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

THE SENATE EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE

Submission by the Community and Public Sector Union (CPSU) – February 2021

Introduction

1. The Community and Public Sector Union (CPSU) welcomes the opportunity to make a submission to the Inquiry into the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (**FW Amendment Bill**).

2. The CPSU represents employees in the Australian Public Service (APS), other areas of Commonwealth Government employment, the ACT Public Service, NT Public Service, ABC, SBS and CSIRO. The CPSU also covers private sector workers in telecommunications, commercial broadcasting, employment services and research.

3. This is a time of great challenges for Australian workers. During the pandemic we have pulled together as a community. We have relied on health workers turning up to keep us safe every day, we have relied on our childcare educators, our retail workers and shop assistants, and many, many others. Australian Public Service (**APS**) and federal government employees were critical to our national response to COVID-19, including:

   - Services Australia employees working on the frontline to make sure Australians who need help have access to JobSeeker and other payments to make ends meet, as well as being deployed to frontline work in hotspots;
   - In the Australian Taxation Office (**ATO**), employees have been critical to implementing the JobKeeper payments and other aspects of the stimulus package;
   - Home Affairs and Biosecurity workers are at the frontline protecting borders and keeping agriculture, fishery and forestry industries strong;
   - Employees in the Department of Health are on the frontline of managing our national response;
   - Department of Foreign Affairs and Trade workers have fielded tens of thousands of calls from desperate travellers and their families, and helped thousands of Australians come home;
   - CSIRO staff are critical to scientific research in response to the crisis;
   - Department of Defence employees are making sure the ADF are supported in their frontline duties throughout the pandemic; and
   - Fair Work Ombudsman employees are providing assistance to thousands of businesses and individuals uncertain about their entitlements.

4. All Australian workers, including those we have relied on to keep us safe during the pandemic, need the protection of our workplace laws. The working people of our country have already sacrificed the most and have paid the highest price:

   - With almost a million unemployed and 1.4 million underemployed;
   - Many have exhausted all their sick leave, annual leave and long service leave; and
   - 3.3 million people have raided their super account.

5. Any changes to our workplace laws must not leave workers worse off. Changes should focus on tackling the biggest problem facing working people as exposed by the pandemic, the unacceptably high number of casual, insecure jobs. Over half a million casuals lost their jobs in the first wave of the pandemic, at great personal cost to themselves and their families.

6. Unfortunately, the Fair Work Amendment Bill fails these tests. The Government's changes will make jobs less secure, and they will make it easier for employers to casualise permanent jobs and allow employers to pay workers less than the award safety net. This is the opposite of what the country needs.

7. The CPSU supports the submission of the Australian Council of Trade Unions (**ACTU**), which details the many ways in which the FW Amendment Bill will leave workers worse off. This submission supplements the ACTU submission and highlights several issues of particular significance to the CPSU, including:

   - Casual employment; and
   - Bargaining provisions.

Casual employment

8. In the Australian labour market, too many workers are in insecure employment, including casual employment. Since the early 1990s casual employment has grown, and since 2014 casual employment has accounted for approximately 25% of the workforce[1]. Insecure, casual work leaves workers with little economic security and little control over their working lives.

9. Casual workers experience:

   - A lack of job security;
   - Difficultly obtaining home loans and planning ahead to cover significant purchases;
   - Unpredictable and fluctuating pay;
   - Inferior rights and entitlements;
   - No entitlement to paid annual leave, paid personal/carer's leave, paid compassionate leave, payment for absence on a public holiday, payment in lieu of notice of termination, redundancy pay, or payment for absences due to jury service.
   - Uncertain access to the right to request flexible working arrangements, and unpaid parental leave and related entitlements under the National Employment Standards (**NES**), unless the casual is a "long term casual" and has a reasonable expectation of continuing employment.
   - Irregular and unpredictable working hours; and
   - A lack of say over their working lives.

10. The personal impact of this insecurity was laid bare during the COVID-19 pandemic when lockdowns and closures saw over half a million casuals lose their jobs and join the long queues for Newstart that formed outside of Centrelink offices.

11. Casual workers in the APS were also subjected to great uncertainty during COVID-19, and were understandably very distressed about their ability meet living expenses in the event they needed to take time away from work due to the

1 Australian Labour Market Statistics, cat. No 6330.0, 11 December 2020

pandemic. Casuals were not covered by initial arrangements to provide paid pandemic leave for employees who needed time away from work due to testing positive for COVID-19, or for any period where the employee is required to self-isolate but cannot work from home.

12. The CPSU sought changes to the APSC *Circular 2020/1: COVID-19 leave arrangements*, which requires agencies to provide employees with paid discretionary leave if the employee's personal leave credits were insufficient to cover time away from work, so that the same provisions also applied to casual employees. The Government ultimately changed its position to provide paid leave for casual employees, which was welcome. However, labour hire employees performing work for the Commonwealth remain excluded from those provisions.

13. As in the private sector, the take-home pay and job security of casual employees in the APS were also under threat during the pandemic. Casual employees in a number of agencies found their shifts were reduced or completely cut as a result of COVID-19, in particular:

    - Casuals employed in cultural institutions;
    - Comcar drivers;
    - Australian Fisheries Management Authority observers;
    - Australian Sports Anti-Doping Authority field officers;
    - Department of Parliamentary Services casuals; and
    - Department of Agriculture and Department of Home Affairs casuals who perform their duties at airports.

