleged underpayments, as well as giving further consideration to the reasons such problems arise and how greater compliance can be encouraged and achieved, this provision of the Bill overreaches beyond what is fair and proportionate.

Ai Group's position and recommendations

The Bill's significantly expanded small claims jurisdiction from $20,000 to $100,000 is unjustified and inappropriate.

If the Bill is to pursue an expanded small claims jurisdiction, this should be more appropriately set at a more reasonable level of $40,000 which is still double the current monetary cap.

Part 25 – Prohibiting employment advertisements with pay rate that would contravene the Act

Summary of the proposed amendments

The Bill imposes a new contravention for employers who advertise, or cause to be advertised, an employment offer at an unlawful rate of pay.

In addition, the Bill would require an employer, who advertises, or causes to be advertised, an employment offer as a pieceworker, to specify any periodic rate of pay the employee would be entitled to or include a statement that a periodic rate of pay is payable in relation to the employment.

A contravention may expose an offending employer to a maximum penalty of $66,000.

The two contraventions do not apply if an employer has a reasonable excuse.

Analysis

These provisions of the Bill are based on recommendations by the Migrant Workers Taskforce Report and were designed to capture job advertisements used in some communities to promote unlawful rates of pay.

Ai Group's position and recommendations

Ai Group does not raise any opposition to this aspect of the Bill.

Should these provisions remain in the Bill, the Government should devote resources to ensuring that there are appropriate public education initiatives implemented to ensure that the new obligations widely known, including initiatives that are communicated in a variety of different community languages

Part 25A – Establishment of the National Construction Industry Forum

Summary of the proposed amendments

On 9 November 2022, the Government introduced amendments to the Bill into Parliament [Sheet ZD197] which would establish a National Construction Industry Forum, with effect from 1 July 2023.

The Forum would provide advice to the Government in relation to work in the building and construction industry including advice in relation to:

- workplace relations;
- skills and training;
- safety;
- productivity;
- diversity and gender equity; and
- industry culture.

The members of the Forum would be:

- The Employment and Workplace Relations Minister (the Chair of the Forum);
- The Infrastructure Minister;
- The Industry Minister;
- One or more members who have experience representing employees in the building and construction industry;
- An equal number of members who have experience representing employers in the building and construction industry, including at least one member who has experience representing contractors in the building and construction industry.
- Any other person appointed by the Minister.

Ai Group's position and recommendations

Ai Group supports the establishment of the Forum. It will hopefully provide a forum for cultural change in the construction sector.

It should not in any way be seen as removing the need for the ABCC which has a completely different role to the proposed Forum.

It is vital that the Minister appoints strong and constructive voices for industry to the Forum.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak employer organisation representing traditional, innovative and emerging industry sectors. We are a truly national organisation which has been supporting businesses across Australia for nearly 150 years.

Ai Group is genuinely representative of Australian industry. Together with partner organisations we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our members are small and large businesses in sectors including manufacturing, construction, ICT, transport & logistics, engineering, food, labour hire, mining services, the defence industry and civil airlines.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

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Attachment C

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16 November 2022

Senate Education and Employment Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: eec.sen@aph.gov.au.

Dear Secretariat

Re. Responses to questions on notice

We write regarding our appearance at the hearing before the Senate Education and Employment Legislation Committee on 16 November 2022 regarding the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 **(the Bill).**

A question from Senator Grogan that was taken on notice by Ai Group and our response is set out below:

> **Senator GROGAN**: I wonder if you could provide us a link to that research you were talking about. Professor Wright gave us some material and a couple of other people over the last few days have given us some evidence to draw from about where they've seen this situation actually make a fundamental difference.
>
> …
>
> **Senator GROGAN**: Can I just have one naughty follow-up question? On that research that you cited from Wooden—this will be a question on notice because I'm just unpacking this and going, 'What?' There seem to be some issues raised by other academics around the categorisation that he's used. The comparisons of multiemployer systems, enterprise-level systems and Australia has given an industrial country categorisation that's not in line with the OECD or any of those others that match comparable countries. It's gone with a different sort of cut that seems to have, potentially, some challenges. Even Wooden's material says that Australia has a 0.4 per cent increase over 10 years compared to his enterprise-level grouping, which is 1.1, and his multi-employer systems, which is 0.7—both higher than Australia, whichever way you look at it. Would you be able to provide us with your argument for utilising that piece of research to help us understand where you're at? That would be great.
>
> **Ms Street:** Yes, Senator Grogan, we can absolutely look at that

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The research of Professor Mark Wooden relating to the comparative wage growth in European countries in which either multi-employer or company dominates appeared in an article he wrote for *The Conversation* on 19 September 2022, a link to which is here.

A relevant extract from Professor Wooden's article is below:

> Examining the period 2011-21, I found that across the multi-employer bargaining countries, real wages growth averaged only 0.6% per year.
>
> In contrast, among those in the company bargaining group, average real wage growth was about four times a high, at 2.3% per annum.
>
> But the company-bargaining group included many Eastern European countries which have greater room for productivity growth and thus wage increases.
>
> Excluding these from both groups, I found that in the countries where multi-employer bargaining dominated, real wage growth averaged 0.7% per year.
>
> Where company bargaining dominated, real wage growth averaged 1.1%.
>
> Australia, which, along with Luxembourg, fits into neither category, had real wage growth of 0.4%.
>
> These calculations are not consistent with the claim that multi-employer bargaining boosts real wages growth. If anything, they suggests the reverse. (emphasis added)

The research of Professor Wooden *suggests* that, based on international comparisons, company level barging provided higher levels of wage increases than multi-employer bargaining, during the analysed period.

It does also show that Australia had lower real wage growth than the average experienced by the countries considered and applying either system, but this of itself is of little significance or value as the article does not provide details of actual wage levels or other employee benefits that would enable robust comparison of the relevant effect\ respective systems.

Ultimately, while the research of Professor Wooden does raise a counterpoint to other evidence from academics referred to by the Senator, the Committee should find that there are very few inferences as to the wage outcome or other effects of adopting multi-employer bargaining that can be reliably drawn from cross-national comparisons identified by any party. This is because there are a very large number of factors

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shaping such outcomes in different labour markets, of which enterprise or multi-employer bargaining is but one. A non-exhaustive list of these factors includes:

- Underlying productivity improvements
- The existence (or absence) of centrally-set awards and minimum wages
- The share of the labour force where bargaining is used to determine wages
- The sectoral composition of the workforce and differences in wage determination methods between sectors

Any comparison between bargaining outcomes in an international context that does not control for these factors cannot determine the extent to which enterprise or multi-employer bargaining is responsible for wage or other outcomes.

The unique and highly developed regulatory regime governing employment conditions in Australia, including the highly developed safety net of terms and conditions comprised of the modern awards and the National Employment Standards, is a very significant factor undermining the utility of seeking to make assessments of the likely effect of the Bill based on inferences drawn from international bargaining outcomes.

We trust this assists the Committee.

Yours sincerely

Brent Ferguson
Head of National Workplace Relations Policy

Nicola Street
Director – Workplace Relations Policy, Diversity, Equity & Inclusion

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16 May 2023

Martin Hehir
Deputy Secretary
Workplace Relations
Department of Employment and Workplace Relations
GPO Box 9828, Canberra ACT 2601

By email: Martin.Hehir@dewr.gov.au

Dear Deputy Secretary,

We write to constructively propose relatively modest amendments to the new bargaining framework that will commence pursuant to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (the **Amendment Act**) that we believe are consistent with the policy objectives underpinning such reforms and which would enhance the operation of the legislative scheme. Subject to any questions that the Department may raise in response, we request that this proposal be brought to the Minister's attention.

In short, we propose amendments that are consistent with the objective of removing barriers to bargaining and which would:

- Encourage further enterprise bargaining to be engaged in by industry;
- Maintain the current primacy of single enterprise agreements, where this is genuinely desired by the parties; and
- Promote outcomes that are favourable to employees.

Specifically, we propose that this could be achieved by:

- Maintaining the current ability of employers and employees to strike an enterprise agreement that applies to the exclusion of a multi-enterprise agreement; and

- Permitting an employer and its employees to make a single-enterprise agreement while subject to an authorisation for multi-enterprise bargaining.

We seek that such changes be earnestly considered as they would promote the achievement of favourable outcomes for employees, go some way to addressing industry anxiety over the new regime and promote setting of terms and conditions through enterprise agreements.

For completeness, we propose that such arrangements should be subject to appropriate safeguards to ensure that the amendments only enable an outcome that employees genuinely desire. For

example, it could be that an employer would have to take reasonable steps to explain the terms of any multi-enterprise agreement and the effect of entering into a single-enterprise agreement that would cause the application of the multi-enterprise agreement or authorisation to cease.

In advancing this proposal, we note that the Government has identified the capacity of the new bargaining regime to incentivise employers to engage in bargaining for single-enterprise agreements as one of the benefits of the new regime. We envisage that the actual conduct of bargaining for a multi-enterprise agreement (once this is permissible) may amplify any such effect, provided that employers who are subject to a relevant authorisation are permitted to strike a single-enterprise agreement with their workforce.

To assist DEWR and the Government's consideration of our request, we set out below an explanation of the existing primacy given by the FW Act to single-enterprise agreements and single-enterprise bargaining, the aspects of the Amendment Act that are of concern, and the changes Ai Group proposes to deliver the outcomes identified above.

Existing primacy of single-enterprise agreements under the *Fair Work Act 2009* (Cth)

Subdivision C of Division 3, Part 2-1 of the *Fair Work Act 2009* (Cth) (**FW Act**) deals with the interaction between one or more enterprise agreements. Relevantly, subsection 58(1) provides:

> Only one enterprise agreement can apply to an employee at a particular time.

