Submission to Senate Standing Committees on Education and Employment:

Inquiry into Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020

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About United Workers Union

United Workers Union (UWU) is a powerful new union with 150,000 workers across the country from more than 45 industries and all walks of life, standing together to make a difference. Our work reaches millions of people every single day of their lives. We feed you, educate you, provide care for you, keep your communities safe and get you the goods you need. Without us, everything stops. We are proud of the work we do–our paramedic members work around the clock to save lives; early childhood educators are shaping the future of the nation; supermarket logistics members pack food for your local supermarket and farms workers put food on Australian dinner tables; hospitality members serve you a drink on your night off; aged care members provide quality care for our elderly and cleaning and security members ensure the spaces you work, travel and learn in are safe and clean.

UWU has had the opportunity to consider a range of submissions across the union movement as they have been developed, including that of the ACTU. The ACTU has provided a comprehensive submission on all aspects of the proposed legislation. As an affiliate member of the ACTU we support the positions adopted in their submission. There is, as you will see, a great level of consensus evident across those submissions around many important industrial issues for Australian workers.

While we have sought to comment on a number of the issues raised by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020*, our silence on other matters should not be taken to be in support.

Executive Summary

All Australians deserve to live in dignity, but the rules that made Australia fair are broken. Under the guise of helping Australia to re-build the national economy during a global health pandemic, the Morrison Government made a clear promise to all Australians - no worker would be worse off under proposed industrial changes. They have broken that promise.

This submission recommends that, having regard to all the problems for workers associated with the proposed legislation, the Senate must reject it in its entirety.

The Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (**the IR Omnibus Bill**) if passed will leave workers worse off, and will in particular have a significant negative effect on those workers whom we have relied on to deliver us through the COVID-19 pandemic. The legislation will make insecure workers even less secure; will allow employers to rush through enterprise agreements that undercut the safety net with lesser scrutiny; will lock some workers out of enterprise bargaining for unacceptably long periods; and, will replace more effective criminal sanctions against wage theft with less effective ones.

The IR Omnibus Bill completely tips the balance in favour of big business. This legislation is nothing more than a return to a WorkChoices, pro-business offensive aimed at slashing wages and resetting work conditions to boost profitability at the expense of everyday working Australians.

Big business and successive conservative governments have reshaped our national economy and values so it is now considered acceptable that people who go to work every day should live

in poverty. Successive governments have presided over a system that has led to the subjugation of workers in the name of choice, competitiveness, shareholder value, the gig economy and good old-fashioned greed. This Government has allowed big business to trample over that once great Australian belief that those who work should earn enough to clothe, feed and house themselves, and still have enough left over to spend on other life necessities for themselves and their children.

Currently, 40 per cent of people are in insecure work and there are more than one million Australians who are underemployed and want to work more.[1] The richest one per cent of Australians now owns more wealth than the bottom 70 per cent.[2] Australian workers are facing attacks to their rights at work, the minimum wage has fallen below the poverty line and wage theft is now so common that it has become a business model in some of our essential industries. Even prior to the COVID-19 pandemic, inequality in Australia was at its highest rate in more than 70 years. Wage growth was at its lowest rate on record, while company profits were up 40 per cent.[3] Now, just as before, working people need better and stronger rights at work to reduce inequality, increase their financial security and to counterbalance balance the growing power of employers.

Throughout 2020 there has been a shift in the concept of "essential workers" -- those who have kept our country going-- continuing to work despite risking their lives. While the Federal Government has recently deemed this work essential, our members have long been undervalued and subjected to precarious working arrangements, low pay and disrespect at work. For our members and working people around the country, the status quo has always been unequal; this crisis has revealed it is also untenable.

The IR Omnibus Bill comes at important time for Australia's lowest paid workers, as more and more cases come to light demonstrating how our industrial relations laws are failing Australian workers. The Government's proposed changes are the opposite of what the country needs. They will directly result in an increase in the number of workers trapped in insecure employment and are nothing more than a stark return to the failed WorkChoices era, veiled in promises of economic growth and national prosperity. By removing the award safety net, millions of workers will see reduction in wage growth and an increase in unfair working conditions. This opens up a new frontier of exploitation that will negatively impact millions of workers.

All workers are entitled to a fair opportunity to provide for themselves and their families and to work in an economy based on jobs that are safe and secure with guaranteed hours and fair wages. It has always been the role of unions to defend and extend rights at work. Creating and protecting secure jobs and decent working conditions is a top priority for UWU. We are committed to protecting vulnerable workers from exploitation in order to avoid large numbers of working poor, a disenfranchised underclass, and low intergenerational social mobility.

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[1] Change the Rules: The Rise of Insecure Work in Australia, ACTU, 2018.
[2] https://www.oxfam.org.au/wp-content/uploads/2017/07/oxfam-An-economy-for-99-percent-oz-factsheet.pdf
[3] Change the Rules: Rising Inequality: An Australian Reality, ACTU, 2017.

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This Government should be addressing insecure work, rather than attacking the very people who kept our economy running in the face of a global pandemic. This Government needs to tackle insecure work, not increase its scope; it needs to raise the pay and conditions of workers, not remove the safety net; and needs to increase compliance for big business, not introduce onerous wage theft laws that will almost certainly never be utilised.

After what Australian workers have been through in 2020, they deserve more job security not further attacks on their rights from a government driven by failed ideology doing the will of big business set on using this pandemic to rip away working rights. The message is clear – the Morrison Government only cares about protecting big business. They do not care about Australian workers.

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Contents

Summary of Recommendations ... 6
Insecure Work ... 7
Insecure work in Australia ... 7
Insecure Work and Women ... 9
Insecure Work & Migrant Workers ... 11
Impact of COVID-19 ... 13
Amending the Casual Definition ... 15
Casual Conversion ... 17
Further Recommendations ... 19
Deregulating Permanent Work ... 21
Identified Modern Awards ... 21
Part time “flexible” hours ... 22
Flexible working directives ... 23
Enterprise Bargaining Reform ... 24
Enterprise Bargaining is failing workers ... 24
A return to WorkChoices is not the answer ... 25
Loss of Consultation ... 27
Public interest exemption ... 27
Non-monetary benefits ... 28
Industry Bargaining ... 28
Wage Theft ... 31
Wage theft is a social and economic issue ... 32
Criminalisation of Wage Theft ... 34
Conclusion ... 38

Summary of Recommendations

Recommendation one: that having regard to the dire impact the proposed legislation will have on millions of Australian workers and the broader economy, the Senate must reject *The Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* in its entirety.

If recommendation one is not supported by the Senate, we propose the following additional recommendations:

Recommendation two: that the proposed definition of casual employment contained in *The Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* be rejected in its entirety.

Recommendation three: that if there is found to be a need to define casual employment in the *Fair Work Act 2009*, the definition must be reflective of existing common law precedent.

Recommendation four: that the proposed casual conversion clause contained in *The Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* be rejected in its entirety.

Recommendation five: that any introduced casual conversion clause must contain a clear and reasonable employee right to request, must be enforceable and have a right of appeal.

Recommendation six: that the proposed amendments contained in Schedule two of *The Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* that seek to deregulate permanent employment be rejected in its entirety.

Recommendation seven: that the proposed amendments contained in Schedule three of *The Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* relating to enterprise bargaining reform be rejected in its entirety.

Recommendation eight: that the proposed amendments contained in Schedule Five of *The Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* be rejected in its entirety.

Recommendation nine: if Wage Theft is to be introduced into the *Fair Work Act 2009* as a federal offence it should at least mirror existing legislation in Queensland and Victoria.

Insecure Work

UWU fundamentally rejects the idea that the reforms in schedule one of the IR Omnibus Bill will improve the working standards for millions of workers in insecure employment. The proposed legislation will, if passed, further reduce the rights of casual workers. The Morrison Government has missed a vital opportunity to address insecure work in Australia and has instead proposed mechanisms that will broaden the use of casuals and entrench millions of workers in insecure employment. This is in stark contrast to the weight of independent expert evidence that has pointed out the high economic cost of insecure work and the continued public health risk of continued casualisation. Further, this is nothing short of an insult to the millions of casual workers who were swept aside by COVID-19 and have been calling for more, not less, job security.

Insecure Work in Australia

Almost five million Australian workers are currently in insecure work.[4] UWU members regularly report insecure work as the leading issue in their workplaces. These workers experience unpredictable and fluctuating pay; inferior rights and entitlements; limited or no access to paid leave; irregular and unpredictable working hours; a lack of security and/or uncertainty over the length of the job; and a lack of any say at work over wages, conditions and work organisation.[5] For insecure workers, wage increases are meaningless if you don't have a shift the next day.

This isn't normal. Australia has the highest proportion of temporary labour in the OECD. We have five times the proportion of temporary employees that the UK has, two and a half times that of Germany and double the proportion in France.[6]

This reflects a deregulatory trend in Australia that sees risk shifted from corporations and onto workers. Instead of using a casual workforce to increase capacity on a seasonal basis, casual work is increasingly the way that Australian businesses meet their medium and long-term labour needs. In the post-COVID era, big business is increasingly viewing casual labour as the foundation for boosting profits.

With casualisation reaching astronomical levels in industries like hospitality, it is clear insecure work can no longer be considered a steppingstone to permanent employment. Indeed, across many industries insecure work is the primary mode of employment and in many workplaces, the only type of jobs available. Insecure work is most prevalent among already disadvantaged groups – women, migrants, and young people. It is an on-going state of insecurity and hardship, and in many cases poverty, especially in a global health pandemic.

