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

Senate Education and Employment Legislation Committee

5 February 2021

Australian
Chamber of Commerce
and Industry

Australian Chamber of Commerce and Industry

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EXECUTIVE SUMMARY

- The COVID pandemic has highlighted substantial problems in Australia's IR system / FW Act.
- Australia cannot build back from the economic damage of COVID with a dysfunctional IR system and we owe it to younger Australians to create the foundations for a better future.
- The *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* is deliberately moderate, balancing the needs of both employers and employees.
- Australians need industrial relations to play its part in supporting recovery and jobs growth, in the face of ongoing uncertainty for all businesses.
- Moderate measures in the Bill should help employers create and retain jobs and get back into bargaining to provide a foundation for wage increases and more secure enterprises and employment.
- While the changes are modest, in combination they should support our recovery.
- ACCI supports passage of the Bill subject to a series of recommendations for technical and substantive amendments, and substantial concerns at the additional penalties for non-compliance.
- Higher fines and criminal penalties don't create jobs, they potentially put them at risk.
    - Increased fines, criminal penalties and other changes in Schedule 5 should be omitted from the Bill.
    - If the compliance changes proceed, there should be at least be a two-year moratorium or suspension of both higher fines and the introduction of criminal penalties for small and family businesses.
- We urge people to read the Bill in its entirely.
- False and irresponsible claims are being made about these changes. Particularly irresponsible are claims that nurses and other health workers will have their pay cut.
- This is not true. It can't happen and it won't happen.

SCHEDULE 1 – CASUAL EMPLOYEES

- Casual employment is a legitimate form of employment. The rate of casual employment is not growing and has remained stable for 22 years.
- Casual employment provides the necessary flexibility for many businesses to manage their business and is crucial for recovery, allowing businesses to scale workforces back up as appropriate in the restart and recovery phases of COVID-19.
- Casual employment is a genuine and fulfilling choice for many employees, particularly those who balance work and other aspects of their lives such as studying or caring responsibilities, and those prioritising additional income.
- ACCI supports a definition of 'casual employee' being included in the FW Act to restore certainty and business confidence to create jobs.

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- ACCI is not opposed to the proposed definition in the Bill being passed by Parliament, albeit with some minor amendments (detailed in Section 1 on Schedule 1 of the Bill).

- In particular, consideration of whether a person will work only as required (as set out in s.15A(2)(b)) should be deleted to remove grey areas and provide more certainty and clarity.

- Casual conversion is rarely consistent with the realities of operating a business. It reduces scope for employees and employers to negotiate a balance that meets each of their needs.

- Nevertheless, ACCI has suggested improvements to address practical issues and potentially unwarranted additional complexity / regulatory burden from the expanded conversion rights in the Bill.

- A major issue of concern to employers is the risk of 'double-dipping' claims being pursued by the very large number of casuals who have worked regularly for an extended period.

- ACCI welcomes the protection against both retrospective and prospective 'double-dipping' claims, to protect against claims for entitlements such as annual leave, despite employees having been already paid a casual loading to compensate in part for not receiving these entitlements.

- Some amendments are nevertheless suggested to ensure the policy objective is met.

SCHEDULE 2 – MODERN AWARDS

- Simplifying modern awards will help achieve the common goal of saving and creating Australian jobs as we look to rebuild after COVID-19.

- The JobKeeper FW Act flexibilities have been an important lifeline for businesses and employees during the COVID crisis.

- Extending similar flexibilities, which are well thought out, contain safeguards, and will help distressed businesses recover and retain employees and is strongly supported by ACCI.

- Such flexibilities should extend to other significant industries still facing significant distress covered by modern awards, including but not limited to the tourism sector and the arts and recreation services industry.

- The current part-time provisions in most awards are rigid and unnecessarily prescriptive and discourage employers from engaging people on a part-time basis instead of casual.

- ACCI supports part-time flexibility changes but recommends some changes to the current drafting to address practical issues around utility and general protections claims.

- If businesses in key distressed industries such as tourism or in locations such as Cairns are to survive and keep employing Australians, then the FW flexibilities they are able to continue to utilise under the Bill must go beyond just the ability to issue duty and location directions, and must also include the ability to, with sufficient safeguards and protections, to issue directions to work reduced hours/days.

- Far more needs to be done to address complexity in modern awards than is proposed in the Bill.

- If we are to truly encourage employment, employing staff under modern awards must no longer be seen as a confronting, complicated, costly, legal minefield.

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SCHEDULE 3 – ENTERPRISE AGREEMENTS

- Enterprise bargaining is failing, if not completely failed, under the FW Act.
- Both unions and employers have called for urgent changes to make agreement making accessible and reliable for employers and employees, or to at least start to reverse the decline.
- Australia cannot afford to tackle COVID recovery with our existing agreement making rules.
- We will not secure sufficient productivity and competitiveness, nor a return towards trend wage growth, without a more reliable, transparent and responsive agreement approval system.
- The changes in Schedule 5 are overwhelmingly positive, albeit moderate. ACCI strongly supports the vast majority of these amendments.
- They should in combination encourage more employers and employees to reconsider the positive opportunities and benefits of bargaining.
- Attacks being made against the amendments to s 189 are patently untrue / baseless:
  - The BOOT is not being abolished – that's simply untrue under any fair reading of the Bill.
  - This is in no way a recipe for widespread wage cuts and it is not appropriate or true to make such claims.
- Further amendments could however usefully clarify that s 189 can only be used in relation to the negative impacts of the COVID19 pandemic, restrictions etc.
- More should be done to help employers retain jobs by implementing all of transfer of business recommendations of the Productivity Commission (Part 12).
- Disappointingly however, some of the changes in Sch 3 will do nothing to support enterprises and jobs, and will increase risks / impose additional costs at the worst possible time. This includes:
  - Restricting when agreements can be terminated after their nominal expiry (Sch 3, Part 8).
  - Terminating all preserved agreements from a single date in 2022 (Sch 3, Part 13).
- Properly understood, Schedule 3 will remove the last vestiges of Work Choices.
  - Those who seek to delay or reject these amendments are effectively supporting the continued perpetuation of AWAs and other Work Choices agreements.

SCHEDULE 4 – GREENFIELDS AGREEMENTS

- Greenfields agreements are a long-standing and critically important part of Australia's IR system.
- Some projects are of such size and significance (and benefit to Australians) that they take more than four years to construct, and they need longer agreements to cover all phases of their construction.
- Australia needs extended term greenfields agreements to secure resources project investments and build community infrastructure for the future.
- Both the Coalition and Labor have recognised this and should support these amendments.

- Greenfields agreements are high paying, and virtually always made with trade unions. This will continue after the amendments.
- These amendments will be subject to substantial additional protections and balances, including:
  - Only major construction projects will have access to extended term agreements.
  - There will be an 8-year cap on extended term greenfields agreements.
  - There must be a pay rise in each year of any extended term greenfields agreement.
- It is irresponsible and incorrect to suggest that all such agreements will run for 8 years, or that this Bill will allow agreements to run for more than 4 years in all but the most exceptional greenfields circumstances.

SCHEDULE 5 – COMPLIANCE AND ENFORCEMENT

Understanding and Reducing Non-Compliance

- Australia has a persistent underpayment problem.
- When the ABC, Maurice Blackburn, major charities and major employers investing millions to get it right get it wrong, we need to rethink the rules as well as how we enforce them.
- Australia will not significantly improve compliance until we tackle complexity, ambiguity, subjectivity, and inconsistency in how we regulate work, and terms and conditions.
- The Migrant Worker Taskforce (MWT) recommendations, which the Bill seeks to implement:
  - Recommend massive changes to compliance which should be approached with significant caution.
  - Were not based on evidence beyond migrant employment, for the employment of citizens and permanent residents.
  - Are in a number of cases not well supported by analysis and explanation, nor any indication of how common or representative concerns were.
- Australia needs to be smarter in how we tackle underpayment / non-compliance.
- There are numerous other initiatives government can take to tackle non-compliance, some of which are being pursued, without further increasing employer liabilities at such a fraught time.
- Any changes to the FW Act need to be very sensitive to their impact on employer confidence to recover and hire as we continue to tackle COVID19, and ongoing risks / uncertainty.

Schedule 5 – Parts 1, 3, 4, 5 and 6

- The Migrant Worker Taskforce (MWT does not provide sufficient basis for a further significant increase in fines.
- The MWT and the amendments did not adequately consider the tenfold increase in fines in 2017 vulnerable workers amendments.
- Excessive fines will discourage employers from hiring and recovery when we need it most. Australia cannot punish its way to greater compliance.

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- Higher fines and criminal penalties should be suspended for small business for two (2) years. Small businesses need confidence to hire, not the threat of a criminal record and jail time.

- There is no basis to regulate job advertising through the Fair Work Act.

Schedule 5 – Part 2 – Small Claims

- The existing small claims avenue for small underpayments is not as ineffective as claimed.

- However, the proposed updated small claims mechanism is generally well designed.

- ACCI is supportive of, as proposed:

  - The courts determining which claims it will hear / be responsible for, and which will go the FWC.

  - The FWC only arbitrating with the express written consent of both employee and employer.

- Any arbitration needs to be subject to both appeal rights and rights to seek judicial review.

- The FWC should not be restricted in the outcomes it can facilitate or award by inconsistency with fair work instruments (proposed 548C(9) and 548D(7) should be deleted).

Schedule 5 – Part 7 – Criminalising Underpayments

- ACCI opposes the proposed criminalisation of underpayments:

  - This will not reduce non-compliance.

  - It risks discouraging hiring, and confidence to hire, when we need it most.

  - Small and family business people appear in greatest danger of being jailed.

- The MWT provided little supporting analysis and justification for recommending criminal sanctions against employers.

- Compliance matters are often contested in both fact and law and are generally inherently not exact enough to provide a foundation for criminal penalties.

- The federal workplace relations system has historically relied on civil remedies for breaches of employment standards and there has been a long-standing bipartisan approach at the Commonwealth level of not criminalising workplace relations matters, including removing penal provisions from the legislation.

- If criminalisation is introduced into the compliance measures in the FW Act:

  - The federal law must comprehensively cover the field to the exclusion of state and territory laws seeking to enforce the FW Act.

  - There should be a 2-year suspension of criminal penalties against small businesses, if not an outright exemption for our smallest employers.

  - Conduct should be both serious and systematic to trigger any consideration of criminal penalties.

  - Only the Commonwealth DPP should be able to bring such criminal prosecutions.

  - The statute of limitations for bringing criminal proceedings should be a strict 6 years.

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SCHEDULE 6 – FAIR WORK COMMISSION

- Frivolous, vexatious and similar litigation by often deluded, unrealistic and poorly motivated applicants not only wastes public resources, such cases unnecessarily cost employers time and money.
- On balance ACCI supports the amendments in Schedule 6.
- The General Manager of the FWC should report on the use of expanded powers to dismiss applications, after two years.

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TABLE OF ABREVIATIONS / ACRONYMS

ABCC	Australian Building and Construction Commission
Bill	Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020
BOOT	Better Off Overall Test
DIDO	Drive In – Drive Out
EM	Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, Explanatory Memorandum, Introduction version, 9 December
FIFO	Fly In - Fly Out
FW Act	Fair Work Act 2009 (Cth)
FWC	Fair Work Commission
FWIS	Fair Work Information Statement
FWO	Fair Work Ombudsman
GF	Greenfields
IR	Industrial Relations
NERR	Notice of Employee Representational Rights
NES	National Employment Standards
TOB	Transfer of Business

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INTRODUCTION

1. The Australian Chamber of Commerce and Industry (ACCI) welcomes the opportunity to make a submission to the Senate Education and Employment Legislation Committee (Committee) Inquiry into the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 [Provisions].

2. The Bill follows an extensive industrial relations working group process participated in by unions, employer groups (including ACCI) and experts across more than three months, with the purpose outlined by the Prime Minister in his National Press Club address in May 2020 launching the working groups as follows:

> *The purpose is simple and honest, to explore, and hopefully find, a pathway to sensible, long-lasting reform with just one goal - make jobs.*

3. The Bill seeks do so by proposing amendments to the Fair Work Act (FW Act) in the following areas:

   a. Schedule 1: Casual employment and casual conversion

   b. Schedule 2: Modern awards

   c. Schedule 3: Enterprise agreements

   d. Schedule 4: Greenfields agreements

   e. Schedule 5: Compliance and enforcement (although ACCI is concerned about the impact of these changes on jobs and small businesses and proposes an alternative approach).

   f. Schedule 6: Additional matters relating to the Fair Work Commission.

4. In ACCI's view, the Bill is not ambitious or far reaching, on balance however it represents a modest and balanced approach that delivers a workable compromise and will:

   a. Help reverse some of the significant damage caused by the pandemic.

   b. Help Equip employers and employees to address the challenges to come.

5. Australians need industrial relations to play its part in supporting recovery and jobs as we tackle ongoing uncertainty and the significant task before us as a nation. Moderate measures in the Bill should help employers create and retain jobs and get back into the business of bargaining to provide a foundation for future wage increases and more secure enterprises and employment. In combination, the changes in this Bill should prove significant in supporting recovery.

6. We hope the further impacts of COVID here and abroad don't make us all live to regret not going further and being more ambitious.

7. It is well known that in 2020, the Australian economy experienced a year like no other with ongoing drought in many regions, devasting bushfires and a pandemic.

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8. The effects on the labour market were severe, with around 1.3 million people or 10 per cent of the labour force losing their job or being stood down on zero hours during the peak of the restrictions. As a result, the effective unemployment rate peaked at around 15 per cent in the initial phases of the crisis.

9. Unfortunately, Australia is not out of the woods just yet, with new COVID-19 outbreaks still occurring in numerous states, including the highly contagious UK variant, resulting in government restrictions and border closures in an attempt to contain the virus. The end of the JobKeeper program in March will also create further uncertainty and present additional challenges for recovery, with businesses' ability to remain afloat and the resulting effects on employment impacted, particularly in those industries that have been most affected by health-related restrictions on activity and travel. It has been predicted that 2021 will see an increase in business failures.

10. Over 900,000 Australians remain unemployed, around 220,000 more than at the onset of the pandemic. 8.5% remain underemployed. There has never been a more important time for policies that support business in delivering strong, inclusive job creating growth.

11. Employers and employees around the country have shown a tremendous resilience and an incredible ability to pivot and adapt to changing circumstances, however as we move into 2021, we face a critical point in our economic recovery. If Australia is to continue to navigate our way out of the economic crisis caused by COVID-19 our workplaces must be a place of adaptability, problem solving and partnership. Unfortunately, Australia's industrial relations system as it currently stands is a barrier to this recovery, with uncertainty regarding the status of employment and entitlements with respect to casual employees, a complicated and inflexible modern awards system, difficult to navigate enterprise bargaining system, and roadblocks to greater investment in the construction of major resource and infrastructure projects.

12. Improvement to the operation and usability of workplace relations law by providing greater certainty and flexibility to employers and employees will go some way to achieving the Bill's aims of supporting productivity, employment and economic growth and ensuring that employees receive their share of benefits that flow from economic recovery. It is vital that these measures are put in place to improve confidence and hiring, particularly for young people at risk of labour market scaring through delayed labour market entry and consolidation.

13. ACCI supports passage of the Bill subject to a series of recommendations for technical and substantive amendments, and to substantial concerns regarding the additional penalties for non-compliance set out in Schedule 5 of the Bill.

14. ACCI urges the Committee to recommend a series of considered changes to the Bill based on the recommendations we put forward throughout this submission to ensure practical issues are addressed and the Bill reflects policy intentions and supports economic and labour market recovery as effectively as possible.

15. Australia simply cannot afford to tackle the challenges we face with an unchanged industrial relations system.

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RECCOMENDATIONS

Schedule 1 – Casual Employees

Recommendation 1.1

Schedule 1, Section 15A(1) of the Bill be amended to include an explanatory note to make clear that where a written contract is not clear, consideration should be given to the manner in which the employment was offered. This appears to reflect the intention of the legislation, as evidenced by the Explanatory Memorandum.

Recommendation 1.2

Schedule 1, Section 15A(2) of the Bill be amended as follows, to ensure clarity and certainty:

> *(2) For the purposes of subsection (1), in determining whether, at the time the offer is made, the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person, regard must ~~be had only~~ only be had to the following considerations:*

Recommendation 1.3

Schedule 1, Section 15A(2)(b) of the Bill be deleted:

> *(2) For the purposes of subsection (1), in determining whether, at the time the offer is made, the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person, regard must be had only to the following considerations: (a) whether the employer can elect to offer work and whether the person can elect to accept or reject work;*
>
> *...*
>
> *~~(b) whether the person will work only as required;~~*

In the event the above recommendation is not adopted, remove the word 'only'.

Recommendation 1.4

Schedule 1, Section 15A(3) of the Bill be deleted:

> *~~(3) To avoid doubt, a regular pattern of hours does not of itself indicate a firm advance commitment to continuing and indefinite work according to an agreed pattern of work.~~*

In the event the above recommendation is not adopted, ACCI recommends s.15A(3) be amended along the lines of the following:

> *"To avoid doubt, a regular pattern of hours is not a consideration in determining whether a firm advance commitment to continuing and indefinite work according to an agreed pattern of work has been made".*

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Recommendation 1.5

Schedule 1, Section 15A(5) of the Bill be amended to insert a subsection with words to the effect of "the employee's employment otherwise ends" into this subsection.

Recommendation 1.6

Schedule 1, Section 66B(1)(a) of the Bill be amended to include an explanatory note to provide further clarity with respect to the meaning of 'employed by the employer for a period of 12 months beginning the day the employment started'

Recommendation 1.7

Schedule 1, Section 66(1)(b) be amended as follows:

66B Employer offers

(1) Subject to section 66C, an employer must make an offer to a casual employee under this section if:

...

(b) during at least the last 6 months of that period, the employee has worked a regular pattern of hours on an ongoing basis with a reasonable expectation of continuing employment which, without significant adjustment, the employee could continue to work as a full-time employee or a part-time employee (as the case may be).

Recommendation 1.8

Schedule 1, Section 66C(2) of the Bill be amended to ensure it reflects the intention of the legislation, as follows:

(2) Without limiting paragraph (1)(a), reasonable grounds for deciding not to make an offer include the following:

(a) the employee's position will, or is reasonably likely to, 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, or is reasonably likely to, be significantly reduced in that period;

(c) there will, or is reasonably likely to, be a significant change in either or both of the following in that period:

...

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Recommendation 1.9

Schedule 1, Section 66C(3), being the requirement for an employer to give written notice to a casual employee if they decide not to make an offer, be removed.

Alternatively, if it is to be retained, ACCI submits that s.66C(3)(b) should be removed:

> *(3) An employer must give written notice to a casual employee in 28 accordance with subsection (4) if:*
>
> > *(a) the employer decides under subsection (1) not to make an offer to the employee; or*
> >
> > ~~*(b) the employee has been employed by the employer for the 12 month period referred to in paragraph 66B(1)(a) but does not meet the requirement referred to in paragraph 66B(1)(b).*~~

Recommendation 1.10

Schedule 1, Section 66C(4) be amended so that the requirement to give notice when an employer is not making an offer only requires the inclusion of the reason or ground in the Act that the employer relies on, with the requirement to give further details only upon request of the employee.

Recommendation 1.11

ACCI strongly maintains that s.66C(3)(b) should be removed. However, if it is to be retained, ACCI recommends Schedule 1, Section 66F(c)(ii) of the Bill be amended as follows:

> *(ii) the employer has not, at any time during that period, given the employee a notice in accordance with paragraph 66C(3)(a) (which deals with notice of employer decisions not to make offers on reasonable grounds) or 66C(3)(b).*

Recommendation 1.12

Schedule 1, Section 66F of the Bill be amended to clarify that once an employer grants a casual employee's request to be converted to a full-time or part-time employee, the employee may only revert to casual employment by written agreement with the employer. This reflects the FWC's model casual conversion clause.

Recommendation 1.13

Schedule 1, Section 125A of the Bill be deleted, to remove the requirement for employers to issue the Casual Employment Information Statement.

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Recommendation 1.14

Schedule 1, Section 125A(2)(b) be amended as follows:

> *(b) an employer offer for casual conversion must in certain circumstances ~~generally~~ be made to certain casual employees within 21 days after the employee has completed 12 months of employment;*

Recommendation 1.15

Schedule 1, Section 125A(2) be amended to make clear that an employee may not receive an offer because it would require the employer to make significant adjustment to their regular pattern of hours, to cover circumstances where an employer does not make an offer on the basis of 66B(1)(b) and gives notice to the employee of this fact in accordance with 66C(3)(b).

Recommendation 1.16

Schedule 1, Section 545A of the Bill be amended as follows:

> *(1) This section applies if:*
>
> *(a) a person is or has been employed by an employer in circumstances where the employment is or was described as casual employment; and*
>
> *(b) the employer pays or has paid the person an identifiable amount (the loading amount) paid to compensate the person for not having one or more relevant entitlements during a period (the employment period); and*
>
> *(c) during the employment period, the person was not a casual employee; and*
>
> *(d) the person (or another person for the benefit of the person) makes a claim for, or to be paid an amount for, one or more of the 28 relevant entitlements with respect to the employment period.*

Recommendation 1.17

Schedule 1, Section 545A of the Bill be amended to make clear that if an employer has engaged an individual as a casual and paid the applicable casual rate under a modern award that there is no claim for any of the relevant entitlements under s545A(4). That is – that the Court must reduce the claim to nil (unless the modern award provides an ability to pay a lesser casual loading in return for an employee being entitled to a relevant entitlement, and the employee's claim is in relation to that specific entitlement).