Section 58 goes on to describe a "general rule" and a "special rule" regarding the ability of a later enterprise agreement to replace an earlier enterprise agreement.

The ***general rule*** is that where two enterprise agreements cover the same employee, the enterprise agreement that was made first (the "earlier agreement") applies to the employee until it passes its nominal expiry date and the agreement that was made second (the "later agreement") cannot apply during this time. Once the first agreement passes its nominal expiry date, it ceases to apply (and can never so apply again) and the later agreement applies instead (FW Act, subsection 58(2)).

The general rule operates subject to the special rule (FW Act, subsection 58(2)(c)).

The ***special rule*** is that if a multi-enterprise agreement applies to an employee in relation to particular employment, and a single-enterprise agreement that covers the employee in relation to the same employment comes into operation, the multi-enterprise agreement ceases to apply to the employee in relation to that employment when the single enterprise agreement comes into operation and can never so apply again (FW Act, subsection 58(3)).

As is evident from the above, it is possible for an employer who is (or becomes) covered by a multi-enterprise agreement to make an enterprise agreement at the single-enterprise level which can immediately apply to employees without the need to wait until the multi-enterprise agreement reaches its nominal expiry date.

This includes where a multi-enterprise agreement is made under the low paid bargaining stream - an employer to whom it applies may make a later single-enterprise agreement with some or all of the employees covered by the multi-enterprise agreement, and the operation of the "special rule" means the later single-enterprise agreement will be able to apply to the employer and employees

immediately without the need to wait until the nominal expiry date of the multi-enterprise agreement passes.

Existing primacy of single enterprise bargaining

Under existing Division 9 of Part 2-4 of the FW Act, where the requirements of section 243 are met the Fair Work Commission (**FWC**) must make a low paid authorisation in relation to bargaining for a proposed multi-enterprise agreement in the low paid bargaining stream.

Under existing Division 10 of Part 2-4 of the FW Act, where the requirements of section 249 are met the FWC must make a single interest employer authorisation in relation to a single-enterprise agreement proposed to be made between two or more employers who are in a franchise arrangement or specified in a Ministerial declaration.

Currently, there is nothing in the FW Act to prevent an employer who is named in either a low paid authorisation or a single interest employer authorisation electing to bargain for a single-enterprise agreement to cover only that employer, and the employees who are specified in the authorisation.

Failure of the Amendment Act to preserve the primacy of single enterprise agreements in enterprise bargaining

From 6 June 2023, new subsections 172(5) and (7) of the FW Act will commence. Those subsections will relevantly provide:

> *Requirement for employer specified in single interest employer authorisation*
> (5) Despite any other provision of this Part, if an employer is specified in a single interest employer authorisation that is in operation:
> (a) the only kind of enterprise agreement the employer may make with their employees who are specified in the authorisation is a single interest employer agreement; and
> (b) the employer must not initiate bargaining, agree to bargain, or be required to bargain with those employees for any other type of enterprise agreement.

and

> *Requirement for employer specified in supported bargaining authorisation*
> (7) Despite any other provision of this Part, if an employer is specified in a supported bargaining authorisation that is in operation:
> (a) the only kind of enterprise agreement the employer may make with their employees who are specified in the authorisation is a supported bargaining agreement; and
> (b) the employer must not initiate bargaining, agree to bargain or be required to bargain with those employees for any other kind of enterprise agreement.

The effect of these subsections is that an employer is no longer free to pursue a single-enterprise agreement, where the employer is named in either a single interest employer authorisation or a supported bargaining authorisation. Instead, an employer will only be able to do so if they first apply to the FWC to be removed from the authorisation and are successful in that application.

An employer is only entitled to be removed from a single interest employer authorisation or supported bargaining authorisation if the FWC is satisfied it is no longer appropriate for the employer to be specified in the authorisation "*because of a change in the employer's circumstances*" (pursuant to new subsection 251(2A)(b), and subsection 244(2) of the FW Act, respectively).

In addition, for a single interest employer authorisation the FWC must also be satisfied before removing an employer from the authorisation that the employers specified in the authorisation and the bargaining representatives of the employees of those employers have had an opportunity to express to the FWC their views (if any) on the application.

Furthermore, new subsection 58(3) of the FW Act will vary the operation of the existing "special rule". New subsection 58(3) will state:

> *Special rule – supported bargaining agreement replaces single-enterprise agreement*
> (3) If:
> (a) a single-enterprise agreement applies to an employee in relation to particular employment; and
> (b) a supported bargaining agreement that covers the employee in relation to the same employment comes into operation;
> the single-enterprise agreement ceases to apply to the employee when the supported bargaining agreement comes into operation, and can never so apply again.

The effect of new subsection 58(3) is that:

- a single enterprise agreement that is made after a multi-enterprise agreement, will no longer immediately start to apply. Instead, the "general rule" will apply so that the later single enterprise agreement may only apply once the earlier multi-enterprise agreement has passed its nominal expiry date, and
- a supported bargaining agreement will commence applying before the nominal expiry date of a single enterprise agreement that covers the same employees.

The above referenced sections represent new barriers to bargaining.

Changes sought to the Amendment Act (or *Fair Work Act 2009*)

The effect of the above changes is that employers and their employees may be forced into supported bargaining agreements and once covered by such agreements, it will be virtually impossible to bargain directly with their own employees.

Put simply, the framework will create new barriers to enterprise bargaining and will, somewhat perversely, prevent employers from reaching agreements with their employees even if employees view such agreements as more favourable.

To address such matters, Ai Group seeks changes to the Amendment Act or FW Act to:

- Retain subsection 58(3) in its current terms; and
- Amend new subsections 172(5) and (7) such that each subsection, in effect, provides:

> *Requirement for employer specified in single interest employer authorisation*
> (5) Despite any other provision of this Part, if an employer is specified in a single interest employer authorisation that is in operation:
> ~~(a) the only kind of enterprise agreement the employer may make with their employees who are specified in the authorisation is a single interest employer agreement; and~~
> (b) the employer must not ~~initiate bargaining, agree to bargain, or~~ be required to bargain with those employees for any other type of enterprise agreement.

and

Requirement for employer specified in supported bargaining authorisation

(7) Despite any other provision of this Part, if an employer is specified in a supported bargaining authorisation that is in operation:

~~(a) the only kind of enterprise agreement the employer may make with their employees who are specified in the authorisation is a supported bargaining agreement; and~~

(b) the employer must not ~~initiate bargaining, agree to bargain or~~ be required to bargain with those employees for any other kind of enterprise agreement.

We look forward to the opportunity to engage in constructive discussion with DEWR on options to avoid the foreseeable and serious detrimental consequences for Australian employers should these issues not be addressed. Should DEWR wish to discuss this matter please contact Brent Ferguson, Ai Group's Head of National Workplace Relations Policy, on 0405 448 119.

Yours sincerely

Attachment E

Australian Industry Group

Application for a Supported Bargaining Authorisation – Disability Services Industry

Submission

(B2023/1235)

15 March 2024

B2023/1235 APPLICATION FOR A SUPPORTED BARGAINING AUTHORISATION – DISABILITY SERVICES INDUSTRY

1. INTRODUCTION

1. This submission of the Australian Industry Group (**Ai Group**) relates to an application filed by the Health Services Union (Branch No. 2 Victoria) (**HACSU**) and the Australian Education Union – Victorian Branch (**AEU**) in the Fair Work Commission (**Commission**) for a supported bargaining authorisation (**SBA**). The submission is filed in accordance with amended directions issued by the Commission on 6 March 2024.

2. The application was originally filed on 9 November 2023 and was subsequently amended pursuant to an order of the Commission on 12 March 2024 [1] (**Application**).

3. Ai Group opposes the Application on the basis that it is not appropriate for the employers respondent to the Application to bargain together.

4. Ai Group urges the Commission to decline to make the SBA, for the reasons outlined in this submission.

[1] PR772281.

2. THE STATUTORY PROVISIONS

5. Section 243(1) requires the Commission to make a SBA if the criteria there stipulated are satisfied: (emphasis added)

> (1) The FWC must make a supported bargaining authorisation in relation to a proposed multi-enterprise agreement if:
>
> (a) an application for the authorisation has been made; and
>
> (b) the FWC is satisfied that it is appropriate for the employers and employees (which may be some or all of the employers or employees specified in the application) that will be covered by the agreement to bargain together, having regard to:
>
> (i) the prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector); and
>
> (ii) whether the employers have clearly identifiable common interests; and
>
> (iii) whether the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process; and
>
> (iv) any other matters the FWC considers appropriate; and
>
> (c) the FWC is satisfied that at least some of the employees who will be covered by the agreement are represented by an employee organisation.

6. Section 243(2) provides examples of *'common interests that employers may have'*:

> (2) For the purposes of subparagraph (1)(b)(ii), examples of common interests that employers may have include the following:
>
> (a) a geographical location;
>
> (b) the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises;
>
> (c) being substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory.

7. Where the Commission makes a SBA, s.243(3) specifies the matters the SBA is required to address:

> (3) The authorisation must specify:
>
> (a) the employers that will be covered by the agreement; and
>
> (b) the employees who will be covered by the agreement; and
>
> (c) any other matter prescribed by the procedural rules.