Far too often, it is assumed that workers choose to work in the industry as the so-called 'flexibility' of casual work suits them.[7] This is largely because employers have sought to frame

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[4] Change the Rules: The Rise of Insecure Work in Australia, ACTU, 2018.
[5] Ibid.
[6] Change the Rules: The Myth of the Casual Wage Premiums, ACTU, 2018.
[7] Ibid.

the prevalence of insecure work as a lifestyle preference of young people, students, parents and carers. Bosses love to praise the virtues of "flexibility," claiming that casuals don't want permanent work. Typical of this attitude, James Pearson, CEO of the Australian Chamber of Commerce and Industry, said: *"We need to remember that most casuals chose to stay casual because they like the additional pay and flexibility."*[8] While there are some casual workers who would genuinely opt to maintain their casual employment, this mantra is a lie.

Evidence suggests that about half of all casuals would prefer permanency with paid leave.[9] This is the strong preference for men in casual work and all casuals aged 25 to 34. Younger workers aged 15 to 25 doing casual work are more likely to prefer a wage premium over paid leave if given the choice.[10] However, regardless of individual preferences, the use of casual work as the dominant business model in some industries means that most workers don't have the choice.

UWU surveyed 4,281 hospitality workers from March to June 2020.[11] Even prior to COVID-19, a significant majority of hospitality workers (64.5 per cent) said it was very or extremely important to have a permanent job. Since COVID-19 this margin has increased to 76.5 per cent, with more than half weighing their need as "extremely important". This means that more than three quarters of hospitality workers wanted a permanent job and, in a post-COVID world, over half said it was extremely important to them.

> *"We never have shift finish times on the roster. Any persons shift may end after 3 hours or 12 hours on any given day. Only the owner knows this information, and will tell you go to home immediately whenever he feels like it."* – Barista, Victoria.
>
> *"Having shift cancelled as I have arrived at work, it was 'too quiet'. Having a roster delivered day by day by poor management. Taking a job which promised 40 hour weeks, was then given 10 hours over 4 days, so the business could save money by not paying super - staff turnover in a month was close to 80%"* – Front of House, Victoria

Employers have access to a range of legal mechanisms that can systematically weaken the employment relationship or outsource it entirely: labour hire, sham contracting, casualisation, opaque supply chains, gig platforms and more. Legally, this seeks to move risk away from the employer and onto individual workers. At a social and interpersonal level, it also diminishes moral expectations of employers and any sense of mutual reciprocity between people in a workplace. The result is a fundamental erosion of the social contract that undermines everyone's collective security, as was so starkly demonstrated during workplace outbreaks of Covid-19. Long term employment insecurity, even when the work demand is regular and predictable, causes real harm to working communities and to the public at large.

Employers are effectively pulling the rug out from underneath their workers on a weekly, if not daily, basis. This is often a deliberate and calculated move. Maintaining such insecure conditions

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[8] https://www.australianchamber.com.au/news/business-welcomes-closing-of-casual-employment-loophole/
[9] Change the Rules: The Myth of the Casual Wage Premiums, ACTU, 2018.
[10] Ibid.
[11] Rebuild Hospo: A Post-Covid Roadmap for Secure Jobs in Hospitality, United Workers Union, 2020.

means that workers have less power to stand against other forms of exploitation and mistreatment, including wage theft, sexual harassment and poorly managed workplace health and safety. Inconsistent shifts have a destabilising effect on workers. They are expected to rearrange their lives at a moment's notice, and this undermines their ability to communicate and unite around workplace issues. In this way, insecure work acts as a force multiplier, helping to enable and accelerate other fundamental problems in the industry, including wage theft, sexual harassment and migrant worker exploitation.

Insecure work is first and foremost an issue of power. Employers know that insecure workers have limited power to speak up and assert their rights. Without job security, workers cannot fully participate in their workplaces or speak up on important issues without fear of job loss. Put simply, insecure workplaces are unsafe and anti-democratic. It's unacceptable that any worker should live day-to-day, waiting for a text message to confirm tomorrow's shift, potentially for years on end. Without notice insecure workers can be considered expendable or "no longer required"—a euphemism for termination without the accompanying legal protections of unfair dismissal. This way of organising work is inefficient, unethical and unnecessary.

> *"In my three years I the industry I have always worked as a subcontractor. The big firms don't want to employ me. I'm an international student and have working restrictions. They just subcontract me through a smaller firm. I'm wearing the company's uniform, but I'm hired by subcontractor – the main company doesn't want to take on the responsibility. To be honest it's so bad, they bully, blackmail, threaten you. Encourage everyone to work on cash only or a bank transfer. We get a flat rate, sometimes as low as $13 an hour. When I have asked to be paid what I should be they just laugh and say if I won't work for that then they will just find someone else who will. I need this job so what choice do I have?"* - Security Worker, Victoria

Insecure Work and Women

Unequal pay outcomes between women and men are a stark indicator of the different ways women and men engage with the workforce and how they are valued for it. While the trend towards insecure work is increasing, the pattern of casual employment suggests a sharply gendered phenomenon.

Recent analyses demonstrate that women are overrepresented in non-standard work categories, and remain more vulnerable than men to exploitative, casualised and insecure forms of work.[12] At present, 67.9 percent of men and 40.2 percent of women work a standard full-time job.[13] Conversely, women comprise 52.6 percent of all casual employees. 26.9 percent of working women are employed on a casual basis, compared to 21.4 percent of men.[14]

Research suggests that the reasons for this overrepresentation are multifaceted and interconnected.[15] They are largely attributed to the entrenched social norms that undervalue women and women's work and ascribe expectations that take women away from the workforce

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[12] Change the Rules: Changing the Rules for Working Women, ACTU, 2018.
[13] Ibid.
[14] Ibid.
[15] Ibid.

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without commensurate family-friendly working arrangements. This is compounded by current rules that enable employers to easily deny permanency.

There are clear economic consequences of this trend for women – including lower wages, less hours of work, a lack of paid leave, an increased likelihood of periods of unemployment and a reduction in superannuation of the lifespan.[16] In addition, there is growing evidence that insecure work negatively effects both health, and the capacity to make long term life decisions.

Case Study: Aged Care

The COVID-19 pandemic has made it brutally clear that the work of low paid women in sectors such as aged care is fundamental to our economic and social survival. At the same time, women have been disproportionately affected by the pandemic. a key example is the aged care sector.

Aged care is a feminised sector. Almost 90 per cent of the workforce is female.[17] The median age of the residential care workforce and the home care workforce is 46 years and 52 years, respectively.[18] In both residential and home care, there are a sizable number of workers who are older than 55 and a smaller but not insignificant number who are 65 and older.[19]

During the pandemic, older workers, as well as immunocompromised workers, have had to make decisions as to whether to continue work or not. Some of our members – many of whom are older women – have had to take leave (often unpaid) during the pandemic as the risk to their own health if they caught COVID-19 was too high. These members have struggled to make ends meet, and now face difficult decisions about whether to return to work or to apply to Centrelink. Some of these older women workers will never return to the workforce.

"I am immunosuppressed and my doctor advised I'm high risk and need to isolate. As a result I can no longer support the elderly as a Homecare Worker. I have only 6 hours sick leave and 28 hours annual leave to live on while I wait for Centrelink to process my claim." – Homecare Worker, NSW

The experiences of our members in aged care reflect broader trends in the labour market. Since the beginning of the COVID-19 pandemic, 5.3 per cent of employed women have lost their jobs compared with 3.9 per cent of men.[20] Women's hours of work have fallen by 11.5 per cent compared with 7.5 per cent for men.[21] Women are more than twice as likely to have stopped looking for a new job, which is likely due to increased unpaid care work in the home.[22] The increase in unpaid care duties fell disproportionately on women workers, as women perform more unpaid care.

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[16] Ibid.
[17] Federal Department of Health, The Aged Care Workforce 2016.
[18] Ibid.
[19] Ibid.
[20] https://australiainstitute.org.au/post/the-coalition-dishes-out-jobs-for-the-boys-while-women-carry-coronavirus-economic-burden/
[21] Ibid.
[22] https://www.wgea.gov.au/topics/gendered-impact-of-covid-19

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Further the Federal Government's early withdrawal of superannuation scheme will disproportionately affect women, as women's superannuation balances at retirement are 47 per cent lower than men's.[23] As a result, women are far more likely to experience poverty in retirement in their old age, and the Government's response to COVID-19 is likely to have made this worse.

Insecure Work & Migrant Workers

UWU considers justice for migrant workers to be core union business. Through years of on-the ground organising, UWU has assisted temporary migrant workers to expose and collectively address some of the worst forms of exploitation in the Australian economy including widespread wage theft, unlawful deductions, sexual assault, substandard accommodation and a variety of other slavery-like practices. These practices are now extremely well-documented in a number of academic studies, parliamentary inquiries, as well as reports prepared by UWU.

It is becoming increasing common for employers to avoid both the spirit of the law and the law itself by engaging workers on temporary visas. In our experience migrant workers' industrial rights are all too often subordinated by their immigration status. It is widely recognised that workers on visas, and people working without a visa, are more vulnerable to workplace exploitation than their local counterparts. They also face higher barriers to accessing remedies.

The power asymmetry that exists in any employer/employee relationship is exacerbated in the case of temporary migrant workers, because their right to remain in the country is contingent on them not being found to be in breach of the work conditions on their visa. Any legal irregularity in the employee/employer relationship, whether the fault of the employee or not, can trigger a chain of events that leads to a grievous result for the worker (detention and deportation) that is disproportionate to any negative outcome potentially faced by the employer and is insensitive to the power dynamics.

Egregious abuses of power are made possible by deeply precarious working arrangements and a broken visa system that does not adequately protect the rights of migrant workers in Australia. Of course, as we have witnessed over recent years, with the backing of a strong union these workers are increasingly taking action, organising their workplaces and setting an example for the rest of the Australian union movement to follow.

Case Study: Horticulture

In Australia's horticulture industry, almost all farm workers are in insecure work that is casual, unpredictable and indirect. The vast majority of workers are employed through labour hire agencies and subcontractors. Grower's over-reliance on contractors has entrenched casual and insecure employment arrangements even when the work is consistent and predictable. The outsourced employment relationship enables unlawful work practices to develop in the shadows.

