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Legislation Committee Inquiry: Fair Work Amendment (Pay Protection) Bill 2017

We thank the Committee for allowing us the additional time to consult with our affiliates and prepare our submission to this Inquiry.

The *Fair Work Amendment (Pay Protection) Bill 2017* ("the Bill") seeks to address the situation of an employee covered by an enterprise agreement receiving less pay than would be the case if their agreement did not apply to them. The Bill does this by deeming the wages and loadings in the underlying minimum wage instrument to apply where they would be more beneficial to the employee than the respective provisions in the enterprise agreement.

We anticipate that the circumstances in which the provisions of the Bill were intended to be triggered are these:

- Where a "zombie" agreement is in place;
- Where the enterprise agreement was "tested" against an enterprise specific award that has since been terminated;
- Where an enterprise agreement was approved by the Fair Work Commission in circumstances where, had more evidence been available to the Commission at the approval time, the agreement may not have been approved (or an undertaking remedying a defect may have been provided).

"Zombie" Agreements

Agreements made prior to the commencement of the *Fair Work Act* contain provisions that have never been compared to either the pay and conditions available under the *modern awards* that became effective on 1 January 2010 or the minimum wages set under the *Fair Work Act*. Some of those agreements may have been approved under the institutional structure created by *WorkChoices.* Initially, agreements made under that regime were not tested at all against award standards.

Agreements made after May 2007 (but before the *Fair Work* Act) were assessed against certain award conditions (including penalty rates), however such agreements were permitted to remove those conditions. Recent media has brought forward examples of agreements that, if reports are correct, ought not have passed even the limited *fairness test* under WorkChoices post May 2007 and surely would not pass the *Better off Overall Test* in the *Fair Work Act*. This includes agreements for some employees working at some *Bakers Delight* and *Kikki K* stores.

All agreements made prior to the *Fair Work Act* would now have reached their nominal expiry dates. In those circumstances, new agreements may be made by employees and their bargaining representatives (including unions) with recourse to the limited bargaining rights that the legislation confers. However, to point out that it is legally possible for such agreements to be replaced with superior ones is to miss the point that the Bill appears to be focusing on – that workers on such agreements may be being paid below the safety net. We agree that this is an issue that ought to be remedied.

However, due to a deficiency in the drafting of the Bill, it will not impact any "zombie" agreements or confer any benefits to the employees covered by those agreements. This is because the interaction between the Fair Work Act's safety net instruments and agreements made under predecessor provisions is not dealt with in the sections of the *Fair Work Act* which the Bill proposes to amend. To have the intended effect, additional amendments are required to Item 13 of Schedule 9 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

Agreements underpinned by enterprise awards

Prior to the implementation of the *Fair Work Act*, a number of safety net awards were described as *enterprise awards*. Contrary to multiple employer awards whose terms were arrived at and varied from time to time based on the existence of industrial disputes between employers and employees in an industry, enterprise awards were (typically) the product of negotiation and resolution between a single company or common enterprise and the unions representing the workers of that company or enterprise. The terms of enterprise awards differed from awards of general application because they were designed to operate in restricted circumstances and were often closely aligned to the operating practices of specific businesses. Some enterprise awards contained conditions that were more or less beneficial to workers on some working arrangements than comparable wider industry awards did.

When the *modern award* system commenced in 2010, there was effectively a carve out for employers and their employees who were covered by enterprise awards. The result, in terms of enterprise agreements, was that the *Better Off Overall Test* involved an assessment of the agreement against the enterprise award, rather than the *modern award*. Transitional provisions in the *Fair Work (Transitional Provisions and Consequential Amendments) Act* had the effect that this continued until 31 December 2013. On that day, all enterprise awards were terminated save for those where the parties had sought to have it replaced with a *modern enterprise award*. The effect is that the underlying safety net entitlements of some workers changed after their enterprise agreement came into effect. It is possible that some enterprise agreements approved by the Fair Work Commission testing their terms against an enterprise award that has since terminated have not reached their nominal expiry dates.

Irrespective of whether the relevant agreements have expired, the Bill will have the effect that the Full Rate of Pay in the Modern Award will prevail over the Full Rate of Pay in the Agreement, to the extent that the former is higher.

Agreements "wrongly approved"

The *Better Off Overall Test* which the Fair Work Commission applies (among other considerations) in deciding whether to approve an enterprise agreement differs from the *No Disadvantage Test* which applies under predecessor laws that involved the Australian Industrial Relations Commission in certifying agreements.