3. THE PROPER INTERPRETION OF SECTION 243

8. We here deal with the proper interpretation of various elements of s.243 of the Act.

9. The Commission has previously considered s.243 of the Act on only one occasion. In *Application by United Workers' Union, Australian Education Union and Independent Education Union of Australia* [2023] FWCFB 176 (***Long Day Care Decision***) the Commission determined to authorise supported bargaining for 64 consenting employer respondents and their employees engaged in work performed in a long day care setting covered by the *Children's Services Award 2010* and the *Educational Services (Teachers) Award 2020*.[2]

10. Accordingly, the Application appears to be only the second of its kind and the first to proceed without consent from the respondent employers.

Section 243(1)(a): Requirement for an Application

11. Section 243(1)(a) requires an application for a SBA to be made.

12. The Full Bench discussed this requirement in the *Long Day Care Decision*, as follows:

> The requirement for an application in paragraph (a) connotes an application that has validly been made in accordance with the requirements of s 242. This means that the application must have been made by a person with standing to do so under s 242(1), must specify the matters prescribed in s 242(2), and must not be made in relation to a proposed greenfields agreement in accordance with s 242(3).[3]

Section 243(1)(b): Application of a SBA & Coverage of a Proposed Agreement

13. Where an application for a SBA has been made, the employers and employees who would be covered by the proposed agreement must be clearly identified. This is evident from various aspects of the legislative provisions. For example:

[2] *Long Day Care Decision* at [1] – [2].

[3] *Long Day Care Decision* at [29].

(a) Section 243(1)(b) requires the Commission to determine whether it is appropriate for *'the employers and employees … that will be covered by the agreement'* to bargain together; and

(b) Section 243(3) requires that the employers and employees that will be covered by the proposed agreement must be specified in the SBA.

14. For the purposes of s.243(3):

(a) The relevant employers must be identified by name.[4]

(b) The relevant employees need not be identified by name; however, the class of employees must be described with sufficient specificity, such that they can be identified definitively and without doubt.

15. The scope of the parties who would be covered by a proposed SBA is a relevant consideration when determining whether the SBA should be made. It is conceivable that decisions about the scope or coverage of a proposed SBA will be made pragmatically by parties, with a view to limiting the impact of potentially divergent views amongst bargaining representatives being advanced during bargaining. Moreover, the scope of a proposed SBA could give rise to a raft of relevant discretionary considerations, depending on the circumstances of a particular matter. They could include:

(a) Any foreseeable potential impact of bargaining between the relevant parties on the economy, specific sectors and / or members of the community that rely upon services of the employers that will be covered by the proposed SBA; and

(b) The impact on other employers that might be said to have a common interest with those covered by the proposed SBA but who have been selectively excluded from the scope of any application. This should include a consideration of the possibility that such employers may subsequently be roped into the coverage of the SBA or any agreement ultimately made.

[4] Section 256A(3) of the Act.

Section 243(1)(b): Appropriateness of Making a SBA

16. Section 243(1)(b) of the Act requires the Commission to be satisfied it is '*appropriate*' for some or all of the respondent employers and their employees that will be covered by the proposed agreement to bargain together.

17. The assessment must be made having regard to the factors enumerated at ss.243(1)(b)(i) – (iv) of the Act. It should also involve a consideration of:

    (a) The objects of the Act;

    (b) The objects of Division 9 of Part 2-4 of the Act; and

    (c) The scheme of the Act as a whole, including the implications of making a SBA.

18. Critically, the objects of the Act continue to place an emphasis on enterprise-level collective bargaining; that is, bargaining in respect of terms and conditions that apply at a particular enterprise. Notably, in the *Long Day Care Decision*, the Commission accepted that enterprise-level bargaining is *'intended to be the primary and preferred mode of bargaining'*.[5]

Sections 243(1)(b): Having Regard to the Matters Listed

19. Section 243(1)(b) of the Act requires the commission to '*have regard to*' the matters listed in ss.243(1)(b)(i) – (iv). This is not, however, an exhaustive list of matters that may be relevant to the exercise of the Commission's discretion.

20. In the *Long Day Care Decision*, the Full Bench of the Commission determined:

> The consideration required under paragraph (b) of s243(1) requires a broad evaluative judgment to be made having regard to the matters specified in subparagraphs (i)-(iv). A requirement to have regard to a matter means that, insofar as it is relevant, it must be treated as a matter of significance in the decision-making process. However, no single matter in s 243(1)(b) is to be regarded as being determinative as to whether the requisite state of satisfaction is reached.[6]

[5] *Long Day Care Decision* at [41].

[6] *Long Day Care Decision* at [29].

21. Each of the factors identified in s.243(1)(b) must be *meaningfully* weighed. In some cases, the Commission may not be in a position to have regard to the matters identified at s.243(1)(b), because there is insufficient material before it about the relevant issue(s). For instance, in the absence of evidence about the *'prevailing pay and conditions within the relevant industry or sector'*, *'including whether low rates of pay prevail'*, the Commission may not be in a position to properly take into account the matters articulated at s.243(1)(b)(i).

22. If the Commission is not properly informed in relation to any of the mandatory considerations, it follows that, respectfully, it cannot reach the requisite degree of satisfaction required to invoke its power to make a SBA. That is, the Commission cannot be satisfied that it is appropriate to make a SBA if it is unable to have regard to any of the mandatory considerations. In such circumstances, its assessment as to whether it would be appropriate for the relevant employers and employees to bargain together would be fundamentally incomplete and therefore, it would not have jurisdiction to make a SBA.

23. Any limitation on the capacity of the Commission to robustly assess the matters that it is directed to take into account, either as a product of deficiencies in the material put before it or limitations on its capacity to ascertain relevant information on its accord, is a factor that will, at the very least, weigh against the granting of an application.

Section 243(1)(b)(i): The Prevailing Pay and Conditions

24. The first of four matters to which the Commission is required to have regard pursuant to s.243(1)(b)(i) is '*the prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector)*'.

25. Relevantly, the Full Bench said the following regarding '*prevailing rates of pay and conditions within the relevant industry or sector*' in the *Long Day Care Decision*:

[30] *Second*, the consideration identified in s 243(1)(b)(i) requires us to have regard to the 'prevailing pay and conditions within the relevant industry or sector'. The reference to 'the relevant industry or sector' plainly indicates that the assessment required will extend beyond the pay and conditions of the employees to whom the authorisation sought will apply (unless the authorisation sought would encompass the entirety of the relevant industry or sector). That will mean that, in the normal course, an applicant for an authorisation might be expected to adduce evidence concerning prevailing pay and conditions within the relevant sector. 'Prevailing' is to be given its ordinary meaning; that is, 'predominant' or 'generally current'.

[31] The words in parentheses in s 243(1)(b)(i) require consideration to be given as to whether 'low rates of pay' prevail in the industry or sector. It is to be noted that the legislature has chosen to use the expression 'low rates of pay' rather than refer to the 'the low paid' — the expression used in the former low-paid bargaining scheme, and also currently used in ss 134(1)(a) and s 284(1)(c). This indicates that some distinction in meaning is intended. 'Low paid' connotes the earnings of employees generally, but 'low rates of pay' has a more confined meaning that refers only to the amount an employee is paid for each defined period of working time (for example, an hour, day or week) or, in the case of pieceworkers, for each completed task or unit of work. The use of this different expression indicates that the approach adopted in the *Practice Nurses decision* and *United Voice* whereby 'low paid' was given the same meaning in s 243 as it had been in Annual Wage Review decisions made by reference to ss 134(1)(a) and 284(1)(c), with the benchmark being two-thirds of median adult ordinary-time earnings, should no longer be followed.

[32] We consider that, *prima facie*, 'low rates of pay' will prevail in an industry or sector if employees are predominantly paid at or close to the award rates of pay for their classification, since this is the lowest rate legally available to pay. This is implicit from the objects of the supported bargaining scheme in s 241, including to assist and encourage employers and employees to bargain and make agreements to meet their needs and to address constraints on their ability to do so. The needs of employees who are paid at award rates include improving their terms and conditions of employment in circumstances where there have been constraints on their ability to bargain. It is also implicit that supported bargaining is a means to assist employers and employees who have been constrained from bargaining to access productivity benefits, consistent with the overarching objects in s 171. Further, this approach finds some support in paragraph [984] of the REM which, in relation to s 243(1)(b)(i), states:

> … the prevailing pay and conditions in the relevant industry – this is intended to include whether low rates of pay prevail in the industry, whether employees in the industry are paid at or close to relevant award rates, etc;…

[33] However, in a particular case, it may be that a prevailing rate of pay which is at or close to the relevant award rate cannot be characterised as a 'low rate of pay' because the award rate itself is relatively high. For the reasons set out later in this decision, it is not necessary for us to consider this possibility in this matter, and it is best left for fuller consideration in an appropriate case.[7]

[7] *Long Day Care Decision* at [30] – [33].

Section 243(1)(b)(ii): Clearly Identifiable Common Interests

26. The second of four matters to which the Commission is required to have regard pursuant to s.243(1)(b) is '*whether the employers have clearly identifiable common interests*'.[8]

27. Section 243(2) relevantly provides:

> *Common interests*
>
> (2) For the purposes of subparagraph (1)(b)(ii), examples of common interests that employers may have include the following:
>
> (a) a geographical location;
>
> (b) the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises;
>
> (c) being substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory.

28. In the *Long Day Care Decision*, the Full Bench compared the examples of '*clearly identifiable common interests*' in s.243(2) of the Act to the previous requirement in the low-paid bargaining stream for the Commission to take into account '*the degree of commonality in the nature of the enterprises to which the agreement relates, and the terms of employment in those enterprises*'.[9] The Full Bench concluded that the list of examples in s.243(2) of the Act '*indicates that a broader range of circumstances may be taken into account in accessing commonality of interests*'.[10]

29. The Full Bench went on to state:

> **[34]** Third, the expression 'common interests' used in s 243(1)(b)(ii) in connection with the employers the subject of an authorisation application is one of wide import, and on its ordinary meaning extends to any joint, shared, related or like characteristics, qualities, undertakings or concerns as between the relevant employers. The diversity of the non-exhaustive list of 'examples' of common interests in s 243(2) gives contextual support to the breadth of meaning which we assign to the expression. The common interests

[8] Section 243(1)(b)(ii) of the Act.