[23] ASU and PerCapita, Not So Super for Women: Superannuation and Women's Retirement Outcomes, July 2017, pg. 6, available at: http://www.asn.au/documents/doc_download/1232-not-so-super-for-women-superannuation-and-women-s-retirement-outcomes-by-asu-per-capita-august2017-version

For example, a group of Ni-Vans workers in Shepparton, Victoria via the Seasonal Worker Program were picking tomatoes through labour hire agency Agri Labour. Workers were paid $8-12 per hour in dangerous conditions. Tomatoes were sprayed with chemicals that resulted in workers experiencing bleeding episodes. The workers brought their concerns to their union who helped them take action by lodging a complaint with the Fair Work Ombudsman (**FWO**) against Agri Labour. As a result, Agri Labour was suspended from the Federal Government Seasonal Worker Program.

Case Study: Security Sector

The normalisation of outsourcing and the cementation of complex labour supply chains in the Australian security sector is driving the low concentration of operators in the industry. While the larger operators hold the majority of contracts for services, the work is generally subjected to further levels of contracting and sham contracting arrangements with smaller operators.

Despite growing rates of employment and the consistent improved profitability of many security businesses, many workers in the security sector experience extremely poor job and earning security. Additional worker vulnerabilities exist due to the high proportion of temporary migrant workers in the industry, the high level of turnover and casual employment. Workers are often in isolated workplaces with little or no capacity to communicate or organise. Further, the nature of security workers as a highly dispersed and isolated workforce means that the true extent of exploitation cannot be determined with precision.

UWU security delegate explains:

"When I first came to Australia, I didn't know anyone. All I knew was going to university and meeting people from my home country who spoke the same language. They offered me a job in a restaurant at a flat rate of $13 an hour.

I had to wait one year before I could do a security course. We hear of security guards getting paid $18 an hour, in my mind $18 is way better than $13. I didn't know any better. I did my security course which cost me almost $1700 and as soon as I got my license, I started applying in all these security companies, but I had no luck.

My friend helped me out and got me a job as a subcontractor. These businesses know the drill, they know that no company is going to hire international students and that is how their business starts. A lot of them speak the same language and take advantage of us, playing emotionally.

Most of them give you $15-20 an hour or less, a complete flat rate, no superannuation, no LSL, no sick leave, no overtime loadings, no weekend or public holiday rates nothing just all flat rate. a lot of time they hold your pay for months and say that it is for security purposes.

They treat migrants so bad. Blackmail them, bully them, force them to work. I was asked to do a shift for the next day and I said sorry not available because I had family commitments. They told me I had to do it, or they would have to hire some new guards. They are ruthless, they are just money-making organisations.

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They say we are brothers then when you say no they fire you or report you to immigration. Sometimes if students are not available to work and they say apologies not available, these subcontractors blackmail them saying you must do it or we will report to immigration that you are exceeding your weekly hours of work.

The people who came before me have been through this. Unfortunately the people who came after will face the same. Why is there no accountability on this? Why are there no checks. Why don't they encourage students to speak? They are all too scared cause they don't want to lose their visas. No one wants to speak. They have been stealing money for years. I came here to get away from this sort of stuff and now look where I am. I'm so done with this".

Impact of COVID-19

When a crisis hits, as the global pandemic of 2020, insecure work leaves no fallback for workers. the COVID-19 crisis has revealed and exacerbated inequalities that have long persisted in our communities and workplaces. Despite claims to the contrary, pandemics and health crisis do discriminate and entrench structures of power and privilege that existed before the crisis. Vulnerable members of our communities and workplaces have been the hardest hit. This includes low paid and precarious workers, young people, women, temporary visa holders and undocumented workers.

The global health pandemic has highlighted the dangers of insecure work, particularly casual employment. While frontline, insecure workers risked their lives by continuing to attend their workplaces the Government seemed intent on not only trapping workers in insecure employment, but actively attacked their rights at work.

First the Government excluded over one million casuals from the JobKeeper wage subsidy.[24] Then they reduced the Coronavirus Supplement making it cheaper for business to rehire workers while forcing workers into insecure work. Then they introduced JobMaker, a scheme that directly subsidises insecure jobs for young workers at the expense of existing permanent employees.

The JobKeeper payment, simply put, places all power in the hands of the employer. It is employers that get to decide whether to apply; it is employers that can exclude workers who should be included; it is employers who can cut workers' hours to fit in with JobKeeper so they don't have to top up wages. On top of this, many hospitality workers have reported that employers have forced them to work more than their contracted hours and/or pay back some of their allowance to earn the entitlement, which is illegal.[25]

> *"I've missed out on the JobKeeper payment because I've been working at my current employer for 6 months as a casual, even though I've worked in the clubs and hospitality industry for around 7 years. I was stood down in March and it took a while for my Job Seeker payment to get processed so I didn't have any income for 3 weeks. I didn't have*

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[24] https://australiainstitute.org.au/post/81-of-australians-support-jobkeeper-for-all-casual-workers/

[25] https://www.workplaceassured.com.au/news/put-casual-back-on-jobkeeper-warns-fwc

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> *enough money for rent. I wanted to negotiate a rent reduction but the real estate agency didn't agree to a reduction. They said if I couldn't pay rent they would look at evicting me, even though I'd been living there for 7 years and always paid rent on time before the pandemic."* – Clubs/Hospitality Worker, Victoria

Calls for paid sick leave for all casual workers fell on deaf ears. High rates of casualisation means un unacceptable number of workers must forego economic security if they fall sick. While this has always been unethical in the midst of a global pandemic it also presents a serious public health risk. For workers living on the poverty line, the economic threat of lost shifts incentives too many workers to continue to work when they are sick. This is a danger to workers, their workplaces, their patrons and their clients.

Case Study: COVID-19 and Hospitality

COVID-19 pushed the hospitality industry into meltdown. While economic indicators suggest that the industry has begun to rebound strongly by the end of 2020, it was the worst hit industry during the pandemic, with around 1 in 3 paid jobs lost by mid-March 2020 and total wages cut by a massive 30 per cent.[26] (See further discussion on the rebound of the hospitality industry at page 21). ‘

The Australian Hotels' Association reported that over 250,000 people in pubs were directly impacted, clubs in NSW alone have impacted 63,000 workers, and Hospo Voice's #ilostmyhosposhift website estimates that, for the 3,000 workers who participated in the survey, over $1.3 million were lost in wages[27].

The pandemic plunged many hospitality workers into poverty overnight. Workers had nothing to fall back on. When jobs are founded on uncertainty and precarity, and where wage theft is endemic, this leave little room for workers to speak out as their hours are, once again, chopped and changed without care or consultation.

The pandemic has magnified and made visible every facet of insecure work in hospitality – the unpredictable hours, inconsistent pay and lack of worker autonomy. The impact was so widespread that only a small minority of workers can claim they were left unscathed. Of those who responded to our #RebuildHospo survey, 26 per cent lost their jobs, 32 per cent were stood down, and 27 per cent had their hours cut, which made up 85 per cent of the industry. This means that 85 per cent of workers were left falling short or without their regular income at the peak of the pandemic.

Around a third of the workforce had to borrow money from family and friends, access their super, and ask for reduction or deferral of their rent. Circumstances were so desperate for some workers that they have had to rely on charities and foodbanks, move out of their homes, and

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[26] https://www.abs.gov.au/statistics/labour/earnings-and-work-hours/weekly-payroll-jobs-and-wages-australia/latest-release
[27] https://www.theguardian.com/australia-news/2020/mar/23/job-losses-from-australias-coronavirus-shutdown-will-be-devastating

have suffered relationship breakdowns. A staggering 20 per cent of workers were simply left without the essentials they needed.

Quotes attributed to UWU hospitality members:

"I have a baby due to be born in the next few weeks. I also have home loan repayments, and other bills to pay. Between the home loan repayments, and a newborn on its way, I have little savings. In just a few months' time, I can see myself having to raise my child from the back seat of my car." - Chef, Queensland

"I (was) the main wage earner for my wife and I. My wife suffers from MS and is unable to work full time. We are going to struggle to pay bills and we have to change our lifestyle. It is putting stress on my wife's health as she feels she needs to work more to make up for me losing my job." – Sous Chef, Victoria

"I had no choice but to accept a casual job. I work the same regular hours per week and have done so for over two and a half years but my employer refuses to put anyone on anything other than casual." – Chef, Victoria.

"As a casual employee I have been living pay check to pay check since January as business has been slow. I was told on Tuesday that there is no longer work for me. I have no way of paying my bills and am seriously worried about becoming homeless within weeks." – Hospitality Worker, Victoria

"I lost my income, and because the government somehow didn't anticipate millions of people losing their jobs, it's been a trial and a half to get onto Centrelink or even speak to someone to access benefits from being laid-off." – Bartender, Victoria

"(My partner and I) have no income. It's quite difficult to get a job back in hospitality and even to receive Centrelink due to the system being inundated with everyone else getting fired. My partner is from Korea and can't even receive any financial support, despite being in a de facto relationship with myself and living in Australia for 7 years." – Café Manager, New South Wales

Amending the Casual Definition

Recommendation two: that the proposed definition of casual employment contained in *The Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* be rejected in its entirety.

Recommendation three: that if there is found to be a need to define casual employment in the *Fair Work Act 2009*, the definition must be reflective of existing common law precedent.

The proposed definition for casual employment has been justified as necessary to overcome ongoing confusion about the legal status of casual employees.[28] This so-called confusion is borne out of employers willingly engaging workers as casuals despite there being an ongoing employment relationship that involves working a similar pattern of hours. The proposed amendments will not solve this issue and instead will simply validate the behaviour of

[28] Workplace Express, IR Bill to offer definition of casual work, 7 December 2020

employers who wrongly classify workers as casuals for the sole purpose of creating precarious employment.