14. Although the Australian Public Service Commission (**APSC**) did eventually coordinate agencies to provide redeployment options for casuals, following persistent representations by the CPSU, this took time, leaving many casual employees without an income for some months.

FW Amendment Bill provisions relating to casual employees

15. The FW Amendment Bill contains a number of measures directed at casual employment. These include:

    - A new statutory definition of casual employment[2];
    - Provisions that retrospectively remove rights for employees incorrectly characterised as casual by their employer[3]; and
    - Provisions to facilitate casual conversion[4].

2 Proposed new section 15A of the Fair Work Act
3 Proposed new section 545A of the Fair Work Act
4 Proposed new Division 4A of the Fair Work Act

16. Unfortunately, the combined effect of these proposals will take casuals backwards and provide even less certainty for insecure workers. The CPSU's submission addresses each proposal in turn, and makes a recommendation in respect of the application of the FW Amendment Bill to the APS.

Definition of casual employment

17. The FW Amendment Bill would introduce a statutory definition of casual employee for the first time. The courts have long applied an objective test to determine the casual status of an employee, and more recently, to indicate when an employee has an entitlement to certain NES provisions[5]. The objective test includes examining the actual conduct of the parties during the course of the employment relationship, that is, whether the employee is actually treated like a casual or whether they are treated as a permanent or ongoing employee.

18. The FW Amendment Bill seeks to disturb the objective test applied by the courts, and replace it with a test entirely based on the employer's position at the time employment is first offered, no matter the employer's subsequent conduct. An employee would be a casual employed if:

    - At the time employment is offered, there is no "firm advance commitment to continuing and indefinite work"; and
    - That offer of work is accepted and the person becomes employed.[6]

19. Previously the courts considered both the terms of an employee's contract and the post-contractual conduct of the parties to determine whether, in substance, the employee was a casual employee or not. In *Rossato*, for example, the factors taken into account by the Full Federal Court included:

    - The duration of the work being described as indefinite in the contract;
    - The work being required to be performed in accordance with a roster, and the expectation those shifts would be worked;
    - The contract prescribing the employee work the "ordinary hours of work" which were consistent with those worked by permanent employees;
    - The ability of the company to stand the employer down where there was insufficient work;
    - The inability of the employee to decline offers of work, and exposure to disciplinary action for refusing a reasonable direction to work allocated shifts;
    - The provision of rosters up to one year in advance;
    - The pre-population of timesheets by the labour hire employer.

20. In a stark departure, the FW Amendment Bill specifically precludes the consideration of the employer and employee's conduct once the contract is accepted. It states:

5 *Workpac v Skene* [2018] FCAFC; *Workpac v Rossato* [2020] FCAFC 84

6 Proposed new 15A(1) of the Fair Work Act

> To avoid doubt, the question of whether a person is a casual employee of an employer is to be assessed on the basis of the offer of employment and the acceptance of that offer, not on the basis of any subsequent conduct of either party[7].

21. The FW Amendment Bill does outline factors relevant to the consideration of whether an employee is casual or not, including whether the employee can accept and reject work, whether they are described as casual, and whether they are paid a loading. However, these factors are only relevant to the extent that the employer considers them when drafting the contract and describing the employee as casual. No matter what the employer and employee's conduct is while the employee is actually working, no matter how regular their work, or how strict the requirement to accept shifts, they will be treated as casual and denied NES entitlements because of their employer's subjective decision at the time the contact was signed.

22. This means that employers can continue to subject employees to insecure working arrangements where they are in fact working as a permanent employee would be expected to work. The FW Amendment Bill will therefore perpetuate and entrench casual employment in the Australian labour market.

23. The effect of these provisions is to put all the power entirely in the hands of employers, to call an employee a casual employee no matter how they are treated. This means that employees do not have access to security or to NES entitlements, no matter whether they are subsequently treated as a permanent employee by their employer after agreeing to the contract.

24. Together with the gaping loopholes in the proposed casual conversion provisions, and the retrospective removal of rights to pursue unpaid NES entitlements, this inappropriate definition of casual employment leaves casual workers less secure, failing the fundamental test that workers will not be worse off because of the FW Amendment Bill.

Retrospective removal of rights

25. The FW Amendment Bill would retrospectively remove the rights of employees to seek payment for entitlements that should have been paid under the NES where they have been incorrectly characterised as casual by their employer, including:

    - Paid annual leave;
    - Paid personal/carer's leave;
    - Paid compassionate leave;
    - Payment for absence on a public holiday;
    - Payment in lieu of notice of termination; and
    - Redundancy pay.

7 Proposed new section 15A(4) of the Fair Work Act

26. Instead, the proposed provisions direct the courts to reduce a person's claim for these unpaid entitlements by any amount of loading paid to the employee when they were incorrectly described as casual[8]. The retrospective removal of entitlements from this group of employees is grossly unfair.

Casual conversion provisions

27. In its 2018 decision on casual and part time employment as part of the 4-yearly review of modern awards, a Full Bench of the Fair Work Commission (**FWC**) said that significant numbers of employees were being prevented from accessing NES entitlements because of their casual status, and this warranted an award provision to allow long term casuals to convert to permanent employment[9]. Following that decision, the FWC varied 85 industry awards to include a right for casual employees to request conversion to permanent employment if certain criteria are met, including 12 months' service.

