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Fair Work Amendment (Pay Protection) Bill 2017

Senate Education and Employment Legislation Committee

1 May 2017

Australian
Chamber of Commerce
and Industry

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1 Introduction

1. The Australian Chamber thanks the Senate Education and Employment Committee (Committee) for the opportunity to make this submission in relation to its inquiry into the *Fair Work Amendment (Pay Protection) Bill 2017* (Cth)(Bill).

1.1 The decline in enterprise bargaining

2. This inquiry takes place in the context of a regulatory environment that is not only failing to adequately support and encourage enterprise bargaining, but has become hostile to bargaining. This is evidenced by the growing number of people who are instead deriving their terms and conditions of employment from modern awards, without enterprise agreements.

3. This regrettable trend towards increased award reliance and recentralisation is at odds with the both the needs of businesses who require capacity to tailor terms and conditions of employment to suit the circumstances of the enterprise and enhance productivity as well as the needs of employees who will be unable to enjoy the flexibility and benefits that enterprise bargaining can deliver. This is directly at odds with how our bargaining system is supposed to work.

4. The Australian Chamber submits that the Bill before the Committee will provide further disincentive to bargain and enter into enterprise agreements in Australia.

5. Enterprise bargaining has been a key feature of Australia's workplace relations system since the reforms introduced by the Keating Government in the 1990s. The current statutory framework is expressly intended to "encourage collective bargaining" and sets out complex and prescriptive requirements regarding how bargaining and agreement making must occur.

6. The *Fair Work Act 2009* (Cth)(FW Act) requires that any agreement be assessed against a test requiring that employees covered by the enterprise agreement be "better off overall" compared to the relevant modern award and also requires that agreement not contravene the National Employment Standards. A body of decisions has emerged which clearly indicate this is a highly complex assessment that gives rise to considerable uncertainty in the bargaining process. The case law also suggests that changes to the statutory tests for both bargaining and agreement approval are required to ensure it is administered in a more practical manner.

1.2 What the Bill does

7. The primary changes proposed by the Bill are set out at items 6 and 7. In summary, in the case of an employee covered by a modern award, item 6 of the Bill would require that a base rate of pay payable to an employee under an enterprise agreement not be less than the 'full rate of pay' instead of the 'base rate of pay', with 'full rate of pay' defined at section 18 of the FW Act to include:

   a. incentive-based payments and bonuses;

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b. loadings;

c. monetary allowances;

d. overtime or penalty rates;

e. any other separately identifiable amounts.

8. Item 7 of the Bill proposes to expressly require that in the case of an award-free employee, an enterprise agreement rate not be less than the national minimum wage rate or a special national minimum wage (as currently provided at section 206(3) of the FW Act) plus the casual loading that the employer would be required to pay the employee under the national minimum wage order.

9. Of note, the Explanatory Memorandum to the FW Act does contemplate that non-monetary benefits could be applied in an assessment of whether employee is better off overall and this acknowledges that some people may value access to flexibility over a higher rate of pay. In this respect the Bill (particularly item 6) is highly problematic

10. The Bill would further complicate enterprise bargaining and have the practical effect of requiring an employer to entrench award conditions in bargaining, constraining innovative approaches to bargaining and preventing employees from enjoying non-monetary benefits of value to them in exchange for award conditions that may be of lesser relevance and value to them.

11. It would also be at odds with the lived experience of bargaining and exchanges that have seen millions of working Australians often with the support of unions, assess and make their own judgements on whether they would be better or worse off from a proposed package of terms and conditions of employment, with the protection of tightly regulated voting and statutory tests guarding against overall disadvantage.

12. The Bill is also at odds with the objects of enterprise bargaining as identified by the reform leaders that conceived it and with the bipartisan consensus across more than 20 years that bargaining that should be encouraged, and be the mechanism to deliver productivity and competitiveness and outcomes in line with the needs of the enterprise and employees within it.

Recommendation:

The Committee recommend against passage of the *Fair Work Amendment (Pay Protection) Bill 2017 (*Cth) and instead instigate a **new inquiry** into the decline in enterprise agreement coverage, the incentives and disincentives to enter into enterprise bargaining under *the Fair Work Act 2009* (Cth), and into key areas where legislative change may be needed to ensure that agreement making can again play the role it is designed to play in Australia's workplace relations system.