This lack of clarity and consistency can and does lead to exploitation, with workers being incorrectly characterised as casual employees. The impact on workers is one of trapping them in insecure working arrangements, as noted above, workers lose out on important employment benefits like leave, job security and consistency. In contrast the impact on employers is that they have less business risk, effectively shifting the risk to workers. Casual employment is no longer used as a temporary supplement to permanent work and is now often used as the permanent workforce, replacing permanent directly engaged employees. The cost competitiveness of this model in comparison with more conventional forms of employment relates to their ability to avoid the usual costs of employment.

While many modern awards and enterprise agreements contain definitions of casual employees this term is not defined in the *Fair Work Act 2009* (**FW Act**). Instead, employers rely on common law precedents that focuses on an assessment of the substance and totality of the employer/employee relationship. This current common law position has been affirmed over time looks to the objective circumstances of the employment relationship to determine its nature.[29]

A statutory definition of casual employment in the FW Act may remove some confusion around casual employment, provided that it is based on the current jurisprudence and doesn't undermine it. However, if passed, the proposed legislation falls short of providing a definition that will achieve certainty and avoid exploitation. Instead these changes will facilitate the casualisation of jobs that should be permanent and secure and thereby trap more Australians in insecure work. The provisions will not lead to a reduction of insecure work but will enable it.

The proposed provisions will set a statutory definition of casual employment which overrides years of carefully years of legal precedents and hard fought for protections won by unions. Rather than providing a statutory remedy that is both clear, simple and grounded in the established law, the proposed amendments, have been drafted in the broadest terms possible. Essentially anyone is legally a casual when, at the point of employment, they are deemed to be so by their employer. Employers have been gifted the legal authority to determine who is and who isn't a casual.

The definition is rooted in a flawed assumption that insecure workers and employers are equal contractual negotiating partners. The reality is that most employment contracts for insecure work are offered on a take-it-or-leave-it-basis in a market which heavily favours the seller. This legislation will allow employers to escape having to provide fair entitlements to workers whom they deliberately label as casuals in employment contracts, but then use as permanent employees. There are a number of Fair Work Commission (**FWC**) cases which show that

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[29] Hamzy v Tricon International Restaurants trading as KFC [2001] FCA 1589; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146; *WorkPac Pty Ltd v Skene* [2018] FCAFC 131; *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84.

UNITED WORKERS UNION

employers have often mislabelled employment as casuals when it is really permanent. The legislation would validate this behaviour.

Further, the proposed amendments will essentially enable employers to avoid court-ordered repayments where they have found to have incorrectly employed someone as a casual. Two recent court cases held that businesses which employ casuals on regular, stable, and predictable schedules are liable to pay leave entitlements.[30] It was estimated that this would cost employers over $39 billion.[31] The proposed amendments to the casual definition are in direct response to this liability and effectively strip the rights of redress of many workers who are currently mislabelled as casual employees.

Despite the generally held view that casuals are paid a loading to compensate for insecure work and the denial of paid sick leave and holidays, this is untrue. A recent study found that about half of all casual employees receive no loading whatsoever, and of the subset that do receive a casual loading, a significant number nevertheless receive less pay than they otherwise would if they were not casual employees.[32]

Most casuals are not being paid more than permanent workers in the same jobs. In fact, the longer they are made to stay as casuals, the more likely that they will actually be paid less than permanent employees. Even where a loading is paid there is also evidence that the level of the casual loading is small and inadequate considering the loss of entitlements and the insecure nature of casual employment.[33]

Casual Conversion

Recommendation four: that the proposed casual conversion clause contained in *The Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* be rejected in its entirety.

Recommendation five: that any introduced casual conversion clause must contain a clear and reasonable employee right to request, must be enforceable and have a right of appeal.

UWU firmly supports the introduction of a casual conversion scheme that effectively provides for the conversion of casual employees to permanent work. However, the failure to provide a clear definition of casual employment that totally rejects existing case law, is not overcome by the introduction of a flawed casual conversion scheme that would only operate at the periphery for a relatively small group of employees.

The proposed casual conversion amendments have been positioned as win for unions and workers in that they provide a mechanism for casual workers who have continuity of service for 12 months and continuity of hours for six months to convert to permeant employment. However, the proposed casual conversion clause proposed will not operate to support

[30] *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84.
[31] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, Explanatory Memorandum.
[32] Change the Rules: The Myth of the Casual Wage Premiums, ACTU, 2018.
[33] Ibid.

conversions to permanent work and, in conjunction with the proposed casual definition, will open the floodgates to increasing insecure employment.

Although the casual conversion provision requires an employer to make an offer, the provision lacks any capacity for enforcement. There are no rights to enforce conversion and the employer is able to escape any obligation based on undefined and absurdly broad "reasonable business grounds". In reality these amendments enforce such a high eligibility bar, underpinned by unnecessarily broad exemptions, without any real penalties for employers who avoid their obligations that it is unlikely to result in any number of casuals successfully converting to permanent employment.

All casual workers deserve the right to request conversion to permanent employment. Although the right to request is currently protected by industrial law in some modern awards and enterprise agreements, where it exists it can be far too easy for employers to refuse this request or avoid obligation entirely. In our experience, permanent conversion rights for casuals far too often fail without workplace union power. It is next to impossible for an employee without any assistance to pursues a casual conversion or to verify or contest a rejection by an employer. Ultimately without fear of punishment driving businesses to do the right thing, most casual workers will never see the benefits of a casual conversion clause.

While we do not suggest that all employers are unscrupulous, it is clear there are systemic issues across all industries which warrant significant concern. The number of companies that show a disregard to following even basic workplace laws is shocking. Workers are too often taken advantage of by employers who prey on a perceived unwillingness or lack of knowledge to pursue rightful entitlements. When workers do speak up, the legal process for getting justice is too complex, costly and slow.

Instead of addressing this inherent issue with existing casual conversion rights, the proposed changes will make it harder for workers to convert to permanent employment. The changes essentially strip workers of the right to request and leaving workers at the will of employers to proactively make the offers of conversion to workers. We know in practice this will rarely happen. As we have seen, many employers are heavily invested in maximising their casual workforce. There is simply not enough of an obligation for employers to make an offer.

Eligibility criteria will be easily evaded by employers who can vary hours and schedules to avoid meeting that high benchmark. Further, employers can refuse to make an offer on so-called reasonable grounds. Reasonable has been defined in broad enough terms that it could be adopted by any employer in any circumstance to avoid triggering the casual conversion. Troublingly we have seen many examples of bosses 'gaming the system', by adjusting rostering at the end of the qualifying period temporarily, to avoid 12-month continuity.

A further limitation of the proposed conversion scheme is that there are little penalties for employers who breach the conversion clause. The FWC can only exercise its arbitral powers subject to the agreement of both parties. The practical effect of this failure to allow for compulsory arbitration of disputes relating to casual conversion will be that employers may simply avoid their compliance obligations by declining to allow the independent umpire to make a binding determination. Workers who are denied the right to appeal through the FWC

UNITED WORKERS UNION

must instead rely on the Federal Court, a legal system that is complex, costly and slow. This is not a viable option for many workers and the Government knows that very few workers will ever pursue this avenue of appeal. The denial of any true right to appeal under the proposed amendments is in complete disregard of the rule of law.

"I've worked multiple different chef jobs in hospitality during my eight years in the industry, including completing a chef apprenticeship in a family-owned restaurant group in inner-Brisbane. The first thing I would say about casual and permanent employment in my experience is that the industry is staffed by a huge number of employees on a casual basis, even though they are effectively permanent full-time or part-time because of the regular patterns of hours they work. But we hardly ever receive a job offer in writing or get payslips, we're often paid incorrect lower rates and rarely get overtime, penalties or leave, let alone proper tax and Superannuation. My super account balance is only about $20,000, when it should be at least $32,000, not including interest. And I haven't had to dip into my super early like so many in hospitality have.

After about five years working as a chef, I'd had enough being ripped off so I went through a six-month period where I worked more than 12 different chef jobs, trying to find one that would pay me correctly. None of them did. Many were cash-in-hand, some never paid me at all and I think only one or two were on the books (paying tax and entitlements).

When I eventually accepted a verbal offer of a full-time chef job in late 2018, my first pay was at casual rates, even though it was 8am-4pm, Monday to Friday including late on Thursday evenings; more than 45 hours in a week. Two months after I raised questions with the owner-manager of the business about pay rates, missing super and penalties and getting no breaks during shift, I was offered a full-time salary as head chef, which I accepted. Then the boss started adding extra unpaid hours, including Sundays that I hadn't previously agreed to do. After 6 months working 6 days a week, I was exhausted and I'd worked eight Sundays in a row on top of my full time days. That was enough for me, so I quit and I'm now looking to retrain at TAFE and work a few days in hospitality as well, but it's hard to find a real part-time instead of casual chef job!

During the last few years, I've had to learn more about my work rights and not put up with exploitation. And I've only recently joined my union and I want to work in better hospitality jobs in the future, not worse" – unemployed hospitality worker, Queensland

Further Recommendations

Economic recovery starts with increasing permanent secure jobs for workers. As evidenced above, the Governments policy agenda to tackle insecure work fundamentally fails to address the drivers of insecure work and fall short of the purported positive impacts on economic growth.

UWU proposes the following policy recommendations to address the rising insecurity of Australian workers:

a. Equal rights for all workers so all workers regardless of their status should have the same basic rights to access the minimum wage, paid leave, public holidays, occupational health and safety protections and collective bargaining.

b. A national labour hire licencing scheme to combat illegal practices in labour hire companies.
c. Overhaul of procurement laws to prohibit the use of subcontracting on government sites and projects.
d. The extension of an unfair dismissal regime beyond just direct employers to persons responsible for the engagement – such as principal contractors or clients.
e. The extension of requirements relating employee records to all workers within an employer's purview (including sub-contracting labour to the full extent of the supply chain).
f. Legislation to be provided for site rates, where an employer becomes covered by the site collective agreement when they provide labour covered by that agreement, whether they were party to the agreement or not.
g. Time to care not a sentence to insecurity so all workers who have caring responsibilities are not entrenched in insecure work as their only option.
h. Increasing protections for visa workers with the fundamental principle that exploitation should not result in deportation. This should apply to all visa workers, people working without a visa, and those working contrary to the terms of their visa.