[9] This requirement was contained in section 243(2)(e) of the Act prior to the amendments made to s.243 by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth).

[10] *Long Day Care Decision* at [27](3).

must be 'clearly identifiable', that is, plainly discernible or recognisable, but need not be self-evident.

30. The above statement was subsequently adopted by the same Full Bench when considering a very similar requirement in s.249(3)(a) of the Act, in the context of an application for a single interest employer authorisation.[11]

31. The Full Bench in the *Long Day Care Decision* also considered there to be force in the proposition that use of the plural expression *'common interests'* indicated a contrary intention to the expression being able to be read in the singular (and as a corollary, that it mandates a need for there be more than one common interest) but did not consider it necessary to determine the issue.[12]

32. In our submission, the existence of a common interest (or multiple common interests) cannot, of itself, satisfy the Commission that it is appropriate to make a SBA. For instance, it cannot be accepted that four businesses located in the same geographic location (e.g. on the same street, in the same suburb), each operating in different sectors, providing wholly different types of services, have a common interest that warrants the making of a SBA. The mere identification of a common interest (or interests) would not be enough to establish that a SBA must be made. Rather, when assessing the significance of a common interest and the extent to which it supports the making of a SBA, the Commission should also have regard to:

    (a) The nature of the interest;

    (b) The relevance that it has to the setting of employees' terms and conditions; and

    (c) The extent to which it relates to the employers' operational requirements and realities.

[11] *Independent Education Union of Australia v Catholic Education Western Australia Limited and others* [2023] FWCFB 177 at [14](2) and [31] – [32].

[12] *Long Day Care Decision* at [35].

33. Similarly, that a group of employers are *'substantially funded … by the Commonwealth'*[13] may not of itself be enough to satisfy the Commission of the appropriateness of making a SBA. There are various types of funding afforded by the Commonwealth to different industries and, in some cases, within industries. Different funding models can operate in different ways and have differing implications for employers and employees. For instance, whilst the provision of home care to an aged person and a person with a disability are both funded by the Commonwealth, they are subsidised through fundamentally different programs that allocate funding to employers on different bases and in different ways. The specific implications of relying on such funding in respect of disability workers are different from the implications in respect of the provision of aged care in private residences.

34. Further, a group of employers receiving funding from the same source may not have a common interest that supports the making of a SBA because, for instance, some rely solely on that funding whilst others have access to other income streams. Alternatively, various organisations funded by one source may provide different types of services.

35. Similarly, the fact that a group of employers are required to comply with the same set of regulatory requirements may not justify the making of a SBA. Whether or not this is so will necessarily depend on the specific facts of the matter.

36. The Commission should adopt a careful and nuanced approach to evaluating any purported common interests.

37. Additionally, only the *'clearly identifiable common interests'* common to *all* of the employers proposed to be included in the SBA will be relevant. The provision requires a consideration of whether the *'employers'* – that is, the employers proposed to be covered by the SBA – have *'clearly identifiable common interests'*. Common interests that relate to only some but not all of the relevant employers would not be relevant for the purposes of s.243(1)(b)(ii).

[13] Section 243(2)(c) of the Act.

38. Finally and for completeness, consistent with the Supplementary Explanatory Memorandum to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (**Bill**), when considering the *'nature of the enterprises'*, as contemplated by s.243(2)(b), factors such as the *'relative size and scope of the enterprises would be relevant'*.[14]

Section 243(1)(b)(iii): The Number of Bargaining Representatives

39. The third matters to which the Commission is required to have regard pursuant to s.243(1)(b) is *'whether the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process'*.[15]

40. In circumstances where an authorisation is sought in relation to a narrow cohort of parties and there is a small number of representatives, this matter is not likely to weigh against the granting of a SBA. If a SBA could cover a wider range of parties with a greater number of representatives, the significance of this issue will be much greater.

41. The Full Bench considered this requirement in the *Long Day Care Decision* and stated: (emphasis added)

> **[36]** Fourth, s 243(1)(b)(iii) is concerned with whether the likely number of bargaining representatives is consistent with a 'manageable' — that is, workable or tractable — collective bargaining process. This requires an assessment to be made which is to some extent speculative or predictive, since the choice of bargaining representative by the relevant employers and employees may not be known at the time an application for an authorisation is considered, and weight has to be given to the scope of their capacity to choose, and change, their bargaining representatives under s 176 of the FW Act. However, the consideration required is what is 'likely' — that is, probable to happen — not what may possibly happen. Any past history of bargaining, representation at the hearing of the authorisation application, and any sameness or diversity of views amongst employees and employers concerning the prospect of multi-employer bargaining may all inform the assessment to be made. However, we do not consider that the prospect of an agreement being reached if an authorisation is made to be a significantly relevant consideration since s 243(1)(b)(iii) is concerned with the collective bargaining *process*, not the *outcome*.

[14] Supplementary Explanatory Memorandum at [161].

[15] Section 243(1)(b)(iii) of the Act.

Section 243(1)(b)(iv): Any Other Matters

42. The final of the four matters to which the Commission is required to have regard pursuant to s.243(1)(b) is *'any other matters the [Commission] considers appropriate'*.[16] It casts a wide net.

43. In the *Long Day Care Decision*, the Full Bench stated as follows:

> **[37]** Fifth, s 243(1)(b)(iv) gives the Commission a broad discretionary scope as to the relevance and weight of other matters to be taken into account. The applicable objects of the FW Act in ss 3, 171 and 241 will guide the Commission in identifying those matters which may appropriately be taken into account, as will the circumstances of the particular case.

44. To some extent, the matters that the Commission must take into account pursuant to s.243(2)(b)(iv) will differ between applications for SBAs, depending on the matters in issue in each set of proceedings, the circumstances of the relevant employers and employees, the context in which the application has been brought, the characteristics of the industry or sector in which the employers and employees are engaged, etc.

45. Nonetheless, we apprehend that it will typically, if not always, be appropriate for the Commission to take the following matters into account.

46. *First,* the views of the employers who would be covered by the proposed agreement. This is a matter that should be given significant weight.

47. We note that the Revised Explanatory Memorandum for the Bill relevantly says as follows in this regard: (emphasis added)

> 983. … In determining whether it is appropriate for the employers and employees to bargain together, it will be relevant for the Fair Work Commission to consider whether any employee organisation or employer supports this course of action. …
>
> 984. When considering whether it is appropriate for the employer and employees to bargain together, the FWC would have regard to:
>
> …

[16] Section 243(1)(b)(iv) of the Act.

• any other matters the FWC considers appropriate – this may include considering the views of the bargaining representatives.[17]

48. It was a matter taken into account by the Full Bench in the *Long Day Care Decision* and in respect of which the Full Bench stated as follows:

> **[54]** We consider it appropriate to have regard to four additional matters. The first is that all the affected employers support the application and none of the employees that would be affected has advised us that they oppose the making of the authorisation sought. This is of significance having regard to the prohibition upon employers engaging in bargaining for any type of agreement other than a supported bargaining agreement once an authorisation is in operation (s 172(7)(b)), and weighs in favour of making the authorisation.

49. To legal position described in the passage above has changed somewhat, by virtue of the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) (**Closing Loopholes No. 2 Act**), which was enacted subsequent to the *Long Day Care Decision*.

50. The Closing Loopholes No. 2 Act amended the Act so as to now permit an employer to bargain to replace a supported bargaining agreement (once made) with a single-enterprise agreement. This pathway is available only where each employee organisation to whom the supported bargaining agreement applies agrees to this course in writing, if the agreement is within its nominal term.[18] Additionally, any such single-enterprise agreement must leave employees better off overall compared to the supported bargaining agreement (as compared to the underpinning reference award(s), which is the usual comparator for the better off overall test).[19]

51. In any event, it remains the case under s.172(7)(b) of the Act (being the provision to which the Full Bench referred in its statement above) that an employer must not bargain for any other type of agreement than a supported bargaining agreement, once named in an authorisation.

[17] Revised Explanatory Memorandum at [983] – [984].

[18] Section 180B of the Act.

[19] Section 193(1) of the Act.

52. Accordingly, the Full Bench's comments at [54] of the *Long Day Care Decision* remain apposite in light of s.172(7)(b) of the Act and further, given the significant difficulties the new provisions will potentially pose for employers who wish to extract themselves from a supported bargaining agreement by making a single-enterprise agreement.

53. *Second,* any history of bargaining between the relevant employers and employees.

54. *Third,* any intention or efforts to make a single-enterprise agreement amongst the relevant employers and employees.

55. Where any of the employers and employees have previously engaged in enterprise bargaining and the relevant agreement has passed its nominal expiry date, the Commission should be reluctant to name them in a SBA, particularly where they do not wish to be covered by the proposed agreement and / or if they intend to engage in bargaining for a new single-enterprise agreement. Consistent with the scheme of the Act and the limited purpose for which the supported bargaining scheme has been created, such employers and employees should not lightly be required to be party to a multi-enterprise agreement. This is particularly relevant because once an employer is named in a SBA that is in operation, it can only make a supported bargaining agreement with the relevant group of employees.[20] The employer is prohibited from initiating bargaining or agreeing to bargain with those employees or their representatives for a single-enterprise agreement.[21] Further, for the reasons explained above, the Act does not provide for a workable pathway back to single-enterprise agreements once an employer is covered by a SBA or a supported bargaining agreement.