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2 The foundations of enterprise bargaining in Australia

13. The system of workplace relations in Australia that developed throughout the 20th century was characterised by institutionalised minimum standard setting, compulsory conciliation and arbitration and considerable third party influence and intervention in the form of industrial tribunals, courts and industrial organisations. This was a very different trajectory from that of Australia's fellow developed economies, save for that in New Zealand.

14. However a necessary and quite fundamental set of reforms commenced in the 1980s when policy makers began to recognise that the global economy, greater mobility of capital and labour and increasing competition demanded a shift away from the centrally controlled industrial relations framework if we were to maintain high standards of living. The focus shifted toward the creation of a system where decisions about wages and conditions of employment could be increasingly made in the workplace where the mutual interests of employers and employees would be paramount, and awards would play a safety net or protective role, underpinning a system with bargaining and agreements at its core.

15. Quite fundamental to this was the reform of tariffs and Australia's commitments to freer trade. Without artificial trade, financial and currency controls, the previous highly centralised approach to regulating work had started to harm Australia, and it had started to fail with wage breakouts.

16. There was a growing recognition by policy makers of the importance of ensuring greater international competitiveness, and that linking wages and improvements in conditions of employment to increases in workplace productivity, through and enterprise bargaining was the tool for achieving this.

17. Enterprise bargaining at the federal level derives its genesis from the *Industrial Relations Act 1988* via recognition of consent awards and certified agreements. The Keating Government's passage of the *Industrial Relations Legislation Amendment Act 1992* served to further facilitate enterprise level certified agreements made by unions and employers.

18. This was followed by the Keating Government's *Industrial Relations Reform Act 1993* which introduced a system of direct bargaining which could displace award regulation for the first time through certified agreements and enterprise flexibility agreements. It's passage amended the objects of the principal *Industrial Relations Act 1988* by providing that Australia's key national industrial relations legislation was:

> '*to provide a framework for the prevention and settlement of industrial disputes which promotes the economic prosperity and welfare of the people of Australia' through objects which included* ***'encouraging and maintaining the making of agreements, between the parties involved in industrial relations, to determine matters pertaining to the relationship between employers and employees, particularly at the workplace or enterprise level'***[1] (emphasis added).

[1] *Industrial Relations Act 1988* (Cth), s. 3(a).

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19. The second reading speech to the *Industrial Relations Reform Act 1993* also captured the Keating Government's desire to move to "a system based primarily on bargaining at the workplace, with much less reliance on arbitration at the apex". Under this system agreements could reduce award entitlements if considering employees' terms and conditions as a whole the reduction was not contrary to the public interest.

20. The very lifeblood driving the first wave of bargaining in the 1990s was identifying outdated entitlements and practices and eliminating them through trading off for higher wages and for alternative, more relevant terms and conditions.

21. The Keating Government reforms represented a decisive step towards placing bargaining at the enterprise level at the forefront of Australian industrial relations, and making bargaining the driving force in how Australians were to work. The philosophy underpinning these reforms, which still resonates today and should continue to drive our system, was encapsulated by the then Prime Minister in April 1993 when he described the features of the new system he was aiming for:

> *Let me describe the model of industrial relations we are working towards.*
>
> *It is a model which places primary emphasis on bargaining at the workplace level within a framework of minimum standards provided by arbitral tribunals.*
>
> *It is a model under which compulsorily arbitrated awards and arbitrated wage increases would be there only as a safety net.*
>
> *The safety net would not be intended to prescribe the actual conditions of work of most employees, but only to catch those unable to make workplace agreements with employers.*
>
> *Over time the safety net would inevitably become simpler. We would have fewer awards with fewer clauses.*
>
> *For most employees and most businesses, wages and conditions of work would be determined by agreements worked out by the employer, the employees and their union.*
>
> *These agreements would predominately be based on improving the productive performance of enterprises, because both employers and employees are coming to understand that only productivity improvements can guarantee sustainable real wage increases.*
>
> *We would have an Industrial Relations Commission which helped employers and employees reach enterprise bargains, which kept the safety net in good repair, which advised the Government and the parties of emerging difficulties and possible improvements, but which would rarely have to use its compulsory arbitral powers. Instead, parties would be expected to bargain in good faith.*
>
> *We would have sufficient harmony between State and federal industrial relations systems to ensure that they all head in the same direction and used the same general rules.*

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That is the goal we are working towards.[2]

22. Post-implementation of the Keating Government reforms, the OECD concluded that "increased flexibility of working time, making wages and labour costs more flexible and reforming employment security provisions"[3] were essential policy components of a micro-economic reform agenda capable of delivering sustained growth in employment and living standards in domestic economies.