28. Similarly, the FW Amendment Bill would make provision for casual employees to be offered permanency in certain circumstances, or to request conversion if the employer fails to make an offer where the provisions require it. This would extend casual conversion provisions to all national system employees, not just those covered by the relevant awards. The provisions in the FW Amendment Bill differ from the award term in that they would require an employer to offer conversion if the requirements are met, whereas the award terms merely provide a right to request.

29. If the FW Amendment Bill passes, an employer must make an offer of permanent employment to a casual employee where:

    - The employee has been employed for twelve months; and
    - During the last 6 months of employment, the employee worked a regular pattern of hours that could continue[10].

30. While the inclusion of casual conversion provisions in the NES is a necessary step to address the escalation of insecure work in the Australian labour market, the proposed provisions will not achieve this objective. This is because:

    - It provides too much scope for an employer to decline to offer permanent employment;
    - There are a wide range of circumstances where an employer can deem an offer to be "unreasonable"; and
    - There is little scope for independent oversight of employer decisions to offer permanency or not.

31. Circumstances where an employer is not required to make an offer include:

    - Where the position will cease within 12 months of deciding not to make the offer;

8 Proposed new section 545A of the Fair Work Act

9 *4 yearly review of modern awards – Part-time employment and Casual employment* [2018] FWCFB 3541, at 367

10 Proposed new section 66B(1) of the Fair Work Act

- Where the employee's hours of work will be significantly reduced in that period;
- If there will be significant changes to the days or times the employee is required to work in that period;
- Where the offer would not comply with a recruitment or selection process required under a law of the Commonwealth or a state or territory[11].

32. It is all too easy for an employer to claim that a position will cease in 12 months or that hours and times are likely to significantly change, as reasons not to make an offer of permanency. The scope for a casual employee to continue to miss out on secure employment because the employer simply does not wish to offer permanency under these provisions is too great.

33. This risk is amplified by the lack of transparency and oversight, with the Fair Work Commission only able to hear disputes in relation to these matters by consent[12], unless an enterprise agreement applying to the employee and the employer includes a dispute term which allows for arbitration. For all other employees, the dispute term included in the new provisions would apply, and the Fair Work Commission would only be able to determine a matter if the employer agrees. An employer who is not inclined to offer permanency will not be inclined to voluntarily submit to arbitration by the Fair Work Commission.

Insecure work in the Australian Public Service

34. Insecure employment is all too common in the APS. There are many thousands of casual and labour-hire workers performing ongoing work for the Commonwealth, rostered on regular shifts, working full time equivalent hours, in some cases for years. Currently 17% of the Australian Taxation Office workforce is casual, 16% of the Australian Public Service Commission, 15% of the Department of Finance, and 11% of Services Australia[13].

35. In addition to directly engaging casual employees, APS agencies are using labour hire workforces on an unprecedented scale. In many cases these workers work side-by-side with APS employees in APS workplaces, and like APS casuals, do not have access to paid leave and other NES entitlements.

36. The Average Staffing Level (**ASL**) cap imposes limits on APS agency staffing numbers, which has hampered the ability of agencies to meet their day-to-day staffing needs. APS agencies such as Services Australia, the Department of Health and the ATO, increasingly rely on contract call centres staffed by labour hire employees. It has created a situation where agencies are forced to rely on a temporary labour hire workforce or contracting out arrangements, hollowing out APS capacity and operating at a greater expense to the Commonwealth, and resulting in the proliferation of insecure work in the APS.

37. There is no central data collected by the APS that tracks or measures labour hire contracts used by APS agencies, the value of those contracts, whether they are value for money compared to directly engaging APS employees, and the size of the labour hire workforces currently undertaking Commonwealth work. However, the CPSU estimates

11 Proposed new section 66C(2) of the Fair Work Act
12 Proposed new section 66M(5)(b) of the Fair Work Act
13 APS Employment Database, 30 June 2020

that the APS relies on a labour hire workforce exceeding 20,000 staff. It has been publicly reported that the Department of Veterans Affairs has a contracted or labour hire workforce totaling 42% of its total workforce, the Department of Defence 24%, and the Attorney-General's Department 21%[14].

38. The APS Employment Principles enshrined in the Public Service Act 1999 (**PS Act**) provide that:

> The APS is a career-based public service that … recognises that the usual basis for engagement is as an ongoing APS employee[15].

Case study:
Insecure work in the Australian Taxation Office

17% of the Australian Taxation Office's workforce is currently engaged as casual employees. Most of these employees perform work that ongoing and central to the ATO's functions, not ad hoc, irregular or intermittent tasks. Many casuals have been engaged by the ATO on a very long term basis, yet they continue to have no job security and they do not receive basic entitlements under the NES.

There is a high concentration of casual workers at certain sites, including:

- Wollongong – 247 casuals in a workforce of 552 (45%)
- Albury – 385 casuals in a workforce of 1011 (38%)
- Penrith – 197 casuals in a workforce of 777 (25%)

In a survey conducted by the CPSU in 2019, 62% of respondents working in Albury indicated they had worked for the ATO for more than 2 years, and 25% said they had worked for the ATO for 9 years or more.

These casual employees are predominately engaged at the APS1-2 level, and are paid the lowest rates of pay in the agency, with no annual leave and no paid sick and carer's leave. At Christmas time they lose their shifts and receive no pay for a 2-7 week period. Their work is of an ongoing nature, usually in Debt or Client Account Services as frontline call takers and processors. The work is stable and often unchanging, for example in Albury where the work has remained substantially the same for 15 years. Despite this, these employees have no pathway to secure, permanent employment.

