Fair Work Legislation Amendment (Secure Jobs, Better Pay Bill) 2022

Submission to Senate Education and Employment Committee

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The primary focus of our submission is the changes proposed to the agreement-making provisions of the FW Act.

While the express policy goals that motivated the introduction of the FW Act were to put collective bargaining at the centre of the workplace relations system, in actuality the FW Act is a system of agreement-making, not a system of collective bargaining.

Collective bargaining does occur under the FW Act agreement-making model, but it is not required to create a collective agreement. The agreement-making processes are controlled by employers and almost entirely single enterprise focussed.

Unless forced to bargain by a majority support determination, employers are responsible for initiating agreement-making, for informing employees of their rights to representation, of deciding when to put an agreement to employees, of explaining the agreement to employees and of running the ballot process (which requires no quorum of voters to approve the agreement). If bargaining does occur, employers control the bargaining process – dictating who is in a room with whom and when bargaining happens.

Under this model, where bargaining is optional, the enterprise is the focus and agreement-making is employer-controlled, the benefits of collective bargaining have not been realised by the majority of workers.

The changes proposed in this Bill to bargaining are modest in nature, and are designed to shift some small amount of control to workers and their representatives, and to rebalance the system. Such rebalancing is necessary if collective bargaining is to be relied upon as one of the tools being used to lift wages out of stagnation.

Part 12 – Termination of Enterprise Agreements after nominal expiry date

The provisions in Schedule One, Part 12 repeal existing s 226 of the FW Act which provides that the FWC must terminate an otherwise expired enterprise agreement upon application by one party to that agreement where it is 'in the public interest' and otherwise appropriate to do so in all the circumstances.

The agreement termination provisions in the FW Act did not attract significant attention, until the decisions in the *Aurizon* cases[1] which rejected the previous approach that it would generally not be appropriate to terminate an agreement where collective bargaining for a

[1] *Re Aurizon Operations Ltd* (2015) 249 IR 55; *CEPU v Aurizon Operations Ltd* (2015) 233 FCR 301.

new agreement was underway, and termination of the agreement would diminish the bargaining power of the employees in those negotiations.[2] After *Aurizon*, some employers successfully applied to the FWC to have their agreements terminated during contested negotiations for a new agreement – an approach which when successful, effectively removed the previously negotiated floor of rights provided to those employees.[3] Research by McCrystal that analysed those FWC decisions concluded that the cases effectively devolved to a 'quasi arbitration' of the bargaining claims between the employer and the employees as represented by their organisation, with employees defending their previously won gains against the employer asserting business needs to remove those conditions.[4] On the whole, these decisions went the way of employers, and their impact has been more widespread than the actual number that led to termination. Irrespective of the likely chances of success, employers now only need to threaten to make an application to terminate an agreement in order to increase their bargaining leverage in negotiations.

At the same time, the termination provisions have also provided an avenue for employees who have been subject to substandard or 'zombie' agreements to seek termination of those arrangements and the restoration of award terms and conditions.[5]

Under the proposed changes, where a unilateral application for termination is brought, it must be determined by a Full Bench where it is opposed by any one of the employer, employees or employee organisation (new s 615A). This is appropriate given the serious consequences of termination of an agreement. The provisions then effectively provide that an agreement can only be terminated if:

- Its continued operation is unfair to employees (retaining the ability to terminate substandard agreements); or
- No employees are covered (so the agreement currently has no work to do); or
- The continued operation of the agreement would lead to more job losses than the termination of the agreement, and the agreement based termination entitlements of any workers who subsequently lose their jobs are guaranteed by the employer.

If the application is made during bargaining for a new agreement, then the FWC must also take into account the adverse effects on the employees (new s 226(4)).

These proposed provisions strike the right balance between enabling the termination of agreements in appropriate circumstances, and ensuring that agreement termination can no longer be used as bargaining leverage by employers in agreement negotiations. Combined with the provision in Part 13 of Schedule 1 which sunset so called 'Zombie' agreements, this schedule adequately protects both employee and employer interests, and neutralises agreement terminations as a threat in bargaining.

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[2] As established in *Re Tahmoor Coal* (2010) 204 IR 243.

[3] See eg *Re Murdoch University Enterprise Agreement 2014* [2017] FWCA 4472; *Re Sedgman Employment Services Pty Ltd Bowen Basin Front Line Employee Enterprise Agreement 2011-2014* [2016] FWCA 1595; *Re Griffin Coal (Maintenance) Collective Agreement 2012* [2016] FWCA 2312.

[4] Shae McCrystal, 'Termination of Enterprise Agreements under the Fair Work Act 2009 (Cth) and Final Offer Arbitration' (2018) 31(2) *Australian Journal of Labour Law* 131.

[5] See eg *Hart v Coles Supermarkets Australia Pty Ltd* [2016] FWCFB 2887.

Part 13 – Sunsetting of "zombie" agreements

This Part is a welcome addition to the FW Act, sunsetting all obsolete and out of date pre FW Act agreements. The Part contains adequate safeguards, allowing for employers to seek additional extensions of these agreements from the FWC in the circumstances where sunsetting of the agreements could leave employees worse off.

Part 14 – Enterprise Agreement Approval

When considering the changes to the enterprise agreement approval provisions, it is important to understand the context in which the agreement approval provisions operate and the reason why they are so important in practice.

The FW Act provides for a system of agreement-making – not a system of collective bargaining. To make an enterprise agreement, an employer can initiate bargaining with employees by issuing a Notice of Employee Representational Rights (NERR), wait 21 days, and then ask the employees to approve the proposed agreement. There is no obligation for the agreement to have been the product of negotiation, or for the employees to have been actively consulted.[6] There is no obligation for a majority of affected employees to vote yes, only for a majority of those who vote.

In these circumstances, where an agreement can be created without any representation or bargaining, the agreement approval requirements exist to ensure that employees who are requested to vote are able to make their choice with, at the very least, informed consent. This idea is a very long way from genuine collective bargaining, but it is absolutely necessary in an agreement-making system that is controlled by employers and where information about the right of workers to be represented in negotiations and the manner in which an agreement will impact those workers is delivered by employers. Unless changes are proposed which remove the capacity of employers to make agreements with employees without any negotiation or representation, the informed consent provisions remain of crucial importance.