Deregulating Permanent Work

Recommendation six: that the proposed amendments contained in Schedule two of *The Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* that seek to deregulate permanent employment be rejected in its entirety.

Further entrenching Australian workers in insecure work is the proposed amendments to twelve identified modern awards that will allow employers to amend working hours for part time workers and the conditions and locations in which they work.

The Government has positioned these amendments as a solution to record high and growing underemployment. It defies all reasonable belief that this Government would believe that increasing job insecurity for permanent part time workers could genuinely have positive impacts for workers or the Australian economy.

Identified Modern Awards

Singling out some Modern Awards and therefore some groups of workers for these amendments is harsh and unfair. The evidence-case that hospitality and retail are distressed is weak. In general, the economic recovery from the COVID-19 pandemic has exceeded expectations. Overall, a variety of data suggests that while the hospitality industry indeed suffered extreme impacts arising from the pandemic and associated lockdown, there is evidence that the industry has already begun to rebound.[34] Retail rebounded completely in the second half of 2020 and by end 2020, hospitality indicators are all tracking back towards normal, and may have snapped back completely by early 2021.[35]

The ABS December 2020 Business Indicator: Business Impacts of COVID-19 data shows that 47 per cent of accommodation and food services businesses experienced an increase in revenue for December, the highest of all industries. Retail at 40 per cent is the second highest. Retail expect a further 40 per cent increase in Jan and accommodation and food at 29 per cent.[36]

Further, the reach of these new measures can extend well beyond these listed awards as the Minister can easily prescribe any modern award as an identified modern award by regulation. It is possible that ultimately, workers in every industry and under every modern award could be subjected to these new provisions. The application of these provisions in some industries where flexibilities around part time workers already exist would remove well established industry practices that provide a reasonable balance between workers and employers and have been developed by agreements through unions, workers and the FWC.

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[34] https://www.abs.gov.au/statistics/economy/business-indicators/business-indicators-business-impacts-covid-19/nov-2020 ; https://www.abs.gov.au/statistics/labour/earnings-and-work-hours/weekly-payroll-jobs-and-wages-australia/latest-release ; https://www.abs.gov.au/statistics/labour/employment-and-unemployment/labour-account-australia/latest-release ; https://www.abs.gov.au/statistics/labour/employment-and-unemployment/labour-force-australia-detailed/latest-release#industry-occupation-and-sector
[35] https://www.abs.gov.au/statistics/economy/business-indicators/business-conditions-and-sentiments/latest-release
[36] Ibid.

Suggesting these amendments are crucial to the economic recovery is simply untrue. We are left to assume that they are designed for the soul purpose of allowing employers to take advantage of their position in the labour market. The crucial measure for long term recovery will be get money pumping in our economy. Measures that arbitrarily cut pay for some groups of workers is the opposite of what we should be doing especially when there is no economic justification for doing so.

Part Time "Flexible" Hours

These amendments dissolve hard won protections for permanent workers that deliver stable and predictable hours and conditions. Under simplified additional hours agreements (**SAHAs**) part time workers will become casual workers, without a loading, and bosses will be able to cheaply amend hours in line with fluctuating demand. It is casual employment, without the loading and full time without the security or overtime compensations for essentially being permanently on-call. Fundamentally this is the worst of both worlds for workers and the best of both worlds for employers.

SAHAs will create enormous pressure on part-time employees to accept additional hours, on little to no notice, without being paid overtime. The provisions purport to require the agreement of the employee. Yet the agreement does not have to be in writing, it need only be noted by the employer that there was an agreement.

Hospitality is one of the worst industries for non-compliance. Based on previous experience, it is highly likely that some employers will force workers to agree or pretend there was agreement when there wasn't. Further, there is nothing to prevent prospective employees from being forced to agree as a condition of employment. This will be reflective of the damage that was inflicted on workers from point of engagement AWAs.

The industrial reality of these changes is that part time employees will be pressured into accepting agreements that make their working arrangements less certain and less secure. Employers will be able to pressure part time workers into working additional hours without overtime and will exacerbate the practice of part time workers being treated as casuals. This is highly unlikely to stimulate job creation and any new employment arrangements will likely be offered on minimum contract hours. This will further increase insecure employment across many industries, and is counterproductive to creating a more stable workforce.

Case Study: Minimum hour contracts in Aged Care

Unpredictable shift patterns are a significant feature of the current aged care work that can negatively impact on job quality and thus the quality of care provided to older Australians

In the home care setting, where work is more immediately driven by client demand, security of hours is a significant problem. Home care workers are typically engaged on minimal-hour contracts by which the provider commits only to provide additional work within the employee's stated availability as it becomes available and based on client need. Many workers will indicate a wide span of availability, so as to maximise their hours of work, yet there is no obligation on the employer to provide any more than minimum contracted hours.

Such workers are essentially 'on call' without pay. If the worker reduces their availability with the provider (for example, in order to gain work elsewhere), the provider may reduce the worker's minimum contracted hours to the extent of the reduction in availability.

This variability of earnings means workers have no certainty over meeting bills and planning for the future and throws into doubt an individual's eligibility to claim various forms of social benefits. While weekly income can frequently be inadequate, the need to be available for work when required by the employer hinders the ability of workers to take up other employment. The need to respond to calls to attend work, frequently at short notice, disrupts life outside work and places particular strain on families and arranging care for children. This is particularly problematic given that the majority of the aged care workforce is women. Women are still more likely than their male colleagues to have caring responsibilities which are not compatible with irregular hours and 'on call' working arrangements.

The end result is that employers gain the significant advantage of an effectively 'on call' workforce without providing compensation.

"In the last three years my income has reduced each year and I expect this year to make four. I have no guarantee at all regarding how many hours I work. I cannot get out of this job soon enough and when I do would never consider working in this field again and would never recommend for anyone else to do so. It's a complete dead end". – Aged Care Worker

"The biggest issues in this industry are the poor pay and unpredictable income and generally being treated as though I am somehow less important than everybody else. This is an industry of exploitation. Every day I am treated poorly by my employer." – Home Care Worker

Flexible Working Directives

Flexible working directives are essentially an extension of the JobKeeper flexibilities for further two years. Under the proposed amendments, workers can be directed to duties or locations of employment that differ from their contract of employment. Employers can make these directions unilaterally on the basis that they reasonably believe the direction is part of a reasonable strategy to assist in the revival of the employer's enterprise.

In contrast to the JobKeeper directions, employers do not have to meet a strict 'decline in turnover' test to be able to issue these directions. These grounds are so broad that in practice almost any employer could invoke these.

While there is a requirement that these directives are reasonable, there is no real obligation to consult with workers prior to making the directive. Further, the lack of viable means to appeal directions of employers which completely undermines the value of the reasonableness criterion.

For the reasons outlined above, these proposed amendments are rejected in their entirety.

Enterprise Bargaining Reform

Recommendation seven: that the proposed amendments contained in Schedule three of *The Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* relating to enterprise bargaining reform be rejected in its entirety.

UWU strongly rejects the proposed amendments relating to enterprise bargaining reform contained in the IR Omnibus Bill. The fundamental purpose of collective bargaining should be to improve working conditions for ordinary Australians. This legislation, if passed, will lead to cuts to those conditions. These changes are designed to reduce the quality of consultation and information flow given to workers before they are asked to vote about an EBA, at the same time as they broaden the circumstances in which an EBA could be below the award standard and still approved legally. They will make it easier for employers to undercut or exclude the minimum safety net of employment conditions and undermine workers' fundamental rights to have a union represent their interests in bargaining. These changes effectively hand employers' unilateral power over enterprise agreement wage setting, a cornerstone of the WorkChoices legislation that was rejected by Australian voters in the 2007 election.

We've been here before. A driving component of WorkChoices was to make it easier to push sub-standard agreements on to workers without them knowing what was in them, only to find later they'd had their conditions cut. There is a broad consensus that WorkChoices was an absolute disaster for workers. These changes come at a time when inequality is at its highest and despite claims to the contrary will do nothing to lift productivity, wages or improve working conditions for Australian workers.

Failing Workers

The fundamental goal of collective bargaining is to provide workers with a democratic and effective mechanism to counterbalance the concentrated economic power possessed by employers. Unfortunately, millions of workers have not seen reasonable, reliable or sustainable gains from workplace enterprise bargaining. In fact, these workers have lost out.

Currently in Australia, one in four people are being paid the barest legal minimum. [37] In many cases that's hardworking Australians earning a wage of less than $700 a week. Four in ten people rely on insecure work. [38] That's forty per cent of Australians not knowing from one day to the next whether they will work enough hours to put food on the table this week. The impact of this wage crisis is clear, sustained and devastating. Business models have been set up to deliberately rip off vulnerable groups in the labour market. Whole classes of workers experience regular and systemic exploitation. Good people, doing decent and meaningful work are living in poverty.

> *"I work as an educator in long day care, I earn $650 roughly a week after tax. If I miss a day because myself or my daughter is sick it means I cannot afford a bill the following week."* ECEC, Queensland

[37] Centre for Future Work, Submission to the Fair Work Commission Annual Wage Review, March 2020.
[38] Change the Rules: The Rise of Insecure Work in Australia, ACTU, 2018.