14 Government Departments average one in five contract workers amid concerns of 'stealthy privatisation', *Canberra Times*, 19 January 2021, **https://www.canberratimes.com.au/story/7087674/stealthy-privatisation-of-public-sector-causes-concern/?cs=14350**, accessed 28 January 2021

15 *Public Service Act 1999* (Cth), section 10A(1)(b)

39. Yet in many agencies, the ongoing work of the agency is increasingly performed by casual and labour-hire staff, not ongoing employees as outlined in the PS Act. Labour-hire companies are engaged because the ASL cap prevents agencies from engaging the APS employees that they need to perform their core functions. Agency Heads are required to uphold the APS Employment Principles[16], however they are being prevented from upholding the requirements of the PS Act by the government's ASL cap policy which has created a systemic drive towards use of a labour-hire workforce.

40. The Government has acknowledged there is a real problem with insecure work across the broader Australian workforce, yet the numbers of insecure workers in its own workforce continue to increase, and despite providing provisions for the conversion of casual workers to permanent employees in the private sector, there is no plan to create pathways to permanency for them in the Australian Public Service.

41. Under the proposed provisions, an employer will not be required to offer permanent employment where the offer would not comply with a recruitment or selection process required under a law of the Commonwealth or state or territory. This exception effectively writes the APS out of the casual conversion provisions, as a merit selection process is required where an ongoing appointment is made.

42. The FW Amendment Bill currently states (bold added):

> **66C When employer offers not required**
>
> (1) Despite section 66B, an employer is not required to make an offer under that section to a casual employee if:
>
> (a) there are reasonable grounds not to make the offer; and
>
> (b) the reasonable grounds are based on facts that are known, or reasonably foreseeable, at the time of deciding not to make the offer.
>
> (2) Without limiting paragraph (1)(a), reasonable grounds for deciding not to make an offer include the following:
>
> (a) the employee's position will cease to exist in the period of 12 months after the time of deciding not to make the offer;
>
> (b) the hours of work which the employee is required to perform will be significantly reduced in that period;
>
> (c) there will be a significant change in either or both of the following in that period:
>
> (ii) the days on which the employee's hours of work are required to be performed;
>
> (ii) the times at which the employee's hours of work are required to be performed;
>
> which cannot be accommodated within the days or times the employee is available to work during that period;
>
> **(d) making the offer would not comply with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory.**

16 *Public Service Act 1999* (Cth), section, 14

Application to the APS

43. The CPSU supports the introduction of robust and effective provisions to facilitate the conversion of casual employees to permanent employment. For the reasons outlined above, the proposed provisions fall short of this objective. Additionally, they do nothing to address the proliferation of insecure work in the APS.

44. The PS Act requires that decisions to promote or engage an employee are based on merit[17], which requires an open and transparent recruitment process[18]. The merit principle is an important element of a fair and transparent public service that is open to all Australians, and it should not be undermined.

45. At the same time, APS employees should not be left to languish in insecure employment, in many cases for years, without the opportunity to obtain more secure employment. The FW Amendment Bill should be amended to provide pathways to permanency for long term casuals in the APS, in a manner that is consistent with the APS Employment Principles enshrined in the Public Service Act.

46. The position of the CPSU is that the entire proposed Division 4A falls short of what is required to provide a robust mechanism for the conversion of casuals to permanent employees. Additionally, section 66C(2)(d) should be amended so that casual employees in the APS are provided with a mechanism for their role to convert to a permanent position.

47. The amendment would read:

> **66C When employer offers not required**
>
> (2) Without limiting paragraph (1)(a), reasonable grounds for deciding not to make an offer include the following:
>
> … … …
>
> (d) A recruitment process is required by or under a law of the Commonwealth or a State or Territory, and the employee has been unsuccessful in a merit selection process for the permanent position.

48. The effect of this amendment would be to require the Commonwealth as an employer to review its casual employment arrangements, and where there are roles meeting the criteria to convert to a permanent position, the APS agency must run a merit process and advertise that position as an ongoing role. If the incumbent casual employee is successful, they would then be engaged as an ongoing employee.

49. Nothing in the current Fair Work Act (**FW Act**) precludes the Commonwealth from taking these steps of its own accord, without legislative amendment. The CPSU would urge the Commonwealth as an employer to immediately review its casual employment arrangements and make provision for the conversion of long-term casual roles into ongoing roles, and subject them to a merit process. The Commissioner's Directions make provision for such a process to draw candidates from current APS employees[19].

17 *Public Service Act 1999* (Cth), section 10A(1)(b)
18 *Public Service Act 1999* (Cth), section 10A(2)
19 Australian Public Service Commissioner's Directions 2016, section 20(3)

50. However, to date we have not seen such steps being taken in the APS, and in fact, casual employment continues to increase in many agencies. That being the case, the CPSU recommends that the amendment to the proposed new section 66C(2)(d) be adopted.

Enterprise bargaining reform

51. The enterprise bargaining system is broken and is not meeting the needs of workers. Legislative change is needed to level the playing field and provide employers with incentive to engage genuinely in the bargaining process in a manner that produces positive results for employees.

52. There is an opportunity to address the breakdown of enterprise bargaining through amendments to the FW Act, and to create the conditions for employees and employers to bargain fairly. Unfortunately, the FW Amendment Bill represents a missed opportunity, and instead further entrenches the unevenness of bargaining power inherent in the current system. This is likely to perpetuate low-wage growth in this country, which was recognised before the COVID-19 pandemic as one of the key obstacles to economic growth[20].