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Schedule 2 – Modern Awards

Passage of Schedule 2 be recommended, subject to the following:

Recommendation 2.1

Schedule 2, Section 168M(3) of the Bill be amended to include additional modern awards covering distressed industries, including but not limited to those covering the tourism and the arts and recreation services industry.

Recommendation 2.2

Schedule 2, Section 168N(1)(a) of the Bill be amended as follows:

(1) *A simplified additional hours agreement:*

(a) must identify additional agreed hours that may to be worked on one or more days; and

(b) must be entered into before the start of the first such period of additional agreed hours.

Recommendation 2.3

Schedule 2, Part 1, Subdivision B of the Bill be amended to remove section 168T.

Recommendation 2.4

Schedule 2, Section 789GZK be amended to include the following:

789GZK Flexible work direction to assist the revival of the enterprise

(1) A flexible work direction given by an employer to an employee of the employer has no effect unless the employer has information before the employer that leads the employer to reasonably believe that the direction is a necessary part of a reasonable strategy to assist in the revival of the employer's enterprise or is a necessary response to government restrictions imposed to slow coronavirus transmission

Recommendation 2.5

Schedule 2, Subsection 789GZL(1)(a) and subsection 789GZM of the Bill be amended to remove the requirement for directions to be made in writing.

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Recommendation 2.6

Schedule 2 be amended to enable the Industrial Relations Minister the power to, via regulation, allow businesses in highly distressed industries/sectors and/or in certain geographical locations, who are covered by an identified modern award to utilise provisions allowing the employer to direct an employee to work reduced hours/days.

Schedule 3 – Enterprise Agreements

Passage of Schedule 3 be recommended, save for Parts 8 and 13, which employers do not support.

Recommendation 3.1

Proposed s 189(1A)(a)(iii) be amended as follows:

> *The negative impact or impacts of the coronavirus known as COVID-19 on the enterprise or enterprises to which the agreement relates; and*

Recommendation 3.2

In addition to implementing PC Recommendation 26.4 as proposed in Schedule 3, Part 12, Parliament should implement the remaining PC Recommendations on TOB as follows:

RECOMMENDATION 26.1 (SECTION 26.3)

The Australian Government should give the Fair Work Commission more discretion to order that an employment arrangement (such as an enterprise agreement) of the old employer does not transfer to the new employer, where that improves the prospects of employees gaining employment with the new employer. This should be achieved by amending the object (at s. 309) of the transfer of business rules in the *Fair Work Act 2009* (Cth) to include the interests of continuing employment for employees of the old employer. Consideration should also be given to whether this should be echoed in the list of factors the Fair Work Commission must take into account in ss. 318 and 320.

RECOMMENDATION 26.2 (SECTION 26.3)

The Australian Government should amend Part 2-8 of the *Fair Work Act 2009* (Cth) to make clear that a new employer can make an offer of employment to an employee of the old employer conditional on the Fair Work Commission granting an order under s. 318 that the employee's employment arrangement would not transfer to the new employer.

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RECOMMENDATION 26.3 (SECTION 26.3)

The Australian Government should amend Part 2-8 of the *Fair Work Act 2009* (Cth) to provide that a transferring employment arrangement automatically terminates 12 months after the transfer, except in transfers between associated entities. The transferring employees should be permitted to commence bargaining for a replacement enterprise agreement nine months after the transfer. If a replacement agreement has not been approved by the 12 month date, the transferring employees would automatically be covered by any other instrument covering the new employer, including the relevant modern award.

RECOMMENDATION 26.5 (SECTION 26.3)

The Australian Government should amend Part 2-8 of the *Fair Work Act 2009* (Cth) so that an employment arrangement does not transfer between associated entities in situations where the employee is redeployed to avoid being made redundant.

Schedule 4 – Greenfields Agreements

Passage of Schedule 4 be recommended.

Schedule 5 – Compliance and Enforcement

ACCI does not view the case for the propose amendments in Schedule 5 to have been made out.

Passage is not recommended.

The following recommendations are advanced if Schedule 5 is to proceed.

Recommendation 5.1

All increases in fines (Schedule 5, Parts 1, 4, and 5) and the imposition criminal penalties (Schedule 5, Part 7) be suspended for 2 years for small businesses to promote confidence to hire and recover in the small business sector.

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Recommendation 5.2

Proposed Schedule 5, Part 3 not be included in the package of amendments passed by the Senate.

If these changes are progressed, there be a statutory note clarifying that new s 536AA would not require any job advertisement to identify a wage rate.

Recommendation 5.3

Amend proposed s 715(2A)(c) in Schedule 5, Part 4 to replace "fully cooperate" with "cooperate".

Amend proposed s 715(2A)(g) in Schedule 5, Part 4 as follows:

> *(g) the person's history of compliance with this Act, within the period within which records must be kept under s 535, as well as their contemporary policies and practices on compliance.*

Recommendation 5.4

Amend the commencement table at Item 2 of the Bill to ensure that to the extent possible all Parts of Schedule 5 commence simultaneously, and that increased pecuniary penalties (Parts 1 and 4) do not commence prior to the FWO being obliged to publish its policies on the circumstances in which it will commence proceedings to enforce them (Part 6).

Recommendation 5.5

Government seek advice on whether arbitration under s 548D may be subject to judicial review.

If this is not clear cut, the Bill be amended to ensure there is an express avenue for such a review of FWC arbitration decisions.

Recommendation 5.6

Delete proposed 548C(9) and 548D(7).

Recommendation 5.7

Schedule 5, Section 26(2)(da) of the Bill be amended as follows:

> s.26(2)(da) *a law of a State or Territory providing for an employer, or officer, agent or an employee of an employer, to be liable to be prosecuted for an offence relating to underpaying an employee an amount payable to the employee in relation to the performance of work, an employee entitlement owed by the employer to an employee, or the employee's employment;*

Recommendation 5.8

Remove Section 324B – *Offence relating to underpayments* of the Bill.

If it is to be retained, the Bill should be amended to provide for a two-year suspension in commencement for small businesses, in order to promote confidence to hire and recovery in the small business sector.

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Recommendation 5.9

Schedule 5, Section s.324B(1) of the Bill be amended as follows:

> *(1) An employer commits an offence if the employer dishonestly engages in a serious and systematic pattern of underpaying one or more employees.*

The same would consequentially apply to s.324B(5), as follows:

> *(5) In determining for the purposes of subsection (1) whether the employer engaged in a serious and systematic pattern of underpaying one or more employees, a court may have regard to:*

Recommendation 5.10

Amend the penalty in s.324B(1) of the Bill to align with current penalties for the most comparable offence under the Criminal Code: s135.2 - Obtaining a financial advantage (Penalty: Imprisonment for 12 months), rather than the 4-year term of imprisonment currently in the Bill.

Recommendation 5.11

Schedule 5, Sections 324C(1) and (2) of the Bill be deleted, ensuring that only the CDPP can make criminal prosecutions, on reference from the FWO or ABCC, but not the FWO or ABCC themselves.

Recommendation 5.12

Schedule 5, Section 324C(3) be amended as follows:

> *(3) Despite anything in any other law, proceedings for an offence against subsection 324B(1), or for an offence against section 6 of the Crimes Act 1914 or a provision of Part 2.4 of the Criminal Code that relates to an offence against subsection 324B(1), in respect of particular conduct may only be commenced:*
>
> > *(a) within ~~7~~6 years after that conduct occurred; or*
> >
> > ~~*(b) at any later time with the Minister's consent.*~~

Schedule 6 – Fair Work Commission

Passage of Schedule 6 be recommended.

Recommendation 6.1

An additional requirement be inserted into the Bill, by way of an additional s 653A requiring the General Manager of the FWC to report on the use of expanded powers to dismiss applications, after two years of the operation of such powers.

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SCH 1 – CASUAL EMPLOYEES

- Casual employment is a legitimate form of employment. The rate of casual employment is not growing and has remained stable for 22 years.
- Casual employment provides the necessary flexibility for many businesses to manage their business and is crucial for recovery, allowing businesses to scale workforces back up as appropriate in the restart and recovery phases of COVID-19.
- Casual employment is also a genuine and fulfilling choice for many employees, particularly those who balance work and other aspects of their lives such as studying or caring responsibilities, and those prioritising additional income.
- ACCI supports a definition of 'casual employee' being included in the FW Act to restore certainty and business confidence to and create jobs.
  - ACCI is not opposed to the proposed definition in the Bill being passed by Parliament, albeit with some minor amendments as detailed below.
  - In particular, consideration of whether a person will work only as required (as set out in s.15A(2)(b)) should be deleted to remove grey areas and provide more certainty and clarity.
- Casual conversion is rarely consistent with the realities of operating a business. It reduces scope for employees and employers to negotiate a balance that meets each of their needs.
  - Nevertheless, ACCI has suggested improvements to address practical issues and potentially unwarranted additional complexity / regulatory burden from the expanded conversion rights in the Bill.
- A major issue of concern to employers is the risk of 'double-dipping' claims being pursued by the very large number of casuals who have worked regularly for an extended period.
  - ACCI welcomes the protection against both retrospective and prospective 'double-dipping' claims, to protect against claims for entitlements such as annual leave, despite having been already paid a casual loading to compensate in part for not receiving these entitlements.
  - Some amendments are nevertheless suggested to ensure the policy objective is met.

PART 1 – MAIN AMENDMENTS

'MEANING OF CASUAL EMPLOYEE'

16. New s 15A establishes a statutory definition of casual employee. ACCI is supportive of a definition of 'casual employee' being included into the FW Act to restore certainty for both employees and employers about their rights and obligations and provide the necessary confidence for businesses to employ and create jobs.

17. Until recently, employees who were engaged and paid as casuals pursuant to an industrial instrument were considered "casual employees" for the purposes of the FW Act. (Most awards and enterprise agreements simply describe a casual as an employee "engaged and paid as such").

18. The recent *Workpac v Skene*[1] and *Workpac v Rossato*[2] decisions departed from this longstanding approach, finding that an employee who was employed as a casual, was not in fact a casual employee. As a consequence, the employees were entitled to annual leave under the FW Act, despite having already been paid a higher casual loaded rate to compensate them in part for not receiving annual leave entitlements. These decisions effectively paved the way for employees to 'double-dip' on their entitlements, enabling them to accept a casual loading in lieu of permanent employee benefits such as annual leave and personal leave, but to then also claim a right to the very same leave they accepted the loading in place of.

19. The decisions in *Skene* and *Rossato* have resulted in a great deal of scope for the Courts to determine that particular employees are not 'casual employees' despite them being engaged and paid as a casual employee, including by the court having unfettered consideration of a wide range of variable factors. This causes widespread uncertainty for employers, large as well as small and family businesses. The effect of the decision is not limited to the industry subject to the decision, as preeminent industrial relations barrister Frank Parry, QC, noted, there is "no reason why the reasoning in Workpac would not be applicable" to a small business or an employer of a casual employee in other industries such as retail or hospitality.[3]

20. The decisions have also opened the door for widespread claims from current and former casual employees, often backed by class action law firms, to be back paid entitlements that the same employee already received in the form of a casual loading. As noted in the Explanatory Memorandum:[4]

> *As a result of recent court cases concerning the distinction between casual and full-time or part-time employment, Australian accounting standards require approximately 25,000 Australian companies to consider any potential contingent liabilities of casual employees who may be found to be other than a casual at common law.*

21. Concerns about uncertainty are amplified by the challenging and ever-changing landscape that employers face, including the effects of the COVID-19 pandemic, government initiatives to restrict the transmission of COVID-19, and the impact of bushfires at the beginning of last year.

22. This ambiguity needs to be addressed in a clear and reliable definition of casual employee, the fundamental purpose of which should be to return to the form of flexible employment historically available to both employers and employees and to do so in a way that will provide clarity and encourage employers to create and retain jobs.

23. ACCI's preferred definition is that a casual employee is one who is engaged as a casual and paid as a casual, including being paid a casual loading of at least 25% of the employee's base rate of pay for ordinary hours (or equivalent). This is aligned with longstanding industrial practice and is clear for employers and employees to understand and apply.

24. Notwithstanding ACCI's strong preference for a casual employee to be defined as one 'engaged and paid as such', ACCI is not currently opposed to the proposed definition of casual employee in the Bill, subject to the amendments proposed below to address concerns with respect to aspects of the current drafting.

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[1] [2018] FCAFC 131
[2] [2020] FCAFC 84
[3] See Dana McCauley, 'Race against time for employers fighting casual 'double dipping'', *SMH*, 20 March 2019.
[4] Explanatory Memorandum, p.x.

25. Section 15A(1) sets out when a person is a casual employee of an employer. The criteria set out in 15A(1) will be difficult for people in small businesses to follow without assistance or guidance. It would be preferable to include an explanatory note to add that where a written contract is not clear, consideration should be given to the manner in which the employment was offered and accepted. This is to take into account that in many situations, casual employment, particularly in small businesses, may be commenced via a verbal contract. This appears to reflect the intention of the legislation, as evidenced by the Explanatory Memorandum:[5]

> *"...there is no requirement for the offer and acceptance to be in writing, and the definition is intended to apply to informal arrangements."*

26. Subsection 15A(2) provides an exhaustive list of factors against which regard must be had in determining the absence of a firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the purposes of paragraph 15A(1)(a).

27. ACCI strongly supports the exhaustive nature of the list of factors, which is critical to provide the greatest degree of certainty. Any non-exhaustive definition would not sufficiently address the uncertainties caused by the *WorkPac v Rossato* Federal Court decision as it would allow for an unfettered fact-sensitive assessment to be undertaken by the courts, doing little to resolve the present state of uncertainty faced by business.

28. From a practical perspective, in considering whether employees are casual, employers would be largely focused on the criteria listed in a definition and it will likely cause confusion if there are additional, unspecified factors that must also be taken into consideration. It is therefore vital that the definition limits the scope for litigation/courts to consider a broader range of matters and potentially interfere with the definition or interpret it in a way that departs from the intention expressed. ACCI therefore commends this aspect of the definition.

29. Employers have, however, raised concerns about the current drafting, in particular the use of the words 'regard must be had only to the following considerations' in sub-section 15A(2) such that it may be interpreted as requiring a court to have regard to every factor in (a) - (d) as opposed to an assessment on an overall basis. This would in turn pose the risk that such an interpretation could find that failure on one factor is fatal and would likely have the unintended consequence of casual employees being excluded from the definition.

30. Given the intention of the section appears to be to narrow the factors that can be taken into account so that they are limited to those in (a) - (d), as distinct from looking at each criterion individually, ACCI suggests that for certainty and clarity the wording be changed to 'regard must only be had to the following considerations…'.

31. In relation to the specific factors that must be considered, the factor set out in 15A(2)(b) *"whether the person will work only as required"*, is quite unclear as to its meaning and is confusing for both employers and employees. ACCI is also concerned that many casual employees may be unintentionally excluded by this factor if their arrangement involves generally working on a particular day every week (e.g. every Monday and Wednesday) but in circumstances where the employer or casual worker are both able to cancel a shift at any time for any reason without requiring agreement/approval from the other party (e.g. the employer might cancel the shift due to projected low sales, client cancellation, or inclement weather; the employee might cancel the shift for study reasons, or to attend a child's school sporting event).

[5] EM, para 12, page 4

32. In these circumstances the arrangement means the person is arguably not working 'only as required.' In addition, as a matter of modern workforce management, it is seldom the case that a casual employee is engaged in a truly "only as required" basis. The words "only as required" appear to refer to the employer inviting the employee to attend work at a moment's notice. In reality, casual employees are typically given advanced notice of a roster, having regard for their availability. If an industrial instrument applies, the roster may be subject to the provisions of that instrument thereby further limiting the capacity of the employee to be employed "only as required".

33. For these reasons the definition would be better served by the deletion of 15A(2)(b).

34. Alternatively, the word "only" should be removed so as to remove any ambiguity that may be caused by rostering in advance, even for a short period of time.

35. In relation to when the assessment of "firm advance commitment" takes place, importantly, the existence of this "firm advance commitment" will be assessed at the time the offer was made, based on the offer and acceptance of employment. This effectively reflects the intention and understanding of the employer and the employee.

36. It also means a person's employment status cannot unintentionally change over time, providing certainty to employees and employers as to the employment status and relevant entitlements at all times. The alternative would be employers may be subject to legal claims with respect to a person's employment status and entitlements on an ongoing and rolling basis, if post-contractual conduct is permitted to be taken into consideration. It would be possible for a proceeding to be launched, the court to find the employee to be casual, and a further proceeding to be commenced shortly thereafter, despite no circumstances having changed, or minor circumstances such as changed hours to cover for a period of leave.

37. There has been some commentary in the media that the assessment of "firm advance commitment" at the time of offer and acceptance of employment will give employers the ability to "legally label someone a casual even if they are hired for a permanent, ongoing, job".[6] These concerns, however, are unfounded, as rights or claims a person may have to seek a legal remedy where an employee believes they have been misclassified under the Act from the outset of their employment are not impacted.

38. Protections are also afforded to employees in *Division 4A – Offers and requests for casual conversion* in the Bill, in that if an employee subsequently works a regular pattern of hours for a period of six months, they may qualify for casual conversion and be able to convert to a permanent full or part time employee.

39. This is highlighted in a note to the new subsection 15A(2), which refers the reader to the rights of a casual employee to casual conversion under Division 4A.This circumstance may occur for example where the position evolves over time based on changing business needs, for example where there develops a need for the employee to work according to an agreed pattern of work on an ongoing basis.

40. There have been comments by some that if an employer 'is unreasonable' and does not offer a casual employee permanent employment under the casual conversion provisions, there is little the employee can do about it. This is not correct as refusal can be challenged in the FWC, which is empowered to resolve disputes about the operation of the new Division 4A (unless another dispute resolution procedure applies).

[6] https://www.theaustralian.com.au/breaking-news/industrial-relations-minister-christian-porter-unveils-casual-work-reforms/news-story/3b79dd061ebd67640fea330b4f3cc390

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41. This is further detailed below in the discussion about proposed s 66M. ACCI respectfully submits that the Committee strongly reject any and all attempts to change the timing of the assessment of "firm advance commitment" (i.e. at the time the offer was made) on this basis.

42. Subsection 15A(3) provides that *"a regular pattern of hours does not of itself indicate a firm advance commitment to continuing and indefinite work according to an agreed pattern of work."* ACCI understands the inclusion of this subsection is for the avoidance of doubt, in an attempt to make clear that a casual can be expected to work a regular pattern of hours and still meet the statutory definition of casual employee when taking all the circumstances of the offer and acceptance into account.

43. However, employers have concerns regarding the use of the term "of itself", in that it may inadvertently imply that a regular pattern of hours can be used to indicate a firm advance commitment, just not by itself in isolation. It may therefore serve to create, rather than avoid doubt. ACCI therefore submits clarity is best provided by deleting subsection 15A(3). If it is to be retained, ACCI suggests amending the subsection along the lines of the following: *"To avoid doubt, a regular pattern of hours is not a consideration in determining whether a firm advance commitment to continuing and indefinite work according to an agreed pattern of work has been made".*

44. New subsection 15A(4) makes clear that the absence of a firm advance commitment is only to be assessed on the basis, and at the time, of the offer and acceptance of employment, and any subsequent conduct is irrelevant. As detailed above, ACCI strongly supports the clarity provided by this subsection, reinforcing the intention of the legislation in 15A(2).

45. New subsection 15A(5) details the circumstances under which a person's casual employment ends, including where the employment is converted to full or part time, or the person accepts an alternative offer of employment (other than as a casual employee). In the interests of simplicity and certainty, ACCI suggests that a further subsection with words to the effect of "the employee's employment otherwise ends" is inserted into this subsection. This is to ensure simplicity and certainty and so that employers and employees are not required to examine and rely on case law to support the principle that a person will cease to be a casual employee when their employment is terminated.

Recommendation 1.1

Schedule 1, Section 15A(1) of the Bill be amended to include an explanatory note to make clear that where a written contract is not clear, consideration should be given to the manner in which the employment was offered. This appears to reflect the intention of the legislation, as evidenced by the Explanatory Memorandum.

Recommendation 1.2

Schedule 1, Section 15A(2) of the Bill be amended as follows, to ensure clarity and certainty:

> *(2) For the purposes of subsection (1), in determining whether, at the time the offer is made, the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person, regard must ~~be had only~~ only be had to the following considerations:*

Recommendation 1.3

Schedule 1, Section 15A(2)(b) of the Bill be deleted:

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(2) For the purposes of subsection (1), in determining whether, at the time the offer is made, the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person, regard must be had only to the following considerations: (a) whether the employer can elect to offer work and whether the person can elect to accept or reject work;

...

~~*(b) whether the person will work only as required;*~~

In the event the above recommendation is not adopted, remove the word 'only'.

Recommendation 1.4

Schedule 1, Section 15A(3) of the Bill be deleted:

~~*(3) To avoid doubt, a regular pattern of hours does not of itself indicate a firm advance commitment to continuing and indefinite work according to an agreed pattern of work.*~~

In the event the above recommendation is not adopted, ACCI recommends s.15A(3) be amended along the lines of the following:

"To avoid doubt, a regular pattern of hours is not a consideration in determining whether a firm advance commitment to continuing and indefinite work according to an agreed pattern of work has been made".

Recommendation 1.5

Schedule 1, Section 15A(5) of the Bill be amended to insert a subsection with words to the effect of "the employee's employment otherwise ends" into this subsection.

OFFERS AND REQUESTS FOR CASUAL CONVERSION

Introduction

46. Proposed new Division 4A of Part 1 of Schedule 1 of the Bill will insert a new right for eligible employees to request to convert to full-time or part-time employment.

47. As a matter of general principle, ACCI is not in favour of changes to the Act which diminish flexibility or scope for employer-employee agreement. Greater flexibility in work makes our workplaces more productive and competitive and gives more Australians opportunities to work, which is particularly important as Australia works to recover from the COVID-19 pandemic.