> *"I work weekends and nights till at least 4am. I'm then up at 7am for the school run. My pay has been dropping dramatically over the past few years. I'm still a casual, no sick pay, no paid holidays."* – Hotel Worker, South Australia

> *"Living on the wage of school cleaner, 88% of my wage goes on RENT! Never mind paying any other bill or having a life."* School Cleaner, New South Wales

In 1991 Australia's then Labor government embraced enterprise-level bargaining. Enterprise bargaining was supported by Labor and the ACTU as part of the Accord, on the basis that the existing system was too centralised. The new model saw workers bargaining at the workplace level, within a safety net of minimum standards provided by tribunals setting awards. Awards were designed to be a safety net of wages and conditions, underpinning wages growth and acting as a fallback in the rare instance where enterprise bargaining did not occur.

The reality is that more and more workers are dependent on the awards system to maintain their wages and conditions.[39] The award system can no longer be considered a floor but a ceiling capping workers' wages and conditions across large proportions of the workforce, and this number is growing. What was once a safety net has now transformed into a cage, with more working people unable to negotiate for above-award pay.

Even when working people can bargain, the current rules limit their power and protect employer's interests above all else. The consequences of the disappearance of collective bargaining are profound for workers, employers and the overall economy. It is clear that the rapid decline in EA coverage in the private sector has been a significant factor in the unprecedented deceleration of wages in Australia. Fewer workers on EAs means lower wages growth. With the collapse in the incidence of private sector collective bargaining and more than five years of wage suppression it is clear that the current system of enterprise bargaining cannot be relied upon to deliver fair and decent outcomes for Australian workers. [40]

WorkChoices is Not the Answer

While UWU strongly believes the current system of enterprise bargaining is not working, the proposed amendments in the IR Omnibus Bill are not the solution. These amendments will further weaken the capacity of the system to improve working standards and will not promote wages growth. Instead they will open a floodgate of non-union below award agreements that will permanently damage living standards for millions of Australian workers.[41]

A key component of the enterprise bargaining system is that parties are able to bargain and are expected to do so in good faith. The BOOT test is an important component of the Australian industrial system which prevents employers from using their power advantage to force

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[39] Alison Pennington, On the Brink: The Erosion of Enterprise Agreement Coverage in Australia's Private Sector, Centre for Future Work, 2018.

[40] Alison Pennington, The Fair Work Act and the decline of enterprise bargaining in Australia's private sector" *Australian Journal of Labour Law* 33, 2020.

[41] Alison Pennington, How Non-Union Agreements Suppress Wage Growth – And Why the Omnibus Bill Will Lead to More of Them, Centre for Future Work, 2020.

UNITED WORKERS UNION

agreements which undercut basic statutory rights. For some workers, the BOOT assessment conducted by the FWC is the only means by which their right to a minimum safety net of terms and conditions is assured. Removing the BOOT test and permanently excluding unions from contesting non-union agreements tips the balance too far to the benefit of employers and will slash the rights and conditions of workers, primarily low paid vulnerable workers.

We have seen this before under the WorkChoices legislation of the Howard Government. Between 2004 and 2009, as a direct result of the removal of the no-disadvantage test and the right for unions to contest agreements the proportion of non-union agreements in the private sector rose from 20 to 60 per cent.[42] This surge in low wage, non-union agreements had a lasting negative impact on wage growth and saw many workers lose entitlements and protections under the law that has continued well beyond the abolition of the WorkChoices legislation.

Case Study: Zombie Agreement in the Cleaning Industry

The union was approached by a member working as a cleaner for a large Perth company that contracts in the private sector and for state government entities. The company relied upon an agreement that was approved in the last days of the Howard coalition government in 2009, and prior to the introduction of the FW Act.

The workers of this cleaning company had not seen a pay rise in ten years and were being underpaid for not only their base rate but also a host of overtime, weekend and Public Holiday rates.

The Union found that the pay rates provided for in the enterprise agreement fell well below those found in the *Cleaning Services Award 2010* (**Award**). The Union contacted the employer at first instance to work together to terminate the enterprise agreement and rectify the underpayments however the employer maintained that they were confident that the pay rates did now fall under the Award rates.

With the help of the union, two cleaners made an application to the FWC to have the agreement terminated. With the employer not opposing the application, the employees became entitled to the conditions under the relevant Award.

This, significantly, meant a pay increase overnight for the entire work force.

The union is now working with the same workers to secure back pay for the money that appears to have been stolen from them over the past few years. Without a technical understanding of the legislation and the ability to make an application to the FWC, these workers would have continued to have been underpaid and have their conditions dictated by a ten-year-old agreement.

[42] Alison Pennington, On the Brink: The Erosion of Enterprise Agreement Coverage in Australia's Private Sector, Centre for Future Work, 2018.

The principal purpose for which the current amendments have been drafted are to remove as many safety net Modern Award protections and entitlements as possible and to unilaterally cut wages. While it is possible that enterprise agreement coverage might increase, this would be on the basis of non-union agreements motivated primarily by the desire of employers to evade minimum conditions in awards.

We know from experience that low paid workers and women will be hardest hit with these changes. Changing the rules to allow for wage cuts during this period of economic recovery is the opposite of what this country needs. In short, Government has delivered on what big business have been asking for since the end of WorkChoices - a collective "bargaining" system that has little room for actual bargaining giving employers increasing power to unilaterally set the terms and conditions of work.

Loss of Consultation

Under the proposed changes employers will not be obliged to provide workers with all the information necessary for them to make an informed choice about whether to vote in favour of a proposed EBA.

Based on our experience, it is our belief that unscrupulous employers will use this loophole to their advantage and attempt to push through agreements that strip workers of their entitlements without properly informing them.

Our experience is that, until they are involved in a conflict or have an issue at work, the large majority of our members have limited or no knowledge about the industrial relations system; how their pay and conditions at work are set; or even their basic workplace rights. We are at a point where some workers don't even realise the extent to which they are being exploited and if they do, for many the consequences of raising it impedes action. The impact on affected workers and the broader community is overwhelmingly one of unfairness – of a system stacked against them. It feeds into a lack of trust in our government and legal systems that ultimately damages our democracy.

In industries with high proportion of CALD and migrant workers, such as horticulture and property services, employers know that it is unlikely that the workers they employ will be unionised, or that they will know and be prepared to exercise their rights. Many are international students, who have an added layer of vulnerability due to a risk of being deported if they work more than 40 hours a fortnight. Many of these students feel a high degree of loyalty to their cultural community, and fear losing their job if they speak out against their employer or join their union. We know that some employers will utilise this to their advantage in an attempt to push through below award wages.

Public Interest Exemption

The current public interest exemption is sufficient and does not need amendment. The IR Omnibus Bill adds a new public interest exemption to section 189 of the FW Act, which will allow the FWC to approve agreements that do not meet the BOOT as long as it is 'appropriate to do so taking into account all the circumstances' (including the views and circumstances of the employers, employees and bargaining representatives, the impact of COVID-19, and the result of

the vote) and 'because of those circumstances' approval is deemed 'not contrary to the public interest'. In practice this will be an extremely low bar for employers to overcome.

These amendments seek to give the power to employers, in that by making the views of the employers relevant to the test, it gives those views, whatever they are, evidentiary status as to what needs to be proved, in place of actual evidence.

Approving enterprise agreements that fail to pass BOOT should be extremely rare and should be in response to short term exceptional circumstances. The proposed amendments are far too broad and easy to meet and must be rejected in their entirety.

Non-Monetary Benefits

We are extremely concerned that the legislation appears to intend to broaden the circumstances in which an employer can offset the removal of a financial benefit (such as penalty rates or overtime entitlements) in exchange for the provision of a non-financial benefit. This is of particular concern given the Fair Work Commission itself has referred on a number of occasions to the difficulty in attributing value to non-monetary benefits, especially when those non-monetary benefits are dependent on contingent outcomes not known at the time the BOOT test is conducted, and where usually, non-monetary benefits do not apply consistently to all employees.[43]

The IR Omnibus Bill's reference to regard being had to "patterns or kinds of work" as matters which might be taken into account with respect to BOOT are clumsy and ambiguous, and will serve only to increase the difficulty for the Commission in applying the BOOT test, and the efficacy of agreement making for the industrial parties.

Industry Bargaining

Australia's system for bargaining is at the extreme end in terms of its level of decentralisation. Most other OECD countries have a more moderate mix of coordination and decentralisation. With only 11 per cent of private sector employees covered by a current EA, Australia's highly decentralised enterprise-level bargaining system is failing to extend bargaining rights to the majority of workers. Having spotted this power imbalance, many employers have exploited it.

As outlined above, the proposed amendments to enterprise bargaining in the IR Omnibus Bill are not the solution to this issue.

Decades of neoliberal economic restructuring have increased inequality, removed key workplace protections, eroded workers' bargaining power, and led to a dramatic rise in the incidence of precarious and insecure work, underemployment, wage theft, and wage stagnation.

UWU believes that workers must be able to collectively bargain for improved workplace standards with the controlling economic entities across industries and along supply chains. Workers need to be able to bargain with the host business in labour hire; with franchisors; with

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[43] See RE Loaded Rates Agreements [2018] FWCFB 3610 at [112 – 114]; National Tertiary Education Union v University of New South Wales [2011] FWAFB 5163 at [96]"

UNITED WORKERS UNION

lead businesses in supply chains; and across industries. Industry bargaining is a necessity for resolving worker bargaining imbalances created by increased contracting out, labour hire, insecure working conditions, decentralised working and attacks on unions that create barriers for union power in the workplace.