CPSU Bargaining under the Fair Work Act

53. The bargaining framework in the FW Act works only if an employer is genuinely willing to work with employees and unions to negotiate in good faith for a mutually beneficial outcome. Where an employer takes an adversarial approach, there is little in the FW Act to compel an employer to bargain genuinely and cooperatively.

54. The 2014 Bargaining round with the current Federal Government for new enterprise agreements for employees of the Commonwealth took over 4 years to complete. It was the first time in more than 30 years that a Commonwealth Government has been unable to resolve workplace bargaining for the vast majority of staff within a term of government. The Commonwealth's bargaining policy included an agenda of cuts requiring removal of existing conditions and rights from agreements, banning any improvements to existing agreements, and requiring a low pay offer[21]. This left individual agencies unable to genuinely negotiate and make reasonable offers and resulted in years of unnecessary dispute.

55. This harsh agenda was not in the name of job creation or genuine productivity. It happened at the same time as significant staff cuts in the APS, and the Government reducing the idea of 'productivity' to cutting employees' rights, conditions and pay.

56. This approach to bargaining led to an unprecedented amount of industrial action and prevented agencies from offering agreements staff could accept, with an unprecedented number of "no" votes. The protracted bargaining period, repeated in around 100 Agencies, was a huge waste of government resources and left staff demoralised. Working parents

20 See for example Jacob Greber (2017, 19 June). Workers must demand greater share of pie, says RBA governor Philip Lowe. *Australian Financial Review*.www.afr.com/news/economy/workers-must-demand-greater-share-of-pie-says-rba-governor-philip-lowe-20170619-gwtxht

21 Australian Government Public Sector Workplace Bargaining Policy (March 2014)

faced uncertain futures as family-friendly conditions were proposed to be cut, and public servants who care deeply about the services they provide, felt undervalued, cut out of decision-making and less engaged.

57. It was only after successive "no" votes, significant workplace upheaval and industrial action that the employees secured bargaining outcomes that protected their existing conditions and rights.

58. In the following round of bargaining commencing in 2018, the vast majority of staff and Commonwealth Agencies elected not to bargain under the current framework and instead accepted pay rises provided by a determination under the Public Service Act 1999 operating over a nominally expired agreement.

59. The recently released Public Sector Workplace Relations Policy 2020 is similarly problematic. The new policy continues the "no enhancement" rule that makes it difficult for agencies to agree to sensible changes to enterprise agreements. It introduces a new wages policy that pegs wage changes in the APS to the annual seasonally adjusted Wage Price Index for the private sector at June each year, which will mean that APS employees will be asked to vote on pay outcomes for the second and third year of an agreement that are completely unknown. That this rigid and uncompromising approach to wages and conditions is possible under the FW Act demonstrates that employers are able to use the current workplace laws to avoid genuinely bargaining with their employees.

60. In the private sector, the bargaining framework in the FW Act has meant that employers reluctant to bargain, such as Stellar, have ample opportunities to avoid finalising agreements with employees.

61. In other jurisdictions, for example ACT Government, where employers are more willing to work with unions and workers, the CPSU has been able to successfully negotiate agreements that provide positive outcomes for both the workers and the employer

Key problems with the bargaining system

62. It is not just CPSU members who have been let down by the enterprise bargaining system, the failings of the system have affected the entire workforce. Employers have too much power and are using this to drive down wages and conditions. This has led to a wage crisis and rising inequality. Although the system was intended to provide workers with fair wages and conditions in exchange for improved productivity, productivity increases have not been shared with workers. Workers' income as a share of GDP has decreased from over 58% in 1975 to 47.1% in 2018[22].

63. The problem of low wages growth across the economy will be compounded with the new wages policy applying to APS employees. In introducing this new policy, the government has shown its disregard for the growing problem of wage stagnation in Australia and the need to kickstart the economy. Rather than being a model employer and driving broader economic growth by improving public sector workers'

22 Stanford J, Labour Share of Australian GDP Hits All-Time Record Low, The Centre for Future Work, June 2017

wages, the government has chosen to tie APS wage outcomes to the sluggish outcomes in the private sector, which will compound poor outcomes for all.

64. At the same time, the number of employees covered by enterprise agreements is falling sharply. From 2013 to 2017 the proportion of private sector employees covered by an enterprise agreement fell from 19% to 12%, and in the public sector it fell from 38% to 33%[23] . Not only does the bargaining framework make it difficult to make employers genuinely bargaining for a new agreement, employers are also able to avoid their obligations under an enterprise agreement through terminating expired agreements and undermining the employment relationship by engaging workers as independent contractors or engaging staff indirectly through labour hire companies.

65. Through the union's experience of bargaining under the FW Act for more than a decade, the CPSU has identified some of the key issues with the enterprise bargaining framework: These include:

- **Failure of Awards to provide an adequate safety net** – In the Commonwealth and Territories, Awards have not kept up with current working conditions. Pay rates in enterprise agreements for most classifications are so far above award rates that the Award does not provide an adequate safety net to encourage bargaining by the employer.
- **Excessive employer bargaining power** – given that there is little chance of Award rates catching up to the Agreement and employees are not entitled to pay rises after the NED of an agreement until a new agreement is negotiated, there is often little incentive for employer to bargain. Where bargaining has been occurring in recent years it is generally used by employers as a drive to reduce conditions rather than seeking genuine improvements to productivity that can be shared with workers. Any talk of productivity has been used disingenuously by employers to limit pay increases rather than to produce mutually beneficial outcomes.
- **Too difficult for unions and employees to initiate bargaining** – There are too many hoops for unions and employees to jump through to bring a reluctant employer to the bargaining table. If an employer refuses to bargain, the only option for unions and employees to initiate bargaining is by a Majority Support Determination. This is a time consuming and difficult process, particularly in large organisations with thousands of employees. It requires the endorsement of a majority of employees with no obligation on the employer to facilitate a vote, and it also requires approval by the Fair Work Commission (FWC).
- **No requirement for bargaining to progress** - Even once bargaining has been initiated, there is no real requirement for it to progress. Good Faith Bargaining orders are limited to procedural matters and don't require parties to make concessions. There is little formal redress available through the Fair Work Commission for workers and their unions when employers appear to comply with good faith bargaining requirements but do not in fact bargain in any meaningful way. Arbitrated outcomes through workplace determinations are only available in very limited circumstances,

23 Pennington A, On the Brink: The Erosion of Enterprise Agreement coverage in Australia's Private Sector, The Centre for Future Work, December 2018

are very resource intensive, and potentially involve delays of years before an outcome is achieved.

- **No requirement for agreement** – There is no requirement for agreement between the negotiating parties before an employer can put an agreement to vote. Therefore, an employer can refuse to make any concessions and just repeatedly put a more-or-less unchanged and unagreed document to employees to wear them down rather than continuing to negotiate towards an agreed outcome.
- **Severe limits on workers using collective power** - Given the weaknesses of the good faith bargaining provisions, and the unavailability of arbitration to resolve a bargaining deadlock, workers are funneled into protected industrial action as one of the only means of moving their employer's position. However, protected industrial action under the FW Act is potentially the most bureaucratic and limiting system in the free world and has drawn criticism from the ILO[24]. Ballot processes are lengthy and expensive. The system is geared to preventing employees from taking effective action, there are onerous notification requirements, and the FW Act provides a wide range of grounds for the employer to seek to suspend or terminate the industrial action.
- **Decision-makers not required to be at the table** – The real employer decision-makers are able to act through representatives who have no real ability to genuinely bargain in good faith, while the decision-makers shield themselves from good faith bargaining orders. For example, Commonwealth bargaining policy is set by the Government and the APSC, and the content of Commonwealth agreements are required to be approved by those parties, while bargaining is conducted by individual agency representatives who are hamstrung[25]. There is little recourse under the FW Act to apply for bargaining orders against the real decision-makers or require them to come to the bargaining table.
- **Industry Bargaining** – Australia is one of very few OECD countries that limits bargaining to the enterprise level. This an ineffective method of securing pay rises as many workers can't bargain at the point where decisions about pay are made. In the Commonwealth Government Sector, this has meant that workers are unable to bargain directly with the APSC and the Government decision-makers. This also leads to pay inequalities across industries and supply chains. For example, in the APS, the maximum rate of pay for an EL1 level employee performing the same standard of work across different agencies varies by over $37,000 between the highest paid agency (Finance) and the lowest (Australian Institute of Aboriginal and Torres Strait Islander Studies).
- **Outsourcing and Labour Hire** – Employers are able to avoid their obligations under enterprise agreements by outsourcing work or hiring staff through labour hire providers that are not subject to the enterprise agreement. In the

24 ILO, CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87) Australia (ratification: 1973), 2007.

25 See Public Sector Workplace Relations Policy 2020, paras 9-13, **https://www.apsc.gov.au/public-sector-workplace-relations-policy-2020**, (accessed 21 January 2021)

APS, the use of labour hire workers in major agencies such as the Australian Tax Office and Services Australia, means that labour hire workers who are not covered by the agreement perform the exact same work, side-by-side with directly employed workers, for inferior pay and conditions.

66. This Bill does nothing to address any of these fundamental flaws in the bargaining system. The amendments proposed do very little to improve the system and, in many respects, further weaken the bargaining framework for workers.

67. Real change requires genuine incentives for employers to engage in the process in good faith, and restrictions on employers avoiding substantive bargaining. Without this, the system is limited in its ability to deliver results for employees.

68. While there is unnecessary complexity in parts of the bargaining system (for example majority support determination and protected action ballot processes) the proposed amendments seek to simplify processes in the wrong places. Rather than removing the unnecessary hurdles that prevent genuine bargaining from occurring, the FW Amendment Bill removes protections for workers against employers exploiting the system.

69. Instead of addressing the real issues and creating a bargaining system that can deliver positive outcomes for both workers and employers, the changes proposed in this Bill are a not only a missed opportunity, but they will leave workers even worse off.

70. Submissions in relation to specific elements of the FW Amendment Bill are included below.

Better of Overall Test (BOOT)

71. One of the most concerning aspects of this Bill is the proposal to weaken the BOOT. These changes will leave workers worse off by allowing employers to reduce their pay and conditions.

72. The BOOT ensures that employees are protected through the bargaining process from having their pay and conditions reduced below the current bare minimum safety net of the Award.

73. The Regulatory Impact Statement points to a recent rise in agreements requiring BOOT undertakings. This has also been the experience of the CPSU in enterprise bargaining. Far from being a justification for the government to weaken the BOOT, this should be seen as an alarm bell in relation to number of employers seeking to reduce employee conditions through bargaining and a reason to further strengthen the bargaining system to deliver for workers.

74. The most concerning amendment is the proposed inclusion of s189(1A), a new broad ground under which the FWC may approve agreements that don't pass the BOOT and leave employees worse off than the Award.