23. The subsequent Government's *Workplace Relations Act 1996* (WR Act) progressed the change agenda and comprehensively established a framework primarily focussed on collective and individual workplace agreements and away from centrally determined outcomes. The original objects of the WR Act, even though the subject of compromise, illustrated the shift:

> *The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:*
>
> *(a) encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market; and*
>
> *(b) ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level; and*
>
> *(c) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for by this Act; and*
>
> *(d) providing the means:*
>
> *(i) for wages and conditions of employment to be determined as far as possible by the agreement of employers and employees at the workplace or enterprise level; and*
>
> *(ii) to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment; and*
>
> *(e) providing a framework of rights and responsibilities for employers and employees, and their organisations, which supports fair and effective agreement-making and ensures that they abide by awards and agreements applying to them; and*

[2] Prime Minister Keating, (1993) Speech to the Institute of Company Directors, Melbourne, 21 April 1993.
[3] *OECD (1994) OECD Jobs Study, (recommendations 4,5 and 6 of OECD Jobs Study, 1994 OECD Ministerial Council).*

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(f) ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association; and

(g) ensuring that employee and employer organisations registered under this Act are representative of and accountable to their members, and are able to operate effectively; and

(h) enabling the Commission to prevent and settle industrial disputes as far as possible by conciliation and, where appropriate and within specified limits, by arbitration; and

(i) assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers; and

(j) respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and

(k) assisting in giving effect to Australia's international obligations in relation to labour standards.

24. It is critical to understand the commonality and consistency between the Keating / Brereton and Howard / Reith (with the Australian Democrats) reforms of this time. Putting to one side AWAs and changes to areas such as union entry, for collective agreement making, a straight line can be drawn between the 1993 and 1996 reforms.

25. The OECD endorsed the 1993 and 1996 policy changes, and called for further changes:

> *The benefits of a comprehensive approach to structural reform have become apparent in the pick-up of Australia's multi-factor productivity growth…better management practices and work arrangements have improved capital productivity…*
>
> *The flexibility of the labour market has increased by the move towards a more decentralised system of setting wages and other conditions of employment, but there is a need for more effective decentralisation…The reform process needs to be completed in the light of Australia's level of structural unemployment and the need to sustain the improvement in productivity performance.*[4]

26. The system of awards in Australia is the legacy of an industrial relations system focussed on centralised, arbitrated outcomes. It was a system shared only by New Zealand who abandoned it with the introduction of the *Employment Contracts Act 1991* following economic crisis which was to play role in improving in both employment outcomes and

[4] OECD (2001) Economic Survey Australia 2001

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New Zealand's competitive position. Kasper summed up effects of the *Employment Contracts Act 1991* and related reforms in New Zealand a few years post-implementation:

> *Previously antagonistic industrial relations have given way to cooperation between employers and workers, flexible adjustment to competitive conditions and an enhanced competitiveness of New Zealand workplaces and firms in a rapidly changing, internationally open economy…The main effect of the labour reforms has been to assist in making the supply-side of the New Zealand economy fairly price elastic…*
>
> *Employers and most employees have welcomed the freedoms under the new contracts system. In many sectors, productivity has risen steeply, reflecting more rational work practices. Managers are now able to effectively manage the human resources that firms hire. Real wages have risen, but slowly, reflecting productivity gains. Union membership and the number of union officials have fallen, as many workers now use bargaining agents to negotiate employment contracts. The frequency of strikes and lockouts has fallen considerably.*
>
> *The ECA and the other reforms have created a "Kiwi job-creation machine", which has increased aggregated employment by over 10 percent during the long upswing of 1991-95. It has nearly halved the overall unemployment rate within less than two years – in contrast to earlier upturns in the New Zealand cycle and the pattern in Australia. …Labour market deregulation has also increased the market premia for skills and reduced transaction costs in operating about markets.*
>
> *Most observers predict a period of sustained, inflation free-growth and further drops in unemployment …as New Zealand – despite strengthening currency – is now seen as an internationally highly competitive exporter and an attractive location to internationally mobile capital and enterprise.*[5]

27. It is clear that moves away from centralised labour regulation during this period contributed to a range of positive outcomes including growth in productivity, lower inflation, growth in real wages, less industrial disputation, and improved employment outcomes but it was clear that the reform trajectory needed to be continued in Australia.