[20] Section 172(7)(a) of the Act.

[21] Section 172(2)(b) of the Act.

56. Depending on the circumstances of a given matter, it may also be appropriate to take into account the following:

(a) Where there is a third party *'who exercises such a degree of control over the terms and conditions of the employees who will be covered by the agreement'* that their participation in bargaining is *'necessary for the agreement to be made'*,[22] or there is some other third party who directly or indirectly funds the employers who would be covered by the agreement; the willingness, capacity and ability of that other party to provide the requisite support, assistance, funding etc, that would enable an improvement in the terms and conditions afforded by the employers to the employees.

(b) Any potential implications for the customers, clients or other users of the employers' products or services.

(c) Any potential implications for other employers and employees who work in the same supply chain as those that are the subject of the application.

(d) Whether the making of a multi-enterprise agreement may unfavourably distort the labour market, by delivering significantly enhanced conditions to certain cohorts of workers *vis-à-vis* others who, for example, work alongside the relevant employees and undertake work that is substantially similar in nature.

(e) The size of each of the respondent employers.[23]

[22] Section 246(3) of the Act.

[23] *Long Day Care Decision* at [57].

4. RESPONSE TO THE APPLICATION

57. We now turn to particularise Ai Group's principal bases for opposing the Application, and in doing so, respond to the:

    (a) Outline of submissions filed by the Australian Council of Trade Unions (**ACTU**) on 2 February 2024 (**ACTU Submission**);

    (b) Outline of submissions filed by HACSU on 2 February 2024 (**HACSU Submission**);

    (c) Witness statement of Angela Carter dated 2 February 2024 (**Carter Statement**);

    (d) Outline of submissions filed by the AEU on 2 February 2024 (**AEU Submission**); and

    (e) Witness statement of Elaine Gillespie dated 2 February 2024 (**Gillespie Statement**).

Section 243(1)(b)(ii): Common Interests

58. The material filed by the applicants does not disclose clearly identifiable common interests that would render it appropriate for the respondents to be required to bargain together.

59. Further, contrary to the unions' assertions, there are key differences with respect to the terms and conditions of employment applying at the respondents' enterprises. There is also an absence of evidence as to commonality in the nature of the respondents' enterprises. These matters undermine the unions' contention that it is appropriate that the relevant employers bargain together.

60. Each of these contentions are outlined in more detail, below.

The Common Interests Identified by the Applicants

61. The AEU asserts that the respondent employers have common interests insofar as:

    (a) They (and their employees) are based in Victoria;[24]

    (b) The disability support work provided by the respondent employers and their employees is funded by the National Disability Insurance Scheme (**NDIS**);[25]

    (c) As NDIS service providers, they are regulated by the NDIS Quality and Safeguards Commission;[26] and

    (d) Where the respondent employer is or was covered by a zombie agreement, the employees performing day-service work have the same terms and conditions of employment.[27]

62. HACSU argues that there is an overriding common interest in this case – being that all of the respondent employers operate disability services businesses and employ staff to perform disability support work in those services[28] - which purportedly gives rise to a number of concomitant common interests. The asserted common interests are said to be:

    (a) Common rates of pay aligned to the *Social, Community, Home Care and Disability Services Industry Award 2010* (**SCHCDS Award**);[29]

    (b) '*(T)he same or substantially the same*' terms and conditions based on zombie agreements, a number of which are said to exceed SCHCDS Award terms and conditions;[30] and

[24] AEU Submission at [39](a).
[25] AEU Submission at [39](b).
[26] AEU Submission at [39](c).
[27] AEU Submission at [39](d).
[28] HACSU Submission at [47].
[29] HACSU Submission at [47](a).
[30] HACSU Submission at [47](b) and (c).

(c) Being registered NDIS providers covered by a common regulatory framework[31] and subject to common funding arrangements (namely, the NDIS).[32]

63. HACSU identifies various other common interests as including:

(a) The respondent employers' capacity to bargain being impacted by NDIS funding;[33]

(b) The provision of disability services in Victoria;[34]

(c) The respondents predominantly employ women;[35]

(d) A need to develop the skills, knowledge and abilities of the respondents' employees to improve their performance, productivity and capabilities;[36]

(e) The need to attract and retain a skilled and quality workforce to ensure their businesses remain viable;[37] and

(f) Being subject to the authority and regulatory powers of the Victorian Disability Workers Commission.[38]

64. In a similar vein, the ACTU points to a common interest arising from each of the respondent employers operating disability services businesses within the same industry, giving rise to concomitant interests in the form of the same award coverage, a common regulatory framework and common funding

[31] HACSU Submission at [47](d).
[32] HACSU Submission at [47](e).
[33] HACSU Submission at [49](i).
[34] HACSU Submission at [49](ii).
[35] HACSU Submission at [49](iii).
[36] HACSU Submission at [49](iv).
[37] HACSU Submission at [49](v).
[38] HACSU Submission at [49](vi).

arrangements.[39] The ACTU submits that the strength of these common interests weigh in favour of granting the Application.[40]

65. We respond to the applicants' assertions regarding commonality in employees' conditions of employment (as referred to at [61(d) and [62(a) and 62(b) above) at [69] – [75] of this submission. Briefly stated, they are either overstated or unsupported by evidence and as such, cannot be said to form the basis of a common interest between all fourteen respondents.

66. Nor do the balance of the common interests identified by the unions justify a finding of appropriateness in relation to the making of a SBA. As we set out earlier in this submission, the mere identification of common interests should not of themselves be accepted as sufficient to justify a conclusion that it is appropriate for employers with those common interests to be required to bargain together. Rather, consideration should be given to the *nature* of those interests, the relevance they have to the setting of employees' terms and conditions of employment, and the extent to which they relate to the employers' operational requirements and realities, in order to assess the extent to which they are relevant to the question of *appropriateness*.

67. More specifically; it is self-evident that a large number of employers may be said to have the following common interests:

    (a) They provide disability services;

    (b) The services they provide are funded by the NDIS; and

    (c) They are subject to a common regulatory framework.

68. It cannot be accepted that it would be appropriate for all employers with the above interests to bargain together. The same could be said of employers who have the above common interests and operate in the same geographic area.

[39] ACTU Submission at [50] – [51].

[40] ACTU Submission at [52].

Countless employers would potentially have those characteristics. It does not follow that it would be appropriate for them all to bargain together.

The Terms and Conditions of Employment

69. The AEU and HACSU argue that a common interest arises from the terms and conditions of employment in the enterprises of the respondent employers, because:

    (a) A number of the employer respondents currently have, or have previously had, a zombie agreement that applies to their workforce,[41] and

    (b) Those zombie agreements have *'the same or substantially the same'* terms and conditions as one another, including a number of entitlements that are above the level provided for in the SCHCDS, Award but with rates of pay aligned to the SCHADS Award.[42]

70. The unions' submissions in this respect are either unsupported by evidence or overstate the degree of commonality between the respondent employers and as such, fail to identify a level of commonality in the applicable terms and conditions of employment that might justify the appropriateness of making a SBA.

71. A number of observations may be made regarding the extent to which the zombie agreements evidence *'common'* terms and conditions of employment within the enterprises of the respondent employers.

72. *First*, the AEU has provided a bundle comprising of 14 zombie agreements, made to cover the 14 respondent employers[43]; however, it appears that three of those agreements no longer apply to the employer it is expressed to cover.

[41] HACSU Submission at [47](a) and (b); AEU Submission at [39](d).

[42] HACSU Submission at [47](a) – (c); AEU Submission at [39](d).

[43] 'AEU Zombie Bundle' filed by the AEU on 2 February 2024. See also Gillespie Statement at [32]. Whilst the Gillespie Statement appears to indicate there are 15 zombie agreements, this does not appear to be consistent with Table 1 set out under paragraph [32] of the Gillespie Statement, nor the contents of the AEU Zombie Bundle.

73. The AEU's assertion that '*[w]here a Relevant Employer <u>is, or was</u>, covered by an AEU Zombie Agreement, the employees performing day-service work <u>have the same</u> terms and conditions of employment'*[44] (emphasis added) is utterly inaccurate. Even where the terms and conditions in particular zombie agreements were identical, in circumstances where a zombie agreement still applies to one employer but has ceased to apply to another, it is incorrect to say that the employees of those employers '*have*' (present tense) the same terms and conditions in so far as one employer '*was*' (past tense) covered by a zombie agreement and the other '*is*' (present tense) still covered. In our submission, commonality in terms and conditions of employment should be assessed as those terms and conditions apply at the time the Application is being considered. In any event, as we explain below, the terms of all 14 zombie agreements are not the same.

74. *Second,* both the AEU and HACSU have identified points of commonality amongst the zombie agreements.[45] Ai Group makes the following observations in response:

    (a) Across the overall group of respondent employers, there appear to be three separate subsets of employers who have *'the same'* terms and conditions of employment. These include:

        (i) Employers to whom the SCHADS Award appears to apply (**SCHADS Award Employers**).

            There are three SCHADS Award Employers. They are:

            (A) Amicus Community Services Limited;

            (B) Dame Pattie Menzies Centre Inc; and

            (C) Mambourin Enterprises Ltd.

[44] AEU Submission at [39](d)

[45] AEU Submission at [39](d); Gillespie Statement at [39]; HACSU Submission at [47](b).