In practice, the provisions have caused some difficulties. There have been issues around compliance with the NERR provisions (which is unsurprising in a model which relies on employers to advise employees about their rights to be represented by a union), and in respect of compliance with the obligation to explain the agreement to the employees in a way that enables them to understand what they are being asked to vote on. It has been argued that these requirements are too technical, and cause unnecessary delays and rejection of agreements. However, since the introduction of s 188(2) in December 2018, the FWC has been able to overlook minor procedural and technical errors in the process of making an agreement, and this provision has seen a significant reduction in the number of

[6] See eg Kurt Walpole, 'The Fair Work Act: Encouraging Collective Agreement-Making but Leaving Collective Bargaining to Choice' (2015) 25(3) *Labour & Industry* 1; Shae McCrystal and Mark Bray, 'Non-union Agreement-making in Australia in Comparative and Historical Context' (2021) 41 *Comparative Labor Law and Policy Journal* 753.

agreements rejected on technical grounds.[7] This amendment has meant that these provisions ensure that employees are able to vote with at least informed consent, in the context where information about their rights is being provided to them by employers. However, the provisions may be seen as unduly cumbersome at enterprises where employees are adequately represented, and the agreement has been the product of genuine negotiation.

Another problem that has also arisen in practice is the approval of agreements where those who have voted on the agreement are unrepresentative of the classes of workers that will be covered or where a small cohort votes on an agreement that will subsequently apply to a much larger group of workers. In these situations, the agreement approval requirements have been complied with, but the question has arisen as to whether workers can genuinely agree to an agreement which extends its coverage to forms of work covered by a range of awards and classifications of workers who are not currently employed by that employer.[8]

With this background in mind, the proposed amendments change the agreement approval process in two significant ways.

First, the amendments remove the obligation to issue a NERR and wait 21 days before balloting employees in respect of agreement negotiations in respect of single-interest employers, supported bargaining, and co-operative bargaining. This change removes one hurdle to agreement-making in the context of negotiations where employee bargaining representatives are involved and representing the rights of workers.

However, for single enterprise agreements where it appears to remain possible for agreements to be made without representation or negotiation (although this latter point is unclear from the current wording of the Bill – see below), the obligation to issue the NERR to commence bargaining, and to wait 21 days before going to ballot, remains. This is appropriate because workers need to be informed of their right to be represented in negotiations in this context. Minor procedural or technical errors in complying with this obligation can be overlooked at approval time under proposed s 188(5) where the relevant employees are not disadvantaged – reproducing the current approach in s 188(2).

Second, is the removal of the obligation to explain an agreement to employees during the access period – a change that applies to all agreements made under the FW Act, and amendments to the concept of genuine agreement. The question raised by the proposed changes is whether or not workers' rights would remain adequately protected.

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[7] Introduced by the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018*; discussed in Fair Work Commission, *Access to Justice*, Annual Report 2018-2019, Commonwealth of Australia, p 71.

[8] See eg *One Key Workforce Pty Ltd v CFMEU* [2018] FCAFC 77; *KCL Industries Pty Ltd* [2016] FWCFB 3048; *CBI Constructors Pty Ltd* [2017] FWCA 6837; *Karijini Rail Pty Limited* [2019] FWC 2907. See further Umeya Chaudhuri and Troy Sarina, 'Employer-Controlled Agreement-Making: Thwarting Collective Bargaining Under the Fair Work Act' in Shae McCrystal, Breen Creighton and Anthony Forsyth, *Collective Bargaining Under the Fair Work Act*, Federation Press, Sydney, 2018.

When approving an enterprise agreement, the FWC must be satisfied that the employees have 'genuinely agreed'– FW Act s 186(2). The meaning of genuine agreement is set out in s 188. The Amendments replace the existing section with a new s 188.

Under s 188(1), to be satisfied that the employees have genuinely agreed, the FWC must take into account the statement of principles under new s 188B.

This statement of principles will be set by the FWC and will deal with the requirements for an employer to inform the employees of bargaining; of their right to be represented; to explain the terms of a proposed agreement and their effect; to give employees a reasonable opportunity to vote in a free and informed manner; and any other matter prescribed by regulation.

For single enterprise agreements, these changes effectively shift the obligation to explain the agreement during the access period from a statutory rule to a qualitative assessment based against a set of principles set out by the FWC. The content of this notice will be critically important - that the obligations on employers are clear, easily understood and not something that must be parsed or worked out through reading multiple FWC decisions. Moving these obligations to a statement of principles is designed to create flexibility in their application – but it also entails risk. This is the risk that they will not be applied rigorously by FWC members, and that inconsistency in the approaches of FWC members could leave employee interests unprotected.

Further, the scope of the principles in s 188B effectively reproduce the concept of 'informed consent' and the obligations that currently exist in the Act – to inform workers about bargaining, representation, the vote, and the nature of the agreement. This does not move us beyond informed consent to ensuring that agreements are the product of genuine negotiation. However, the extent of this shortcoming depends in practice on another aspect of the approval requirements – new s 188(2).

In respect of the concept of 'genuine agreement', new s 188(2) is most important to counter the creation of agreements where employees are not adequately represented or the agreement is not genuinely negotiated.

First, under proposed s 188(2)(a) the FWC must be satisfied that the employees requested to approve the agreement 'have a sufficient interest in the terms of the agreement'.

The meaning of this provision is unclear from the text of the Bill. The Explanatory Memorandum (EM) to the Bill provides that it is 'directed at ensuring that employees must have a 'sufficient stake' in the terms of the agreement'. It then provides the example that 'employees would not have a sufficient interest in the terms of the agreement if no genuine collective bargaining in good faith occurred as part of the agreement-making process'.[9]

[9] Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 Explanatory Memorandum, Parliament of the Commonwealth of Australia, 2022, p 129.