28. A significant feature of the structural changes in Australia in 1993 and in 1996 was that they were taken by Australian governments of different political persuasions. Despite the visceral and tribal politicisation of industrial relations as an area of Government policy (which has only become worse since the 1990s) there was bipartisan support (at least between governments) for the new direction in Australian workplace relations which was to persist for some time. As was noted in the June 2002 Report on Agreement Making in Australia under the Workplace Relations Act 1996:

> *For more than a decade now there has been widespread support for the policy of moving Australia's formal workplace relations system away from its traditional focus on the centralised determination of wages and conditions of employment by*

[5] Kasper, W E "*Liberating labour: The New Zealand Employment Contracts Act*", Kiel Working Papers, No. 694, (1995), pp. 1-2.

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> *industrial tribunals – through a system of industry and occupational awards – to agreements reached directly at the enterprise and workplace level.*
>
> *Reforms to the wage setting arrangements began in the late 1980s with a growing recognition among Australians of the importance of ensuring greater international competitiveness by linking wages and improvements in the conditions of employment to increases in productivity, skill and flexibility at the workplace level…*[6]

29. A decade had passed since the reform process commenced under the Keating Government, and there was still agreement between the major political parties on the primacy of enterprise bargaining, and its importance for both driving living standards and increasing competitiveness. The need to make enterprise based agreements a central part of the system has been endorsed by both major political parties, major employer organisations, the ACTU, and the majority of individual unions (although different approaches have been advocated).[7] As was noted in Australian Chamber's blueprint for the Australian Workplace Relations System, '*Modern Workplace: Modern Futu*re', the challenge for Australia was to create a workplace relations framework where decisions about wages, conditions of employment and the resolution of disputes could be made in the workplace having regard to the circumstances and mutual interests of the actual employers and employees.[8]

30. It was and remains the Australian Chamber's view that such a system is the most effective way to lift economic performance and living standards in conjunction with each other, not at each other's expense. This has only been confirmed and made more urgent by the experiences of subsequent years, and the decline Australia's enterprise bargaining system now faces.

31. Only because key stakeholders held similar views regarding the direction in which the industrial relations system had to head, was the transition towards greater enterprise focus able to progress during the 1990's. This shift was in line with policies facilitating a move toward an open and competitive market and there was recognition that a decentralised labour market regulation is in the national interest. Referring to the reform of the 1990s the then Shadow Minister for Industrial Relations stated:

> *These reforms were based upon partnerships being formed in the workplace. Perhaps for the first time in Australia's industrial history the focus became on partnerships to grow the cake, not simply adversaries fighting over how to divide it.*[9]

32. However the political dynamic changed following the *Workplace Relations Amendment (Work Choices) Act 2005*, and arguably prior to this as various workplace reform bills stalled in the then Senate.

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[6] Department of Employment and Workplace Relations and the Office of the Employment Advocate, Report on Agreement Making in Australian under the Workplace Relations Act 1996, June 2002.
[7] Department of Employment and Workplace Relations and the Office of the Employment Advocate (2002) Report on Agreement Making in Australia under the Workplace Relations Act 1996) , June 2002.
[8] ACCI, "Modern Workplace: Modern Future – A Blueprint for the Australia Workplace Relations System 2002-2010", 2002
[9] Shadow Minister for Industrial Relations, Robert McClelland (2002) Speech to Industrial Relations Society of New South Wales, 17 May 2002.

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33. Adversarialism again dominated the system and the policy overcorrection of the incoming Government through the introduction of the FW Act threatened to arrest the advancement of the policy objectives agreed from the 1990s.