48. Employers already spend more time than ever working out how to manage their workforce and deal with the diverse needs of their employees fairly and lawfully. In addition, many small and family businesses take on enormous risk to generate employment opportunities. The Bill as it currently stands risks inhibiting the ability of business to remain competitive, and as a result may inhibit job security for some employees, particularly those engaged as casuals.

49. The only true secure job for any employee comes from ensuring that businesses continue to remain sustainable and competitive, and flexibility is key to this. For this reason, many employers are concerned at the prospect of reduced flexibility and the changes proposed in the Bill may for some operate as a barrier to employment.

50. ACCI acknowledges the decision of the FWC in 2017 in the Casual Employment Case[7] and the subsequent determinations adding model casual conversion provisions into a significant number of modern awards.

51. ACCI notes however that in comparison to the FWC model clause, the Bill contains additional regulatory burdens on employers, for example by introducing an employer obligation to offer conversion (rather than simply an employee right to request), and access to casual conversion is increased by shortening the period of service required to demonstrate a regular pattern of work from 12 to 6 months. An obligation for employers to provide employees with a Casual Employee Information Statement (in addition to the Fair Work Information Statement) is also introduced.

52. ACCI appreciates the opportunity to provide feedback to extended casual conversion rights to ensure the interests of businesses, employees and job seekers are protected.

53. As a general comment, on an overall basis the casual conversion provisions of the Bill are extremely complex, and both employees and employers would benefit from advisory materials from the FWO. We provide further details on specific provisions in the Bill in our submission below.

The Origins of Casual Conversion

54. In order to provide context to *Division 4A – Offers and requests for casual conversion*, it is useful to consider the origins of casual conversion in our workplace relations system.

55. The Fair Work System currently provides a significant number of employees in specific industries with a right to request permanent work through casual conversion clauses in modern awards. However historically casual conversion obligations have existed on an "on-again, off-again" basis across Australia's recent industrial relations history.

56. The first casual conversion provision in an award was granted by the South Australian Industrial Relations Commission (the SAIRC) in *Clerks (South Australia) Award*[8]. This decision however was quashed on appeal by the Full Bench of the SAIRC[9] as the decision was seen as unjust because it did not grant the employer any right to object to a conversion request. Subsequently the Full Bench re-determined the matter in a further decision and awarded a conversion clause with a right of employer refusal.[10]

57. After the initial decision of the SAIRC, but prior to the first appeal decision, a Full Bench of the Australian Industrial Relations Commission[11] (AIRC) in the Metal and Engineering & Associated Industries Award 1998 case (the Metals case) established a test case standard regarding the conversion of casual employment to part-time or full time employment. In the years following this decision a number of other applications for casual conversion provisions to be placed in a number of other federal awards were made and determined.

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[7] [2017] FWCFB 3541 (5 July 2017).
[8] [2000] SAIRComm 41
[9] [2001] SAIRComm 7
[10] [2002] SAIRComm 39
[11] Metal, Engineering and Associated Industries Award, 1998-Part: Application by AKMEPKIU for variation of the Metal, Engineering and Associated Industries Award, 1998 –(2000) T4991.

58. A number of cases granted conversion on terms that departed from those set out in the Metals case. The most common departure was to extend the qualifying period for the exercise of the election to convert from 6 months to 12 months.

59. Under changes to industrial legislation in 2006, casual conversion terms which provided "conversion from casual employment to another type of employment" were no longer an "allowable award matter" in Federal awards[12]. As a result, casual conversion clauses in current awards ceased to have effect.

60. From March 2008, the AIRC began the award modernisation process under amended industrial legislation, during which time the AIRC indicated that casual conversion provisions would be maintained where they were already an industry standard[13]. As a result, 26 of the 122 modern awards containing some form of casual conversion clause were maintained. In a small number of cases, casual conversion clauses were added to awards which had previously not contained such clauses.[14]

61. On 5 July 2017, as a part of the FWC's 4 yearly review of modern awards, the FWC provisionally decided to insert a conversion provision in an additional 85 modern awards that did not already have one. Prior to this no modern award had been varied to add a casual conversion clause since the modern awards took effect on 1 January 2010.

62. As a part of the process a model modern award clause was developed which entitles eligible casual employees covered by the 85 awards to request to convert to full-time or part-time employment. The award variation officially took effect on 1 October 2018.

63. In 2019 the Fair Work Amendment (Right to Request Casual Conversion) Bill was introduced into Parliament, to insert into the National Employment Standards (NES) a new right for eligible employees to request to convert to full-time or part-time employment largely in line with the model modern award clause. The Bill lapsed at the dissolution of Parliament in April 2019.

Employer offers for casual conversion

64. New section 66B requires an employer to make an offer of full-time or part-time employment to an eligible casual employee within 21 days of the employee having been employed for 12 months, subject to some exceptions.

65. ACCI does not support the departure from the FWC model clause in that an addition obligation is placed on an employer to make an offer to an employee to convert to permanent employment to all eligible casuals, rather than responding to a request by only those casual employees who may seek to convert. This additional obligation requires an employer to consider the relevant factors regarding whether an employee has met the eligibility criteria, determine whether they are required to make an offer of casual conversion, and give a written notice to the employee (including whether the employee is not eligible and/or the applicable reasonable grounds for refusal) thereby subjecting employers to potentially unnecessary regulatory burden in relation to casual employees who have no interest in converting.

66. Leaving the onus only on those casual employees who seek to convert to permanent part or full time employment is consistent with the current framework with respect to the model term, and means that only those casual employees who are interested in converting are required to take action.

[12] S525(1) Workplace Relations Amendment (Work Choices) Act 2005 (Cth)
[13] Australian Industrial Relations Commission [2008] AIRCFM 1000.
[14] For example the Textile, Clothing, Footwear and Allied Industries Award 2010.

67. Despite our opposition, ACCI seeks to comment on the technical aspects of the Bill with respect to employer offers for casual conversion.

68. Section 66B of the Bill sets out when an employer must make an offer to a casual employee for casual conversion. New section 66B requires an employer to make an offer of full-time or part-time employment to an eligible casual employee within 21 days of the employee having been employed for a period of 12 months, subject to the exceptions in section 66C.

69. Under subsection 66B(1) a casual employee will be eligible if the employee:

has been employed by the employer for a period of 12 months beginning the day the employment started (paragraph 66B(1)(a)); and

during at least the last 6 months of that period, the employee has worked a regular pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to work as a full-time employee or a part-time employee, as the case may be (paragraph 66B(1)(b)).

70. ACCI submits the Bill would benefit from further clarity with respect to the meaning of 'employed by the employer for a period of 12 months beginning the day the employment started' (66B(1)(a)). On the face of the legislation, to satisfy this limb it appears that the Bill simply requires a person to have been employed for 12 months, for example from March 2019 to March 2020, to be eligible. It is however apparent from the explanatory memorandum that this is not intended to be the case. The explanatory memorandum states as follows:[15]

> *Whether a person has been employed for a period of 12 months will depend on the particular circumstances. For example, a person who is employed to perform an afternoon of casual work in March, and is then employed to perform another afternoon of casual work in the April of the following year will not have been employed 'for a period of 12 months', so that employer will not have to consider whether to make an offer in relation to that employee at that time.*

71. While the above example appears relatively straightforward, on the face of the legislation in proposed 66B(1)(a) it could be open to interpretation that this particular employee was employed for a period of 12 months, as the employee may have been on the books for longer than 12 months.

72. There are likely to be other examples that are less straightforward, for example a casual employee engaged to work certain events or occasions, or who works as an usher at the MCG every boxing day test match. While the question of whether these employees were employed for a period of 12 months may be a moot point as the employees may subsequently not satisfy the second limb of the test in paragraph 66B(1)(b), further clarity would nevertheless be welcome with respect to this aspect of the Bill.

73. In relation to the consideration of "regular pattern of hours", paragraph 66B(1)(b)) adopts a similar concept of 'regular' as the Model Term for awards developed by the FWC which provides that:

> "*A regular casual employee is a casual employee who has in the preceding period of 12 months worked a pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to perform as a full-time employee or part-time employee under the provisions of this award.*"

[15] EM, para 26, page 8

74. However, the Model Term was developed by the FWC in the context that awards typically impose significant restrictions on the pattern of hours that may be worked by a part-time employee (e.g. number of days and hours, ability to vary, etc).

75. The Bill appears to address this problem by including the word "regular" before "pattern of hours".

76. The explanatory memorandum to the Bill provides additional guidance on the meaning of the term "regular pattern of hours", as follows:[16]

> *Whether an employee meets this requirement will depend on the particular circumstances and involves consideration of the pattern of hours worked during the relevant 6 month period. For example, if an employee has worked shifts of 8 hours each on every Monday and Tuesday for the most recent 9 months of their employment, it will be clear they have worked a regular pattern of hours for the requisite 6 months. Depending on the circumstances of any particular case, the employee may still have worked a regular pattern of hours even with some fluctuation or variation in specific times and days worked, including (for example) if the employee took time away from work when ill or on holiday.*
>
> *Additionally, the assessment of whether the employee worked a 'regular pattern of hours' is qualified by the contextual requirement that the pattern of hours must be able to be continued as a full-time or part-time employee without significant adjustment.*

77. Despite the addition of the word 'regular' before 'pattern of hours', and the guidance in the explanatory memorandum, ACCI is concerned the current drafting of the Bill may be too broad and may potentially provide conversion rights to casual employees regardless of how 'irregular' their pattern of work has been.

78. In coming to this conclusion it is necessary to first look at how the "engagement" of a casual on a "regular" basis has previously been interpreted by both the FWC and courts.

79. As the FWC noted in *Shortland v The Smith Snackfood Co Ltd*[17], as a matter of the common law of employment, and in absence of an agreement to the contrary, each occasion that a casual employee works is viewed as a separate engagement pursuant to a separate contract of employment. Casual employees may be engaged from week to week, day to day, shift to shift, hour to hour or for any other agreed short period. Casual employees may transition between periods in which their engagement is intermittent, to periods where their engagement is more regular.

80. Further, continuous service by a casual employee who has an established sequence of engagements with an employer is broken only when the employer or the employee make it clear to the other party, by words or actions that there will be no further engagements.

81. In respect of engagement casuals on a "regular" basis, guidance as to how section 66B(1)(b) may be interpreted by the FWC may also be gleaned from the FWC's interpretation is section 384(2) of the Fair Work Act, which concerns the period of employment of a casual on a "regular and systematic basis". In *Yaraka Holdings Pty Ltd v Giljevic*, the court found: [18]

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[16] EM, page 8, paras 27 and 28.
[17] Wayne Shortland v The Smiths Snackfood Co Ltd [2010] FWAFB 5709 at [10] citing *Andison v Woolworths Limited*, IRCA, N1522 of 1994, 8 August 1995 per Moore J at pp 3-4.
[18] [2006] ACTCA 6, 149 IR 339 cited by the Full Bench of the FWC, see for example [2020] FWCFB 306.

> "*The term "regular" should be construed liberally. It may be accepted, as the Magistrate did, that it is intended to imply some form of repetitive pattern rather than being used as a synonym for "frequent" or "often". However, equally, it is not used in the section as a synonym for words such as "uniform" or "constant*".

82. Given the FWC's interpretation in *Yaraka*, it is foreseeable for example that a casual employee engaged to seasonally pick fruit or to work certain events or occasions (e.g. a casual employee who works as an usher at the MCG every boxing day test match, or works every public holiday), could under the current drafting of the Bill be considered to be working a 'regular pattern of hours', even though the period of engagement may be very limited and extremely irregular in nature, and characterised by extended gaps between engagements.

83. This does not appear to be in line with the policy intention underpinning the Bill and could lead to unintended and inappropriate results.

84. In order to address this, ACCI suggests s.66(1)(b) be amended as follows:

> ***66B Employer offers***
>
> *(1) Subject to section 66C, an employer must make an offer to a casual employee under this section if:*
>
> ...
>
> *(b) during at least the last 6 months of that period, the employee has worked a regular pattern of hours on an ongoing basis with a reasonable expectation of continuing employment which, without significant adjustment, the employee could continue to work as a full-time employee or a part-time employee (as the case may be).*

85. The addition of the words "with a reasonable expectation of continuing employment" would align proposed s.66B(1)(b) in line with the current wording in s384(2)(a) and would assist in excluding the possibility that an employee could be eligible to convert to permanent part-time employment where they have worked a "regular pattern of hours" that is in fact highly irregular such that an employee is a lot less likely to have any expectation of continuing employment due to the irregularity of their work.

86. The FWC has previously considered that an employee will not have a "reasonable expectation of continuing employment" where their engagement is for "discrete periods".[19] By way of example, this would mean that an employee who works ad hoc events that form a pattern (e.g. multiple sporting calendar events during a year) but for which the casual employee has no expectation of continuing employment because each event is a discrete period would not meet the eligibility criteria for an employer to offer conversion under s.66(1)(b) as proposed to be amended, as set out above. This is consistent with the policy intention behind this aspect of the Bill and ACCI commends this recommendation to the Committee.

[19] Leslie Holland v UGL Resources Pty Ltd T/A UGL Resources [2012] FWA 3453 at [31]

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When employer offers are not required

87. New section 66C provides for when an employer is not required to make an offer to convert. The reasoning for these grounds are well recognised and reflect the grounds upon which an employer may refuse an employee's request to convert on reasonable business grounds as previously determined by the FWC in the major Casual Employment Case heard by a 5 Member Full Bench.

88. After considering an extensive amount of evidence and lengthy submissions put by both unions and employer associations, the FWC rejected the claim for an absolute right to convert, and relevantly determined:[20]

> ***[380]*** *....we do not consider that the employer should be deprived of the capacity to refuse a casual conversion request on reasonable grounds. If it would require a significant adjustment to the casual employee's hours of work to accommodate them in full-time or part-time employment in accordance with the terms of the applicable modern award, or it is known or reasonably foreseeable that the casual employee's position will cease to exist or the employee's hours of work will significantly change or be reduced within the next 12 months, we consider that it would be unreasonable to require the employer nonetheless to convert the employee in those circumstances.*

89. It is critical that these grounds are retained in the Bill to avoid unworkable situations such as those described above.

90. It is also critical that the Bill retains the recognition that there may be other reasonable grounds on which an employer can decide not to make an offer. These include those specific to a particular workplace or an employee's role and therefore are not easily contemplated by a generic list. For example, a business may seek to refuse conversion for a casual employee on the basis of a contractual obligation, and it is currently unclear whether this reason would be considered reasonable grounds for such a refusal on the basis of the factors currently listed in the Act, despite often being commercially necessary.

91. This was also recognised by the FWC in the Casual Employment Case:[21]

> ***[380]*** *....The circumstances we have identified would generally constitute the grounds upon which a conversion request could reasonably be refused, although there may be other grounds which we currently cannot contemplate.*

92. It is critical that all relevant factors are able to be considered, particularly given that an employer will be liable for a civil penalty of a breach of the FW Act if it made the wrong judgement about whether the formulation was satisfied.

93. ACCI does however have a suggestion to refine the drafting of s.66C(2) ensure it reflects the intention of the legislation, as follows:

> *(2) Without limiting paragraph (1)(a), reasonable grounds for deciding not to make an offer include the following:*
>
> > *(a) the employee's position will, or is reasonably likely to, cease to exist in the period of 12 months after the time of deciding not to make the offer;*

[20] [2017] FWCFB 3541.
[21] [2017] FWCFB 3541.

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(b) the hours of work which the employee is required to perform will, or is reasonably likely to, be significantly reduced in that period;

(c) there will, or is reasonably likely to, be a significant change in either or both of the following in that period:

...

94. This change is proposed to ensure consistency with the concept of 'reasonably foreseeable' in s.66C(1) of the Bill and consistency with the FWC's Casual Employment Decision.

95. Where it is not viable for an employer to offer an ongoing full-time or part-time position due to foreseeable future limitations on the need for the work being performed, we note that the employer may refuse the request, however the employee and employer are not precluded from considering other options, such as a fixed term contract.

96. New subsection 66C(3) requires an employer to give written notice to a casual employee if they decide not to make an offer. This must occur within 21 days after the end of the 12-month period referred to in paragraph 66B(1)(a).

97. This is not limited to circumstances where an employer determines that there are reasonable grounds not to make an offer. The written notice must occur even where the employee does not qualify for casual conversion in the first place, in that they have, for example, not worked a regular pattern of hours on an ongoing basis during the last 6 months of that period which, without significant adjustment, the employee could continue to work as a full or part time employee.

98. ACCI submits this is unduly onerous and will result in an unnecessary additional regulatory burden on employers:

a. This is particularly the case in obvious scenarios, for example where an employee clearly does not meet the eligibility requirements and is working on an ad hoc basis, with highly irregular hours and days.

b. This is also the case where an employee does not meet the criteria and who may have no interest in converting to a part-time or full-time role (and where that is well known by both parties). A letter from the employer concerning the refusal to offer conversion could serve to confuse and may unnecessarily negatively impact the relationship.

c. This administrative burden will be felt by both small and larger businesses: smaller businesses are less likely to have the capacity for dedicated resources and expertise to assist with such matters, and larger businesses will have more employees that the obligation will apply to (who may not qualify or indeed wish to convert).

99. On this basis ACCI submits that the requirement to give notice where an offer will not be made should be removed. If it is to be retained, ACCI submits that s.66C(3)(b) should be removed:

(3) An employer must give written notice to a casual employee in 28 accordance with subsection (4) if:

(a) the employer decides under subsection (1) not to make an offer to the employee; or

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~~*(b) the employee has been employed by the employer for the 12 month period referred to in paragraph 66B(1)(a) but does not meet the requirement referred to in paragraph 66B(1)(b).*~~

100. Under new subsection 66C(4) the notice required by subsection 66C(3) must include details of the reasons for not making an offer and any grounds upon which the employer has decided not to make an offer. ACCI further submits that the requirement should be to merely point to the reason or ground in the Act that the employer relies on, with the requirement to give further details only upon request of the employee. This would better balance the regulatory burden on employers with the desire for interested employees to obtain detailed reasons.

Recommendation 1.6

Schedule 1, Section 66B(1)(a) of the Bill be amended to include an explanatory note to provide further clarity with respect to the meaning of 'employed by the employer for a period of 12 months beginning the day the employment started'

Recommendation 1.7

Schedule 1, Section 66(1)(b) be amended as follows:

66B Employer offers

(1) Subject to section 66C, an employer must make an offer to a casual employee under this section if:

...

(b) during at least the last 6 months of that period, the employee has worked a regular pattern of hours on an ongoing basis with a reasonable expectation of continuing employment which, without significant adjustment, the employee could continue to work as a full-time employee or a part-time employee (as the case may be).

Recommendation 1.8

Schedule 1, Section 66C(2) of the Bill be amended to ensure it reflects the intention of the legislation, as follows:

(2) Without limiting paragraph (1)(a), reasonable grounds for deciding not to make an offer include the following:

(a) the employee's position will, or is reasonably likely to, 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, or is reasonably likely to, be significantly reduced in that period;

(c) there will, or is reasonably likely to, be a significant change in either or both of the following in that period:

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Recommendation 1.9

Schedule 1, Section 66C(3), being the requirement for an employer to give written notice to a casual employee if they decide not to make an offer, be removed.

Alternatively, if it is to be retained, ACCI submits that s.66C(3)(b) should be removed:

(3) An employer must give written notice to a casual employee in 28 accordance with subsection (4) if:

(a) the employer decides under subsection (1) not to make an offer to the employee; or

~~*(b) the employee has been employed by the employer for the 12 month period referred to in paragraph 66B(1)(a) but does not meet the requirement referred to in paragraph 66B(1)(b).*~~

Recommendation 1.10

Schedule 1, Section 66C(4) be amended so that the requirement to give notice when an employer is not making an offer only requires the inclusion of the reason or ground in the Act that the employer relies on, with the requirement to give further details only upon request of the employee.

Residual employee right to request conversion

101. Subdivision C sets out the residual right to request casual conversion available to casual employees in certain circumstances who have not received or accepted an employer offer to convert. Eligibility criteria, grounds for refusal and formal requirements broadly reflect those applying to the obligation to offer conversion under Subdivision B. As such, ACCI relies on our comments set out above where relevant.

102. Importantly, the right to request is not ongoing but instead intermittent, in that generally, 6 months must have past before a request can be made in circumstances where the employee has previously refused an offer to convert, or the employer gave a notice of a decision to not make an offer or refused a previous request of the employee (see s.66F). This is sensible in order to provide a measure of certainty to employers and their employees in workforce planning, and prevent situations where an employee may have their request refused and then simply re-apply shortly thereafter.

103. ACCI notes, however that s.66F(c)(ii) (relating to when a casual employee may make a request) does not exclude circumstances where a notice of refusal in the preceding 6 months was given where an employee cannot work without significant adjustment under s.66C(3)(b). This could mean that an employer may have given a refusal on the basis of the need for significant adjustment in the preceding 6 months and the employee has been notified of such a decision in accordance with s.66C(3)&(4) but in such circumstances where the employee disagrees they can still subsequently make a request as there is nothing limiting the employee from doing so in s.66F(1)(c).

104. While ACCI strongly maintains that s.66C(3)(b) should be removed (as set out above), if it is to be retained, ACCI recommends that reference to s.66(3)(b) is included in s.66F(c)(ii), as follows:

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(ii) the employer has not, at any time during that period, given the employee a notice in accordance with paragraph 66C(3)(a) (which deals with notice of employer decisions not to make offers on reasonable grounds) or 66C(3)(b).