The EM suggests that new s 188(2)(a) will require all agreements to be the product of genuine collective bargaining in good faith. This would be a significant and very welcome change to the current agreement-making provisions. It would remove some of the concern about moving the rules concerning the making of agreements from the Act to a 'statement of principles' because there will be some reassurance that employee interests have been considered in the creation of the agreement. However, the example provided by the EM is not what the text of the amendment says. The text says that employees must 'have a sufficient interest in the terms of the agreement' – a test which arguably could be satisfied simply by the agreement impacting the rights and entitlements of the employees not by requiring actual negotiation.

If the intention of proposed s 188(2)(a) is to achieve the goal stated in the EM – that an agreement has been the product of genuine collective bargaining in good faith – then this is not what it currently does. Furthermore, the note referring to the *One Key* decision does not assist because that decision did not find that actual collective bargaining for an agreement was necessary for the agreement to be the product of genuine agreement.

To be clear, the objective expressed in the EM is appropriate and laudable, and if this is what the Amendments achieved it would reduce concerns about the changes to the agreement approval provisions. Agreements should not be approved unless they are the product of genuine collective bargaining in good faith – and a change to the Act to achieve this is necessary to ensure that the FW Act provisions do not remain simply as 'agreement-making' provisions rather than provisions allowing for genuine collective bargaining. However, the phrasing of s 188(2)(a) is too ambiguous to achieve this objective – and the disjunct between the EM and the wording of s 188(2)(a) is likely to lead to litigation over the meaning of the provision.

Second, proposed s 188(2)(b) requires the FWC to be satisfied that the employees requested to vote on the agreement are sufficiently representative, having regard to the employees the agreement is expressed to cover.

This provision should resolve the problem identified in *One Key* and like cases of small groups of non-representative workers being asked to approve agreements covering multiple awards and classifications that do not apply to them.

Part 15 – Initiating Bargaining

The Amendments proposed in Part 15 will enable employees and their representatives to initiate bargaining for a single-enterprise agreement where:

- There is an existing single-enterprise agreement;
- It has passed its nominal expiry date and is within 5 years of that date;
- A single-interest employer authorisation did not cease to be in operation because of the making of the earlier agreement; and
- The same, or substantially the same, group of employees will be covered by the proposed agreement as are covered by the existing agreement.

This is an important change to the FW Act and overcomes the existing imbalance whereby employers are free to initiate bargaining for an agreement at any time, but employees and their representatives can only initiate bargaining by obtaining a majority support determination at an enterprise (which requires a majority of those to be covered by a proposed agreement to show their support for bargaining). The MSD provisions have been retained for new enterprise agreements, and for enterprises with no history of bargaining over the past five years. However, for enterprises whose terms and conditions of engagement are covered by a recently expired enterprise agreement, and the proposed new agreement has the same scope, there is no reason why the employees and their representatives should not be able to initiate bargaining at those sites.[10] Requiring them to seek an MSD is an unnecessary waste of time and resources.

The only aspect of this proposal that is unclear is the exclusion of enterprises where the existing agreement had the effect of causing a single-interest employer authorisation to cease operation at that workplace. It is unclear why employees in this situation should be required to seek an MSD to initiate bargaining in respect of the replacement of their expired single-enterprise agreement. The EM is silent as to the reason for this exclusion, and it cannot be parsed from the text alone.

Part 18 – Bargaining Disputes

The amendments to the FW Act in Part 18 replace the existing provisions under the FW Act for serious breach declarations and bargaining related workplace determinations with provisions enabling the FWC to create an 'intractable bargaining declaration' and then arbitrate through the creation of an 'intractable bargaining workplace determination'.

The provisions to be repealed deal with circumstances where the good faith bargaining provisions are breached and those breaches are not remedied, such that there is a 'serious breach'. The problem with these provisions is that the legislative bars are set too high for them to be of any practical use. The good faith bargaining obligations can be complied with by parties even in the absence of a serious commitment to reach an agreement. While the provisions notionally prevent surface bargaining, it is relatively easy for parties to avoid reaching agreement without being found to have acted in breach of the good faith provisions.[11] Repeal of the serious breach provisions reflects the reality that they were not encouraging or facilitating agreement outcomes in any meaningful way.

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[10] Prior to the introduction of s 437(2A), inserted into the FW Act by the *Fair Work Amendment Act 2015*, employees and their bargaining representatives could initiate bargaining and support their claims to bargain through taking protected industrial action without the need for a majority support determination (as had been determined in *JJ Richards & Sons Pty Ltd v FWA* (2012) 201 FCR 297). The differences in the proposed changes are that this would be limited to workplaces with an existing history of bargaining, and once bargaining was initiated, the good faith obligations would apply to employers (meaning that employees and their representatives would not need to pursue industrial action to bring an employer to the bargaining table).

[11] See eg Anthony Forsyth and Bradon Ellem, 'Has the Australian Model Resisted US-Style Anti-Union Organising Campaigns? Case Studies of the Cochlear and ResMed Bargaining Disputes' in Shae McCrystal, Breen Creighton and Anthony Forsyth, *Collective Bargaining Under the Fair Work Act*, Federation Press, Sydney, 2018.

The Bill proposes to replace the provisions with an intractable bargaining disputes provision, but one which is linked to the dispute resolution procedures in s 240, rather than the good faith provisions in s 228. These provisions will only apply for single enterprise agreements and single-interest employer enterprise agreements, or agreements in the context of supported bargaining (but not co-operative bargaining or greenfields agreements).

These proposed changes decouple access to arbitration for intractable disputes from a requirement to demonstrate breach of the good faith provisions. This should make access to arbitration easier, given the difficulties attendant on establishing a breach of the good faith provisions. The inclusion of this provision is necessary given that access to the right to protected industrial action continues to be highly restricted under the FW Act, which has a significant impact on the ability of employees to exercise bargaining power to improve their wages and conditions. If access to protected industrial action is not to be bolstered, then meaningful access to arbitration for intractable bargaining disputes is appropriate.

Part 19 – Industrial Action

The protected industrial action provisions under the FW Act are some of the most complex and over engineered provisions regulating strike action in the world.