34. The OECD's 2008 Economic Survey of Australia cautioned:

> *The simplification and gradual decentralisation of industrial relations since the early 1990s has made the economy more resilient. But the pursuit of reforms towards a greater individualisation of labour relations, following the WorkChoices Act in March 2006, did stir much controversy, because of equity concerns. […] While equity concerns need to be addressed, care should be taken not to undermine labour market flexibility. To maintain a close link between productivity gains and wages, the future organisation of collective bargaining must remain within the company framework, as recognised by the government. Harmonising the system of industrial relations across the states is an important goal, but the result must not be alignment on the most restrictive standards.*[10]

35. However, and this is a critical point, the FW Act did not change the nominal place enterprise bargaining is to play under the Australian workplace relations system, nor the bipartisan commitment to place enterprise bargaining at the heart of workplace relations, driving outcomes for employers and employees.

36. Employers dispute the effectiveness of the FW Act in achieving the aims set out by Parliament, and consider that a range of the settings in the legislation are inconsistent with how our workplace relations system should operate.

37. However, the nominal role for agreement making / bargaining remains essentially unchanged, and essentially as it was developed by the Keating Government 25 years ago. It is the performance of the system that is the challenge.

38. Australia's current productivity growth is falling well short of the sustained, stronger productivity growth of previous decades. The Productivity Commission noted that since 2004 multi-factor productivity has stalled and that low wage growth and falling fixed capital investment suggest that a weak income outlook may persist past the decline in Australia's terms of trade.[11] Even returning to the much higher labour productivity growth of the 1990s would not be enough to maintain the per capita income growth Australia enjoyed in the 2000s given the drag from the declining terms of trade and ageing population over the next decade. The Productivity Commission has noted that while there are still skills available for today's work environment that can be drawn down on for some time, "failure to develop polices most relevant to future productivity – and its outcome, higher income – will burden future generations with the eventual adjustment cost".[12] A failure to adopt productivity enhancing policies now risks long run effects for Australia's prosperity, for the living standards of employees, and for what we can achieve as a community into the future.

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[10] OECD, "Economic Survey of Australia", *Policy Brief,* 2008, p. 8.
[11] Productivity Commission, 'Increasing Australia's future prosperity'. November 2016, p. 1.
[12] Productivity Commission, 'Increasing Australia's future prosperity'. November 2016, p. 1.

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39. There remains a clear case for the reduction in the influence of awards and tribunals and to encourage workplace based bargaining with wages and conditions linked to productivity as was intended by the reforms of the 1990s. This was a part of the vision of former Prime Minister Paul Keating in shifting the focus toward enterprise bargaining, stating:

> *Over time the safety net would inevitably become simpler. We would have fewer awards with fewer clauses.*[13]

40. However against the backdrop of Australia's waning productivity and increasing unemployment, aspects of the system are impeding the transition to a workplace based system. Bargaining is going backwards, which should signal significant concern for our policymakers. This is evident from the current decline in enterprise bargaining and the move toward recentralisation of the labour market is, in the Australian Chamber's view, a move in the wrong direction. The Bill will have the practical effect of entrenching and exacerbating an already regrettable shift.

41. The Australian Chamber is also gravely concerned about the politicisation of workplace relations in the current context. Unfortunately the finding of common ground in more recent instances of workplace relations reform has been very much the exception rather than the rule – and this has come as the need to do better has become ever more acute.

42. There is a need to re-endorse in principle consensus about the direction of policy settings to ensure their relevance to modern workplaces and to meet the productivity and labour market challenges that confront Australia, and then to more maturely and constructively engage with how the system can be improved.

43. The important reforms of the 1990s would unlikely have been achieved or been able to endure without both sides of politics agreeing that such a movement was required, and we need policymakers to return to the spirit and commitment of the 1990s in combatting the problems we face today.

[13] Prime Minister Paul Keating, (1993) Speech to the Institute of Company Directors, Melbourne, 21 April 1993.