75. The FW Act currently only allows the FWC to approve agreements that do not pass the BOOT in very limited situations, requiring exceptional circumstances[26]. There is already scope within the existing provisions for BOOT exceptions to be made in exceptional circumstances where the survival of the employer's business is at stake.

76. Concerningly, the proposed provisions are not limited to exceptional circumstances. While the justification for this amendment is a response to the COVID-19 pandemic, the impact of COVID-19 is only one of the factors to be considered by the FWC and is not determinative.

77. Allowing agreements to be approved without passing the BOOT rips a hole in the safety net for workers. The proposed threshold for an agreement to be approved without passing the BOOT is far too low, allowing it to be opportunistically exploited by employers who are already seeking to drive down working conditions in bargaining.

78. For Commonwealth Government employees, although enterprise agreement conditions are well above the award for most, BOOT issues often arise for casual employees at lower classifications.

79. These employees are usually in the minority in a workplace. Given that the amendment puts an emphasis on the views of the majority of employees rather than using a legal or objective test, minority groups may be subject to a tyranny of the majority where an agreement is endorsed by most staff even though certain groups would not be better off. This allows employer to play groups of employees off against each other, and in doing so, reduce the conditions of certain groups below the safety net.

80. This is even more concerning in conjunction with the amendments that would restrict the ability of casual employees to vote on agreements. Those with the least say will have the most to lose.

81. Although the proposed s189(1A) automatically sunsets after 2 years, it may be an additional 4 years before the agreement expires, and even then, may stay in operation long after its nominal expiry date. Therefore, the effects of this change may continue for over 6 years.

82. The FW Amendment Bill also introduces new subsection 193(8) which guides the consideration of the FWC when making a BOOT assessment. The factors to be taken into consideration introduce a more subjective element to the test. The proposed s193(8) limits the FWC to considering patterns or kinds of work currently engaged in or reasonably foreseeable 'by the employer' and, most concerningly, s193(8)(c) requires the FWC to give 'significant weight' to the views of the employer and employee, including the outcome of the workplace vote. This suggests that a strong employee vote to approve an agreement may be used to override an objective assessment that some employees may be worse off under the agreement. This is particularly concerning as the FW Amendment Bill also proposes to weaken the requirements for pre-approval information to be given to employees, meaning

26 *Fair Work Act 2009*, s189(2)

that employees may inadvertently approve an agreement that leave them worse off in certain circumstances.

83. The final proposed change in relation to the BOOT is the inclusion of new section 205A which requires a model NES interaction term to be inserted in agreements which states that a term of the agreement will have no effect to the extent that is provides a lesser entitlement than the NES. While this would reduce delays associated with the FWC seeking undertakings to this effect when approving an agreement, it means that employers will be able to include terms in agreements that misrepresent employee entitlements under the NES or purport to exclude them. Although those terms will not be enforceable due to the NES interaction term, many employees will not be familiar enough with the NES to enforce their rights. Section 205A shifts the onus to employees to monitor the compliance of agreements with the NES, rather than the Commission, which is much better equipped to make the assessment, doing so at approval time.

Notice of Employee Representative Rights (NERR)

84. The FW Amendment Bill makes two changes in relation to the NERR by:

- Increasing the time limit for the NERR to be issued from 14 to 28 days after bargaining commences.[27]
- Introducing a new requirement that the prescribed NERR form must be provided on the FWC's on website.[28]

85. The timely issue of the NERR is important. The NERR heralds the start of bargaining, it informs employees of their rights to representation, and it makes it clear who will and will not be covered by a proposed agreement.

86. The CPSU has experienced issues in the past of employers incorrectly issuing the NERR, which have led to delays in the finalisation of enterprise agreements. However, these issues have largely been resolved by amendments to the FW Act inserting new subsection 188(2), which allows the FWC to overlook technical issues with the NERR when approving an agreement[29]. The proposed requirement to include the prescribed NERR on the FWC website will also have a positive effect.

87. The CPSU is concerned that increasing the time limit to issue the NERR will give reluctant employers another way in which to delay bargaining. There are already too many hurdles to bringing employers to the bargaining table who don't want to bargain.

88. Nor does there seem to be any real benefit to be gained from the increased time frame. The errors that the CPSU has seen with the issuing of the NERR have included incorrect phone numbers being included, additional information being added to the NERR and incorrect references to the FWO or FWC. All of these would be addressed by the proposed inclusion of new s174(1C). None of them would be avoided by giving an employers an additional 14 days to issue the NERR.

27 Proposed new section 173(3) of the Fair Work Act

28 Proposed new section 174(1)(c) of the Fair Work Act

29 *Fair Work Amendment (Repeal Four Yearly Review and Other Measures) Act 2018*

Pre-approval requirements

89. The explanatory memorandum states that these proposed amendments in the FW Amendment Bill seek to reduce the "current prescriptive requirements" in the pre-approval stage[30].

90. Section 180 of the Act currently requires that the employer takes 'all reasonable steps' to ensure that all relevant employees are given access to a copy of the written text of the agreement and other material incorporated by reference into the agreement and that the terms of the agreement, and the effect of those terms are explained to employees. Employers must also take all reasonable steps to ensure employees are notified of the time and place of the vote and the voting method that will be used at the start of the access period.