With only the possible exception of the UK, no other country which purports to provide workers with the right to take lawful strike action makes it so difficult to access lawful strike action, so challenging to take meaningful and impactful strike action, and so easy inadvertently to break those rules and lose the capacity to strike.[12]

The amendments will enable access to protected industrial action in a slightly wider range of circumstances – for agreements negotiated in the context of single-interest employers where that definition is wider than it presently is, and in the context of supported bargaining. However, industrial action remains so constrained under the FW Act that it is highly unlikely that the proposed amendments will significantly increase rates of industrial action.

The proposed changes to industrial action regulation are:

- Removal of the thirty day rule – which requires all approved industrial action to be taken within 30 days of the declaration of the ballot results in order to be able to use the action.
- Introduction of a PAB Order mandate of 3 months – meaning that industrial action approved by a vote conducted after a PAB order can only be taken in the three months after the declaration of the ballot results, and requiring another PAB order and proposed action ballot to be conducted every three months if industrial action is to continue;
- A requirement for the parties to attend conciliation at the FWC after a PAB order is made and before the finalisation of the ballot, and provision for loss of access to

[12] As to this see Shae McCrystal, 'Why is it so hard to take lawful strike action in Australia?' (2019) 61(1) *Journal of Industrial Relations* 129.

protected industrial action for breach of an order in connection with this requirement;
- Removal of the AEC as the default ballot agent;
- Inclusion of a 120 hour (five days) notice period for single-interest employers or supported bargaining agreements.

Removal of 30 day rule

The removal of the 30 day rule, that requires industrial action to commence within 30 days of the declaration of the ballot (or 60 days if the FWC extends the term) is a welcome change. This provision has been the subject of adverse interpretation in the Federal Court, which found that every single form of industrial action approved on a ballot must be taken in the first 30 days (or 60 by extension) or the capacity to use the action would be lost.[13] This means that unions and their employees must rush to take all approved forms of industrial action within the 30 day period, whether the action is industrially necessary or not. Equally it has led to a range of artificial behaviours by unions using 'enlivenment' strategies to ensure that all forms of approved action are taken. For example, one way of enlivening each form of action is to have a single employee take one instance of each form of authorised protected industrial action within the necessary timeframe.[14]

Requirement to obtain another PAB order and reballot members

Replacing the 30 day rule with a three month ballot mandate means that bargaining representatives would need to return to the FWC for a PAB order, and then formally reballot after each three month period where negotiations have not led to an agreement. This change will not fix the problem where industrial action is deployed in response to legal requirements rather than in a manner that is strategic and directed to bargaining. The suggested mandate is simply too short and will artificially push parties into unnecessary escalation of industrial action towards the end of the three month period.

If a ballot mandate is necessary, the minimum mandate period of 6 months would be more appropriate – to enable negotiations to continue and for industrial action to be used to serve the needs of the parties to bargaining – rather than industrial action being driven by an artificially short mandate period imposed by Statute.

At the end of a ballot mandate period, if a new ballot is required, a new PAB Order should not be required, just the conduct of a ballot.

[13] *United Collieries Ltd v CFMEU* (2006) 153 FCR 543; *Energy Australia Yallourn Pty Ltd v CRMEU* (2014) 218 FCR 316.

[14] The perverse impact of the 30 day rule is discussed in Catrina Denvir and Shae McCrystal, 'Researching Labour Law 'in Practice': Challenges in Assessing the Impact of Protected Industrial Action Ballot Procedures on Enterprise Bargaining Processes' in John Howe, Anna Chapman and Ingrid Landau (eds), *The Evolving Project of Labour Law: Foundations, Development and Future Research Directions*, Federation Press, Sydney, 161.

Problems with PAB Orders and ballots

PAB orders and ballots are a formal requirement in the FW Act system, ostensibly enacted to ensure that members of trade unions are able to make a democratic decision as to whether or not they wish to take protected industrial action.[15] The requirements mean that to take protected industrial action, a PAB order must be obtained from the FWC, then a ballot of the employees represented by the bargaining representative who obtained the order must be conducted by a ballot agent. For the action to be approved, a majority of employees on the electoral roll must vote, and a majority of those who vote must approve the agreement.

Ballot requirements for proposed strike action are not uncommon around the world. However, Australia is unique in having a requirement to seek the permission of a third party for a ballot to be conducted, and for employers to be able to intervene and oppose the conduct of such a ballot.[16]

Empirical research conducted by Creighton et al on the PAB order process has demonstrated that very few PAB order applications are refused by the FWC.[17] Further, the involvement of employers in the PAB process, the involvement of an independent ballot agent (the AEC or otherwise) and the publication of the ballot outcome on the FWC website, changes the nature of the vote itself. The public nature of the ballot means that the results will necessarily have an impact on the associated negotiations, and it becomes imperative for unions to make strategic decisions around whether or not to risk a PAB ballot, and if a PAB ballot is run, for that ballot to authorise industrial action even where the members are unsure about taking such action in practice. This means that:

- In many workplaces, workers will never get the choice to vote because the risk of a no vote is so significant that the union will not apply for a PAB order;
- In workplaces where a union does not want to reveal its density, it will not apply for a PAB order;
- Where a union will apply for a PAB order, the importance of the yes vote on the ballot means that members are encouraged to vote yes for the ballot even if they do not intend to take industrial action. Unions must embark on a campaign to get members to vote, to ensure quorum and to get members to vote yes so as not to undermine their position at the bargaining table. The strong message presented to many members is that the PAB order and vote is a legislative requirement – not a genuine vote to authorise industrial action. After the PABO vote occurs, the union will conduct its own internal, democratic processes, to determine if it will take strike action, and members are encouraged to express any negative views in this forum.[18]

In practice, the PAB order provisions create unnecessary obstacles to industrial action, and do not substantively achieve meaningful democratic outcomes. Employers frequently oppose PAB orders in the FWC with the intention of using their opposition as leverage to get

[15] FW Act s 436.
[16] Breen Creighton et al, *Strike Ballots, Democracy and Law*, Oxford University Press, Oxford, 2022, Chapter 3.
[17] Ibid, p 110.
[18] Ibid, pp 143-146.

the union to agree to a longer notice period (and then they withdraw their opposition).[19] The requirement for the PAB ballot to specify all forms of proposed industrial action has also been a significant sticking point – creating opportunities to challenge the legitimacy of ballot questions, and then to challenge whether or not industrial action when taken was the industrial action approved in the ballot.[20]

In this context it is perplexing why the Bill increased the frequency of PAB orders and ballots, rather than removing the requirement for employee representatives to seek a PAB order altogether. The inclusion in the Bill of mandatory conciliation prior to the taking of protected industrial action makes the PAB process itself even more unnecessary – as employers would be given ample opportunity to air their grievances within the forum presented by conciliation.