The case for implementing this change in Australian labour law is even stronger in light of the devastating impact of the COVID-19 pandemic on workers. Inclusion of all workers in a functional system of collective bargaining, that goes beyond the enterprise that happens to directly employ them, is not just a matter of economic power. It is a vital mechanism to ensure workers have control over the safety of their work, across sectors, industries, franchises, labour hire arrangements, supply chains – or however work is configured.[44]

Case Study: Fresh Food Supply Chain

One example of a continuing plan to turn around this systematic suppression of worker dignity has been the UWU's commitment to organise along the entire Fresh Food Supply Chain. The union had always maintained high membership and bargaining activity in food processing and distribution. The decision to organise further upstream in the supply chain, in the fresh food sector, was predicated on a number of interconnected factors. First, the investment in control of the fresh food supply chain by the major supermarkets. Second, the supermarket strategy of moving risk from themselves to the workers through formal contracting out of labour provision, through to more shadowy and extremely exploitative arrangements prevalent in fresh food production.

It was clear to the UWU that without linking workers together through supply chains, the highly exploitative employment practices in fresh food would slowly move through the supply chain controlled by the major supermarkets. The union's response to the limits of the current enterprise bargaining scheme has been to create a nationally coordinated bargaining approach, which has had some success in pushing back against the shifting of risk onto workers. Through coordinated and synchronised bargaining, workers have won secure and direct jobs and an end to outsourcing in some instances. Logistics workers have supported farm workers by establishing and prosecuting shareholder resolutions for labour rights. Both groups of workers have attended company AGMs to speak in support of one another.

These solidarity actions have seen thousands of farm workers subjected to precarious and exploitative arrangements join the union and collectively bargain for basic labour rights. The major supermarket retailers that have established enormous control over their supply chains now sit down with the UWU and recognise their role in the working conditions of farm workers. While this recognition is hard-won and fragile, the supply chain organising approach (even

[44] Block, S. and Sachs, B. 2020. *Clean Slate for Worker Power: Building a Just Economy and Democracy.* Labor and Worklife Program: Harvard Law School.

within a legal scheme hostile and ignorant of modern employment methods) is building solidarity and hope amongst workers that they do deserve jobs that they can count on.

While its precise shape requires much further consideration, for industry bargaining to be successful it must follow these three principles:

- It must be universal: it must meet the needs of workers who have fallen through the gaps in the current system.
- It must be accessible in that all workers must be able to benefit.
- It must give workers a real voice and restore their power to determine their living standards.

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Wage Theft

Recommendation eight: that the proposed amendments contained in Schedule Five of *The Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* be rejected in its entirety.

Recommendation nine: if Wage Theft is to be introduced into the *Fair Work Act 2009* as a federal offence it should at least mirror existing legislation in Queensland and Victoria.

The ACTU has provided clear commentary on the compliance and enforcement amendments proposed in Schedule Five of the IR Omnibus Bill. We defer to this commentary and wish to focus solely on the issue of wage theft criminalisation in this submission.

UWU has long advocated for wage theft legislation federally and at a state level. Existing wage theft criminalisation legislation in both Victorian and Queensland are the direct result of the union movement fighting for the rights of millions of workers who have seen their wages stolen from them by their employers.

Unfortunately, the proposed wage theft criminalisation amendments under the IR Omnibus Bill are nothing more than headline grabbing meaningless policy for the Government to point to as a win for workers. In reality, these proposed amendments will water down the existing criminalisation legislation in Victoria and Queensland (specifically relating to penalties for employers and capacity of employees to recover stolen entitlements) and present standards for culpability so onerous that they are unlikely to ever be used. This is simply another example of the Government heeding to the wishes of big business and denying Australian workers the rights and protections they deserve.

Case Study: Wage Theft in Hospitality

It is no secret that wage theft is rampant in hospitality and goes hand in hand with insecure work. Workers know that speaking up about wage theft is a dangerous move when most are in casual employment and employers routinely stop giving shifts to workers who voice their concerns.

A huge 82 per cent of workers surveyed by UWU were affected by wage theft. Almost half said they were paid below the minimum award rate and over 30 per cent were paid off-the-books without access to their entitlements; were not paid their superannuation; and did not receive the tips they got from customers.

The cafe I worked for had been underpaying me over two and a half years. I missed out on weekend and public holiday rates and I was paid below the legal hourly minimum. I worked out they owed me at least $18,000. That wage theft meant that when Covid hit I didn't have that money to fall back on. You start to realise how much you are owed and how much you missed out on and how hospitality employers have been taking advantage of their staff. Covid really opened my eyes to just how insecure all our jobs are in hospitality. With casual employment you have to stay silent about wage theft and about abuse and sexual harassment or you will have no job. We need more permanent jobs in the industry, so we have more security and real rights we can enforce. - Café Worker, Queensland

Case Study: Wage Theft in Cleaning

An FWO audit conducted in the contract cleaning industry found that 33 per cent of cleaning businesses underpay their workers.[45] Subcontracting, sham contracting and labour hire are all rife in the cleaning industry and many of our cleaning members are also migrants who are especially vulnerable to wage theft.

The nature of contract cleaners as a highly dispersed and hidden workforce means that the true extent of exploitation cannot be determined with precision. Contraventions of the *Cleaning Services Award 2010* in retail cleaning are extremely common, with the frequency of breaches becoming exponentially higher once a second-tier or more of subcontracting is introduced. Most cleaners working in supply chains are not receiving payslips, are paid a flat cash rate for all hours worked (and so are not paid minimum wages, parttime allowances, night shift, weekend or public holiday penalty rates), do not receive overtime, do not receive superannuation, and are often unable to provide a clear indication of the business which has employed them.

For example, for two years a group of Karen Refugees from Burma who were permanent parttime school cleaners in Canberra had their wages stolen. These cleaners were not paid correctly for school holiday work, nor were they paid annual leave loadings. Some of the cleaners were owed almost $25,000 and the union took action in the federal court and won. The union has since supported our Karen Refugee members to set up their own cleaning company, Harmony Community Cleaning.

The ACT Territory Government also took action against dodgy subcontracting and wage theft rife in the cleaning industry when they brought school cleaning back-in house under government control. When unions act, governments can follow and prevent wage theft.

Social and Economic Issue

It is a fundamental right of all workers in Australia to timely payment of all wages owing to them, and employers who unlawfully withhold workers' wages are committing wage theft and are wage thieves. Wage theft has become the 'new normal' in many of the industries UWU represents, highlighting a significant problem in the Australian economy. Wage theft is rife across a diverse range of industries including food and beverage production, early childhood education, security, horticulture and supermarket supply chains, and cleaning. Every year, thousands of the lowest paid workers in the country experience wage theft. For many this can mean the difference between getting by or experiencing financial hardship.

The workers that UWU represents are particularly vulnerable to wage theft. For example, migrant workers on insecure visa arrangements, young workers who are paid cash in hand, and workers in industries where subcontracting is common are at high risk of wage theft. UWU has been assisting these members tackle wage theft for many years and we have unique insights and authority to comment on the issue.

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[45] 9 FWO (2016) 'Cleaning industry compliance needs to improve', Media Release, 13 May 2016, accessible at: Cleaning industry compliance needs to improve - Media Releases

Worker exploitation and wage theft has become a low-risk decision for many Australian businesses and is indeed regarded as a 'cost of doing business'. Australians expect businesses to pay their workers fairly and justly. Businesses that use wage theft as a core part of their business are stealing and are undermining Australian law and community standards. Many businesses are doing so because of a lack of enforcement, scrutiny and deterrence measures. Current laws are not being adequately enforced and punishment is too light. Business owners do not consider the Fair Work Ombudsman's (**FWO's**) activities as a deterrent. Scrutiny and accountability are just too low. The FWO has only 300 inspectors for over 11 million workers in over 2 million workplaces and laws restrict union access in high-risk industries where casual contracted work is systematic.[46]

Moreover, weak laws and regulation around sub-contracting, sham-contracting, labour hire, franchisors and phoenixing ensure businesses can get away with worker exploitation. Businesses often outsource hiring arrangements, resulting in subcontracting or labour hire arrangements that see wages as low as a reported $4.60 an hour.[47]

Sham contracting is used by employers to disguise employment relationships as independent contracting arrangements. This is usually done for the purposes of avoiding responsibility for employee entitlements and is highly problematic. This practice occurs often in horticulture, security and cleaning.

The lengthy and complex legal processes required to prosecute wage theft are also highly problematic and put workers in vulnerable financial and legal positions. When workers do speak up, the legal process for getting justice is too complex, costly and slow. A justice system where you have to wait years to get your wages back is no justice at all. There are also inadequate protections for whistle-blowers that make it difficult for migrant workers to speak out about wage theft.

The scale and cost of wage theft in, and to, the Australian economy is significant. In Queensland alone, the Government found that almost $2.5 billion was being stolen from Queensland workers every year.[48] Industry Super Australia found that almost $6 billion in superannuation theft occurred in 2016-2017 and the ACTU is estimating that between $6 and $12 billion is being stripped from the economy annually.[49] It is clear that the cost to the economy is significant. Wage theft is now extremely well-documented in a number of academic studies, state and federal parliamentary inquiries, as well as submissions and reports.[50]

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[46] Howe, J. (2016) 'New visas threaten Australian jobs', The Sydney Morning Herald, 6 June 2016, accessible at: http://www.smh.com.au/comment/new-visas-threaten-australian-jobs-20160606-gpchab.html
[47] https://www.accr.org.au/news/accr-nuw-report-shows-supermarkets-must-do-more-to-manage-exploitation-in-farm-supply-chains/
[48] https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2018/5618T1921.pdf
[49]https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Underpaymentofwages/Submissions
[50] 2017 federal senate inquiry into corporate avoidance of the Fair Work Act https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/Avo

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The extent of the problem does not need to be reiterated, instead the focus must be on the significant cost of wage theft to individual workers and its impact on Australian society. Wage theft is more than a cost to the economy, it is about a fundamental threat to Australia's social contract, and it is a driver of social inequality in a country where this is already increasing. Wage theft mocks the notion of a 'fair day's pay for a fair day's work', condemns workers to poverty by regressively transferring wealth from workers to employers and undermining workers' retirement savings scheme, destroys workers' trust in the rule of law, is unfair on law-abiding employers, and robs governments of tax revenue.