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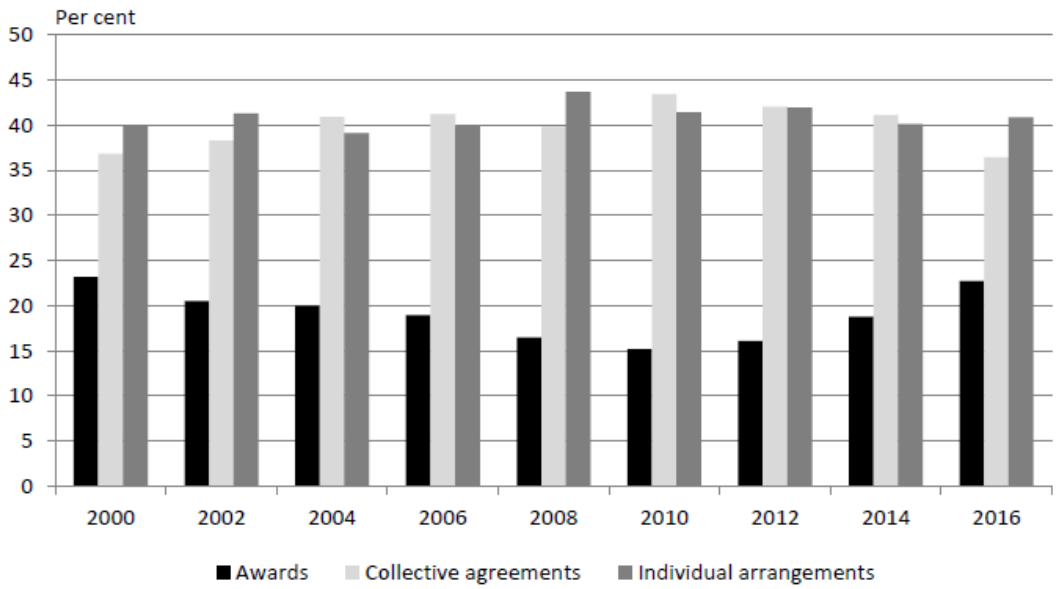
3 The worrying state of bargaining in Australia

44. The need to encourage collective bargaining is reflected in the FW Act's general objects and modern awards objective. However data on method of pay setting instead demonstrates a sustained increase in award reliance and a decrease in the percentage of employees covered by collective agreements since 2010.

Chart: Method of setting pay



Note: As defined by the ABS, individual arrangements include registered or unregistered individual agreements and owner managers of incorporated businesses.

Source: Fair Work Commission Statistical Report drawing from ABS, *Employee Earnings and Hours, Australia,* various, Catalogue No. 6306.0.

Table: Award reliance

	2008	2010	2012	2014	2016
All industries	16.5	15.2	16.1	18.8	24.5
Accommodation and food services	50.3	45.2	44.8	42.8	42.7
Administrative and support services	33.9	31.4	29	37.3	42.1
Retail trade	28.9	22.3	25.6	28.5	34.5
Health care and social assistance	17.2	17.1	19	22.3	28.8
Rental, hiring and real estate services	20.2	22.8	20.9	22.1	27.2
Arts and recreation services	14.2	15.1	19.7	22	26.2
Education and training	8.4	5.1	6.8	5.1	26
Construction	9.1	10	10.6	13.7	19.7
Public administration and safety	3.6	1.9	6.9	12.8	18.1
Manufacturing	12.2	14.6	11.3	15.7	17.7
Wholesale trade	9	10.9	8.1	11.9	16.8
Transport, postal and warehousing	8.3	8	7.3	10.9	13.4

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	2008	2010	2012	2014	2016
Professional, scientific and technical services	5.4	4.2	6	9.9	9.3
Electricity, gas, water and waste services	5.4	3.1	4.3	6.9	6.5
Information media and telecommunications	5.6	5.7	5.7	5.2	5.5
Mining	1.2	1.9	0.6	0.8	n/a
Financial and insurance services	2.2	2.1	4.7	5	n/a
Other services	25.4	27.2	24.6	25.1	34.3

Source: ABS, *Employee Earnings and Hours, Australia,* various, Catalogue No. 6306.0.

45. It is not a coincidence that this worrying trend has emerged post-commencement of the FW Act. The FW Act introduced processes and steps that an employer must follow to make an enterprise agreement that are highly prescriptive. The good faith bargaining rules prescribe requirements to attend and participate in meetings at reasonable times; disclose relevant information (other than confidential or commercially sensitive information) in a timely manner; respond to proposals made by other bargaining representatives in a timely manner; give genuine consideration to the proposals of other bargaining representatives and provide reasons for responses to those proposals have already been considered above. This in itself creates a paperwork burden for businesses as they carefully document the discussions and provide carefully considered written responses to claims.