Each of the SCHCDS Award Employers previously had a zombie agreement that applied to their workforce, which is included in the '*AEU Zombie Bundle'* filed by the AEU on 2 February 2024.[46]

However, there is no evidence of any application having been made to extend the period of operation of these zombie agreements,[47] and the Gillespie Statement identifies the zombie agreements of the three SCHCDS Award Employers as having expired (which we understand to be intended to be a reference to the agreement having ceased to operate rather than nominally expired).[48]

None of the SCHCDS Award Employers appear on the Commission's database of enterprise agreements pending approval or made.[49]

As the applicants assert that the proposed SBA relates to employees of the respondent employers who perform work covered by the SCHCDS Award,[50] it follows that in the absence of any registered agreement operating so as to displace its application, the SCHADS Award appears to apply to these employers' workforces to whom the proposed authorisation relates.

[46] Being the *Amicus Group Disability Services Victoria (Part 1) Collective Agreement 2008*, *Dame Pattie Menzies Centre Disability Services Victoria (Part 1) Collective Agreement 2008*, and *Mambourin Enterprise Inc Disability Services Victoria (Part 1) Collective Agreement 2008*.

[47] The names of the three SCHADS Award Employers do not appear on the Commission's '*List of pre-2010 agreements – extended or pending extension application*' (available at https://www.fwc.gov.au/documents/agreements/resources/list-of-pre-2010-agreements-extended-or-pending-extension-application.xlsx) nor the Commission's list of zombie agreements extended past 7 December 2023 (available at https://www.fwc.gov.au/agreements-awards/enterprise-agreements/sunsetting-pre-2010-agreements/zombie-agreements-extended).

[48] Gillespie Statement at [32]. See Items 1, 8 and 12 of Table 1. Summary of zombie agreements. We assume the reference to the zombie agreements expiring is not a reference to 'nominal expiry date' given the statement at [33] of the Gillespie Statement that the nominal expiry date for each AEU zombie agreement was 30 June 2009; and further, given the operation of Item 20A(1) of Schedule 3 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).

[49] Based on searches undertaken using the employer named identified in Table 1 at [33] of the Gillespie Statement, in the Commission's 'Agreements in Progress' and 'Document Search' databases.

[50] AEU Submission at [3].

(ii) Employers to whom a zombie agreement negotiated in or around 2005 applies (**2005 Agreements**), the terms of which appear to be the same as one another (but not the same as the SCHCDS Award or the 2008 Agreements) (**2005 Agreement Employers**).

There are three 2005 Agreement Employers. They are:

(A) Milparinka Adult Training Unit Inc;[51]

(B) Mirridong Services Inc;[52] and

(C) Windarring Limited.[53]

(ii) Employers to whom a zombie agreement negotiated in or around 2008 applies (the **2008 Agreements**), the terms of which appear to be the same as one another (but not the same as the SCHADS Award or the 2005 Agreements) (**2008 Agreement Employers**).

There are seven 2008 Agreement Employers. They are:

(A) Asteria Services Inc[54]

(B) Aurora Support Services Inc;[55]

(C) Community Accessibility Inc;[56]

[51] The relevant zombie agreements is the *Milparinka Inc Disability Services Victoria (Part 1) Enterprise Agreement 2005*.

[52] The relevant zombie agreement is the *Mirridong Services Inc Disability Services Victoria (Part 1) Enterprise Agreement 2005.*

[53] The relevant zombie agreement is *Windarring ATSS Disability Services Victoria (Part 1) Enterprise Agreement 2005.*

[54] The relevant zombie agreement is the *Asteria Services Inc Disability Services Victoria (Part 1) Collective Agreement 2008.*

[55] The relevant zombie agreement is the *Whittlesea District ATSS Disability Services Vic Collective Agreement.*

[56] The relevant zombie agreement is the *Murray Valley Centre Disability Services Victoria (Part 1) Collective Agreement 2008.*

(D) George Gray Centre Inc;[57]

(E) Life Skills Victoria Inc;[58]

(F) McCallum Disability Services Inc;[59] and

(G) Noweyung Ltd.[60]

(iii) There is also one further employer – Distinctive Options – with an agreement in terms that are not the same as the 2005 Agreements or 2008 Agreements.[61]

(b) On our review, some of the terms and conditions asserted as being common to all of the zombie agreements only appear to be common across the 2008 Agreements and 2005 Agreements. This includes, for example, the entitlements to:

(i) Five hours' weekly non-contact time for full-time employees and pro-rata for part-time and casual employees[62]. The *Distinctive Options Day Services Collective Agreement 2006 – 2009* (**Distinctive Options Agreement**) does not contain a term dealing with non-contact time; and

(i) Four professional development and program development days for instructors to plan programs and their professional development[63]. The Distinctive Options Agreement provides Disability Day Services Practitioners with an entitlement to a minimum of three program

[57] The relevant zombie agreement is the *George Gray Centre Disability Services Victoria (Part 1) Collective Agreement 2008.*

[58] The relevant zombie agreement is the *Moe Life Skills Community Centre Disability Services (Part 1) Collective Agreement.*

[59] The relevant zombie agreement is the *McCallum Disability Services Disability Services Victoria (Part 1) Collective Agreement 2008.*

[60] The relevant zombie agreement is the *Noweyung Ltd Disability Services Victoria (Part 1) Collective Agreement 2008.*

[61] The relevant agreement is the *Distinctive Options Day Services Collective Agreement 2006 – 2009.*

[62] Gillespie Statement at [39](a).

[63] Gillespie Statement at [39](b).

development days per annum with such days being used for program development purposes.[64]

75. *Third*, in response to the assertion that the terms of the zombie agreements in relation to the shift allowance, first aid allowance and sleepover allowance are more generous than the SCHADS Award[65] we have not identified the existence of above-award entitlements to this effect in the relevant instruments.

76. *Lastly,* we include as **Attachment A** to this submission, analysis of the terms and conditions contained in the 2008 Agreements, 2005 Agreements, SCHCDS Award and Distinctive Options in relation to the following matters:

    (a) Ordinary hours of work (including span of ordinary hours, hours averaging periods, maximum shift length, maximum ordinary hours per week and arrangements for weekend work);

    (b) Minimum engagement periods;

    (c) Personal leave;

    (d) Annual leave;

    (e) Shift allowances;

    (f) First aid allowance;

    (g) Sleepover allowance;

    (h) Make-up pay, and

    (i) Redundancy pay.

77. As is evident from that analysis, there are differences across the four categories of instruments (and by extension, the four categories of respondent employers) such that there is no single, common standard.

[64] Clause 19.1 of the Distinctive Options Agreement.

[65] HACSU Submission at [8] and [47](c); Carter Statement at [24].

The Nature of the Respondents' Enterprises

78. The unions' case regarding the nature of the respondent employers' enterprises dose not rise beyond bare assertions that each of them:

    (a) Operate disability services businesses (to which common funding and regulatory arrangements apply), in which disability support workers are employed to provide those services;[66] and

    (b) Employ predominantly women.[67]

79. Neither HACSU nor the AEU have provided any evidence in relation to the nature of the respondent employers' operations. It is not addressed at all in the Carter Statement, whilst the Gillespie Statement simply states it is understood the relevant employers will provide evidence in the proceedings as to the nature of their enterprises.[68]

80. The nature of the enterprises of the respondent employers' is clearly a matter that is potentially relevant to the employment arrangements within those enterprises. Operational differences are likely to give rise to a need for different types of employment arrangements – for example, with respect to the way in which labour is utilised or required to be deployed.

81. On the basis of the material before it, the Commission cannot conclude that the respondent employers' operations are sufficiently similar so as to be satisfied that it is appropriate that they bargain together.

Section 243(1)(b)(iii): The Likely Number of Bargaining Representatives

82. The AEU notes that some (not all) of the employer respondents have legal representation in relation to these proceedings, [69] whilst others have not

[66] HACSU Submission at [47]; AEU Submission at [39](b) and (c).

[67] HACSU Submission at [49](iii). The AEU Submission at [42](b) and ACTU Submission at [63](c) make more generalised submissions concerning the highly feminised nature of the sector without specific reference to the workforce composition of the respondent employers.

[68] Gillespie Statement at [40].

[69] AEU Submission at [41]; Gillespie Statement at [16].

appointed a bargaining representative.[70] The fact that some of the respondent employers are represented in relation to proceedings relating to the SBA does not of itself establish that those employers will be represented during any bargaining process. Rather, on its face, it appears likely that the respondent employers will participate separately in the bargaining process; some with and others without representation. This may be contrasted to the circumstances of the matter considered in the *Long Day Care Decision*, in which a large number of respondents had appointed a small number of bargaining representatives and there was only one large employer who represented itself.[71]

83. In the *Long Day Care Decision*, the Full Bench noted that (amongst other things) *'any sameness or diversity of views amongst employees and employers concerning the prospect of multi-employer bargaining may (all) inform the assessment to be made*' for the purpose of s.243(1)(b)(iii).[72] Accordingly, in considering whether for the purpose of s.243(1)(b)(iii) the collective bargaining process will be '*manageable*', it is relevant to consider the likely complexion of the negotiation, where a majority (if not all) employers are opposed to bargaining together. This is a factor which weighs against the likely manageability of bargaining.

84. Finally, HACSU speculates that bargaining may proceed in an efficient manner if it were to follow a similar course with respect to the manner in which it has negotiated multi-enterprise agreements in the past. It does not, however, particularise any reasons why it may reasonably be anticipated to proceed in a similar fashion.[73]

Section 243(1)(b)(iv): Other Matters

85. For the purposes of s.243(1)(b)(iv), Ai Group submits that the attitude of the respondents towards the Application tells strongly against its making. To our

[70] Gillespie Statement at [16].

[71] *Long Day Care Decision* at [2].