91. There is nothing overly prescriptive about these requirements. These represent the minimum that is required to ensure employees are properly informed about the agreement that they are being asked to endorse. Without this information, employees are not making an informed decision, and there is a risk that employees may inadvertently approve an agreement that contains hidden cuts to conditions.

92. The CPSU is concerned about the proposed changes to section 180 which replace the requirement to take 'all reasonable steps' with a general requirement to take 'reasonable steps', and changes to section 188 to remove the obligation on FWC to ensure compliance with the procedural requirements, and simply require the FWC to be satisfied that the relevant employees have been given 'a fair and reasonable opportunity to decide whether or not to approve an enterprise agreement'.

93. Agreements can be quite complex and changes that have significant effects on conditions can be subtle, such as the change of a 'will' to a 'may'. In numerous Commonwealth agencies, the CPSU has had to raise the issue of the employer providing misleading information in the access period, for example telling employees that the inclusion of rights in policy is the same as including it in the enterprise agreement or saying that no substantive change has been made to a clause when it has been made discretionary.

94. The current provisions provide an important safeguard for employees and should not be weakened.

Voting requirements

95. The FW Amendment Bill proposes to replace s181(1) and amends the group of employees who are entitled to vote on an enterprise agreement to exclude all casuals, except those who actually performed work during the access period. The explanatory memorandum states that this would clarify the current requirement and is consistent with current case law[31].

30 Regulatory Impact Statement at page lxvii

31 The Explanatory memo cites *NTEU v Swinburne University of Technology* [2015 FCAFC 98] at para 222

96. Section 181(1) currently refers to 'employees employed at the time' being able to vote. This is the wording that the courts and the FWC have considered in relation to casual employees. While in the decision in *Swinburne*, cited in the explanatory memorandum, this was limited on the facts to employees to performed work in the access period, other decisions have given this a broader interpretation[32].

97. While CPSU acknowledges that extra clarity about the voting rights of casual employees would be beneficial, the union is concerned that this definition may exclude some casual employees who have an expectation of continued work with an employer and may be affected by the terms of the agreement. This amendment would also allow employers to influence who is entitled to vote on an agreement by deciding when the vote will take place (i.e. during a slow period when not many casuals are engaged, or when there are an abnormally high number of casuals to drown-out others groups of employees).

Termination of agreements

98. The CPSU agrees that one of the significant flaws of the current bargaining system arises from FWC decisions that have allowed employers terminate enterprise agreements during bargaining[33]. This unfairly shifts the balance of power during bargaining as the consequence of not reaching agreement is no longer that employees maintain their current conditions, but that conditions can be reduced to the Award minimums. This allows employers to coerce employees to accept substandard deals.

99. This Bill was an opportunity to address the bad case law in this area. However, the only change that the FW Amendment Bill proposes is new section 225 which prohibits an application for termination being made until 3 months after the nominal expiry of an enterprise agreement. This does not address the fundamental issue and will have little impact in practice.

Time limits for determining applications

100. The CPSU supports steps being taken to avoid issues that have been caused by delays in the FWC agreement approval process. CPSU members have felt the effects of this when pay rises due to come into effect on the commencement of a new agreement have been delayed for months due to delays in the FWC approval process.

101. However, it is important that any efforts to reduce approval timelines do not come at the expense of any of the checks and balances that are in place to protect workers in that process.

102. The FW Amendment Bill proposes to insert new section 255AA which requires, as far as practicable, that the FWC determine applications to approve or vary enterprise agreements within 21 working days after the application is made, or it must provide a written notice about why it hasn't been determined within that period, including any exceptional circumstances.

32 See for example McDermott Australia Pty Ltd v Australian Workers' Union, The and another [2016] FWCFB 2222

33 See Murdoch University [2017] FWCA 4472, "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Griffin Coal Mining Company Pty Ltd (C2016/4201)

103. This new requirement must be accompanied by additional funding and resourcing to the FWC to manage its workload to ensure that resourcing is not just diverted to enterprise agreement approvals from other areas which are also subject to growing delays, such as the handing down of other decisions, approval of rule changes and approval of entry permits.

Transfer of business

104. The transfer of business provisions ensure that, in certain circumstances when employees are transferred from one employer to another to perform the same work, their enterprise agreement follows them and they retain their terms and conditions. This provides a protection for workers against employers changing their corporate structure or outsourcing their workers to another employer to avoid their obligations under an enterprise agreement.

105. The FW Amendment Bill proposes a new section 311(1) which excludes employees from the transfer of business provisions if they transfer to an associated entity of their current employer, and the employee sought the transfer at their own initiative. This means that if an employee seeks the transfer, they will no longer be covered by their previous enterprise agreement.

106. The CPSU is concerned that this change weakens the protections for employees and is open to exploitation by employers who may put pressure on an employee to either 'voluntarily' transfer to an associated entity without their enterprise agreement or face being made redundant.

Conclusion

107. Australian workers deserve the protection of robust and fair workplace laws. The current FW Act is inadequate to promote fair enterprise bargaining where there is genuine impetus for employers to negotiate with their employees. The FW Amendment Bill does not address this issue, but further entrenches the inequality of bargaining power inherent in the current system.

108. Too many Australian workers work in insecure jobs, and that number is increasing. The pandemic has exposed the urgent need to arrest the increase in insecure employment, but the FW Amendment Bill exposes casual employees to even greater insecurity and uncertainty.

109. Australian workers have already paid too high a cost during the COVID-19 pandemic. The proposed amendments would see workers pay again. This is not what Australian workers deserve, and it is not what is needed to promote Australia's economic recovery.