46. However, in addition to these rules that regulate negotiations, there are a number of prescriptive administrative requirements including the requirement:

    a. for an employer to provide employees with notification of their bargaining representation rights as soon as practicable and no later than 14 days of initiation of bargaining;

    b. that an employer not conduct a vote to approve an enterprise agreement until at least 21 days have passed since the notification of the right to representation during bargaining has been distributed;

    c. that employees be given at least seven days' notice of the vote to approve the enterprise agreement. The employees must also be given a copy of the agreement and any material referenced in the agreement.

47. In addition to the bargaining and procedural rules, the FW Act requires the Fair Work Commission to be satisfied that:

    a. if the agreement is not a greenfields agreement, that it has been genuinely agreed to by the employees covered by the agreement;[14]

    b. the terms of the agreement do not contravene section 55 (which deals with the interaction between the National Employment Standards and enterprise agreements etc.);[15]

    c. the agreement passes the better off overall test;[16]

[14] S. 186(2)(a).
[15] S. 186(2)(c).

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d. the group of employees covered by the agreement is fairly chosen;[17]

e. the agreement does not include any unlawful terms;[18]

f. the agreement does not include any outworker terms;[19]

g. the agreement includes a term providing for the settlement of disputes;[20]

h. the agreement would not be inconsistent with or undermine good faith bargaining (where a scope order is in operation).[21]

48. The implications of all this are that:

a. There are many more procedural landmines or points of potential error in the system, at which enterprise bargaining can go wrong. Bargaining will typically require legal/expert representation that can be costly and can still fail to deliver an agreement due to the framework's inherent uncertainty;

b. The risk v reward assessment for bargaining has changed under the FW Act. Businesses are all about evaluating risk, and employers are increasingly calculating that the risks of embarking on bargaining outweigh the potential benefits.

49. In terms of the risks:

a. Failed enterprise bargaining, and failing to navigate the procedures for bargaining, negotiation or agreement approval can be very costly, and the legal costs can outweigh the benefits.

b. Failed enterprise bargaining can be detrimental for workplace relations, that is for trust, rapport and culture at the workplace level. For many, it is better to not bother than to have tried and failed.

c. Bargaining can attract third party interference in the workplace where things go wrong.

50. The rejection of an agreement can be a costly and resource intensive dilemma and as such it is important that the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017* (Cth) passes. This bill is currently the subject of an inquiry by the Committee and the amendments in Schedule 2 will expressly provide the Fair Wok Commission with the ability to overlook a procedural defect in approving an enterprise agreement, provided that employees to be covered by the agreement are not disadvantaged.

51. At the same time as we are seeing a decline in bargaining, the modern awards together with their review processes has once again encouraged disputes between employer,

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[16] S. 186(2)(d).
[17] S. 186(3).
[18] S. 186(4).
[19] S. 186(4A).
[20] S. 186(6).
[21] S. 187(2).

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industry and union representations triggering increased third party intervention by the Fair Work Commission. The commencement of the 4 yearly review of modern awards shortly after the conclusion of the 2 yearly review has provided an at large invitation for litigation, often to inject new prescription and complexity into the award system. Such processes have arrested the effective transition from the centralised system of compulsory conciliation and arbitration to a decentralised enterprise bargaining system, underpinned by a simple safety net of minimum standards as intended by the earlier policy makers of the 1990s and 2000s. Rather, the regulatory burden of the award system is becoming increasingly entrenched and threatens to intensify with each union claim for further regulation. The *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017* (Cth) proposes changes that will bring an end to the automatic periodic review process.

52. However these changes will not in themselves address all of the disincentives to bargain inherent within the current system, some of which are identified above. Further changes are required and not of the nature proposed in the Bill subject of this inquiry which represents a move back toward recentralisation and will have the practical effect of entrenching award conditions.