105. In respect of a request that has been granted, ACCI suggests that it would be beneficial to add for clarity that once an employer grants a casual employee's request to be converted to a full-time or part-time employee, the employee may only revert to casual employment by written agreement with the employer. This reflects the FWC's model casual conversion clause.

Recommendation 1.11

ACCI strongly maintains that s.66C(3)(b) should be removed. However, if it is to be retained, ACCI recommends Schedule 1, Section 66F(c)(ii) of the Bill be amended as follows:

(ii) the employer has not, at any time during that period, given the employee a notice in accordance with paragraph 66C(3)(a) (which deals with notice of employer decisions not to make offers on reasonable grounds) or 66C(3)(b).

Recommendation 1.12

Schedule 1, Section 66F of the Bill be amended to clarify that once an employer grants a casual employee's request to be converted to a full-time or part-time employee, the employee may only revert to casual employment by written agreement with the employer. This reflects the FWC's model casual conversion clause.

Right and obligations

106. New subsection 66L(1) provides that an employer cannot vary or reduce an employee's hours of work, or terminate an employee's employment, in order to avoid any right or obligations under new *Division 4A – Offers and requests for casual conversion* (i.e. to defeat the employee's eligibility to receive an offer convert to full or part time employment).

107. ACCI questions to need for 66L(1) given employees already have recourse through a general protections claim where they are subject to adverse treatment. This appears to have the potential to subject employers to an additional liability (breach of the National Employment Standards) for the same conduct that is already protected under the general protections regime. The note to subsection 66L(1) in fact alerts the reader to the general protections provisions, which it states "may also prohibit adverse action by an employer against an employee, including a casual employee, because of their workplace right under the new Division."

108. ACCI submits that two alternative courses of action for the same conduct should not be included in the FW Act. Rather than adding an additional liability as well as additional complexity to the Act, a better approach would be to simply refer to the general protections provisions of the FW Act within this part of the Act.

109. If 66L remains, ACCI submits that words to the effect of the following should be added to 66L(2):

(2) Nothing in this Division:

...

(d) "requires an employer to maintain an employee's hours of work or not terminate an employee's employment, other than as provided in section 66L(1)".

110. This is to make abundantly clear that there may be legitimate reasons to alter hours or terminate the employment of an employee, and to prevent any confusion that simply altering hours (where there is a valid reason to do so) may be the basis for a claim.

Casual conversion disputes

111. New s 66M provides a procedure that parties must follow to resolve any dispute that arises about the operation of the new Division (including involvement of the FWC) unless another dispute resolution procedure applies.

112. ACCI does not support an unnecessary intrusion by a third party, the industrial relations tribunal, into the remit of employer decision making. This is particularly the case where the dispute resolution provision is broad and applies to the operation of the entire Division 4A. This is in contrast to the model clause, which permits the matter to be referred to the FWC in relation to dispute involving matters where the employee does not accept the employer's refusal.

113. While ACCI is not supportive of potential overreach into the remit of employer decision making, ACCI does support that any arbitration is by consent of the parties only, and that dispute resolution procedures of the parties are respected where an agreed dispute resolution procedure already applies to those parties.

CASUAL EMPLOYMENT INFORMATION STATEMENT

114. Item 5 inserts new section 125A at the end of Division 12 in Part 2-2, requiring the FWO to prepare and publish a Casual Employment Information Statement (Statement), which employers must provide to new casual employees.

115. Requiring employers to issue a new Statement to employees is an unnecessary impost on employers which has the potential to create confusion and increase the regulatory burden on lawfully operating employers.

116. There have been a number of changes to the NES since the Act was first created, however ACCI is not aware of any previous change to the NES which has required employers to circulate information to employees.

117. It is the role of Government and more specifically the FWO to educate the public of and ensure compliance with Australia's workplace laws. Its educative role extends to both employees and business owners alike. As the recent "Working better for small business" report commissioned by the FWC recognised "smaller employers' need just as much support to navigate the system" as any other participants.[22]

118. The requirement under the Bill for employers to issue the Statement to current casual employees shifts the FWO's educative and compliance function and responsibilities onto employers, many of whom are small business owners and who in many instances may need just as much, if not more assistance and guidance from the FWO on the application and effect of the Bill.

[22] Bruce Bilson, Agile Advisory, Working Better for Small Business, Report from the Connect & Engage small business consultation program, 6 July 2018.

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119. In addition, if the Bill passes it will attract significant publicity and will likely be a key focus on the FWO's education efforts, in order to ensure the change is widely understood. This should occur without employers shouldering the additional administrative burden and red tape of having to issue the Statement to casual employees.

120. ACCI therefore respectfully submits that in line with previous change to the NES, the Bill should be amended to remove the requirement for employers to issue a Casual Employment Information Statement.

121. If the requirement is to be retained, ACCI seeks to comment on technical aspects of the requirement in the Bill, as follows.

122. New subsection 125A(2) provides that the Statement must contain certain information about casual employment and offers and requests for casual conversion under Division 4A of Part 2-2. Paragraph (2)(b) as currently drafted is not an accurate statement. The inclusion of such wording in the Statement would be confusing. ACCI therefore suggests the following amendment to s.125A(2)(b):

> *(b) an employer offer for casual conversion must in certain circumstances ~~generally~~ be made to certain casual employees within 21 days after the employee has completed 12 months of employment;*

123. Further, subsection 125A(2)(c) provides as follows:

> *(c) an employer can decide not to make an offer for casual conversion if there are reasonable grounds to do so, but the employer must notify the employee of these grounds;*

124. 125A(2)(c) does not appear to cover circumstances where an employer does not make an offer on the basis of 66B(1)(b) and gives notice to the employee of this fact in accordance with 66C(3)(b).

125. ACCI therefore recommends that an additional requirement for the Casual Employment Information Statement be added to make clear that an employee may not receive an offer because it would require the employer to make significant adjustment to their regular pattern of hours.

Recommendation 1.13

Schedule 1, Section 125A of the Bill be deleted, to remove the requirement for employers to issue the Casual Employment Information Statement.

Recommendation 1.14

Schedule 1, Section 125A(2)(b) be amended as follows:

> *(b) an employer offer for casual conversion must in certain circumstances ~~generally~~ be made to certain casual employees within 21 days after the employee has completed 12 months of employment;*

Recommendation 1.15

Schedule 1, Section 125A(2) be amended to make clear that an employee may not receive an offer because it would require the employer to make significant adjustment to their regular pattern of hours, to cover circumstances where an employer does not make an offer on the basis of 66B(1)(b) and gives notice to the employee of this fact in accordance with 66C(3)(b).

ORDERS RELATING TO CASUAL LOADING AMOUNTS

126. The greatest issue of concern to employers in respect of casual employment matters is the risk of 'double-dipping' claims being pursued by the very large number of casuals who have worked regularly for an extended period. There are at least eight class actions underway about this matter.

127. ACCI therefore commends this issue being addressed in the Bill. We note that new section 545A sets out a statutory rule for offsetting amounts payable by an employer to a person for relevant entitlements by the amount of a casual loading previously paid by the employer to compensate the person for not having those entitlements.

128. As noted in the explanatory memorandum, the statutory offset rule is intended to apply in circumstances where a person has been employed and paid on the understanding they were a casual employee, but is later found not to be a casual employee and a claim is made for amounts for entitlements casual employees do not receive (as occurred in *Rossato*).[23]

129. ACCI would be very concerned if the Committee recommended not to provide protection against both retrospective and prospective 'double-dipping' claims, as part of the Bill which addresses the casual definition and casual conversion issues.

130. Employer confidence to employ, including through viable and accessible casual employment options, will be critical to the long path to recovery, and the recovery of hundreds of thousands of jobs lost as a result of the COVID-19 pandemic.

131. We understand there have been concerns raised by some around the constitutionality of any retrospective double dipping fix. Whilst we appreciate these concerns, any such fix which allows the offsetting of a previously paid loading against permanent entitlements owed should in our view be considered a genuine adjustment of competing claims and therefore will not constitute the acquisition of property in contravention of s51(xxxi) of the Constitution. As Mason CJ, Brennan, Deane and Gaudron JJ explained in *Australian Tape Manufacturers* at 32:[24]

> *"Where an obligation to make a payment is imposed as genuine taxation, as a penalty for proscribed conduct, as compensation for a wrong done or damages for an injury inflicted, or as a genuine adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity, it is unlikely that there will be any question of an 'acquisition of property' within s 51(xxxi) of the Constitution."*

[23] EM para 88, page 18.
[24] (1993) 176 CLR 480.

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132. Further any decision to not look to retrospectively address the double dipping issues stemming from *Rossato* will have ongoing financial implications for business whether they are subject to a legal claim or not, due to the ongoing financial reporting implications of the decision, as highlighted in guidance provided by the Australian Securities and Investments Commission FAQ1 on COVID-19 Implication for financial reporting and audit.

133. In line with ASIC's guidance, Australian Accounting standards now require many businesses to either recognise a liability and related expenses or disclose a contingent liability, for additional employee entitlements (including annual leave, personal and carer's leave, compassionate leave, public holiday pay, and redundancy payments) for past and present 'casual employees' who were employed in circumstances that may possibly be covered by the *Rossato* decision which did not allow an offset for any casual loading paid, unless the possibility can be considered by the business as too remote.[25]

134. This will have huge implications for the financial statements and solvency of many businesses who without a retrospective fix will be forced to continue to recognise either a liability or disclose a contingent liability on their books, even where the possible effect of the *Rossato* decision on the business is considered only a mere possibility (and not a probability). Such a recognition or disclosure by a business will also have significant ongoing implications for associated matters such as a business' taxation liabilities (e.g. withholding tax and payroll tax) and superannuation guarantee contribution payments.

135. ACCI therefore strongly supports the inclusion of s.545A *Orders relating to casual loading amounts* in the Bill. We do however have a recommendation with respect to the drafting to ensure it reflects policy intentions.

136. As drafted, s.545A is not sufficiently clear that the provision does not apply to past casual employees because s.545A(1)(a) refers to a person who 'is employed'. Much of the cost risk associated with casual 'double-dipping' claims and associated class actions relates to past employees (e.g. Mr Rossato). We acknowledge that s.46(7) in the Bill with respect to application of certain amendments is useful in this regard, however the changes proposed below would assist in clarifying the intent and avoiding any unintended consequences.

137. In addition, the wording in s.545A should expressly address circumstances where an employee is pursuing an entitlement (e.g. accrued annual leave), and not simply pursuing pay in lieu of an entitlement.

138. As such, ACCI proposes the following amendments:

(1) This section applies if:

(a) a person is or has been employed by an employer in circumstances where the employment is or was described as casual employment; and

(b) the employer pays or has paid the person an identifiable amount (the loading amount) paid to compensate the person for not having one or more relevant entitlements during a period (the employment period); and

(c) during the employment period, the person was not a casual employee; and

[25] The Australian Accounting Standards that may be relevant in considering the accounting implications in Rossato are: AASB 119 Employee Benefits and AASB 137 Provisions, Contingent Liabilities and Contingent Assets.

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(d) the person (or another person for the benefit of the person) makes a claim for, or to be paid an amount for, one or more of the relevant entitlements with respect to the employment period.

139. New subsection 545A(3) provides that despite subsection 545A(2), the court may reduce the claim amount by an amount equal to a proportion of the loading amount the court considers appropriate, having regard only to the factors listed in paragraphs 545A(3)(a) to (c). This assessment of proportionality is intended to provide fairness between the parties in the adjustment of their rights, claims and obligations.

140. However, many awards do not provide a break down of the loading amount attributable to each relevant entitlement proportionately. In fact a number of awards do not even expressly state that the casual loading is in lieu of the paid NES entitlements.

141. Section 545A should therefore make clear that if an employer has engaged an individual as a casual and paid the applicable casual rate under a modern award that there is no claim for any of the relevant entitlements under s545A(4). That is – that the Court must reduce the claim to nil (unless the modern award provides an ability to pay a lesser casual loading in return for an employee being entitled to a relevant entitlement, and the employee's claim is in relation to that specific entitlement).

142. For example, clause 47.1 of the Manufacturing and Associated Industries and Occupations Award 2020, provides "Employees engaged in the technical field are entitled to a casual loading of 17.5% and, in addition, are entitled to annual leave and annual leave loading on a pro rata basis, provided that a casual loading of 25% may apply instead of these entitlements". In this example, it could apply to a situation where the employee was paid 17.5% loading and did not receive paid annual leave and leave loading entitlements.

143. Only where there is no modern award (or presumably, an enterprise agreement) in place could there reasonably be a question as to what the casual loading should be proportionately offset against.

144. Even in those cases, this should only be the case where the casual loading specified is less than 25%. The court should not otherwise be afforded discretion to determine what *"an appropriate proportion of the loading amount attributable to each of those entitlements in all of the circumstances"* is.

Recommendation 1.16

Schedule 1, Section 545A of the Bill be amended as follows:

(1) This section applies if:

(a) a person is or has been employed by an employer in circumstances where the employment is or was described as casual employment; and

(b) the employer pays or has paid the person an identifiable amount (the loading amount) paid to compensate the person for not having one or more relevant entitlements during a period (the employment period); and

(c) during the employment period, the person was not a casual employee; and

(d) the person (or another person for the benefit of the person) makes a claim for, or to be paid an amount for, one or more of the relevant entitlements with respect to the employment period.

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Recommendation 1.17

Schedule 1, Section 545A of the Bill be amended to make clear that if an employer has engaged an individual as a casual and paid the applicable casual rate under a modern award that there is no claim for any of the relevant entitlements under s545A(4). That is – that the Court must reduce the claim to nil (unless the modern award provides an ability to pay a lesser casual loading in return for an employee being entitled to a relevant entitlement, and the employee's claim is in relation to that specific entitlement).

SCH1 PART 2 – OTHER AMENDMENTS

Treatment of pre-conversion service

145. There is currently conflicting case law around the treatment of pre-conversion service of casual employees under the Act, with the contradictory decisions of *Unilver*[26] and *AMWU v Donau*[27] creating significant uncertainty and confusion for employers who find themselves with full-time or part-time employees with a period of prior casual service during their employment.

146. Schedule 1, Part 2 of the Bill usefully provides certainty as to the treatment of pre-conversion service as a casual employee for other entitlements in the NES.

147. In a common-sense approach, the Bill establishes that prior periods of service as a regular casual employee count towards 'continuous service' for the purposes of eligibility to request a flexible working arrangement[28] and for parental leave,[29] so long as the period of continuous service is not broken since the date of conversion. This means that casual employees will not lose their right to either entitlement as a result of their conversion to either full-time or part-time employment.

148. The Bill makes clear that prior service as a casual employee will not count towards the accrual and amount of annual leave,[30] paid personal/carer's leave,[31] notice of termination[32] and redundancy pay.[33] This is a sensible approach given that employees in the vast majority of cases during their casual period of employment would have already received a casual loading in lieu of or in compensation for these entitlements.

149. Without this essential qualification in the Bill there would be considerable confusion for both employers and employees in the workplace. In addition, without these sections of the Bill, conflicting case law could have been interpreted as effectively allowing for the "double-dipping" of some entitlements in circumstances where full or part-time employees had a period of casual service during their employment prior to conversion and received a casual loading in lieu of and in compensation for those entitlements. This section of the Bill rightfully ensures that will not be the case in the future.

[26] Unilever Australia Trading Limited v AMWU [2018] FWCFB 4463
[27] AMWU v Donau Pty Ltd [2016] FWCFB 3075
[28] See s.65(2A) of the Bill.
[29] See s.67(1A) of the Bill.
[30] See ss.87(1) and 87(2) of the Bill.
[31] See ss.96(1) and 96(2) of the Bill.
[32] S.117(4)
[33] S.119(3).

SCH 7 – APPLICATION, SAVING AND TRANSITIONAL PROVISIONS

The FWC's ability to resolve uncertainties and difficulties

150. Pursuant to the FW Act, casual conversion clauses are permitted to be included in enterprise agreements as a matter pertaining to the employment relationship.[34] In 2019 the then Department of Jobs and Small Business reported that around one third of agreements included a casual conversion clause (as at September 2018).[35]

151. New clause 45 in the Bill is therefore a welcome and practical provision that would give the FWC the power to resolve uncertainties and difficulties which will no doubt arise between enterprises agreements made before the commencement of the Bill, relating to how the agreement interacts with the statutory definition and new Division 4A of Part 2-2 (casual conversion), or to make the agreement operate effectively with those provisions.

152. A similar problem was identified and addressed both in the recent Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018 and before the NES provisions themselves came into operation on 1 January 2010 through Items 23 and 26 of Schedule 3, Part 5, Division 1, of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

Current casual employees and the new definition of casual

153. New subclause 46(1) provides that the new statutory definition of casual employee applies on and after commencement in relation to offers of employment that were given before, on or after commencement.

154. This means that an examination of the terms of the initial offer and acceptance of employment will be required. This may cause some administrative burden for employers in that it will require an assessment of current employment arrangements, however on the whole it is likely to result in greater certainty for existing employment arrangements in that employers and employees will not be subject to the uncertainty created by the *Skene* and *Rossato* decisions.

155. Protections are also provided for employees in that employees who have been the subject of a court decision that they are not a casual employee, or who have converted before commencement to a part or full-time employee, are not inadvertently reverted to casual employment simply because the terms of their original offer and acceptance of employment would have met the requirements of the new definition of casual employee.

Transitioning casual employees

156. New clause 47 varies the application of the casual conversion rights and obligations in new Division 4A in relation to existing casual employees over a 6-month transition period. The provisions provide the opportunity (subject to reasonable grounds) for all existing casual employees, even if they do not satisfy the statutory definition of casual employee in section 15A, to convert under Division 4A if the relevant requirements are met.

[34] Section 172(1)(1), see also paragraph 672 of the Explanatory memorandum to the Fair Work Bill 2008.
[35] Department of Jobs and Small Business, Workplace Agreements Database (Sept 2018), cited in Submission to the Senate Education and Employment Committee Inquiry into the Fair Work Amendment (Right to Request Casual Conversion) Bill 2019.

157. This means an employer must assess whether to offer conversion under Division 4A of the amended Act to any employee who was, or may have been, a casual employee immediately before commencement, as well as to any employee who at commencement is a casual employee within the meaning of the new statutory definition. This assessment must occur by the end of the transition period.

158. ACCI supports a transitional period being provided to employers to allow for an appropriate period of adjustment and assessment, noting that employers are able to comply with their obligations under this clause at any stage during the transition period.

Requirement to provide Casual Employment Information Statement to existing employees after transitional period

159. New subclause 47(5) provides employers referred to in subclause 47(1) (i.e. employers of all casual employees, including employees designated as casuals, who started their employment before commencement of the amendments) must give each of those employees a Casual Employment Information Statement as soon as practicable after the end of the transition period.

160. As set out above in relation to the Casual Employment Information Statement, ACCI respectfully submits that the Bill should be amended to remove the requirement for employers to issue a Statement to casual employees.

161. If the requirement is to remain, ACCI is supportive of the obligation to provide the Statement only arising after the transitional period so as to not confuse employees with details of rights and obligations which will not apply to them for a 6-month period.

Variations to modern awards

162. Clause 48 requires the FWC, within 6 months after commencement, to review modern award terms dealing with casual employment or casual conversion and vary any terms that are inconsistent with the definition of casual employee in new section 15A, or Division 4A of Part 2-2, or where there is an uncertainty or difficulty relating to the interaction between the award and the amended FW Act.

163. ACCI does not oppose this provision to provide a mechanism to ensure obligations under awards are clear on their face.

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SCH 2 - MODERN AWARDS

- Simplifying modern awards will help achieve the common goal of saving and creating Australian jobs as we look to rebuild after COVID-19.
- The JobKeeper FW Act flexibilities have been an important lifeline for businesses and employees during the COVID crisis.
- Extending similar flexibilities, which are well thought out, contain safeguards and will help distressed businesses recover is strongly supported by ACCI.
- Such flexibilities should extend to other significant industries still facing significant distress covered by modern awards, including but not limited to the tourism sector and the arts and recreation services industry.
- The current part-time provisions in most awards are rigid and unnecessarily prescriptive and discourage employers from engaging people on a part-time basis instead of casual.
- ACCI supports part-time flexibility changes but recommends some changes to the current drafting to address practical issues around utility and general protections claims.
- If businesses in key distressed industries such as tourism or in locations such as Cairns are to survive and keep employing Australians, then the Fair Work flexibilities they are able to continue to utilise under the Bill must go beyond just the ability to issue duty and location directions, and must also include the ability to, with sufficient safeguards and protections, to issue directions to work reduced hours/days.
- Far more needs to be done to address complexity in modern awards than is proposed in the Bill.
- If we are to truly encourage employment, employing staff under modern awards must no longer be seen as a confronting, complicated, costly, legal minefield.

INTRODUCTION

164. The COVID-19 pandemic has had unpredictable and unprecedented impacts on the Australian economy, including a profound impact on the capacity of employers in many, perhaps all, industries at one point or another to maintain employment.

165. As the RBA observed in its August 2020 Statement on Monetary Policy, the COVID-19 pandemic represents 'the largest shock to the global economy in many decades' and that 'labour markets have been severely disrupted'.

166. The focus of any government reforms in these circumstances, as has been the case during the COVID-19 pandemic, should be to keep people in work and keep businesses alive so that they can get to the other side of the economic downturn caused by the pandemic with the capacity to return to normal activity and eventually towards full / pre-pandemic levels of employment.

167. While all industries and most businesses have been profoundly affected in one way or another as a result of the pandemic, it is clear some industries and businesses have been affected over a longer period and more deeply. The reforms proposed in Schedule 2 reflect this reality.

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168. The measures contained in Schedule 2 dealing with modern awards represent a largely temporary but necessary response to the current extraordinary situation faced by many businesses and their employees as a result of the COVID-19 pandemic.