If the PAB order requirement is to be retained at all, it should only be necessary once. There are ample alternate provisions in the FW Act that can be used if unions do not play by the rules (eg, breaches of good faith provisions and orders under ss 418 to stop industrial action). Requiring multiple PAB orders will be a waste of time, energy and resources – all things which could more usefully be focussed on bargaining itself.

<u>The default ballot agent and the quorum problem</u>

In order to authorise protected industrial action in a protected action ballot, 50% of those on the roll of voters must cast a ballot, and 50% of those voting must approve the agreement. The problems created by the quorum requirement are exacerbated by the proposed amendments in two ways.

First, the amendments remove the AEC as the default protected ballot agent, and allow for accreditation of a range of different potential ballot agents. Research by Creighton et al into why employee bargaining representatives use the AEC to conduct protected action ballots demonstrates that that they are generally motivated by two factors: cost (the AEC is free to users but other agents are not), and the perception of independence and integrity brought by using the AEC.[21]

However, the same research also shows that using the AEC comes with different kinds of costs in practice. The AEC will not conduct electronic ballots even though they are authorised by the FW Act, and the AEC more frequently uses postal ballots over attendance ballots. In respect of achieving quorum in a protected action ballot, attendance ballots are statistically more likely to deliver quorum than postal ballots.[22] While there is no meaningful

[19] In the study conducted by Creighton et al (Ibid, p 132) in 358 PAB Order applications under consideration in the study (27.5% of all applications considered), employers indicated that they would not challenge a PAB Order if the notice period was extended by consent, and the notice period was extended in practice in 350 instances.
[20] As in the *Esso* litigation, see Breen Creighton and Shae McCrystal, 'Before the High Court – Esso Australia Pty Ltd v Australian Workers' Union: Breaches of Orders, Coercion and Protected Industrial Action under the Fair Work Act 2009 (Cth)' (2017) 39(2) *Sydney Law Review* 233.
[21] Breen Creighton et al, *Strike Ballots, Democracy and Law*, Oxford University Press, Oxford, 2022, 138-142.
[22] Ibid.

statistic data on success rates for electronic ballots, anecdotal evidence suggests that they are the most effective way of achieving quorum.

This means that cost factors tend to push employee bargaining representatives to the AEC as ballot agent – and the AEC most commonly used postal balloting which is the method least likely to encourage quorum. If the number of protected action ballots required for each set of agreement negotiations is going to increase under this Bill, the cost of those ballots has not been addressed, nor has ensuring that the most efficient method of balloting can be used in a cost effective manner.

Second, quorum will be much more difficult to achieve where protected industrial action is proposed in supported bargaining or single-interest employer contexts. The quorum rules will mean that a majority of those employees represented by a bargaining representative across multiple workplaces will need to vote, and to vote in favour of the agreement. The quorum rule was designed for single enterprise agreement- making – it was not designed for these other contexts, and needs to be reconsidered.[23]

Compulsory conciliation conferences

The Bill would insert a new obstacle to taking protected industrial action in the form of a 'conference' conducted by the FWC which must be ordered whenever a PAB order is made. The purpose of the conference is expressed to be 'for the purposes of mediation or conciliation in relation to the agreement'. The conference must be conducted before the voting in the relevant ballot is finalised, must be conducted in private, and the FWC has the power to mediate, conciliate, make a recommendation or express an opinion.

The introduction of these compulsory conciliation conferences, which must be repeated every time a PAB order is made, is not entirely clear. They are connected to a ballot to approve industrial action, but are not expressed to be about industrial action. They increase the compliance burden associated with taking industrial action, without a clear purpose. And, if conciliation conferences are considered to be of benefit in relation to agreement-making, the large number of enterprises where employees do not take industrial action are left out.

The Bill also proposes new s 409(6A) (and the employer equivalent in s 411(4)) which provides that to be employee claim action (and thus protected action), 'each bargaining representative of an employee who will be covered by the agreement must not have contravened any order made under s 448A (which is about mediation and conciliation conferences) that:

- Applies to the bargaining representative; and
- Relates to the protected action ballot order for the protected action ballot'.

[23] Notably, in the context of single-interest authorisations under the current FW Act provisions, some unions seek to PABO each enterprise separately, in order to avoid having to hit quorum across all those eligible to vote. They do this by arguing that they are seeking a single-enterprise agreement at each site. This approach would not work under the proposed amendments because the union could not seek a separate agreement once the single-interest employer authorisation was made.

There are two ambiguities in this provision that should be addressed. First, it is not clear if the failure by one bargaining representative to comply with any relevant order impacts only that representative or all of the bargaining representatives for that agreement. Failure to comply with an order by one representative, should not penalise other representatives and this should be clarified. Second, the provision provides no way back for a bargaining representative who has contravened an order (either intentionally or inadvertently). Since the decision of the High Court in Esso Australia Pty Ltd v Australian Workers' Union,[24] any breach of an order (inadvertent, unintentional or otherwise) has the effect by virtue of s 413(5) of removing access to protected industrial action for the duration of the bargaining round (unless the relevant order can be subsequently retrospectively revoked). It is unclear what work proposed s 409(6A) has to do in light of the fact that s 413(5) remains unamended; and the provision also reinforces the worst aspect of s 413(5) – that of failing to provide a way back for a bargaining representative and the workers concerned once a breach has been remedied.