The *No Disadvantage Test* focused the Commission's analysis on the content of the terms and conditions in the agreement as compared to the terms and conditions in an award and other relevant laws. An agreement failed that test if the terms and conditions in the agreement had the effect that there was, on balance, a reduction in the overall terms and conditions of employment. The assessment was very much a global one based on a "desktop review" of wages conditions as expressed in different instruments. The degree to which particular workers, or categories of workers, would be in a position to *access* more beneficial terms in the agreement as compared to their *exposure* to the less beneficial terms thereof was not inquiry that the *No Disadvantage Test* called for.

The *Better Off Overall Test* however focuses on whether employees themselves would be better off overall. It requires the Commission to consider the benefit that would be enjoyed by each employee, and the detriments that each employee might be exposed to, although it is permitted to substitute that consideration of individual benefit for a consideration of the benefits (and detriments) to representative classes of employees (for example, "electricians" or "night shift cleaners" etc). Any employee not being better off overall under this test is grounds to refuse the approval of the agreement. It is this change in the nature of the inquiry performed by the Commission that has led to some agreements not being approved (or approved only on the giving of certain undertakings) in circumstances where they likely would have been certified under previous arrangements. This includes agreements which provide a substantial premium on the base rate of pay but also provide some reduction on extent of the loadings for work performed outside of ordinary hours or on evenings or weekends. Some agreements that should not be approved under the *Better Off Overall Test* may be approved if the representative classes of employees that are used as the basis of the assessment are incomplete or not appropriately defined.

The Bill will have the effect that the Full Rate of Pay in the Modern Award will prevail over the Full Rate of Pay in the Agreement, to the extent that the former is higher. The Bill is thus capable of remedying instances where an agreement might not have passed the *Better Off Overall Test* if the evidence available to the Commission was more comprehensive. However, the benefits provided by the Bill are not targeted in the same way that undertaking given to the Fair Work Commission to correct a deficiency in the agreement could be. Such an undertaking is designed ensure that the *particular* employees or classes of employees who would not be Better Off Overall were the agreement approved in its original terms are placed in a position where they are Better Off Overall. The Bill however could conceivably extend an additional benefit to all employees, including perhaps some of the majority who are Better Off Overall as a result of the Agreement being made.

<u>Implementation concerns</u>

We note that the Bill is intended to apply retrospectively to existing instruments. It is uncommon for the Parliament to pass laws that will invalidate or modify the legal effect of existing arrangements, for reasons that are well rehearsed. The closest parallel to the terms of the Bill is contained in Items 13 and 14 of Schedule 9 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*. Those provisions relevantly provided for the increased base rates of pay in modern awards to apply to the exclusion of lower rates in agreements made before the *Fair Work Act*, but also permitted employers to apply to the Commission for phased introduction of the higher rates. This presents a more measured approach to that which the Bill mandates and may warrant consideration, at least on a short term or transitional basis.

Secondly, we are concerned that there is some disconnect between the policy intent of the *Fair Work Act* that employees are better off overall as a result of an agreement and deeming provisions that effectively uplift award pay rates to enterprise agreements. We have alluded to this above (in terms of the Bill potentially providing additional benefits to classes of workers who *are* better off overall because of the agreement), however there is an additional dimension which relates to time. An employee may be better off overall over a week, fortnight or other relevant pay period as a result of their enterprise agreement, however this Bill would intervene so that each day, shift or hour worked (depending on how such rates are expressed) is paid at least the rates that would have been applicable under the relevant award.

Amendments required

In a context where wage growth in Australia is at historic lows, and in lieu of a much more fundamental rewrite of industrial relations laws, we are tempted to give our unqualified support this Bill notwithstanding its lack of precision and lack of integration with other policy objectives in the *Fair Work Act*. This would be on the basis that something is better than nothing.

However, we consider that the Bill is simply too flawed to support in its current form. The legacy issue that we consider is in most need of intervention – the issue of "zombie agreements" - is not remedied by this Bill due its drafting deficiencies. We support its application in situations where the underlying safety net instrument has changed, which includes its application to "zombie agreements" as well as the transition away from enterprise awards. However, an option to phase in increases to pay rates ought to be considered where the agreement has not passed its nominal expiry date (which, as above, would only arise in agreements initially underpinned by enterprise awards).

We are not convinced that the Bill should operate on enterprise agreements that are neither "zombie agreements" or agreements initially underpinned by an enterprise award. We note that, on the basis of the Second Reading speech, the circumstance that appears to have particularly motivated the Senator to introduce the Bill is that concerning the agreement that was proposed to cover the workforce of Coles Supermarkets. We rather consider that the example of that case demonstrated that the system is responsive enough to permit agreements that do not meet the *Better Off Overall* test to be revisited.

Yours faithfully,

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Director – Legal & Industrial