Criminalisation of Wage Theft

UWU has long fought for the criminalisation of wage theft. Wage theft has successfully been criminalised in Victoria and Queensland, in no small part due to the efforts and activism of UWU members. However, the proposed wage theft criminalisation under the IR Omnibus Bill are inappropriate and will not address the issue of wage theft in the Australian economy.

Wage theft is not isolated or inadvertent; it is a rampant, systematic employer practice. In many industries covered by UWU, it is the prevailing business model. Under the current system, it is too easy for employers to underpay workers, and too costly and difficult for workers to recover money. UWU rejects the approach to wage theft contained in the IR Omnibus Bill and instead proposes a package of reforms to address wage theft on the basis of the following.

One off wage theft is still wage theft

Significant wage theft should not be excused, simply because it is said to be a "one off". Wage theft is often, but not always, systematic. Both systematic and one-off instances of wage theft should be criminalised, with higher penalties for employers engaging in systematic conduct. One-off instances of wage theft can still represent a substantial loss for workers, especially low paid workers.

For example, G8, a large early childhood education provider, did not pay redundancy to over 180 early childhood educators. It could be argued this was a case of 'one off' wage theft, but the workers lost (and then won back, via the union) over $830,000. This demonstrates that even one-off instances of wage theft can be significant, and that employers should not be protected from penalties on the excuse that 'it only happened once.'

Legal definitions of employees

Restrictive or confusing legal distinctions between employees and other workers should not be permitted to act as a defence to criminal wage theft. Significant cases of wage theft have been

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idanceof FairWork/Report; inquiries and reports by the Western Australian and Queensland Governments (https://www.commerce.wa.gov.au/sites/default/files/atoms/files/report_of_the_inquiry_into_wage_theft_0.pdf and https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2018/5618T1921.pdf); Victorian Government https://engage.vic.gov.au/wage-theft ; federal senate inquiries on wage theft in the cleaning industry (https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/Exploitationof Cleaners).

exposed involving attempts to defend exploitative conduct through the use of complex legal distinctions between employment and other forms of worker engagement.

For example, in 2017, a cleaning contractor at the Cadbury chocolate factory in Hobart sacked half their cleaning workforce and hired new workers who had recently arrived from Sri Lanka on sham contracts. These new workers were coerced onto ABNs by the cleaning company, at $17.50 an hour - almost $8 per hour less than the casual Award rate. Being on an ABN the workers didn't accrue any leave, had to pay their own tax and insurances, and they couldn't afford workers' compensation.

Although the new workers were afraid to raise concerns or issues with their new employer, existing union cleaners, caterers and security guards at the factory encouraged them to join the union, stand together to stop sham contracting. Together these union members took the issue to Cadbury management, who directed the cleaning company to fix it immediately. Within 24 hours, cleaning company management flew to Hobart and offered full employment to the Sri Lankan cleaners on the Award, with all the protections and entitlements offered to other members at the site, as well as committing to an ongoing audit of all their operations.

Sham contracts, and other similar arrangements, should not act as a barrier to the prosecution of wage theft. UWU supports a formulation of wage theft criminalisation which relies on a broad definition of employment to ensure that the offence will capture exploitative work arrangements that are constructed to avoid liability, such as sham contracting or franchising arrangements.

Objective standard

The formulation of any wage theft criminal test must be based on an objective standard. A wage theft offence that requires a subjective consideration of the state of mind of the alleged offender may often be pointless. While some employers still engage in flagrant, brazen wage theft exploitation, more often the behaviour will sit within some kind of construct designed to obfuscate or disguise the behaviour as inadvertence or wilful blindness. The best way to ensure a wage theft offence operates on the conduct it intends to discourage is to make it a strict liability offence (which still leaves open defences such as mistake). If a higher standard of fault were used, such as dishonesty, the standard must be constructed based on an objective test founded on the standards of reasonable people (regardless of what the accused says they knew or didn't know).

Corporate actors

The offence must capture the behaviour of the key corporate actors whose conduct drives the unlawful behaviour. Most Australian workers are employed by corporations. The individuals who are driving the use of wage theft (many of whom are well known) should not be permitted to hide behind a corporate veil, and avoid responsibility for their criminal conduct. Many of these individuals (while not themselves the “legal” employer of the workers involved) are responsible for creating and directing the culture that has encouraged or condoned wage theft occurring within their businesses.

UWU supports:

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- The use of an attribution model of liability which means the conduct of an officer or the directors of a corporation to be attributed to the corporation;
- The use of provisions similar to section 550 of the FW Act so that company directors, company officers, human resources officers and professional advisors who have knowingly been involved in wage theft can be held responsible.
- Broader provisions to extend liability in a supply chain context such as those recommended by the ACTU to extend liability for wage theft and other contraventions to principal and other contractors in supply chains, except where certification is provided.

Falsification of worker records

Wage theft criminal offences must extend to the falsification of worker records and the failure to keep worker entitlements. A policy which purports to be genuinely aimed at tackling wage theft, but does not deal with some of the most common contrivances used to avoid detection – like the falsification of worker records or dealing with workers "off the books" (where no records are kept) is a sham.

UWU believes it is crucial that an offence which criminalises wage theft behaviour is accompanied by complementary offences relating to the creation of false records or the false alteration of records, and where the worker records required to be kept by the Fair Work Act (already mandated as civil penalty provisions) are not kept, as part of the dishonest attempt to withhold wages and entitlements from workers.

ROE

Unions must have expanded right of entry powers to uncover and address wage theft. Under the FW Act, unions have more limited right of entry powers than the FWO. Many workers are reluctant to pursue wage underpayments until they have left their job, often because they are concerned that their employer will take retaliative action against them. Union permit holders have a right under the Act to request or inspect documents of current, but not former, employees and this allows employers to obstruct attempts by unions to recover wages for members.

In addition, unions are limited to inspecting member records that relate to a suspected contravention, not non-members records, except with written permission or a Commission order. Given that wage theft is often systematic, this limitation impedes the ability of unions to uncover the full extent of wage theft.

UWU supports expanding right of entry powers to ensure unions can request and inspect documents of former employees, and readily investigate suspected contraventions for both members and non-members.

Recovery of worker entitlement

The recovery of worker entitlements must be easier – simple, affordable and accessible. For many Australian workers, the recovery of unpaid entitlements is expensive, time consuming and unwieldy.

The FW Act currently includes a small claims procedure designed to expedite the recovery of entitlements below $20,000. This is not a solution. Very few workers use it. Many cases of wage

theft involve underpayment totalling more than $20,000, making this scheme useless for most workers. Further, this scheme does not allow for a court to impose civil penalties that would otherwise apply in a wage theft scenario. This removes a key incentive for a matter to resolve quickly and efficiently and is, in many cases of wage theft, simply not appropriate.

UWU believes workers should be able to access specialist courts to recover wages and deal with a range of industrial matters. A model such as the South Australian Employment Tribunal, which operates as a one-stop shop for workers to recover wages and deal with matters such as workers' compensation and industrial disputation has meant a concentration and development of expertise over time, and has resulted in more streamlined, easier to access justice in relation to wage recovery.

It is noted that the small claims jurisdiction is increased from $20,000 to $50,000. It is also noted that the Fair Work Commission is to be charged with conciliation and consent arbitration of recovery of wages claims. These are improvements to the recovery process but are fatally flawed due to the absence of compulsion to the conciliation and arbitration process.

Broader powers for courts

Courts should have a broader range of powers to deal with wage theft behaviour. UWU supports recommendations made by the Migrant Taskforce Report, that courts be given "specific power to make additional enforcement orders, including adverse publicity orders and banning orders, against employers who underpay migrant workers". In particular, we support the idea that the FW Act be clarified to ensure Courts understand it is permissible and even, in the right circumstances, appropriate that directors who are involved in the contravention of that legislation or engage in wage theft criminal behaviour are disqualified from holding office.

Protect collective bargaining

In several sectors where wage theft is rife, such as horticulture and cleaning, it is powerful actors at the top of a supply chain who exert considerable price pressure on suppliers and labour hire companies further down the chain, creating a market for insecure and underpaid work. For effective collective bargaining to occur, the controlling economic entities must be at the bargaining table. As noted in this submission, UWU supports amending the provisions of the FW Act to permit for industry wide and supply-chain bargaining.

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Conclusion

The proposed IR Omnibus Bill will be a devastating blow to all Australian workers and will further entrench low wage growth, insecure employment and loss of worker voice in our industrial relations systems. The long-held consensus that the rights of workers to act collectively to gain a fair share from the rewards of their work is to be respected and upheld in our industrial relations system is broken.

To address this fracture in society we need to restore the voice and the rights of all workers. Workers need to be given real power after the failure of the industrial relations system has left millions of Australian workers facing impossible hurdles to provide a decent standard of living for themselves and their families. Workers need to have a real say in decisions that affect their job security, their wages and their lives.

Our industrial relations system has failed workers. Enterprise bargaining has failed workers. The award system has failed workers. The truth is that big business and successive governments have reshaped our economy and values so it is now considered acceptable that people who go to work every day should live in poverty or scrape out the barest of livings.

Successive governments have presided over a system that has led to the subjugation of workers in the name of choice, competitiveness, shareholder value, the gig economy and good old fashioned greed. Big business has trampled over that once great Australian belief that those who work should earn enough to clothe, feed and house themselves, and still have enough left over to spend on other life necessities for themselves and their children.

There can be little debate the scales in this system have tipped too far towards the interests of big business. And in an environment in which union powers have been repeatedly eroded, a direct effect has been downward pressure on wages and an increase in inequality.

UWU will continue to fight against these draconian industrial changes and push for real industrial change that embody and proudly assert the great Australian value of the fair go for all and hold respect for working people at their core.

For more information on this submission, please contact Matthew Lawrence

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