169. In line with the modern award objectives contained in s 134 of the FW Act, the changes proposed in Schedule 2 appear to be directed towards:

a. improving/maintaining/protecting the relative living standards of the low paid, by enabling employers to maintain the employment of award-covered workers[36];

b. promoting social inclusion through increased workforce participation[37];

c. promoting flexible modern work practices, having regard to the specific circumstances arising from COVID-19[38]; and

d. positively impacting employment growth, and the sustainability of the national economy in an incremental and proportionate fashion[39].

170. Addressing issues and inflexibilities in our IR / modern award system in order to assist in the maintenance of employment and business viability, should directly contribute to the strength and performance of the economy, and therefore contribute positively to the achievement of these modern award objectives.

171. Short term shocks to the economy however have long term impacts on the most vulnerable workers, including on workforce participation rates which often take years, if not decades to recover following severe economic downturns. The reforms contained in Schedule 2 appear to seek to encourage employers to retain as many workers as possible in jobs until a full recovery can be achieved through greater employment flexibility provisions. These additional operational flexibilities may also allow some businesses to hold off taking other more drastic steps until a more certain economic picture arises.

172. It should however be acknowledged that for some employers and their employees for whom circumstances remain frighteningly dire (such as those in the tourism industry), the IR reforms contained in Schedule 2 of the Bill if passed will remain either:

a. Not sufficient to arrest their slide into unviability; or

b. May be overtaken by steps the employer feels compelled to take (or does take) to save their business.

173. This said ACCI recognises the important role the IR regime plays in making changes that are practical and possible to militate against adverse consequences being caused by the unprecedented COVID-19 crisis, such as those contained in Schedule 2 dealing with modern awards.

174. Where measures are available to maintain employment and facilitate working arrangements – no matter how modest – they should be passed by the parliament and implemented.

[36] See section 134(1)(a) of the FW Act
[37] See section 134(1)(c) of the FW Act
[38] See section 134(1)(d) of the FW Act
[39] See section 134(1)(h) of the FW Act

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IDENTIFIED MODERN AWARDS LIST

175. The increased flexibilities contained in Schedule 2 of the Bill apply to a list of specified modern awards as set out in section 168M(3)(a)-(l) covering the retail, hospitality, meat and seafood processing and vehicle industries, being:

Business Equipment Award	Nursery Award
Commercial Sales Award	Pharmacy Industry Award
Fast Food Industry Award	Restaurant Industry Award
General Retail Industry Award	Registered and Licensed Clubs Award
Hospitality Industry (General) Award	Seafood Processing Award
Meat Industry Award	Vehicle Repair, Services & Retail Award

176. As explained in the Bill's regulatory impact statement, the list of 12 identified modern awards has its origins in a mapping exercise conducted by the FWC. Both the retail and accommodation and food service industries given their high level of award reliance, large proportion of small business and direct impact felt as a result of COVID-19 and government restrictions are considered to be 'distressed sectors' and therefore the primarily focus of reform.[40]

177. Whilst ACCI agrees with the need for assistance and flexibilities to assist both the retail and food and accommodation services industries who have suffered immensely as a result of COVID-19 and ongoing government restrictions, ACCI believes that there are a significant number of other key industries (with corresponding modern awards) who are similarly facing significant challenges as a result of COVID-19 and government restrictions to limit transmission of coronavirus, including but not limited to the following awards covering such industries as the entertainment industry, tourism, arts and recreation:

a. Alpine Resorts Award 2020

b. Amusement, Events and Recreation Award 2010

c. Car Parking Award 2020

d. Cemetery Industry Award 2020

e. Dry Cleaning and Laundry Industry Award 2020

f. Electrical, Electronic and Communications Contracting Award 2010

g. Fitness Industry Award 2010

h. Funeral Industry Award 2010

i. Hair and Beauty Industry Award 2010

[40] Fair Work Commission Presidents Statement, 31 August 2020, Melbourne. Fair Work Commission, Information note – Modern award and industries, 30 March 2020.

j. Horse and Greyhound Training 2020

k. Live Performance Award 2010

l. Marine Tourism and Charter Vessels Award 2020

m. Professional Diving Industry (Recreational) Award 2020

n. Racing Clubs Events 2020

o. Racing Industry Ground Maintenance 2020

p. Sporting Organisations Award 2020

q. Travelling Shows Award 2020

r. Wine Industry Award 2010

178. By way of example, the latest update to payroll jobs and wages (week ending 14 November 2020[41]) shows that the arts and recreation services industry (along with the accommodation and food services industry) is in the upper cluster when it comes to job decline figures since 14 March 2020. The arts and recreation service industry has seen a 10.6% decline in jobs alone since March 2020. This is an industry, which like retail and food and accommodation services is dominated by small businesses, with 97.4% of businesses considered small in the arts and recreational services industry.[42]

179. In addition, the arts and recreation services industry has been one of the most disrupted and affected during the COVID-19 pandemic. Closure and restrictions have hampered the regular operation and use of cultural and sports venues, including museums, galleries, theatres, gyms and stadiums. Government restrictions on gathering numbers have severely limited or entirely suspended both sporting and entertainment events and productions.

180. Like retail and food and accommodation services, due to the 'people-facing' nature of jobs in the arts and recreational services industry (including sports coaches, fitness instructors, sportspersons, music professionals, event organisers, actors, dancers and entertainers, etc.), it is likely that the disruption and limitations placed on this industry will continue for the foreseeable future.

181. Despite this, the flexibility provisions contained in Bill are limited to the identified modern awards contained in section 168M(3)(a)-(l) which do not extend to the eight awards[43] covering the arts and recreation services industry. Meaning despite the ongoing challenges, restrictions and economic pressures being placed on businesses, employers and employees in this industry, through no fault of their own, they will not have access in any capacity to the modern award flexibilities contained in Schedule 2.

182. Whilst ACCI appreciates the basis upon which the identified list of modern awards has been constructed, as the above case of the arts and recreational services industry evidences, we do not believe that the list of identified modern awards as it currently stands is a full, accurate and true

[41] Weekly Payroll Jobs and Wages in Australia, Week ending 14 November 2020; ABS, Labour Account Australia, June 2020.
[42] Fair Work Commission, Information note – Modern Awards and industries, 30 March 2020.
[43] Amusement, Events and Recreation Award 2010, Local Government Industry Award 2010, Live Performance Award 2010, Fitness Industry Award 2010, Sporting Organisations Award 2020, Racing Industry Ground Maintenance Award 2010, Horse and Greyhound Training Award 2010 and the Travelling Shows Award 2020.

reflection of the current state of play when it comes to which industries and occupations are in distress as a result of COVID-19 and government restrictions to limit transmission.

183. For this reason, ACCI strongly supports the Bill being amended to include a greater number of identified awards which better reflect the level of distress being felt across other industries and occupations covered by modern awards, including but not limited to tourism and the arts and recreation services industry.

Recommendation 2.1

Schedule 2, Section 168M(3) of the Bill be amended to include additional modern awards covering distressed industries, including but not limited to those covering the tourism and the arts and recreation services industry.

AGREEMENTS FOR PART-TIME EMPLOYEES TO WORK ADDITIONAL AGREED HOURS

184. The vast majority (66.8%) of casual employees work part-time hours.[44] It follows that a critical pathway to enhance permanent employment is through a form of part-time flexibility in order to encourage more jobs with greater security that also provide employers with the flexibility they need to adapt to changing circumstances and consumer demands.

185. The current part-time provisions in most awards are however rigid and unnecessarily prescriptive. They discourage employers from engaging people on a part-time basis (instead of as casuals) and from offering additional hours of work to existing part-time employees.

186. The current approach in many modern awards does not enable employers to readily respond to changes in trading patterns and penalizes employers for offering additional hours of work to part-time employees, by requiring the payment of overtime rates. This has discouraged, and continues to discourage, employers from employing part-time employees and from offering them additional work (leaving many underemployed, including many parents are carers who may want the option of additional hours). It also encourages employers to rely on casual labour.

187. As such, the current award regulation of part-time employment in several critical awards (including the General Retail Award 2020 and the Fast Food Award 2020) is entirely inadequate for dealing with the changing trading environment that has and will continued to face employers and employees in distressed industries in the years ahead.

188. The COVID-19 pandemic has also brought into the spotlight the inability of part-time provisions in a number of awards to deal with changing trading environments created by COVID-19. This is particularly evident in the General Retail Industry Award 2020. While a part-time employee under the General Retail Industry Award 2020 can agree to change their roster to work additional hours, this cannot change their total number of hours worked in a week. If the employee wants to temporarily increase the number of hours per week they can work, they need to make a separate written agreement with their employer. The award is unclear whether this can be a temporary agreement, so to avoid doubt, the employer and employee may need to make another written agreement to return to their previously agreed number of hours.

[44] ABS Labour Force, Australia, Detailed, Quarterly, May 2020, Cat No. 6291.0.55.003

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189. Part-time provisions in awards need to strike a fairer balance between a degree of regulatory and certainty for employees and flexibility for employers as to the days and times at which part-time employee's ordinary hours of work may be rostered.

190. As the FWC full bench recognised in their decision to vary the Hospitality Industry (General) Award 2020 and the Clubs Award 2020 to introduce great level of part-time flexibility in July 2017:

> *"[the] degree of regularity and certainty in working hours for part-time employees needs to bear a proper relationship to the patterns of work in the industry sector in question"*
>
> *"Greater flexibility in part-time employment provisions in the Hospitality Award and the Clubs Award would be in the interests of both employees and employers. It would also make the operation of casual conversion provisions more effective."*

191. In addition, greater part-time flexibility gives employers greater scope and incentive to hire and employ part-time workers, as opposed to casuals. As the below table evidences, since the introduction of greater part-time flexibility provisions in the Hospitality Industry (General) Award 2020 the percentage of employees employed as part-time workers in the accommodation and food services industry has been gradually increasing as a share of overall employment.[45]

	Accommodation and food services part-time share of employment (%)	Accommodation part-time share of employment (%)	Food and beverage part-time share of employment (%)
Feb-2018	58.6	44.8	60.6
Feb-2019	58.5	47.0	60.2
Feb-2020	61.7	46.6	63.5

192. For these reasons ACCI is supportive of efforts in the Bill to enable greater part-time flexibility so that awards can better enable employees to agree to pick up additional hours of work beyond their guaranteed/agreed hours at ordinary rates, along with some capacity for an employer to vary start and finish times of part-time employees within agreed availability of the employee, leading to immediate and tangle benefits for both employers and employees.

Simplified Additional Hours Agreement

193. New Division 9 of Part 2-3 of the Bill seeks to allow an employer and a part time employee (who works a minimum of 16 hours per week) covered by an identified modern award to agree to enter into a simplified additional hours agreement (SAHA) for the employee to work additional agreed hours. An employee cannot be compelled to enter into such an arrangement. This applies to employees covered by the identified modern awards where certain circumstances are met, including that:

a. the employee agrees to work the additional hours and the agreement is recorded and retained;

b. the agreement identifies the additional agreed hours to be worked and is entered into before working such additional hours;

[45] ABS, Labour Force, Australia, Detailed, Quarterly, May 2020 (Cat. No. 6291.0.55.003), original data.

c. the part-time employee is engaged to perform at least 16 regular hours per week (or where appropriate, the employee's average hours are 16 hours per week); and

d. the shift length is at least three hours or is part of a continuous work stream of at least 3 hours (i.e. 1 hour of additional agreed hours worked after the end of a 2-hour shift) – this is unaffected by any breaks.

194. Although at first blush the parameters of the ability of an employer and part-time employee to agree additional hours to be paid without overtime may appear somewhat broad, they are not without significant limitations. In particular, overtime still remains payable to an employee despite having entered into an SAHA where as a consequence of working those hours, the employee works:

a. outside the span or spread of hours which otherwise attracts the payment of overtime under the modern award; or

b. in combination with any other hours worked by the employee, in excess of 38 hours per week or an average of 38 hours per week; or

c. more than the maximum number of daily hours specified in the modern award that requires the payment of overtime.

195. Additionally, except for the circumstances described above, additional agreed hours are treated as ordinary hours of work for the purposes of paying penalty rates that apply to ordinary hours of work as well as for the accrual and payment of annual and personal leave entitlements and superannuation guarantee contributions.

196. Any agreement entered into with a part time employee can be terminated with seven days' written notice or at any time agreed between the employer and employee.

Part-time flexibility provisions

197. Whilst ACCI is supportive of efforts to achieve greater part-time flexibility that benefits both employers and employees, as currently drafted, the part-time flexibility provisions contained in new Division 9 of the Bill are a missed opportunity to both address the pressing issues of lack of flexibility in many modern awards, as well as the opportunity to provide many part-time workers with additional hours and income that may not have otherwise been offered.

198. New section 168N establishes the process for entering into a SAHA. A SAHA must identify additional agreed hours to be worked on one or more days[46], and must be entered into before the start of the first period of those hours[47].

199. As currently drafted, s 168N will not provide sufficient flexibility to employers or employees, as it will not typically be known at the time when a SAHA is entered into, what times the additional hours will be worked in future weeks because this will typically vary from week to week.

[46] Section 168N(1)(a)
[47] Section 168N(1)(b)

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200. The practical reality of this means that employers will have to enter into a new SAHA with their employee each and every time they wish to offer them additional hours, as section 168N requires complete specificity as to the identity of the additional hours which will be worked under the SAHA before it is entered into.

201. This differs from existing part-time flexibility clauses in a number of key modern awards (including the Hospitality Industry (General) Award 2020, the Registered and Licensed Clubs Award 2020 and the Restaurant Industry Award 2020) which largely operate on the basis of an agreement as to an employee's guaranteed number of hours per week or roster cycle and an employee's availability periods including days and times. For example, a part-time employee might have 16 guaranteed hours per week. Their availability might be Mondays, Tuesdays and Wednesdays between 7 am and 7 pm. This means they must be rostered for at least 16 hours per week during these periods (their guaranteed hours), however they can generally be offered additional hours on top of their guaranteed hours without the need for the employer to pay overtime so long as it is within the employee's availability and the employee agrees.

202. For section 168N as currently drafted to have utility, such that it operates in a manner akin to many existing, successful part-time flexibility clauses, ACCI recommends that section 168N be amended such that the words "that may" be added into subclause 168N(1)(a). This will allow for hours that may be worked to be identified rather than hours that must be worked, so as to ensure that the part-time flexibility clause actually has flexibility for both an employer and an employee.

Recommendation 2.2

Schedule 2, Section 168N(1)(a) of the Bill be amended as follows:

(1) *A simplified additional hours agreement:*

(a) must identify additional agreed hours <u>that may</u> to be worked on one or more days; and

(b) must be entered into before the start of the first such period of additional agreed hours.

<u>General Protections</u>

203. New section 168T of the proposed Bill makes entering or not entering into and terminating or not terminating a SAHA a workplace right for the purposes of the general protections regime contained in Part 3-1 of the FW Act.

204. This has significant implications for employers and for the utility of the part-time flexibility provisions contained in the Bill.

205. In particular, this will expose employers to breaches of the General Protections provisions contained in the FW Act if:

a. An employer chooses to offer additional/unexpected hours to an employee who enters into a SAHA instead of someone who doesn't enter into a SAHA. This is because the decision to offer additional hours to a SAHA employee over another employee would be caught by section 342(1)(d) of the FW Act which prohibits discrimination between two employees.

b. An employer decides not to give overtime hours to an employee who usually receives overtime hours, because other employees on a SAHA are able to perform the same work at single time rates. Again, this will be caught by section 342(1)(d) of the FW Act prohibiting discrimination.

206. The above types of activities are likely to readily arise once the SAHAs are introduced. Indeed, the very point of the SAHA appears to be to provide employers with a legitimate avenue and incentive to offer additional extra hours at single time rates to part-time employees who agree to enter into a SAHA.

207. The expansion of the workplace right definition to include the entering and terminating of a SAHA will substantially constrain its utility or alternatively simply expose many employers to large fines and compensation orders for breach of the general protections provisions of the FW Act.

208. For these reasons, ACCI strongly recommends that the Bill be amended to remove section 168T.

Recommendation 2.3

Schedule 2, Part 1, Subdivision B of the Bill be amended to remove section 168T.

FLEXIBLE WORK DIRECTIONS

209. In essence, Schedule 2, Part 2 of the Bill appears to temporarily continue the ability of employers covered by the identified modern awards to issue the same duties and location directions as existed under the JobKeeper FW Act flexibilities, providing a straightforward mechanism that allows employers to direct their employees to perform different functions and perform work at alternative locations where a direction is given, and certain safeguards met.

210. Employers who are (or have) participated in the JobKeeper Scheme have had the benefit of Part 6-4C of the FW Act, which introduced this range of new temporary flexibility measures that employers have been able to utilise to protect the ongoing viability of their business and the jobs they provide because of it.

211. In this respect, it is important to note that the independent review of the temporary JobKeeper provisions[48] of the FW Act found that an overwhelming majority of employers – between 84 to 98 per cent depending on the specific direction or agreement – saw the provisions as 'important' or 'essential' to maintaining operations through the pandemic. Similarly, the provisions were considered important or essential to between 87 and 98 per cent of employers in sustaining employee connections and keeping their staff in work.

[48] Independent review of the temporary JobKeeper provisions of the Fair Work Act, Attorney General's Department (Commonwealth), 7 September 2020.

212. Providing similar flexibilities to employers to deploy their workforce more flexibly will be just as important going forward in giving employers the confidence to maintain and bring forward hiring decisions during the recovery, particularly for businesses operating in industries that are sensitive to demand-side impacts such as in hospitality and retail.

213. To this end, Part 2 of Schedule 2 of the Bill inserts a new Part 6-4D into the FW Act to extend in the identified modern awards (subject to various safeguards) flexible work directions in relation to duties to be performed by an employee and the location of an employee's work.

214. Two types of safeguards with respect to flexible work directions are contained within Division 2 of the proposed Bill:

- 'universal' safeguards that apply at large to directions made under Part 2; and

- specific safeguards that apply with respect to the individual directions that may be made (duties or location directions).

215. Importantly, these safeguards are not new, they are largely consistent with the safeguards contained in various temporary modern award variations approved by the FWC in response to COVID-19 and consistent with the safeguards contained in the JobKeeper legislation, made in response to the current and ongoing extraordinary circumstances presented by COVID-19.

216. Part 3 of Schedule 2 repeals new Part 6-4D to cease provision for these directions after a period of two years.

Universal safeguards

Directions are not to be unreasonable

217. The first universal safeguard requires that directions issued under Division 2 not be unreasonable in all of the circumstances. If a direction in unreasonable, section 789GZJ provides that the direction will not apply to the employee.

218. This safeguard mirrors section 789GK of Part 6-4C of the FW Act. It therefore aligns with the safeguards applicable to all directions issued under the JobKeeper amendments to the FW Act and ensures that employees receiving direction pursuant to Division 2 are not in a materially different position to the position of employees under the JobKeeper legislation (pursuant to Part 6-4C of the Fair Work Act).

Direction to assist the revival of the enterprise

219. New section 789GZK of the Bill makes clear that for a flexible work direction to have effect, an employer must have information to support a reasonable belief that the direction is a necessary part of a reasonable strategy to assist in the revival of the employer's enterprise.

220. Whilst the explanatory memorandum identifies that this may arise because of "the continuing impact of COVID-19", unlike the JobKeeper flexibility provisions, it is not clear that a direction may be given under the Bill's new flexibility provision because of business changes attributable to the COVID-19 pandemic or because of government restrictions imposed to limit the spread of COVID-19.

221. As the recent outbreaks across the northern beaches of Sydney and bayside Melbourne over the 2020-2021 summer have made clear, Australia is likely to continue to be subject to ongoing outbreaks which will likely continue to result in intermittent government restrictions on business operations and travel for

the foreseeable future. In such instances however it would appear arguable under the current drafting of section 789GZK that an employer who seeks to utilise the duty or location directions in order to respond to these changes in circumstances may be restricted from doing so as any employer directions taken will not be directed at business revival but at business survival or change.

222. For this reason, ACCI proposes that this section be amended to add "or is a necessary response to government restrictions imposed to slow coronavirus transmission" in order to ensure that businesses impacted by COVID and/or subject to government restrictions as a result of attempts to slow the transmission of COVID-19 continue to have access to flexible work directions.

Recommendation 2.4

Schedule 2, Section 789GZK be amended to include the following:

789GZK Flexible work direction to assist the revival of the enterprise

(1) A flexible work direction given by an employer to an employee of the employer has no effect unless the employer has information before the employer that leads the employer to reasonably believe that the direction is a necessary part of a reasonable strategy to assist in the revival of the employer's enterprise or is a necessary response to government restrictions imposed to slow coronavirus transmission

Directions to be in writing

223. The next universal safeguard is that all directions must be made in writing. This is given effect to in both new subsection 789GZL(1)(a) and subsection 789GZM of the Bill.

224. ACCI does not accept that, as a general proposition, it is necessarily the case that directions issued under an Award should be or must be in writing in order for the direction to be issued. It is highly foreseeable that there may be many instances where providing the direction in writing may be impracticable or otiose, particularly in the context of duties directions which can often be at short notice and in response to changing circumstances or government restrictions. For this reason, ACCI suggests that this requirement be removed from the Bill.

Recommendation 2.5

Schedule 2, Subsection 789GZL(1)(a) and subsection 789GZM of the Bill be amended to remove the requirement for directions to be made in writing.

Consultation obligations

225. Consistent with the previous JobKeeper Flexibility provision safeguards, new subsection 789GZL(1) provides that a flexible work direction does not apply to an employee unless the employer gives the employee three days written notice of the intention to give the direction (or a lesser period by genuine agreement) and consults with the employee or the employee's representative about it, keeping a written record of the consultation.