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4 The Bill's propose changes will impose further disincentives to bargain

53. No other major international trading economy has an award wage system like Australia. The complexity and prescription existent within this system of modern awards is exemplified by the Building and Construction General On-site Award 2010. Australian Chamber member Master Builders Australia has produced a 200 page manual to help employers navigate the award terms and has stated:

> *Despite that fact, the level of complexity and the fact that there are a range of obscure allowances payable for many different tasks and situations, a multitude of which are outmoded, means that the On-Site Award is an instrument that continues to hamper productivity…*[22]

54. On the topic of these allowances the former Minister for Employment observed that in the award's 140 pages there were some 69 separate allowances and some conditions of little or no relevance with the Minister observing "bricklayers working in a tuberculosis hospital are entitled to have an x-ray every 6 months during work hours at the employer's expense. As an inconvenient aside, the last dedicated TB Ward was closed in 1981…"[23]

55. Master Builders Australia noted that the Fair Work Commission has identified a need for rationalisation of allowances in the complex award however efforts to do this have been resisted by union parties.[24]

56. On the surface, bargaining presents an opportunity to displace the 'one size fits all' character of the award structure and to instead implement a wage and conditions structure of greater relevance to the employer and employees in a particular enterprise. However the disincentives to bargain inherent within the framework are preventing bargaining from delivering optimal outcomes. The changes proposed within the Bill would not serve to promote productivity and enterprise bargaining as intended by the FW Act but would instead encourage the entrenchment of award conditions, many of which exist as historical legacies from over 100 years ago and have no or limited relevance to many people in the contemporary setting.

57. The Bill does this by affecting changes to section 206 of the Act, which require that the base rate of pay payable under an agreement not be less than the base rate of pay in the modern award (if one applies) and national minimum wage order. Most problematically, Item 6 of the Bill would have the effect that base rates of pay in enterprise agreements could not be less than the 'full rate of pay' as defined in section 18 of the FW Act to include all of the following in an award:

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[22] Master Builders Australia, *Submission to the Productivity Commission on the Review of the Workplace Relations Framework: Issues Papers 1-5*, 11 March 2015, p 22.

[23] Master Builders Australia referencing the the Hon Senator Eric Abetz Minister for Employment "Industrial Relations After The Thirty Years War" speech to the Sydney Institute 28 January 2014 http://australianpolitics.com/2014/01/28/abetz-industrial-relationsspeech.html

[24] Master Builders Australia, *Submission to the Productivity Commission on the Review of the Workplace Relations Framework: Issues Papers 1-5*, 11 March 2015, p 23.

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(a) incentive-based payments and bonuses;

(b) loadings;

(c) monetary allowances;

(d) overtime or penalty rates;

(e) any other separately identifiable amounts.

58. As noted earlier in this submission, the FW Act already requires that any agreement be assessed against a test requiring that employees covered by the enterprise agreement be "better off overall" compared to the relevant modern award and National Employment Standards and a body of decisions have emerged which suggests this is a complex assessment which gives rise to uncertainty in the bargaining process. The amendments proposed to the Bill would provide further disincentive to bargain and would constrain innovative approaches to bargaining and prevent employees from enjoying non-monetary benefits of value to them in exchange for award conditions that may be of lesser relevance and value to them. Of note, the Explanatory Memorandum to the FW Act does contemplate that non-monetary benefits could be applied in an assessment of whether employee is better off overall and this acknowledges that some people may value access to flexibility over a higher rate of pay.

59. The bargaining framework must not exist as a regulatory barrier to flexibility and productivity improvement and should not be layered with prescription. It should instead be focussed on delivering wages and conditions linked to productivity, enhancing flexibility as well as employee and employer circumstances at the enterprise concerned. In this regard the amendments proposed in the Bill take steps in the wrong direction.

60. The Australian Chamber urges the Committee to recommend against passage of the Bill and would instead encourage the Parliament to pursue and support legislative reform to ensure that the system better encourages enterprise bargaining which is currently in decline in Australia.

Australian Chamber of Commerce and Industry

5 About the Australian Chamber

The Australian Chamber of Commerce and Industry is the largest and most representative business advocacy network in Australia. We speak on behalf of Australian business at home and abroad.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses are also able to be members of our Business Leaders Council.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, employing over 4 million Australian workers.

The Australian Chamber strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

Australian Chamber of Commerce and Industry

Australian Chamber Members

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