[72] *Long Day Care Decision* at [36].

[73] HACSU Submission at [53] – [55].

knowledge, many if not most of the respondent employers do not support the Application.

86. In contrast to the circumstances in the *Long Day Care Decision*, there is no evidence in this matter that the respondent employers support the making of the SBA.[74]

87. Instead, the evidence and submissions put by the AEU and HACSU is to the effect that the response to correspondence sent by HACSU to thirteen of the respondent employers during the period July - August 2023 which (amongst other things) enquired '*whether there might be any interest in making a joint supported bargaining application*' was not positive:

> The Respondents either did not respond, advised they were not interested in bargaining or did not provide a firm commitment to want to explore bargaining further.[75]

88. The ACTU acknowledges that the presence of consent between the parties to a proposed SBA will weigh in favour of making it, but argues that the absence of consent amongst respondent employers should not weigh *against* a SBA.[76]

89. The tenor of the ACTU's submission is that the absence of consent should be treated as a neutral consideration. We disagree. In the *Long Day Care Decision*, the Full Bench noted that all of the specified employers supported the making of the authorisation sought by the applicants[77] and concluded that the absence of opposition to the SBA by any of the affected employers or employees was '*of significance*'.

90. In this matter, the corollary must be true. The absence of support is of significance.

[74] *Long Day Care Decision* at [2].

[75] HACSU Submission at [10]; Carter Statement at [24] – [25] and Annexure AC3.

[76] ACTU Submission at [76].

[77] *Long Day Care Decision* at [2].

ATTACHMENT A

Analysis of terms and conditions in industrial instruments applying to Respondent Employers

Respondent Employer Groups	**2008 Agreement**	**2005 Agreement**	***Social, Community, Home Care and Disability Services Industry Award 2010* (SCHADS Award) Employers**	**Distinctive Options Day Services Collective Agreement 2006 – 2009 (Distinctive Options Agreement)**
Respondent Employers in each Group	Asteria Services Inc. Aurora Support Services Inc Community Accessibility Inc George Gray Centre Inc Life Skills Victoria Inc McCallum Disability Services Inc Noweyung Ltd	Milparinka Adult Training Unit Inc Mirridong Services Inc Windarring Limited	Amicus Community Services Limited Dame Pattie Menzies Centre Inc Mambourin Enterprises Ltd	Distinctive Options
Entitlement **Ordinary hours of work (employees employed on or after the date of lodgement of the Agreement, or by agreement)**	**Ordinary hours and averaging period:** Ordinary hours are an average of 38 per week, averaged either fortnightly or 4-weekly. **Span of ordinary hours:** Ordinary hours are to be worked 7am - 10pm, Monday to Sunday, unless otherwise agreed between the employee and employer. **Maximum shift length:** The span of ordinary hours must not exceed 12 in any one day. **Maximum ordinary hours per week:**	**Ordinary hours and averaging period:** Ordinary hours are 152 per 4 week period. **Span of ordinary hours:** Ordinary hours are to be worked between 7:30am - 7:30pm, Monday to Friday, as either: • 20 days of not more than 7.6 consecutive hours each; or • a maximum of 9 consecutive hours in any 1 day with a maximum average of 38 hours per week over a 4 week period by providing RDOs; or • by mutual agreement, any other arrangement provided the length of any ordinary day shall not exceed 12	**Ordinary hours and averaging period:** Ordinary hours are 38 per week or an average of 38 per week worked either: • in a week of five days in shifts not exceeding eight hours each; • in a fortnight of 76 hours in 10 shifts not exceeding eight hours each; or • in a four week period of 152 hours to be worked as 19 shifts of eight hours each, subject to practicality. **Span of ordinary hours:**	**Ordinary hours and averaging period:** Ordinary hours are 152 per 4 week period. **Span of ordinary hours:** Ordinary hours are to be worked between 7am - 10pm, Monday to Friday, worked as either: • 20 days of not more than 7.6 consecutive hours each; or • a maximum of 9 consecutive hours in any 1 day with a maximum average of 38 hours per week over a 4 week period by providing RDOs; or • by mutual agreement, any other arrangement provided the length of any ordinary

	Ordinary hours must not exceed 48 hours in any 1 week. **Weekend work:** Where an employee works on a weekend, they receive 2 consecutive days off and the ordinary time worked on a weekend will be paid at time and one quarter.	consecutive hours and provided no more than 48 hours may be worked in any 1 week. OR Where it is proposed work be carried out on a weekend, 7:30am - 7:30pm on five out of seven days, by agreement, provided an employee receives 2 consecutive days off. **Weekend work:** Where an employee works on a weekend, they receive 2 consecutive days off and the ordinary time worked on a weekend will be paid at time and one quarter.	Day worker - 6am - 8pm, Monday to Sunday	day shall not exceed 12 consecutive hours and provided no more than 48 hours may be worked in any 1 week. OR Where it is proposed work be carried out on a weekend, 7am - 10pm on five out of seven days, by agreement, provided an employee receives 2 consecutive days off. **Weekend work:** Where an employee works on a weekend, they receive 2 consecutive days off and the ordinary time worked on a weekend will be paid at time and one quarter.
Ordinary hours of work (employees employed prior to the date of lodgement of the Agreement)	**Ordinary hours and averaging period:** Ordinary hours are 152 per 4 week period. **Span of ordinary hours:** Ordinary hours are to be worked between 7:30am - 7:30pm, Monday to Friday, as either: • 20 days of not more than 7.6 consecutive hours each; or • a maximum of 9 consecutive hours in any 1 day with a	The hours of work do not differ for employees based on when they commenced employment.	The hours of work do not differ for employees based on when they commenced employment.	**Ordinary hours and averaging period:** Not specified. **Span of ordinary hours:** Ordinary hours are to be worked between 7:30am - 7:30pm, Monday to Friday, to be worked as either: • 20 days of not more than 7.6 consecutive hours each; or • a maximum of 9 consecutive hours in any 1 day with a

	maximum average of 38 hours per week over a 4 week period by providing RDOs; or • by mutual agreement, any other arrangement provided the length of any ordinary day shall not exceed 12 consecutive hours and provided no more than 48 hours may be worked in any 1 week. OR Where it is proposed work be carried out on a weekend, 7:30am - 7:30pm on five out of seven days, by agreement, provided an employee receives 2 consecutive days off. **Weekend work:** Where an employee works on a weekend, they receive 2 consecutive days off and the ordinary time worked on a weekend will be paid at time and one quarter.			maximum average of 38 hours per week over a 4 week period by providing RDOs; or • by mutual agreement, any other arrangement provided the length of any ordinary day shall not exceed 12 consecutive hours and provided no more than 48 hours may be worked in any 1 week. OR Where it is proposed work be carried out on a weekend, 7:30am - 7:30pm on five out of seven days, by agreement, provided an employee receives 2 consecutive days off. **Weekend work:** Where an employee works on a weekend, they receive 2 consecutive days off and the ordinary time worked on a weekend will be paid at time and one quarter.
Minimum engagement periods	The 2008 Agreements do not provide minimum engagement periods for shifts.	The 2005 Agreements do not provide minimum engagement periods for shifts. The 2005 Agreements incorporate the Disability Services Award (Victoria) 1999	The award provides the following minimum engagement periods: **Clause 10.5:** part-time and casual employees must be paid for the following minimum	The minimum period of engagement for casual employees is 2 hours.

		(the Award) as at the time of certification of each agreement, and as varied after that date to give effect to a test case standard. The 2005 Agreements were approved on 26 August 2005, 28 October 2005 and 28 March 2006. A version of the Award incorporating all amendments up to and including 20 January 2006 has been located and reviewed. This version of the Award does not provide any minimum engagement periods.	number of hours for each shift or period of work in a broken shift: (a) SACS employees (except when undertaking disability services work) - 3 hours; and (b) all other employees - 2 hours. **Clause 25.7(e):** if an employee on sleepover is required to perform work during the sleepover period, they must be paid for the time worked with a minimum payment of 1 hour. **Clause 25.7(f):** an employer may roster an employee to perform work immediately before and/or immediately after the sleepover period, but must roster the employee or pay the employee for at least 4 hours' work for at least 1 of these periods of work. **Clause 25.10(c)** - Minimum payments for remote work: (A) where the employee is on call between 6am and 10pm—a minimum payment of 15 minutes' pay; (B) where the employee is on call between 10pm and 6am—a minimum payment of 30 minutes' pay;	

			(C) where the employee is not on call—a minimum payment of 1 hour's pay; (D) where the remote work involves participating in staff meetings or staff training remotely—a minimum payment of 1 hour's pay. (i) Any time worked continuously beyond the minimum payment period outlined above will be rounded up to the nearest 15 minutes and paid accordingly. (ii) Where multiple instances of remote work are performed on any day, separate minimum payments will be triggered for each instance of remote work performed, save that where multiple instances of remote work are performed within the applicable minimum payment period, only 1 minimum payment period is triggered. **Clause 28.4**: if recalled to work overtime, a minimum of 2 hours' work at the appropriate rate for each time recalled.	