Notice periods

The amendments impose a new notice period of 120 hours for protected industrial action in respect of single-interest employers and supported bargaining. The use of a period of hours rather than working days contrasts with the use of '3 working days' for protected industrial action at single-enterprise sites. The use of hours in this respect removes the difficulties that have arisen with the working days formulae. Where 3 working days notice is required, if notice of action is given on a Monday, the three working days does not start until the Tuesday, and will not end until the end of Thursday – meaning action cannot be taken until the Friday. Three working days is, in practice, five days. If the three working days formulae was replaced with '72 hours' (to align with the new 120 hours provision), this would make the notice periods work in the same way, and be much simpler to administer in practice.

General comments on the multi-employer bargaining provisions

In general, the Bill is a very welcome attempt to move beyond the constraints of the current enterprise bargaining framework by introducing new multi-employer agreement options. There are several aspects, however, which are likely to limit the Bill's capacity to implement the Government's key objective: 'to get wages moving and end the era of deliberate wage stagnation', especially in feminised industries.[25]

An over-arching concern is that the Government has chosen to situate the proposed new multi-employer agreement options on top of existing mechanisms in the Fair Work Act (Supported Bargaining replaces low-paid bargaining; Single Interest Employer Bargaining is augmented; and Cooperative Bargaining replaces non-low-paid multi-employer bargaining). The result is an unwieldy set of arrangements which still reflect the predominant 'enterprise' focus of the current scheme, compounded by the Government's express preference in favour of bargaining at the enterprise level.[26]

[24] [2017] HCA 54.
[25] Minister's Second Reading Speech.
[26] Ibid, stating that this is intended to remain the primary form of agreement-making.

International evidence clearly demonstrates the connection between industry/multiple-employer bargaining systems and high levels of bargaining coverage (especially in continental Europe).[27] Therefore, an unequivocal statutory preference should be stated in favour of multi-employer agreement options as the pathway to increasing the volume of collective bargaining and lifting workers' wages above award levels.

The primacy given to single-enterprise agreements is reflected in the Bill's provisions preventing access to Supported Bargaining or Single Interest Employer Bargaining before the expiry of current agreements.[28] This opens up the potential for employers to keep making single-enterprise agreements indefinitely (by negotiating a new agreement before expiry of the current one), undermining the efficacy of the new multi-employer streams.

There should at least be the capacity to initiate the new multi-employer bargaining processes and have authorisations made ahead of the expiry of current agreements, for example just as it is possible now to apply for bargaining orders up to 90 days before the nominal expiry date.[29]

Part 20 Supported Bargaining

The new Supported Bargaining stream improves considerably on the failed FW Act low-paid bargaining provisions. It removes many of the complex (and in many instances, irrelevant) criteria for triggering that form of bargaining, the application of which by the FWC has led to it never getting off the ground. However, given the complexity and likely practical difficulties of the proposed Single Interest Employer Bargaining stream (see below), it would be better if Supported Bargaining was not predominantly framed around workers in low-paid industries.[30]

That framing will assist the workers who the Government has indicated it intends to benefit from the Supported Bargaining stream, including employees 'in low-paid industries such as aged care, disability care, and early childhood education and care who may lack the necessary skills, resources and power to bargain effectively'.[31] Such workers would be likely to satisfy the factors relevant to the FWC's assessment (for purposes of determining whether it should make a Supported Bargaining authorisation) of whether it is appropriate for (some or all) of the employers and employees to bargain together,[32] which include:

[27] See eg Claus Schnabel, *Union Membership and Collective Bargaining: Trends and Determinants* (LASER Discussion Papers – Paper No. 121, Labor and Socio-Economic Research Center, University of Erlangen-Nuremberg, 2020).
[28] In the case of Supported Bargaining, see proposed s 243A(1)-(3) (although this does include a mechanism to address employers making a single-enterprise agreement with the intention of avoiding Supported Bargaining Authorisations). In the case of Single Interest Employers, see proposed s 249(3A)(d).
[29] FW Act, s 229(3)(a)(i).
[30] See eg Explanatory Memorandum, paras [890], [938].
[31] Ibid.
[32] Proposed s 243(1)(b).

- prevailing pay and conditions in the relevant industry or sector, including whether low pay rates prevail[33]
- whether the employers have clearly identifiable common interests,[34] for example (a) geographical location (b) nature of the enterprises and the terms/conditions of employment in them (c) being substantially funded, directly or indirectly, by Commonwealth/State/ Territory[35]
- whether the likely number of bargaining representatives would be consistent with a manageable bargaining process[36]
- any other matters the FWC considers appropriate,[37] eg the views of the bargaining representatives.[38]

The absence of a majority employee support requirement to obtain a Supported Bargaining authorisation (or a variation of one to add a new employer) is welcome. But it is unclear why majority support forms part of the criteria for determining if a new employer should be added to a Supported Bargaining agreement after it is made, without the employer's consent,[39] as this is conceptually no different to the making of a Supported Bargaining authorisation (and the FWC is able to consider the same factors as those set out in proposed s 243,[40] outlined above).

As well as the funded services sectors mentioned earlier, the Supported Bargaining stream could be useful for workers in low-paid settings in the private sector such as cleaning and security. However, it may operate to exclude workers who have been able to engage in single-enterprise bargaining under the FW Act – but would like to be able to obtain even better outcomes through multi-employer bargaining. This could be addressed by adding to the factors relevant to the granting of a Supported Bargaining authorisation, the need to facilitate access to this form of multi-employer bargaining to provide workers the opportunity to improve wages and working conditions.

Part 21 Single Interest Employer Bargaining

The expanded Single Interest Employer Bargaining stream may assist in giving some workers access to a form of multi-employer bargaining. However, outside the context of franchise arrangements,[41] the requirements that must be satisfied to obtain a Single Interest Employer Authorisation are onerous and are likely to limit the effectiveness of this stream.

The following requirements are particularly problematic.

