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:

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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]

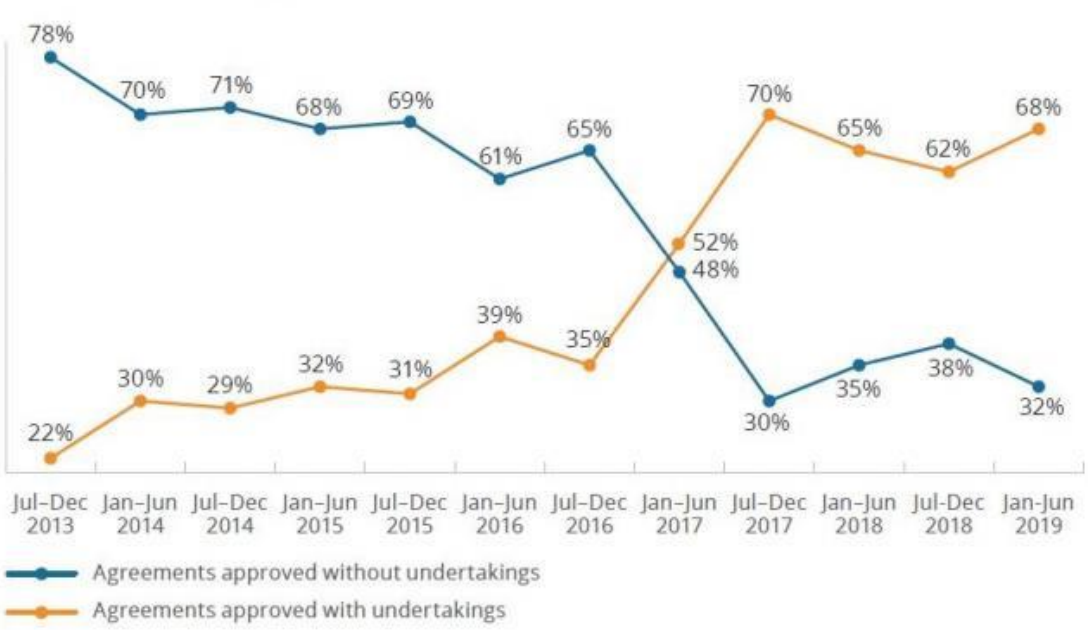
- 2,293 agreements were approved without undertakings.[17]

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

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(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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