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Dispute settlement procedure

226. Under new subsection 789GZO(3) the FWC is able to resolve disputes in accordance with existing dispute resolution terms of modern awards.

227. Although this differs from the JobKeeper flexibility provision dispute resolution mechanism, it is clear that even under the JobKeeper provisions such directions were rarely controversial or subject to dispute with only 13% of all JobKeeper disputes related to direction about duties of work and only 10% in relation to disputes about a direction about a work location.[49]

DUTIES

228. New section 789GZG establishes a prerequisite for an employer to be able to direct an employee to perform any duties during a period that are within their skill and competency (a 'flexible work duties direction').

229. This new section largely aligns with the duties directions contained in the temporary JobKeeper provisions of the FW Act in sections 789GE and 789GJB.

230. The safeguards applying specifically to duties directions under new subsections 789GZG(a)-(c) largely mirror those contained in sections 789GF and 789GJB of Part 6-4C of the FW Act (JobKeeper flexibilities), such that a location direction may only be given where:

a. the duties are safe, having regard to (without limitation) the nature and spread of COVID-19;

b. where the employee was required to have a licence or qualification in order to perform those duties, the employee had the licence or qualification; and

c. the duties are reasonably within the scope of the employer's business operations.

231. In addition to the general safeguards set out at paragraph 67 above, new subsection 789GZN(1) also requires an employer to ensure that where an employee is given a flexible work duties direction under section 789GZG, the employee's hourly base rate of pay is not less than the greater of:

a. the base rate of pay on an hourly basis that would have applied if the direction had not been given; or

b. the base rate of pay on an hourly basis applicable to the duties performed.

232. It is also worth noting that s 789GZN(1), higher duties allowances, will continue to operate on their own terms and apply to an employee in relation to any higher duties being performed.

233. As the independent review into the JobKeeper provisions of the FW Act found, the duties direction flexibilities enabled employers to pivot and adapt to changing markets and restrictions. For example, in the hospitality sector, the provisions were critical in helping businesses pivot their operations, using directions for employees to perform different duties. Restaurant and cafes that had to close or significantly reduce their venue capacity adapted their businesses by directing staff to deliver food and having them perform maintenance tasks on the premises.

[49] Fair Work Commission Presidents Statement, 31 August 2020, Melbourne. Figures as at 9 August 2020.

234. ACCI supports the continued operation of the duties flexibilities for employers, as contained in Schedule 2, Part 2 of the Bill and recommends it be passed as introduced.

LOCATION

235. New section 789GZH establishes that an employer may be able to direct an employee to perform duties during a period at a place (including the employee's home) that is different from the employee's normal workplace where certain conditions are met, and safeguards provided.

236. This new section aligns with the location directions contained in the temporary JobKeeper provisions of the Fair Work Act in sections 789GF and 789GJC.

237. The safeguards applying specifically to location directions under new subsections 789GZH(a)-(c) mirror those contained in sections 789GF and 789GJB of Part 6-4C of the FW Act (JobKeeper flexibilities), such that a location direction may only be given where:

a. the place is suitable for the employee's duties;

b. if the place isn't the employee's home, it does not require the employee to travel a distance that is unreasonable in all the circumstances; and

c. the performance of the employee's duties at the place is safe, having regard to (without limitation) the nature and spread of COVID-19, and reasonably within the scope of the employer's business operations.

238. As the independent review into the JobKeeper provisions of the FW Act found, the location direction flexibilities enabled employers to adapt business models to a new market environment. For example, in the retail industry, where hours of operation have changed enormously due to both evolving consumer demands and levels of government restrictions, the location directions have been used to move workers to other store or distribution locations with greater demand, thus ensuring greater business viability and job retention for those employees subject to location directions.[50]

239. ACCI supports the continued operation of the location's flexibilities for employers, as contained in Schedule 2, Part 2 of the Bill and recommends it be passed as introduced.

FURTHER CONSIDERATIONS

REDUCTION IN HOURS/DAYS

240. The independent review into the FW Act JobKeeper flexibility provisions makes abundantly clear that the most utilised Fair Work flexibility was the ability for an employer to direct an employee to work reduced hours or days. In large part this is attributable to the fact that only a small minority of business were able to adapt their workforces accordingly without the need to explicitly draw on the provision, in many instances this was because they were able to come to unofficial agreements to differ working arrangements with their employees, rather than draw on the provisions.

[50] Independent review of the temporary JobKeeper provisions of the Fair Work Act, Attorney General's Department (Commonwealth), 7 September 2020, page 16.

241. In addition, it is evident from the feedback received by the independent review that the reduction in hours/days provisions were viewed as the most essential by employers for the continued operation of their businesses and the ongoing connection with their workforce.

242. Similarly, the report acknowledges that employee representatives also agreed that the impact of these provisions had been largely positive, enabling a rapid response to disruptions caused by COVID-19 as well as providing a degree of equity in how employees bore the burden.

243. The impact of the COVID-19 pandemic on business continues to be patchy and inconsistent across the country, as differing government restrictions, border closures and customer behaviours lead to vastly different impacts on different industries, sectors and geographically based communities.

244. For example, it is widely acknowledged and recognised in social and economic data that Cairns and Byron Bay are extreme outliers when it comes to emerging from the economic rubble of the coronavirus crisis, in part due to their large reliance on overseas tourism, as well as the impact of state border closures on their domestic markets.

245. As one journalist from the Courier Mail recently described Cairns:

> "*The tourism mecca is not so much a city in hibernation but a trauma-induced coma.*
>
> *The COVID-19 virus may have barely touched the far north but the economic consequences are writ large.*
>
> *The best business right now appears to be printing for sale/lease signs.*"[51]

246. If businesses in key distressed industries such as tourism or in locations such as Cairns are to survive and to keep employing Australians, then the Fair Work flexibilities they are able to continue to utilise under the Bill must go beyond just the ability to issue duty and location directions. It must also include the ability to, subject to sufficient safeguards and protections, continue in some capacity to issue directions to work reduced hours/days.

247. For these reason, ACCI strongly believes that the Bill should be amended to provide the capacity to the Industrial Relations Minister to temporarily allow, via regulation, businesses in highly distressed industries/sectors and/or in certain geographical locations, who are covered by an identified modern award to utilise provisions allowing the employer to direct an employee to work reduced hours/days, akin to those contained in the temporary JobKeeper provision of the FW Act.

248. This would allow for more targeted and specific relief to those businesses and employees who need it most, whilst also building into the Bill necessary flexibility to enable it to adapt and respond to new covid outbreaks and restrictions.

249. The amendment should contain necessary safeguards which have been seen in both the COVID-19 temporary modern award variations and in the JobKeeper Fair Work Act flexibility provisions, including:

a. a requirement that the employee must not be able to be usefully employed during the hours that have been reduced. This ensures that any reduction in hours is necessary due to operational impacts that have arisen as the business attempts to revive itself from the impacts of the COVID-19 pandemic and the impact of any government restrictions on the business;

[51] Empty Esplanade Lagoon shows Cairns is in a trauma-induced coma, Steven Wardill, Courier Mail, 1 September 2020

b. limitations on the percentage of hours or number of hours that may be reduced;

c. preservation of accrual of service-based entitlements by reference to an employee's ordinary hours before any reduction took place; and

d. provisions pertaining to the payments to be made with respect to any leave taken or redundancies implemented during a period where hours are reduced.

250. Such an amendment should also include:

a. Provisions requiring employers to consider and not unreasonably refuse employee requests to engage in secondary employment, training or professional development where the employee has their hours reduced. Such a safeguard would mirror the protections outlined in section 789GU of Part 6-4C of the Fair Work Act.

Recommendation 2.6

Schedule 2 be amended to enable the Industrial Relations Minister the power to, via regulation, allow businesses in highly distressed industries/sectors and/or in certain geographical locations, who are covered by an identified modern award to utilise provisions allowing the employer to direct an employee to work reduced hours/days.

AWARD COMPLEXITY

251. Overwhelmingly award complexity remains one of the hallmarks of our industrial relations system. Modern awards have shrunk from over 1500 in 2009 to 122 today yet we still continue to see many business large and small shunning employment and falling foul of award provisions because of misunderstanding and misinterpreting provisions.

252. Despite successive attempts to simplify and refine the award system over time, there is broad acknowledgement that our system usability and complexity needs further reform.

253. Business operators work in a world of constant challenge and change. Increasing demands of customers, a more aggressively competitive market, increased burden of administration, the constant change of regulation and a more assertive workforce, not to mention COVID-19. Unfortunately for far too many businesses modern award remain:

a. Convoluted ... Too long and unwieldy, time intensive and difficult to process.

b. Complex ... The language is difficult to understand, with 'legalese' and jargon.

c. Ambiguous ... Information provided is not clear, requiring too much interpretation.

d. Subjective … Requiring employers to make judgements on subjective matters such as maturity which can subsequently be overturned.

e. Of questionable relevance ... Difficult to identify which award are the most relevant when employees' roles varied and do not clearly fit into a single industry.

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f. Not for them ... Written for the benefit of "bureaucrats and lawyers", with no consideration of end user needs or capability.

254. Added to which many employers in distressed industries are subject to a radically changed and extraordinarily difficult trading environment. This has and will continue to place significant limitations on their capacity to maintain and grow employment.

255. Whilst the explanatory memorandum to the Bill recognises "award complexity is a significant issue for many businesses, especially small businesses, which may lack the resources to understand in detail how awards operate", it is fair to say that the reforms contained within the Bill, whist a step in the right direction do not address with any significance the concerns and issues around complexity of modern awards which have continually and repeatedly been stressed by users of the Australian industrial relations system.

256. If businesses and employment are to recover in the distressed industries, government has no choice but to remove some of the complexity and inflexibilities in modern awards.

257. If we are to encourage employment and confidence to create jobs in recovery / a sustained period of ongoing COVID uncertainty, employing staff must no longer be seen as a confronting, complicated, costly, legal minefield. What was barely acceptable in terms of imposing high costs and risks on employers before COVID-19 can no longer be even remotely reasonable.

258. For these reasons ACCI implores the government and the parliament to continue to look at and address modern award complexity for the good of employers and employees around the country

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SCH 3 – ENTERPRISE AGREEMENTS

- Enterprise bargaining is failing, if not completely failed, under the FW Act.
- Both unions and employers have called for urgent changes to make agreement making accessible and reliable for employers and employees, or to at least start to reverse the decline.
- Australia cannot afford to tackle COVID recovery with the existing agreement making rules.
- We will not secure sufficient productivity and competitiveness, nor a return towards trend wage growth, without a more reliable, transparent and responsive agreement approval system.
- The changes in Schedule 3 are overwhelmingly positive, albeit moderate. ACCI strongly supports the majority of these amendments.
- They should in combination encourage more employers and employees to reconsider the positive opportunities and benefits of bargaining.
- The attacks being made against the amendments to s 189 are patently untrue / baseless:
  - The BOOT is not being abolished – that's simply untrue under any fair reading of the Bill.
  - This is in no way a recipe for widespread wage cuts and it is neither appropriate nor true to make such claims.
  - A further amendment could however usefully clarify that s 189 can only be used in relation to the negative impacts of the COVID-19 pandemic, restrictions etc.
- More should be done to help employers retain jobs by implementing additional transfer of business recommendations of the Productivity Commission (Part 12).
- Disappointingly however, some of the changes in Sch 3 will not support enterprises and jobs, and may in fact create additional costs and risks at the worst possible time. This includes:
  - Restricting when agreements can be terminated after their nominal expiry (Sch 3, Part 8).
  - Terminating all preserved agreements from a single date in 2022 (Sch 3, Part 13).
- Properly understood, Schedule 3 will remove the last vestiges of Work Choices.
  - Those who delay or reject these amendments are effectively supporting the continued perpetuation of AWAs and other Work Choices agreements.

INTRODUCTION

259. The current enterprise bargaining framework is not working for a significant number of employers, employees and unions and has not worked for some time. Australia's core statutory mechanism to deliver pay and productivity has failed, a failure which is particularly striking because agreement making grew, and generations of agreements were renewed, under previous iterations of our principal national IR legislation.

260. In-term enterprise agreements apply to fewer workplaces than they did in 2010 or 2012, and apply to fewer employees, in a labour market which has expanded significantly over this time.

261. Enterprise bargaining under the FW Act is in sustained decline, and has widely lost relevance and currency, even in workplaces nominally subject to in term agreements.

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262. Numerous enterprises which were part of the system, bargaining and reaching agreements in the recent past, no longer do so. They manage despite rather than with the support of their agreement, or use expired agreements as a foundation for alternative, over-award arrangements, not as originally envisaged with the support and contemporary relevance of agreement making.

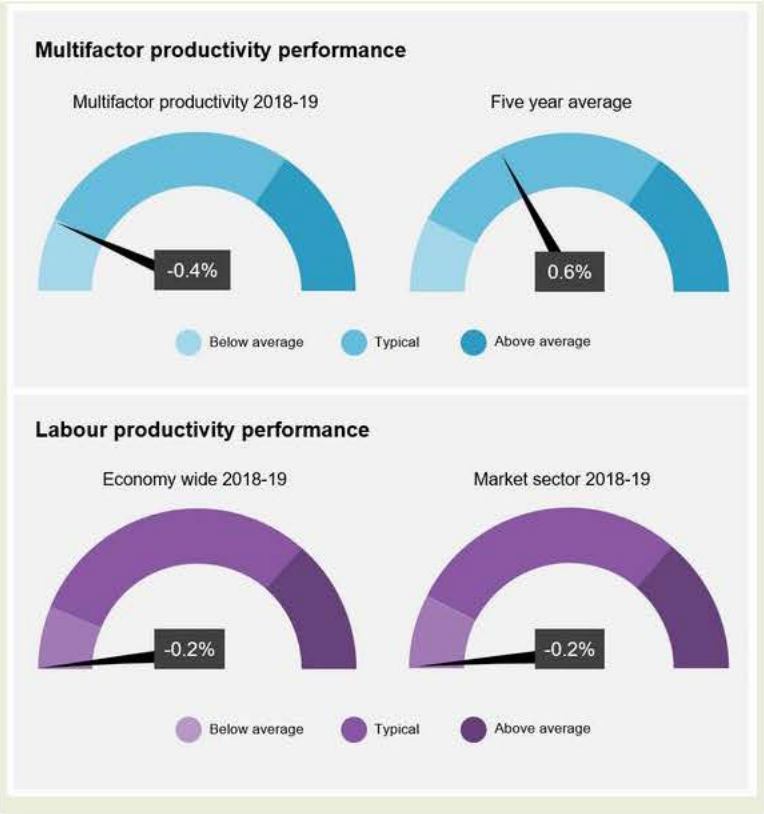
263. Where agreement making does occur employer feedback to ACCI is that:

a. It is increasingly rarely used to tackle productivity, efficiency or competitiveness.

b. It is too often an administrative ritual rather than a genuine negotiation.

c. Bargaining increasingly solely consists of rolling over previous agreements in exchange for a further pay rise / to secure a further period or projectable labour costs free of the threat of strike action.

264. It is not surprising that Australia's productivity performance remains poor. How well and widely we bargain is far from the sole determinant of productivity, but it is part of the equation. The Productivity Commission paints a stark picture of labour productivity in particular[52].



265. Australia cannot afford to allow this to continue. We need a bargaining system that works as a foundation for meeting the recovery and competitiveness challenges we will face post pandemic.

266. Dysfunction and failure in the enterprise bargaining rules of the FW Act is a significant known problem, which becomes acute as Australia is challenged to succeed in post pandemic recovery, sustaining businesses and retaining jobs.

[52] https://www.pc.gov.au/research/ongoing/productivity-insights/recent-productivity-trends

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PART 1 – OBJECTS

267. The objects of legislation are important, particularly for the effective application of amendments to legislation specifically intended to change / improve upon the status quo.

268. Objects clauses assist the courts and others in the interpretation of legislation. Section 15AA of the *Acts Interpretation Act 1901* (Cth) states:

> *In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.*

269. The importance of objects in this context is perhaps even greater in the FW Act than in legislation generally. The FW Act was been deliberately constructed for purposive, objects-based interpretation. In addition to the primary objects of the Act (s 3), there are specific objects for (for example):

a. Modern awards (s 134), enterprise awards (s 168B), and state public sector awards (168F)

b. Enterprise agreements (s 171)

c. Low paid bargaining (s 241)

d. Minimum wages (s 284)

e. Transfer of business (s 309)

f. General protections (s 336) and Unfair dismissal (s 381)

g. Protected action (s 436)

h. Union entry into workplaces (s 480)

i. Extensions to the National Employment Standards (s 743, s 758)

j. TCF outworkers (s 789AC)

k. Coronavirus economic response (s 789GB)

270. Amendments to the enterprise bargaining framework, such as those in Schedule 3 of the Bill will be interpreted based on their terms with the support of the EM and extraneous materials, but also purposively based on the explicit intent (the objects) of both the amendments and the amended legislation.

271. Based not only on the general importance of statutory objects for interpretation, but also the specific importance and weight which has been placed on objects in the design of the FW Act, it is critical that any improvements to the bargaining framework in 2021 be not only framed effectively, but also be underpinned by suitably revised objects.

272. The FWC and Courts need to look to revised objects to ensure that improvements to the system can deliver on their intent. The importance of such an approach is reinforced by adverse decisions in recent years that seem to many users of the system to be at odds with the intent and schema of the legislation.

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Interpretation is inevitable, and should be properly supported

273. There are various concepts in the agreement making amendments of the Bill, and existing agreement making provisions, that are inescapably interpretive or subjective, and for which decision makers in the FWC and the Courts will need sufficient guidance and support. These include:

a. What are and are not exceptional circumstances.[53]

b. The public interest.[54]

c. What is reasonably foreseeable in regard to future patterns or kinds of work, or types of employment.[55]

274. Revised objects do not remove discretion from decision makers (in this case the FWC), they provide the FWC with a framework of considerations to guide its exercise of discretion. Through objects, the Parliament assists courts and tribunals in setting its expectations and parameters for their decision making. It is on this basis that ACCI urges the Committee recommend amending the objects as proposed.

Current and Proposed

275. To assist the Committee, the following table compares the existing Objects and the proposed Objects, with changes underlined:

Current s 171	Proposed new s 171
Objects of this Part The objects of this Part are:	Objects of this Part The objects of this Part are:
(a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits; and	(a) to provide a simple, flexible, fair <u>and balanced</u> framework for employers and employees to agree to terms and conditions of employment, particularly at the enterprise level; and (b) to enable collective bargaining in good faith for enterprise agreements that: (i) deliver productivity benefits; and (ii) <u>enable business and employment growth</u>; and (iii) <u>reflect the needs and priorities of employers and employees</u>; and
(b) to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements, including through:	(c) to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements, including through:

[53] Proposed s 255AA(2), Sch 3, Part 10, Item 57 (Bill p.59)
[54] Proposed s 189(1A), Sch 3, Part 5, Item 19 (Bill p.43)
[55] Proposed s 193(8)(a)(ii), Sch 3, Part 5, Item 25 (Bill p.44)

Current s 171	Proposed new s 171
(i) making bargaining orders; and (ii) dealing with disputes where the bargaining representatives request assistance; and (iii) ensuring that applications to the FWC for approval of enterprise agreements are dealt with without delay.	(i) making bargaining orders; and (ii) dealing with disputes where the bargaining representatives request assistance; and (iii) ensuring that applications to the FWC for approval of enterprise agreements are dealt with in a timely, practical and transparent manner.

276. None of the existing protective elements are lost or diminished. Fairness remains, good faith remains, as do the references to orders and assistance.

277. The proposed additions to the Objects are entirely merited and consistent with the system. ACCI cannot see anything objectionable in emphasising / specifying:

a. The importance of agreements enabling business and employment growth.

b. The importance of agreements reflecting the needs and priorities of employers and employees.

c. Timely, practical and transparent approvals.

PART 2 – NOTICE OF EMPLOYEE REPRESENTATIONAL RIGHTS (NERR)

278. The NERR is a statement which employers must give employees at a prescribed point in the bargaining process which sets out:

a. What an enterprise agreement is.

b. How it will be approved.

c. Employee rights to appoint bargaining representatives, including rights to be represented by trade unions.

d. Where employees can go for further information and assistance.

279. The NERR is also a notice of the employer's intention to secure an enterprise agreement and helps to define the scope of employees proposed to be covered by the agreement.

The NERR should be abolished or become a FWC responsibility

280. Employers appreciate why then Minister Gillard imposed this requirement in the 2000s, akin to making employers issue a Product Disclosure Statement on bargaining. However, in practice, the NERR has proven to be:

a. Arguably unnecessary as bargaining successfully proceeded for some years without such a requirement.

b. One more element of over-regulation and over prescription in our system which employers can get wrong, which can delay wage increases and operational efficiencies, and which can create uncertainty and threaten mutual trust and confidence.

c. Unrewarding for employers. If employers provide employees with prescribed information on choosing their bargaining representatives, this should preclude any latter applications from associations or organisations that were not chosen, at any stage of the process. The answer to a union or unregistered association popping up at the approval stage seeking to object should be that employees were informed of their representation options in the NERR and did not choose the union, so it should have no role and not be heard. However, the exercise of issuing the NERR does not provide that level of assurance or certainty.

281. In the absence of outright removal, the NERR process needs to be improved.

Problems with the NERR

282. Under the approach proposed in Schedule 3, Part 2 the FWC will control the content of the NERR and thereby massively reduce scope for error. The amendments Appear simple but will be a powerful and significant change towards making the system more useable and reliable.

283. The FWC currently produces a five-page guide to preparing a one-page NERR[56], in response to the regular problems experienced in meeting the notification obligations. This illustrates the complexity and scope for error in the current FW Act.