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[33] Proposed s 243(1)(b)(i); see also Explanatory Memorandum, para [944], whether employees in the industry are paid at award levels.
[34] Proposed s 243(1)(b)(ii).
[35] Proposed s 243(2).
[36] Proposed s 243(1)(b)(iii).
[37] Proposed s 243(1)(b)(iv).
[38] Explanatory Memorandum, para [944].
[39] Proposed s 216BA(1)(a); see Explanatory Memorandum, para [928].
[40] Explanatory Memorandum, para [929].
[41] FW Act, s 249(2) (retained in the Bill).

Employer agreement to bargain together (existing s 249(1)(b))

The Bill does not repeal this provision in the FW Act, which requires (as a condition of the FWC granting a Single Interest Employer Authorisation) that 'that the employers that will be covered by the agreement have agreed to bargain together' and have not been coerced in any way.

This would have the practical effect of preventing Single Interest Employer Bargaining from occurring if some or all of the employers do not consent. Hopefully this is simply a drafting error, as the whole Single Interest stream will be a dead letter if employer consent is indeed intended and remains in the legislation.

Common interests test (proposed s 249(3)(b) & (3C))

The employers must have 'clearly identifiable common interests', determined by reference to factors including (a) geographic location (b) regulatory regime (c) the nature of the enterprises to which the agreement will relate and the terms/conditions of employment in those enterprises. This will likely operate to significantly limit access to Single Interest Employer Bargaining, including in the following examples:

> The fresh food supply chain: growers/farms and their labour providers, logistics companies (warehousing/transport), supermarkets – different geographic locations, nature of the enterprises and terms/conditions very different especially at each end of the supply chain (even though the market power of lead firms influences the price for labour at each level below).
>
> Outsourced business functions: eg Qantas and the firms to which it has outsourced work such as ground services including cleaning, catering, baggage handling – nature of the enterprises may only be satisfied where it is partial outsourcing and Qantas continues to have some of the work done in some locations by direct employees (so there are Qantas and outsourced provider employees performing largely similar work although on different rates/conditions).

Examples where the common interests test might be more readily satisfied:

> Fast-food chain including brand-owned and franchised stores: nature of the enterprises and terms/conditions very similar, although franchised stores might be able to argue they are subject to a different regulatory regime.
>
> A group of regionally-based universities: similar location, subject to the same regulatory regime (eg TEQSA, AQF, federal/state legislative framework), similar kinds of enterprises with likely little variation in wages and conditions.

The limits of the test could be addressed by adding other relevant factors the FWC can consider such as:

- the nature of the corporate/legal relationship between the various business entities
- whether one of them supplies labour/services/products to another

- whether the business entities are competitors/operate in the same market
- the common interests of the relevant *employees* including the occupation/work performed
- whether the operations of the lead firm(s) and its (their) relationship with the direct employer have an impact on the wages and conditions of the workers in question.

Majority support test (proposed s 249(3)(a)(ii) & (3B))

It must be shown that a majority of the employees employed at a time determined by the FWC, and who will be covered by the agreement, want to bargain with the employers who will be covered. The FWC can use any method it considers appropriate to work out if a majority want to bargain.

This means that majority support of the employees *across all of the enterprises* is needed, a very difficult threshold to meet in the context of many separate and dispersed workplaces (for example, in the fast-food chain scenario outlined above with tens of thousands of workers).

As Forsyth has argued,[42] workers' preferences should be assessed on the basis of *achievable thresholds* of employee support. This requires a fundamental shift away from the concept of majoritarianism as the determinant of whether collective bargaining occurs. Majority support-based systems of establishing the right to collective bargaining (as found in the labour laws of the USA, UK and Australia) provide considerable opportunities for employer tactics in the campaign period to thwart the required majority being obtained. Employers have been allowed to pervert 'democratic' notions (translated as a requirement for the union to show majority support) as a ruse for seeking to avoid bargaining altogether.

This can be seen in the majority support determination process required to trigger single-enterprise bargaining under the FW Act now. Employers have engaged in strategies to prevent the FWC issuing a determination such as: refusing to provide information on workforce numbers (so the union does not know the majority target it is aiming for); questioning the validity of union petitions demonstrating majority support from the workforce; making direct appeals to the workforce (eg, threatening adverse consequences for the business if employees support collective bargaining); and running their own surveys or ballots to counter a union's majority support evidence.[43]

Rather than majority support, access to multi-employer bargaining should be based on a concept of *legitimacy*[44] – i.e. what level of employee support should a union have to

[42] Anthony Forsyth, *The Future of Unions and Worker Representation: The Digital Picket Line*, Hart Publishing, Oxford, 2022, 212-214.
[43] See the case law considered in Anthony Forsyth, John Howe, Peter Gahan and Ingrid Landau, 'Establishing the Right to Bargain Collectively in Australia and the UK: Are Majority Support Determinations under Australia's Fair Work Act a More Effective Form of Union Recognition?' (2017) 46:3 *Industrial Law Journal* 335, 348-357; and Forsyth (2022), 45-46.
[44] See eg Alan Bogg and Tonia Novitz, 'The Politics and Law of Trade Union Recognition: Democracy, Human Rights and Pragmatism in the New Zealand and British Context' (2019) 50:2 *Victoria University of Wellington*

establish, to demonstrate that it is the legitimate representative of a group of workers within the proposed multi-employer bargaining configuration that they have chosen?

A lower threshold should be set than the majority test proposed in the Bill. For example, In New Zealand's new system of industry-wide Fair Pay Agreements, the threshold is 10% of employees in the relevant sector who will be covered by a proposed FPA *or* 1,000 such employees.[45] These thresholds recognise the barriers to organising workers across disparate locations in multi-employer structures and the certainty of continued employer resistance. They would also level the playing field, which has been tilted in favour of employers for too long.