Personal leave	Full-time employees are entitled to 15 days of personal in each year of service (pro-rata for part-time employees). Employees are entitled to use up to 10 days of "carer's leave" in each year of service. However, this "comes off" their personal leave entitlement. It is not stated that the carer's leave entitlement is pro-rata for part-time employees. However, because taking carer's leave reduces an employee's personal leave entitlement, an employee could not take carer's leave unless they have accrued sufficient personal leave (which accrues pro-rata for part-time employees)	Full-time employees are entitled to 15 days of personal in each year of service (pro-rata for part-time employees). Employees are entitled to use up to 5 days of "carer's leave" in each year of service. However, this is deducted from the employee's personal leave entitlement. The 2005 Agreements do not specify that the carer's leave entitlement is pro-rata for part-time employees.	The award provides personal/carer's leave in accordance with the National Employment Standards in the *Fair Work Act 2009* (Cth).	Full-time employees are entitled to 15 days of personal in each year of service (pro-rata for part-time employees). Employees are entitled to use up to 10 days of "carer's leave" in each year of service. However, this "comes off" their personal leave entitlement. It is not stated that the carer's leave entitlement is pro-rata for part-time employees.
Annual leave	Permanent full-time employees are entitled to 6 weeks annual leave per annum (pro-rata for permanent part-time employees). An employee who, during the year, is rostered to work ordinary hours on 30 or more weekends, is entitled to an additional week's annual leave (pro-rata for permanent part-time employees).	Permanent full-time employees are entitled to 6 weeks annual leave per annum (pro-rata for permanent part-time employees). An employee who undertakes work on 30 or more weekends in any 1 year, as part of their ordinary weekly hours of work, is entitled to an additional week's annual leave (pro-rata for permanent part-time employees).	The award provides annual leave in accordance with the National Employment Standards in the *Fair Work Act 2009* (Cth). In addition, the award provides that an employee who works either of the following during the yearly period in respect of which their annual leave accrues, is entitled to an additional week's annual leave on the same terms and conditions:	Permanent full-time employees are entitled to 6 weeks annual leave per annum (pro-rata for permanent part-time employees).

			• for more than 4 ordinary hours on 10 or more weekends; or • at least 8 24-hour care shifts in accordance with clause 25.8 of the award.	
Shift allowances	The 2008 Agreements do not contain shift allowances. While the enterprise agreements refer to shift allowances, they do not state the amount of any such shift allowance, or when it is payable. For completeness, the enterprise agreements expressly operate to the exclusion of all awards.	The 2005 Agreements do not provide any shift allowances. The 2005 Agreements incorporate the Disability Services Award (Victoria) 1999 (the Award) as at the time of certification of each agreement, and as varied after that date to give effect to a test case standard. The 2005 Agreements were approved on 26 August 2005, 28 October 2005 and 28 March 2006. A version of the Award incorporating all amendments up to and including 20 January 2006 has been located and reviewed. This version of the Award does not provide for any shift allowances.	Afternoon shift (any shift which finishes after 8pm and at or before 12 midnight Monday to Friday): 12.5% of the employee's ordinary rate of pay for the whole of such shift. Night shift (any shift which finishes after 12 midnight or commences before 6am Monday to Friday): - 15% of the employee's ordinary rate of pay for the whole of such shift. Public holiday shift (any time worked between midnight on the night prior to the public holiday and midnight of the public holiday): 150% of the employee's ordinary rate of pay for that part of such shift which is on the public holiday.	The Distinctive Options Agreement does not provide any shift allowances. While the Distinctive Options Agreement refers to shift allowances, it does not state the amount of any such shift allowance, or when it is payable. For completeness, while the Distinctive Options Agreement incorporates some provisions of an award by reference (although the award it refers to is not defined), it does not incorporate any provision that provides a shift allowance.

Is the shift penalty cumulative with other penalties (in particular, weekend penalties)?	The 2008 Agreements do not provide any shift allowances.	The 2005 Agreements do not provide any shift allowance.	The Saturday and Sunday penalties are in substitution for and not cumulative upon the afternoon shift, night shift, and public holiday shift, penalties.	The Distinctive Options Agreement does not provide any shift allowances.
First Aid allowance	The 2008 Agreements do not provide a first aid allowance. For completeness, the enterprise agreements expressly operate to the exclusion of all awards.	The 2005 Agreements do not provide a first aid allowance. The enterprise agreements incorporate the Disability Services Award (Victoria) 1999 (the Award) as at the time of certification of each agreement, and as varied after that date to give effect to a test case standard. The 2005 Agreements were approved on 26 August 2005, 28 October 2005 and 28 March 2006. A version of the Award incorporating all amendments up to and including 20 January 2006 has been located and reviewed. This version of the Award does not provide for first aid allowance.	For permanent full-time employees, the award provides a first aid allowance of 1.67% of the standard rate (as defined) per week ($19.04 per week) (pro-rate for permanent part-time and casual employees).	The Distinctive Options Agreement does not provide a first aid allowance. For completeness, while the Distinctive Options Agreement incorporates some provisions of an award by reference (although the award it refers to is not defined), it does not incorporate any provision that provides a first aid allowance.
Sleepover allowance	The 2008 Agreements provide for time-off-in-lieu for authorised overnight stays in independent living houses. The 2008 Agreements do not provide a sleepover allowance, and for completeness, are	The 2005 Agreements do not provide a sleepover allowance. The 2005 Agreements incorporate the Disability Services Award (Victoria) 1999 (the Award) as at the time of certification of each agreement, and as varied after that date to	The award provides a sleepover allowance to employees of 4.9% of the standard rate (as defined) for each night on which they sleep over (i.e. $55.89 per night).	The Distinctive Options Agreement does not provide a sleepover allowance. For completeness, while the Distinctive Options Agreement incorporates some provisions of an award by reference (although the award it refers to is not

	expressed as operating to the exclusion of all awards.	give effect to a test case standard. The 2005 Agreements were approved on 26 August 2005, 28 October 2005 and 28 March 2006. A version of the Award incorporating all amendments up to and including 20 January 2006 has been located and reviewed. This version of the Award does not provide for a sleepover allowance.		defined), it does not incorporate any provision that provides a sleepover allowance.
Make-up pay	The 2008 Agreements provide an entitlement to accident make-up pay where an employee becomes entitled to weekly compensation payments pursuant to the Accident Compensation Act 1985 (Vic).	The 2005 Agreements provide an entitlement to accident make-up pay where an employee becomes entitled to weekly compensation payments pursuant to the Accident Compensation Act 1985 (Vic).	The award does not provide make-up (accident) pay.	The Distinctive Options Agreement provides an entitlement to accident make-up pay where an employee becomes entitled to weekly compensation payments pursuant to the Accident Compensation Act 1985 (Vic). The maximum period of accident pay to be made for any one injury is 52 weeks. Accident pay does not apply for an injury during the first 5 normal working days of incapacity, or to any incapacity occurring during the first 2 weeks of employment (unless such incapacity continues beyond the first 2 weeks).

Amount of redundancy pay (other than for small business employers)	The 2008 Agreements provide an amount of redundancy pay that is consistent with the National Employment Standards in the *Fair Work Act 2009* (Cth).	The 2005 Agreements provide an amount of redundancy pay that is consistent with the National Employment Standards in the *Fair Work Act 2009* (Cth).	The award provides an amount of redundancy pay that is consistent with the National Employment Standards in the *Fair Work Act 2009* (Cth).	The Distinctive Options Agreement provides redundancy pay to an employee who is terminated by reason of redundancy, as follows, in respect of their continuous service: Less than 1 year - NIL 1 year and less than 2 years - 4 weeks' pay 2 years and less than 3 years - 6 weeks' pay 3 years and less than 4 years - 7 weeks' pay 4 years and less than 5 years - 8 weeks' pay 5 years and less than 6 years - 10 weeks' pay 6 years and less than 7 years - 11 weeks' pay 7 years and less than 8 years - 13 weeks' pay 8 years and more - 14 weeks' pay

Amount of redundancy pay (small business employer)	A small business employer is defined as an employer who employs fewer than 15 employees. The 2008 Agreements provide redundancy pay to an employee of a small business employer who is terminated by reason of redundancy, as follows, in respect of their continuous service: Less than 1 year - NIL 1 year and less than 2 years - 4 weeks 2 years and less than 3 years - 6 weeks 3 years and less than 4 years - 7 weeks 4 years and over - 8 weeks	A small business employer is defined as an employer who employs fewer than 15 employees. The 2005 Agreements provide redundancy pay to an employee of a small business employer who is terminated by reason of redundancy, as follows, in respect of their continuous service: Less than 1 year - NIL 1 year and less than 2 years - 4 weeks 2 years and less than 3 years - 6 weeks 3 years and less than 4 years - 7 weeks 4 years and over - 8 weeks	The award provides an amount of redundancy pay that is consistent with the National Employment Standards in the *Fair Work Act 2009* (Cth). The obligation to pay redundancy pay does not apply to small business employers (with certain exemptions).	A small business employer is defined as an employer who employs fewer than 15 employees. However, the Distinctive Options Agreement does not exclude an employee from eligibility to a redundancy payment where they are employed by a small business employer. The significance of the definition of "small employer" is not apparent. The Distinctive Options Agreement provides redundancy pay to an employee who is terminated by reason of redundancy, as follows, in respect of their continuous service: Less than 1 year - NIL 1 year and less than 2 years - 4 weeks' pay 2 years and less than 3 years - 6 weeks' pay 3 years and less than 4 years - 7 weeks' pay 4 years and less than 5 years - 8 weeks' pay

				5 years and less than 6 years - 10 weeks' pay 6 years and less than 7 years - 11 weeks' pay 7 years and less than 8 years - 13 weeks' pay 8 years and more - 14 weeks' pay

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak national employer organisation representing traditional, innovative and emerging industry sectors. We have been acting on behalf of businesses across Australia for 150 years. Ai Group and partner organisations represent the interests of more than 60,000 businesses employing more than 1 million staff. Our membership includes businesses of all sizes, from large international companies operating in Australia and iconic Australian brands to family-run SMEs. Our members operate across a wide cross-section of the Australian economy and are linked to the broader economy through national and international supply chains.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

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