284. The FWC indicates to users that "The notice is given by providing employees with an exact copy of the Notice of employee representative rights provided in Schedule 2.1 of the Fair Work Regulations 2009. The notice cannot contain any other content." This points to two problems, employers adding content or serving erroneous or out of date information. The proposed amendments will address both these problems.

285. Under the existing rules the FWC even provides an NERR generator[57], yet errors are still made beyond the ken and capacity of employers, and even many expert and regular users of the system. As stressed, these NERR based errors often trip up or doom agreement making without any actual risk to employees and their chosen representation. This delays wage increases and threatens good relations at work.

286. There is every good reason to genuinely standardise the form and content of the NERR, as proposed.

287. The PC examined problems with the NERR finding that it contributes to making enterprise bargaining more rigid and costly than necessary, and that:

a. Procedure should be made the servant not the king in the agreement system[58]:

b. Substance not form should prevail.

c. Stapling together documents had led an employer to fail the NERR requitements.[59]

[56] https://www.fwc.gov.au/awards-agreements/agreements/make-agreement/enterprise-bargaining/guide-notice-employee
[57] https://www.fwc.gov.au/download-notice-employee-representational-rights
[58] PC (2015) Review of Australia's Workplace Relations Framework, Final Report, p.662
[59] Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union [2014] FWCFB 2042 (2 April 2014), cited in the 2015 PC Review Final Report, p.34.

d. Agreements have been deemed invalid because the NERR contained an omission reading '[Name of employer]', notwithstanding that the letterhead on the notice contained the employer's name.

e. An agreement was rejected because the employer had inadvertently issued a NERR template from the FWC website which had not been updated, and as such was technically not compliant.

288. Such overly technical approaches have real world implications:

> *A FWC decision invalidating a NERR can particularly delay an agreement because the parties must issue a new NERR and wait at least 21 days after issuing it before the agreement can be approved by holding another employee vote.*[60]

289. As stressed, such delays threaten mutual trust and confidence, and they delay both pay rises and productivity gains (to the extent they even remain possible under our agreement making system).

290. Subsection 188(2) was inserted into the FW Act in December 2018[61] in recognition of these problems, however:

a. NERR problems still occur.

b. NERR problems and risks remain notorious and unacceptably discourage employers from bargaining.

c. Risks of error remain unacceptably high, damaging employers and employees.

d. This can be fixed more simply and comprehensively, protecting both employees and employers as now proposed.

FWC Publication

291. The primary change in relation to the NERR is Item 3 of Schedule 3, Part 2, which seeks to insert a new s 174(1B). This would see the FWC publish the NES in a prescribed form on its website. Employers would then need to do no more to discharge their responsibilities than provide a link to employees.

292. This will ensure employees receive the NERR in standard and consistent form, and that in all cases they can receive the same, up to date information on representation in a form which employers can be confident the FWC is going to accept (as it comes from the FWC).

293. This will be a powerful and impactful reform that will significantly improve and de-risk a known and notorious problem in the bargaining system.

294. The FWC already seeks to provide as much assistance and clarity as it can on the NERR, being well aware that the current rules create undue risks of error and rejection, including in circumstances which do not create any detriment or risks for employees.

a. Errors and problems emerge when employers are required to amend and customise these proforma documents and send them to their employees.

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[60] PC (2015) Review of Australia's Workplace Relations Framework, Final Report, p.666
[61] Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018 (No. 170, 2018)

b. This amendment would cut out the middle man and remove unnecessary scope for error.

c. The pro forma or template the FWC already prepares would become the information employees actually receive, in standard form, de-risking want is currently an unacceptably / unjustifiably risky process.

How this should work in practice

295. We hope that the impact of these amendments will include:

a. The FWC shifting from publishing proformas and guides to the NERR, to publish the actual NERR, removing scope for error.

b. Employers being able to give employees an NERRS printed from the FWC website to satisfy s.173, or even better, it being sufficient to give employees a link to the FWC website / PDF that will satisfy the notice requirements, and always be up to date and accurate.

Union objections

296. The PC received objections to fixing problems with the NERR in its 2015 review:

> *Some employee groups opposed this proposal, arguing that any loosening of the prescriptive requirements would allow employers to mislead employees as to their representational rights, and thus undermine the capacity for unions to act as bargaining representatives for employees (Community and Public Sector Union (CPSU) (SPSF Group), sub. DR270; Australian Council of Trade Unions (ACTU), trans., pp. 88–9).*
>
> *However, the Productivity Commission is unconvinced by these arguments. The proposed approach would not give employers carte blanche with respect to the NERR's content. Were an employer to issue a NERR which appeared to be materially misleading, it is likely that the FWC would reject it. Preventing the small possibility that a misleading NERR may slip through the FWC's discretion does not justify the tangible costs and delays to bargaining participants that arise from the prescriptiveness of the existing rules.*[62]

297. Such objections were found to be baseless in 2015, and they carry even less water now in relation to the Schedule 3, Part 2 of the current Bill:

a. A standard NERR, issued by the Commission will be more accurate and consistent.

b. Standardisation will reduce rather than increase scope for employees to be misled.

c. No information on union membership or rights will be omitted.

d. There will be reduced scope for any misleading NERRs.

[62] PC (2015) Review of Australia's Workplace Relations Framework, Final Report, p.667

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Time frames

298. Item 2 of Schedule 3, Part 2 would amend s 173(3) to:

> *Extend the timeframe in which the employer must give the notice from the current 14 days to 28 days, to give employers more time to comply with the requirement to give the notice and reduce the risk of agreements being challenged on technical grounds at the approval stage.*[63]

299. ACCI agrees with justification for this change in EM "This will make compliance with the NERR requirements easier and reduce the likelihood of errors in both providing the NERR on time and correctly."[64]

300. Agreement making is highly complex, with multiple deadlines and processes. ACCI supports greater flexibility and scope to navigate these rules and urges the Senate to consider this amendment on that basis.

301. This is also a valid, practical response to COVID-19. In a period in which more employees are working from home, more time may be required to provably distribute employment information to them, including the NERR. COVID safe operations make information distribution exercises such as the NERR more difficult and more time needs to be allowed.

302. ACCI can see no increased risk to employees or detrimental impact of extending this timeframe:

a. There will be no change to the scope of information in the NERR or the communication of representational information to employees to be covered by enterprise agreements. Employees will receive no less information or protection from the NERR than they receive now.

b. There is no change to the requirement to take reasonable steps to give the NERR to employees (s 173(1)).

c. Employers will still need to give the NERR as soon as practicable (s 173(3)).

d. The 28-day period will remain the maximum or default period, beyond which reasonable practicability could not be asserted.

e. Employees will continue to receive the NERR and the information it provides prior to voting on any proposed agreement. The following remains in s 173 unchanged:

> *Note: The employer cannot request employees to approve the agreement under section 181 until 21 days after the last notice is given (see subsection 181(2)).*

PART 3 – PRE-APPROVAL REQUIREMENTS

303. Part 3 of Schedule 3 would reframe what are currently framed as obligations to give copies of agreements to the more accurate catch all of 'Pre-Approval Requirements'.[65]

[63] Drawn from the EM, p.lviii
[64] EM, p.lviii
[65] Schedule 3, Item 5

304. The requirements of existing s 180(2) regarding information and copies of the agreement are expanded upon through a new general requirement for the employer to take reasonable steps to ensure that the relevant employees are given a fair and reasonable opportunity to decide whether or not to approve the agreement.[66]

305. Employers will continue to be obliged to provide copies of the agreement to the employees who will vote on it and be covered by it, along with any incorporate material that is not publicly available. This is a practical paper saving change that is likely to see employers not required to for example print out legislation or other publicly available material.

306. Nothing existing beyond this seems omitted, and in particular the obligations requiring notifications on voting and explanation are retained in full (existing s 180(5) and (6) are combined into a new 180(3)(c).

307. The characterisation in the EM seems accurate:

> *The amendments in Part 3 take a purposive approach to the pre-approval requirements, while maintaining the protections they provide to employees when making an enterprise agreement.*
>
> *Employers would still be required to give employees a fair and reasonable opportunity to decide whether or not to approve the agreement prior to any vote, which may include seeking advice from their union.*[67]

PART 4 – VOTING REQUIREMENTS

308. Very narrow and specific changes are proposed to voting to approve enterprise agreements. These changes will improve the democratic approval of agreements by the employees who work under them and will in no way diminish or threaten democratic approval, nor detract from employee rights.

309. Consistent with one of the key themes or threads through these amendments, the changes in Part 4 adjustment the execution of the rules to address well-recognised practical problems, or ambiguities in the agreement making and approval system. In doing so they will help make agreement making quicker, more reliable, more consistent and more transparent.

310. The changes respond to tribunal or court decisions which clearly invite remediation through legislative amendment (below). Regulation as complex, wide ranging and detailed as the FW Act needs to be revisited semi regularly to stay on course, like trimming the sails on a ship. Labor in government found as much in needing to significantly review and amend its new fair work system in 2012.

311. Agreement approval under the FW Act will continue to be majoritarian, in which employees vote on the agreements which will cover them. Only where a majority approves changes in an enterprise agreement will they come into effect, and they will remain subject to various protective tests and process, including the requirement that employees be better off. Minorities that do not support agreements will also enjoy protections against discrimination and the inviolate protections of the NES, as they do now.

[66] Proposed new s 180(2).
[67] EM, p.cxiv

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Importance of clarifying which casuals can vote on agreements

312. The amendments seek to clarify when casual employees can vote to approve a proposed enterprise agreement, which is a clear area of ambiguity after court and tribunal decisions. This responds to the issues exposed by:

a. *National Tertiary Education Industry Union v Swinburne University of Technology* [2015] FCAFC 98

b. *Appeal by Shop, Distributive and Allied Employees Association* [2019] FWCFB 7599.

313. The amendments will assist in ensuring the right cohorts of employees are notified, receive proposed agreements and explanations of them, and are then invited to vote. Clarity and delineation is an important measure for fairness and enforceability in this area.

314. It is not surprising this is an area of delineation and a need for clarity. Casuals are inherently able to be engaged by the day or session and it is currently not sufficiently clear which of them can or should vote for an enterprise agreement. For employers there is ambiguity on who needs to be given copies of the proposed agreement and notified of the vote etc, and the amendments will fix that.

315. The amendments take an established concept under the FW Act (the Access Period) and use it to delineate which casuals need to be invited to vote for an agreement. The access period for a proposed enterprise agreement is the 7-day period ending immediately before the start of the voting process to approve the proposed enterprise agreement. The access period consists of seven clear calendar days.[68]

316. The impact of the amendments is clearly explained in the EM, at 219:

> *An employee will not be entitled to vote on an agreement if they commenced employment after the time the request to vote is made, or if they are a casual employee who only performed work before or after the access period, but not during the access period.*

317. Employers welcome the following clarification:

> *This approach also ensures that employers can clearly identify which casual employees are entitled to vote to approve an agreement, in the period between the end of the access period and immediately before the request to vote is made.*[69]

318. The Government appears to have settled on a practical, clear approach which employers can work with, and which will provide clarity to employees and unions.

319. In particular the approach commended to the Senate seems to have avoided the difficulties of attempting to formulate voting qualifications based on:

a. A minimum period of employment for a casual to be eligible to vote.

b. Employment on a regular and systematic basis.[70]

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[68] https://www.fwc.gov.au/enterprise-agreements-benchbook/voting/voting-process#field-content-0-heading
[69] EM, para 220, p.41
[70] Paragraph 384(2)(a)(i)

c. The employee having a reasonable expectation of continuing employment.[71]

Item 14, Subsection 181(1)

320. This amendment will make the following changes.

Current s 181(1)	Proposed new s 181(1)
Employers may request employees to approve a proposed enterprise agreement	No change
(1) An employer that will be covered by a proposed enterprise agreement may request the employees employed at the time who will be covered by the agreement to approve the agreement by voting for it.	(1) An employer that will be covered by a proposed enterprise agreement may request the following employees who will be covered by the agreement to approve the agreement by voting for it: (a) the employees employed at the time the request is made, other than as casual employees; (b) the casual employees who performed work at any time during the access period for the agreement.
(2) The request must not be made until at least 21 days after the day on which the last notice under subsection 173(1) (which deals with giving notice of employee representational rights) in relation to the agreement is given.	No change
(3) Without limiting subsection (1), the employer may request that the employees vote by ballot or by an electronic method.	No change

Items 15 and 16, Paragraphs 207(1)(a) and (b), and (2)

321. These are again proposals to repeal and replace, as follows:

Current s 207	Proposed new s 207
Variation of an enterprise agreement may be made by employers and employees	No change
Variation by employers and employees (1) The following may jointly make a variation of an enterprise agreement:	

[71] Paragraph 384(2)(a)(ii)

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Current s 207	Proposed new s 207
(a) if the agreement covers a single employer--the employer and: (i) the employees employed at the time who are covered by the agreement; and (ii) the employees employed at the time who will be covered by the agreement if the variation is approved by the FWC; (b) if the agreement covers 2 or more employers--all of those employers and: (i) the employees employed at the time who are covered by the agreement; and (ii) the employees employed at the time who will be covered by the agreement if the variation is approved by the FWC. Note: For when a variation of an enterprise agreement is made , see section 209.	(a) if the agreement covers a single employer—the employer and the affected employees for the variation; (b) if the agreement covers 2 or more employers—all of the employers and the affected employees for the variation.
(2) The employees referred to in paragraphs (1)(a) and (b) are the affected employees for the variation.	(2) The affected employees for the variation are the employees who: (a) are covered by the agreement, or will be covered by the agreement if the FWC approves the variation; and (b) are either: (i) employed at the time a request is made under subsection 208(1) in relation to the variation, other than as casual employees; or (ii) casual employees who performed work at any time during the access period for the variation. Note: For the access period for a variation, see subsection 180(4) as that subsection has effect in accordance with subsection 211(3).
Variation has no effect unless approved by the FWC (3) A variation of an enterprise agreement has no effect unless it is approved by the FWC under section 211.	No change
Limitation--greenfields agreement (4) Subsection (1) applies to a greenfields agreement only if one or more of the persons who will be necessary for the normal conduct of the enterprise concerned and are covered by the agreement have been employed.	No change

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PART 5 – BETTER OFF OVERALL TEST (BOOT)

322. Protections against disadvantage in agreement making have been the most politically contentious parts of our IR system for at least 15 years. They are easily misunderstood and misrepresented.

323. We urge the Committee to pay careful regard to the proposals in Part 5 of Schedule 3, how they have been drafted, what they are designed to deliver, and how they will work. We urge the Committee to be wary of misrepresentation or exaggeration regarding these changes.

324. Throughout the working group process that informed these amendments, it was stressed that employees not be left worse off. ACCI understands the amendments have been drafted with a firm view to delivering on such a parameter.

325. Tests of advantage and disadvantage are complex and contentious matters for any IR reform package, no less so in seeking to address problems in our system in the context of existential crisis. Nonetheless the firm feedback of employers is that practical problems abound in the application of the BOOT and must be fixed to restore confidence in the system and to support it being able to play the role Australia needs it to apply in supporting recovery and jobs.

326. Australia simply cannot afford to continue to accept a failed enterprise bargaining system in seeking to navigate the ongoing ramifications of a global pandemic.

Reasonable foreseeability

327. One of the most common complaints regarding the application of the BOOT under the existing FW Act is that consideration of prospective award covered employees under s 193 exceeds consideration of reasonable scenarios and strays too often into the improbable, unforeseen and unplanned.

328. Employer's report being asked to give undertakings or explain the application of shift provisions when they don't use shift work, report being asked for assurances for classifications they do not employ under and have no intention to employ under, report being asked to address scope of work under awards that they do not undertake and have no plans to undertake, and report being asked to pay or account for disability or other allowances that are fundamentally inapplicable to their operations.

329. In the working groups one major retail employer reported being asked to account for a cool room allowance when none of their operations include refrigeration or sell food.

330. This illustrates the type of bureaucratic requirements that overpower and discourage employers from using the bargaining system under the current FW Act.

331. Being required to give assurances in relation to work, employment or hours which in no way reflect the running of your business communicates a system which is out of touch, impractical, and elevates form over substance. It also gives the impression of a system that goes looking for problems and reasons not to approve agreements, rather than looking for reasons to give effect to what employers and employees are able to agree upon, and to help them retain and increase job and business security

332. ACCI is confident the experienced practitioners who sit on the FWC do not want to be directed to take or impose impractical approaches at odds with their experience. Proposed s 193(8)(a)(ii) seems a practical, balanced and reliable solution to such problems.

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333. It retains the requirement that the BOOT be satisfied in regard to perspective employees but seeks to apply it not to all possible or theoretical circumstances, but to those that are reasonably foreseeable.

334. Thus, a retail outlet that may conceivably open on a Sunday may be asked to address the applications of Sunday penalty rates, but an operation in a centre which is not open on Sundays may not be asked to do so. A business that may well employ under a higher classification of an award may be asked to address that classification for the application of the BOOT, but a small business in which the only qualified tradesperson is the owner may not be required to do so. A business with a cool room or selling food may need to account for a cold room allowance, but a furniture store would not.

335. The test of reasonable foreseeability will clearly be interpreted and applied by the FWC, likely in a full bench 'test case' in which peak union an employer interests would be invited to be heard, and able to communicate their conception of how this more balanced and practical approach should be applied.

336. At all times the FWC will interpret such a requirement in line with its terms, in reflection of the purpose of balance in the legislation, including its protective elements , but we hope with a more practical and proportionate approach which focuses on clarity and reliability in approvals.

337. Employers see no scenarios in which the proposed changes could lead to any diminution of protections or the benefit of agreement making in practice.

338. Reasonable foreseeability was chosen for the construction all this important refinement to the BOOT based on it's already being included as a test elsewhere in the FW Act.[72]

339. We also invite the Committee to consider the obverse of this proposal.

a. Would it be practical or merited to continue to ask, or somehow encourage the FWC to require consideration of matters which were unforeseeable on any reasonable basis?

b. Or to put employers to proof or to delay agreements that have been agreed to by employees who are looking for a pay increase, based on fanciful or unrealistic scenarios?

Overall benefits including non-monetary benefits

340. The EM neatly explains the case for the further proposed change in this area (proposed s 193(8)(b), as follows:

> *240. Paragraph 193(8)(b) provides that the FWC may have regard, in determining whether an enterprise agreement passes the BOOT, to the overall benefits (including non-monetary benefits) an award covered employee or prospective award covered employee would receive under the agreement when compared to the relevant modern award.*
>
> *241. Non-monetary benefits may include, for example:*
>
> *- flexible working arrangements;*
>
> *- time off in lieu;*

[72] s 423(6)(b)

> *- time off to participate in community service activity;*
>
> *- provision of training; or*
>
> *- health care benefits.*
>
> *242. This provision makes clear that the BOOT requires consideration of agreement terms that are more beneficial and less beneficial, and an overall assessment of whether an employee would be better off under an agreement compared to the award, and that non-monetary benefits are to be taken into account in this exercise. This reflects case law concerning the BOOT (see for example Armacell Australia Pty Ltd [2010] FWAFB 9985, Solar Systems Pty Ltd [2012] FWAFB 6397).*

341. This is about listening to employees and what they value and pursue through bargaining. It does not displace financial assessment or calculation that will remain the norm and core of the BOOT but expands and complements it where necessary to account for what employees value and prioritise.

342. The impact of refusing to make this change would be to accept that employers should continue to refuse to act on employee priorities on flexible working, time off, community service, training or health care (i.e. non-monetary benefits valued by many employees).

343. Rejection would impose the values and priorities of others above those of the employees that will actually work under an agreement.

344. There is one concern which should be stated and disposed of. The FWC will at all times discharge its responsibilities protectively, and sceptically in such an area and it would be at pains to ensure that employees in such circumstances understood very well what was being proposed and genuinely understood any value to be accorded to a non-monetary benefit.

Weight in BOOT considerations

345. Proposed s 193(8)(c) addresses the determinative weight to be attached to employee and employer views, and those of bargaining representatives, in assessing the BOOT. Again, this seems to be about according greater weight and significance to what those who will actually work under a proposed agreement value and prioritise.

346. ACCI was particularly struck by this from the EM:

> *Such views may inform the FWC about the subjective value of particular terms of the agreement, including terms that confer non-monetary benefits. While the FWC must have regard to such views, this does not mean the FWC is obliged to decide that an agreement passes the BOOT on that basis.*[73]

347. Nothing will preclude FWC scepticism and examination of any proposed non-monetary benefits, which may include regard to the examples in the EM. In all, it seems proposed s 193(8)(c) will assist the FWC's approach to considering the BOOT in a wider range of circumstances.

[73] EM, Item 244, p.46

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PART 5 – EMERGENCY / CRISIS RESPONSE AGREEMENTS – s 189

348. Item 19 in Part 5 of Schedule 3 specifies some of the temporary circumstances in which the FWC could approve enterprise agreements that do not pass better off overall test, building on the long-standing s 189 exception introduced by Labor when last in government. These are proposed to be sunsetted after 2 years.

349. Some argue these outcomes (an emergency agreement that may not meet the BOOT in full) can already be secured from the FWC using existing s 189, however:

a. It is suitable that the COVID-19 pandemic, the greatest threat to businesses and jobs in living memory, be specified and recognised in the designated legislative avenue for employers and employees to accommodate and successfully navigate exceptional circumstances that threaten both jobs and businesses.

b. Redundancy or duplication in drafting, which ACCI sees as far from clear cut, is not of itself an argument against the capacity proposed here.

c. Such an argument would stand only if absolutely unambiguous that s 189 agreements can be used to address the negative impacts of COVID-19. This is not the case.

i. ACCI is not aware of FWC decisions that support such a view.

ii. It is appropriate that Parliament make this unambiguous as a temporary emergency measure given the ongoing threats to businesses and jobs.