It is therefore of great concern that the Government is putting forward amendments to the already flawed provisions of the Bill, which would *require a majority to be established at each enterprise* (rather than majority employee support across all of the relevant businesses) to obtain a Single Interest Employer Authorisation – in response to concerns about the original Bill raised by the Business Council of Australia and other employer groups.[46] This would effectively mean that in order just to be allowed to engage in bargaining for an agreement covering multiple employers in the Single Interest stream, a union would have to win a series of workplace contests, enterprise-by-enterprise. In reality, that is not a system of multi-employer collective bargaining. It remains in essence *enterprise* bargaining with the possible outcome of more than one enterprise being covered by the resulting agreement. It is a recipe for the kinds of employer tactics aimed at frustrating the commencement of bargaining, discussed above. Such a system is highly unlikely to lead to the widespread extension of *collective* bargaining needed to lift workers' wages.

As for the evidentiary requirement to establish majority support, the Explanatory Memorandum indicates that the FWC could be satisfied 'having regard to a petition of a representative sample of the employer's employees or the number of employees voting in support in a ballot of some of the employer's employees'.[47] The ability to examine a representative sample petition is welcome, but the EM couches this (and the partial ballot concept) in the context of *one employer* rather than the multiple employers that would be involved in the process. However, now that (through the amendments discussed above) the Government is contemplating an enterprise-by-enterprise approach to majority support, the reference to a representative petition or ballot 'of some of the employer's employees' makes more sense.

<u>Fairly chosen test</u> (proposed s 249(3)(c) & (3D))

The group of employees who will be covered by the agreement must have been fairly chosen, and if the agreement will not cover all employees of the employer, the FWC must take into account whether the group is organisationally, operationally or organisationally distinct.

Law Review 259, 278-279; and NZ Ministry of Business, Innovation and Employment, *Fair Pay Agreements – the nature of 'support' for the representation test* (Briefing document, 3 May 2021).

[45] *Fair Pay Agreements Bill 2022* (NZ), cl 29(1).

[46] See eg 'Burke offers concession on multi-employer deals', *Workplace Express* (7 November 2022).

[47] Explanatory Memorandum, para [1028].

This is a concept borrowed from single-enterprise bargaining.[48] The reference to an agreement not covering all employees of the *employer* reveals that it does not have a place in the context of multi-employer bargaining where there are *two or more employers*. By its nature, an agreement in the Single Interest Employer Bargaining stream will *not* cover all of the employees of all the employers involved. Engaging in further inquiry as to whether groups included in the agreement (or excluded) at the various employers are organisationally, operationally or organisationally distinct makes no sense. It also provides another opportunity for employer obstruction to the making of authorisations and therefore to bargaining actually occurring in this stream.

Public interest test (proposed s 249(3)(f))

A similar opportunity is provided by the requirement that it not be 'contrary to the public interest to make the authorisation'. According to the EM this provides the FWC scope to consider all the relevant circumstances and the broader public interest, eg the economic ramifications of making an authorisation. Further, the public interest is likely to favour authorisations 'that inhibit a "race to the bottom" on wages and conditions, while discouraging the making of authorisations that could adversely affect competition on the basis of factors such as quality (including service levels) and innovation'; and the views of employers/bargaining representatives of employees (required to be considered under proposed s 249(3)(e)) will also be relevant to assessing the public interest.[49]

What is the need for a public interest test of any kind? It might be argued it has a place where (as the Government has framed the bargaining options in the FW Act as amended by the Bill) the emphasis remains on single-enterprise bargaining and the new multi-employer bargaining streams are seen as somehow exceptional. But as argued above, that is not enough to bolster multi-employer bargaining with a view to lifting workers' wages.

The public interest test as outlined in the EM may help support union/worker arguments as to the necessity of Single Interest Employer Bargaining in some situations, but equally could be interpreted by the FWC to avoid making authorisations. If it is to be retained, the public interest test should be oriented more clearly towards an understanding of the 'public interest' in allowing this form of bargaining to improve the wages and conditions of particular workers (and meet the Government's main policy goal for this Bill: ending wage stagnation).

Overall

There is a real risk that, in specifying too many requirements that must be met to obtain a Single Interest Employer Bargaining authorisation – many of which will be difficult to satisfy in practice – the Government is setting up a repeat of the failed low-paid bargaining scheme in the FW Act.

[48] See eg FW Act, s 236((2)(d) and (3A), s 238(4)(c) and (4A).
[49] Explanatory Memorandum, para [1023].

Part 23 Cooperative Workplaces

The current provisions for making multi-employer agreements would be reframed as the Cooperative Bargaining Stream, which will be 'entirely voluntary. Note there's no industrial action in that stream. Conciliation and arbitration are by consent.'[50] This stream might be utilised, for example, by small businesses such as hairdressers who voluntarily agree to bargain together with their employees (an example of 'opt-in' multi-employer bargaining that was frequently referred to in the lead-up to the Jobs and Skills Summit).

However, without any of the statutory mechanisms available in other forms of bargaining, it is unlikely that the Cooperative Bargaining Stream will have any greater impact than the current multi-employer bargaining provisions (which have had very limited take-up).
Part 23 of the Bill also includes proposed s 178C, which is not really about 'cooperative workplaces' but rather is about excluding certain individuals and organisations from involvement in the new multi-employer bargaining streams created by the Bill. Exclusion through an order of the FWC would be based on the relevant person's record of repeated non-compliance with the FW Act, in particular, court findings of civil remedy contraventions or offences in the preceding 18 months.

Section 178C would have obvious application in respect of the Construction, Forestry, Maritime, Mining and Energy Union and many of its officials. Indeed it is the Government's stated position that multi-employer bargaining should not be 'extended to industries in which it is neither appropriate nor necessary – in particular, commercial construction'.[51] However, s 178C could also operate to exclude other unions and their officials from participation in multi-employer bargaining, for example due to inadvertent breaches of the complex protected industrial action and right of entry provisions of the FW Act which result in the imposition of civil remedies.

Section 178C adopts an approach to enforcement/compliance with the FW Act which was integral to the former Coalition Government's *Ensuring Integrity Bill 2019* – a measure which the then Labor Opposition vigorously opposed (contributing to its defeat in the Senate). Section 178C should be removed from the Bill so that all workers and their unions have the opportunity to access multi-employer bargaining.

[50] Minister's Second Reading Speech.
[51] Ibid.