350. The threat of COVID-19 is not over. Recent community transmission and lockdowns have shown us how rapidly threats to businesses and jobs can emerge, as can job and business-destroying government restrictions.

351. JobKeeper is due to end and some businesses and employees will face very difficult transitions and choices in coming weeks.

352. It is also clear that the geopolitical risks of COVID-19 may worsen and could create the circumstances that s 189 is designed to address. For all Australia's comparative epidemiological and economic policy successes in 2020, we may still, in a very small number of cases, require the assistance of an amended s 189.

The Committee will need to sort fact from fiction

353. Since their introduction, accusations of potential misuse have been levelled against these changes. Such accusations are baseless and quite at odds with how any agreements made using s 189 would operate in practice and the circumstances they are asked to address.

354. Key points on the s 189 amendments:

a. It provides scope to approve emergency agreements on an exceptional basis, to save businesses from going under and jobs being lost.

b. Such scope has been part of the system under both Labor and the Coalition, for at least two decades. The current rules, s189, were legislated under the Rudd Government

c. These measures were used in the 1990s recession, not widely and without any influx of proposals, but they did help preserve operations and jobs.

d. Such agreements will only be approved in exceptional circumstances.[74] Any employer seeking to have an agreement approved that does not meet the BOOT will be made to show cause and put to significant proofs by the FWC, which would likely sit as a Full Bench to consider any application under an amended s 189.

e. The views of employees and their bargaining representatives will be actively sought during the process. To be considered, the agreement must have support from the majority of employees, through a vote. The employees will have had the intended effect of the agreement explained to them, and they will have received copies along with all the appropriate pre-approval requirements.

f. The FWC must expressly determine that it would not be contrary to the public interest to approve such an agreement.[75]

g. The FWC will require evidence, not only of the exceptional circumstances, but also how the agreement is going to keep the business in business and employees in jobs. Opportunistic cost cutting is just not going to get over the line or be permissible in relation to s 189.

h. Employers may also need to bring evidence of commensurate cost reductions in other areas of the business, including in managerial or executive pay.

i. Any number of conditions could be made for approval by way of undertakings including the FWC requiring the reporting back on the progress of the enterprise under the agreement.

j. The FWC can only approve such agreements for up to 2 years.[76]

355. The new changes, proposed s.189(1A) would have the following effect:

a. Additional capacity and direction to consider the views of employees, employers and bargaining representatives.

b. Additional capacity and direction to consider the circumstances of employers and employees.

c. An express direction to consider the interests and impact on any trade union that wants to be covered by the agreement.

d. Scope to consider the impact on the enterprise of COVID-19 and its impact on enterprises, markets, custom, opening and availability, and any other matters able to be considered relevant by the FWC.

356. Under proposed Item 23, additional undertakings can be required from employers to secure such agreements. This could include revisiting an agreement when the crisis passes or assurances about how particular capacities will operate / employees will be protected.

357. It seems clear that an employer would only be able to propose such an agreement in the most extreme negative circumstances, where, for example, COVID-19 was endangering the enterprise or jobs.

[74] s 189(2)
[75] s 189(2)
[76] s 189(4)

It would seem anomalous for any enterprise to argue it was selling so much PPE (for example) due to COVID-19 that it warranted being able to make an agreement that did not meet the BOOT, or that it had encountered higher demand for its services during COVID.

358. However, we have heeded criticism that this is not clearly expressed enough in proposed paragraph 189(1A)(a)(iii). This could usefully be clarified by the amendment recommended below.

Correcting fictions

359. Charges have been levelled against these proposed amendments which are quite at odds with how they would operate and the circumstances they address. Such claims also pay insufficient respect to the FWC and how it approaches its statutory duties.

360. Such claims threaten to trivialise the very real threat of business and job losses due to COVID-19. Other claims attempt to demonise the proposed changes to s 189 through exaggeration and attempts to instil baseless fears. The following identifies, and responds to such claims[77]:

Claim	Facts
These changes will allow for the scrapping of penalty rates for millions of employees. Employees could lose penalties for working on Christmas Day, Boxing Day, New Year's Day and Australia Day.	If s.189 agreements became widespread or common for millions of employees Australia would be in a Depression / a massive economic and jobs crisis. An employer would need to show how any changes to rates were not contrary to the public interest. An employer would need to satisfy the FWC that penalty rates would need to change in preference to addressing other costs. An employer would need to secure majority employee support in a vote of those the agreement would apply to. The FWC would put the employer to proof that the employees understood what they were voting for. The FWC is going to question an employer on why it shouldn't simply not trade on these days if it is not making money. The FWC is almost certain to find reductions in penalty rates are not merited, nor in the public interest.
Workers could lose their weekend, early morning and late-night shift penalties under these changes.	As set out above, only if the majority vote for such changes and the FWC finds they would be in the public interest, and an appropriate response to the adversity facing the business. This is not going to happen.

[77] Including here: https://www.tonyburke.com.au/media-releases/2021/1/14/morrisons-1170-summer-holiday-pay-cut-for-workers

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Claim	Facts
These changes abolish the BOOT test.	This is simply untrue. The BOOT test will remain in the FW Act, in an improved form. Creating an exceptional avenue for exceptional circumstances is not abolishing anything.

361. It was particularly disappointing to read claims that nurses and those who 'got us through the pandemic' will have their pay cut or 'lose penalty rates'.

a. ACCI cannot conceive of any health employer being in such adverse circumstances that warrant the use of s 189 or proposed s 189(1A).

b. Our understanding is that COVID-19, testing, treatment, isolation, and now vaccination has increased demand for health workers and the viability of many health employers.

Recommendation 3.1

Proposed s 189(1A)(a)(iii) be amended as follows:

> *The negative impact or impacts of the coronavirus known as COVID-19 on the enterprise or enterprises to which the agreement relates; and*

PART 6—NES INTERACTION TERMS

362. In another practical response to real world problems in bargaining, Part 6 of Schedule 3 will require agreements to include a new model term that explains / clarifies the interaction between the NES and enterprise agreement terms (or indeed any omissions on such matters).

363. As the EM indicates:

> *Item 36 repeals paragraph 186(2)(c). When deciding whether to approve an enterprise agreement, the FWC no longer needs to be satisfied that the terms of the agreement do not contravene section 55 (which governs the interaction between the NES and enterprise agreements)…*
>
> *Instead of this process, new section 205A requires enterprise agreements to include the model NES interaction term.*

364. This amendment addresses a key problem experienced in having agreements approved, which is causing delays and frequently requiring undertakings. It would fix more than one of the top 10 problems for agreement making identified by the FWC on its website[78]. As indicated in the EM:

[78] Top 10 Tips for the Agreement Making Process, https://www.fwc.gov.au/awards-agreements/agreements/making-agreement/10-tips-agreement-making

> *This amendment simplifies the enterprise agreement approval process by avoiding the need for the FWC to examine each term of an agreement to determine whether it contravenes section 55.*
>
> *Instead the FWC will only need to consider whether the agreement includes the model NES interaction term.*[79]

365. Where agreements fail to include the model term, they will be deemed to do so. There is no loosening or watering down of protections in the NES, in fact the opposite, the precedence of the NES over any conflicting agreement terms will be made clearer and more consistent.

366. This should help avoid the need for undertakings in circumstances which do not warrant them, and in which there is no intent to apply approaches inconsistent with the NES.

367. Regular problems regarding the interaction of agreements and redundancy, shift work and notice of termination will be removed / fixed for all proposed agreements without requiring the revisiting of all / most agreement applications during approval.

368. These amendments will address multiple of the "Common issues or defects in applications to approve single enterprise agreements" which the FWC has identified and sought to provide information on to applicants for agreement approval.[80] Rather than requiring agreement parties to be recontacted and asked to amend proposed agreements and provide undertakings, problems or ambiguities may be clarified centrally, and consistently.

369. Problems currently arise where for example:

a. The agreement does not describe or define an employee as a shift worker for the purposes of the NES, but the modern award that covers the employee does so.

b. An agreement attempts to credit annual leave on a different basis than the NES.

c. The agreement provides that personal/carer's leave accrues at a certain point in time eg 'on the anniversary of your appointment'

d. The agreement limits the amount of personal leave that can be taken as carer's leave.

e. The agreement does not provide carer's leave for casual employees.

f. The agreement lists 'all' public holidays but does not include other State/Territory public holidays.

370. The status quo is creating delays and imposing costs and uncertainty where unmerited on these issues, and in situations in which there is no intention to depart from either statutory or award protections.

371. In seeking to address such problems the specific, existing advice of the FWC is as follows:

[79] EM, p.48
[80] https://www.fwc.gov.au/documents/documents/factsheets/making-compliant-agreement-applications.pdf

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> *TIP: Many issues in relation to the NES may be addressed by including an 'NES precedence' term in the agreement that provides that in the event of any inconsistency with the NES, the more beneficial term will apply to the extent of that inconsistency. An example of such a clause is:*
>
> *"This Agreement will be read and interpreted in conjunction with the National Employment Standards (NES). Where there is an inconsistency between this agreement and the NES, and the NES provides a greater benefit, the NES provision will apply to the extent of the inconsistency."*

372. ACCI understands that the amendments in Schedule 3, Part 6 essentially seek to make universal and consistent precisely the remedial measures already recommended by the FWC. Rather than encouraging applicants to have an NES Precedence Term in their agreements, one will be implied / imported into all agreements.

PART 7 – FRANCHISES

373. ACCI supports but does not seek to specifically address this Part of Schedule 3.

PART 8—TERMINATING AGREEMENTS AFTER NOMINAL EXPIRY DATE

374. Part 8 is a direct response to union concerns, and is directly contrary to:

a. Employer views, priorities and experiences,

b. Data and evidence.

375. Employers do not share the concerns raised by the ACTU with respect to terminating agreements and continue to see such claims as exaggerated. The ACTU has said of the existing rules on the termination of expired agreements:

> *This practice has become a favourite of companies looking to bully their workforces into submission, and the precedent set up the Fair Work Commission's rulings on disputes at Aurizon has allowed hundreds of agreements to be terminated.*[81]
>
> *The ACTU will campaign against this appalling treatment of working people… everywhere that companies are using termination of agreements as blackmail – until the rules are changed.*

376. Inclusion of measures to address this concern is direct evidence that the Bill should not be viewed as solely addressing employer priorities, or as somehow inherently biased against unions or employees.

377. The inclusion of these amendments is evidence that union concerns – even where exaggerated and contrary to the facts - are being addressed in this package of amendments.

[81] https://www.actu.org.au/actu-media/archives/2017/streets-betrays-workers-by-terminating-agreement-and-slashing-wages-by-46

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Union concerns are exaggerated / baseless

378. The reality is that:

a. The overwhelming majority of terminations of expired agreements are neither controversial, nor opposed.

b. The FWC will only terminate an agreement which has reached its nominal expiry date under s 226, where it is satisfied that it is not contrary to the public interest to do so.

c. Applications to terminate enterprise agreements beyond their nominal expiry date have not significantly increased after the Aurizon decision in 2015[82]. The 2018-19 FWC Annual Report clarified that agreement termination has not become the norm:

Table 23: Applications to terminate enterprise agreements – applications lodged and finalised

	No. lodged				No. finalised			
Matter type	2018–19	2017–18	2016–17	2015–16	2018–19	2017–18	2016–17	2015–16
FWA s.222 – Application for approval of a termination of an enterprise agreement	221	130	97	92	222	124	93	92
FWA s.225 – Application for termination of an enterprise agreement after its nominal expiry date	263	388	303	311	266	384	297	310
Total	484	518	400	403	488	508	390	402

FWA = Fair Work Act

Note: The number of applications finalised does not equal the number of applications lodged in the financial year because some applications are finalised outside the year in which they are lodged

Update: 323 such applications were lodged in 2019-20.

d. Ample protection is already built into the FW Act:

i. The FWC may only terminate a nominally expired agreement if satisfied it is not contrary to the public interest to do so.[83]

ii. The FWC will only terminate an out of term enterprise agreement where appropriate having considered the views of employer, employees and any union covered by the agreement.[84]

iii. The FWC will only terminate an out of term enterprise agreement where appropriate having considered the circumstances of the employer, employees and any union covered by the agreement.[85]

[82] Aurizon Operations Limited; Aurizon Network Pty Ltd; Australia Eastern Railroad Pty Ltd [2015] FWCFB 540
[83] s 226(a)
[84] s 226(b)(i)
[85] s 226(b)(i)

iv. The FWC will only terminate an out of term enterprise agreement where appropriate having considered the likely effect of terminating the agreement on employer, employees and any union covered by the agreement.[86]

Position

379. This is not an amendment to the FW Act that ACCI can support. In addition to being of little merit, a three-month delay will preclude the timely termination of expired agreements that are entirely non-controversial and unopposed. It will see the unwarranted perpetuation of agreements which have become inapplicable, misleading or damaging.

380. Alternative options / adjustments could include:

a. Rather than all nominally expired agreements being subjected a mandatory three-month extension / non-termination, those with standing to apply should be empowered to seek a three-month moratorium on termination in appropriate circumstances. So, an application-based model would be better than a blanket three-month prohibition on termination.

b. Adding scope for any of those able to apply for termination of expired agreements under s 225 to do so within the first three months of expiry where able to meet some additional statutory test or considerations. This would be a prohibition model which applicants could argue exceptions to.

c. Allowing application to terminate expired agreements within three months, even if the actual termination could not take effect until three months had elapsed since the nominal expiry date.

d. Scope to terminate some expired agreements 'on the papers' at any point post expiry in non-controversial or un-contested situations through a simpler process. For example, where a project has ceased, or workplace closed. This could be automatic termination by giving notice unless someone came forward to oppose it.

e. **If there is to be some form of three (3) month cooling off or stasis period in which an agreement cannot be terminated, by employer or union, then consideration should be given to the same applying to strikes and lockouts.**

f. **There should be a comparable period in which protected action could not be brought under Part 3-3 of the FW Act for industrial action to replace (and by implication terminate) any agreement beyond its nominal expiry date.**

PART 9—HOW THE FWC MAY INFORM ITSELF

381. One of the disincentives to bargaining under the FW Act is that successful negotiations with employees, top quality advice and representation, and actively endeavouring to comply with the law is increasingly not enough to get an agreement over the line for approval. The existing system remains unreliable, unpredictable and often uncommunicative with applicants in too many instances.

[86] s 226(b)(i)

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382. One problem is that representation under the Act has too frequently been interpreted as a free for all, general public interest matter, rather than a tightly prescribed process for employers, employees and appointed or default representatives.

383. Too often agreement approval is subject to interventions or attempted interventions from:

a. Non-bargaining representatives.

b. Unregistered bodies and persons purporting to be trade unions.

c. Registered trade unions that have not been chosen by employees as their bargaining representatives.

384. Agreement approval should not be a free for all, nor an at large public inquiry open to all comers or potential objectors. Representation to the FWC in relation to the approval of collective agreements should be tightly prescribed, and that prescription needs to be tightened as proposed.

385. Proposed s 254AA exhaustively lists all those who should have an interest and be heard on agreement approval, including:

a. The employer

b. An employee or employees who will be covered by an agreement.

c. Appointed bargaining representatives of the employer or employees, which may be a trade union.

d. Where an agreement is to be varied, a trade union party to that agreement.

386. It should be of particular and pressing concern where any person:

a. Asserts a right or interest in opposing a proposed agreement which the majority of actual employees who will work under it have supported by way of a democratic ballot.

b. Seeks to impose the will / prioritise the will of a minority of employees against the will of the majority, or even the priorities and positions of interests external to a workplace to override those of the actual employer and employees. This seems the height of paternalism and contrary to democratic decision making.

c. Asserts a right or interest in opposing a proposed agreement where they have not been chosen as a bargaining representative by the actual employees who will work under the agreement. Recalling that these employees will have been notified of their representation rights through the NERR.

d. Asserts a right or interest in opposing a proposed agreement with the effect or assumption that they can override employee wishes, choices and priorities.

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Rights to collective bargaining

387. Australia has ratified ILO Convention 98[87], on the right to collectively bargain. Scope for non-workplace interests, and those not chosen by employees to represent them, being able to override their priorities and interests are at odds with this standard.

Will 'exceptional circumstances' be exceptional?

388. ACCI is concerned that the specification of who may be heard on agreement approval in s 254AA(2)(a)-(c)[88] may be undone using the alternative 'exceptional circumstances' avenue provided for in the introductory text of subsection (2).

389. Some unions will assert that every agreement in 'their industry' (sic) that they did not negotiate or that they did not know about prior to lodgement constitutes exceptional circumstances which warrant their intervention, and they will use 'agreements in progress' information from the FWC to facilitate interventions in 100% of such cases.

390. The Bill should be amended to ensure that this is not allowed to occur, or it will risk unions in some industries attempting to make a mockery not only of new s 254AA, but also the wider notion of appointed bargaining representation and freedom of association under the FW Act.

State and Territory Ministers

391. Proposed s 254AA(2)(c)(vii) appears to need clarification.

392. In relation to private sector matters, submissions, evidence or other information should only be able to be considered from a State or Territory Minister in relation to an agreement, award or decision which is going to directly impact on their specific jurisdiction / area of responsibility (i.e. their State or Territory), unless extraordinary circumstances exist.

393. We are not clear that submissions from the Victorian Government (for example) would often assist consideration of private sector matters in any other State or in a Territory.

394. Where its input was considered relevant, any State or Territory Government is quite well resourced to argue exceptional circumstances exist under s 254AA(2).

395. It would therefore be useful to consider amending Item 54 of the Bill as follows:

> *(vii) the Minister; or*
>
> *(viii) A Minister of a State or Territory who has responsibility for workplace relations matters, in relation to a matter applicable to in whole or part their State and Territory.*

[87] C098 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98), ratified by Australia 28 February 1973.
[88] Bill, Item 54, p.57

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PART 10—TIME LIMITS FOR DETERMINING CERTAIN APPLICATIONS

Fixing delays / improving communications must be part of making bargaining work

396. There are various explanations for the decline of enterprise bargaining under the FW Act, but a key disincentive for employers is delay and uncertainty, real and perceived. As the FWC has battled with poorly drafted and often conflicting legislation, and adverse court interpretations, this has delayed approvals, as have inconsistent approaches to similar or identical agreements.

397. The FWC has pursued a number of administrative improvements under the current rules and has sought to reduce agreement approval timelines. In doing so, the FWC has already proved its capacity to deliver on the expectations of a statutory timetable for agreement approval.

398. However employers continue to report very inconsistent experiences seeking to have agreements approved, including agreements that pay well over award, are strongly supported by employees in the vote, and have union support. Such damaging delays are not in any way confined to new or contentious propositions.

399. A number of employers report that their agreements disappear into what seems a black hole in the FWC for months with no clear signals on their progress, if there are concerns or where they may lie, or when the agreement will emerge or require further action or clarification.

400. When agreements do emerge after weeks or months, employers report FWC members' chambers asking for undertakings or further information on very short timeframes. This inconsistency is a cause of substantial dissatisfaction for employers and has been an active disincentive to bargaining.

401. Such delays create significant HR problems directly and fundamentally at odds with the reason for bargaining in the first place. Delays in agreement progress and approval detract from the trust and confidence of successful negotiations.

402. Consider for example, employer and employees successfully negotiate, and the employer throughout assures the employees that the agreement is legally compliant, pays over the award etc. If the agreement is then delayed by the 'independent umpire', and the employer cannot say why, it is logical that employees will become suspicious and lose trust in the employer.

403. Another critical problem with delays is that pay rises and operational changes are delayed, employees miss out, jobs and enterprises are not made more secure etc. In negotiations the employer promises beneficial outcomes, and the employee expects to see these promises delivered upon. Delayed pay increases are going to seem a breach of faith, even where the employer is powerless to progress the agreement.

404. Delayed approval and wage rises are also doing nothing to redress historically lower wage growth; a nominated key priority of trade unions.

405. Businesses work to commercial timeframes every day, and when we bargain in good faith both under the FW Act and commercially this means responding appropriately quickly to others. These amendments ask no more of the FWC.

There is already a direct analogue in the FW Act

406. The precise concept of requiring the FWC to deliver on a matter it is charged with determining within a specified timeframe is already part of the FW Act. Section 441 is as follows:

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FAIR WORK ACT 2009 - SECT 441

Application to be determined within 2 days after it is made

(1) The FWC must, as far as practicable, determine an application for a protected action ballot order within 2 working days after the application is made.

(2) However, the FWC must not determine the application unless it is satisfied that each applicant has complied with section 440.

407. A further analogue is found in the NES regarding requests for flexible working arrangements:

a. All employers who receive a request must provide a written response within 21 days which outlines whether the request is approved or refused.

b. Employers can only refuse a request on reasonable business grounds.

c. If a request is refused the written response must include the reasons for the refusal.

The Commission will determine the approval timeframe

408. If proposed s 255AA is parsed properly, it will readily be seen that all the discretion remains with the FWC without diminution or disempowerment:

a. Presently, the FWC has discretion on when it approves agreements, and it divides them into the simple and more complex for its internal performance management and timelines.

b. Under s 255AA the FWC will determine which applications can be approved within the default or presumed 21 days, and which of them create exceptional circumstances that warrant a longer approval target.

The Commission already works to comparable performance targets

409. There is nothing remarkable in setting a reasonable approval timeline for agreement approvals. The FWC already operates to time-based performance benchmarks, including on agreement approval. The most recent Annual Report of the FWC includes the following:

Timeliness benchmarks

The Commission's portfolio budget statements set out performance standards for timeliness of staff conciliation conferences in unfair dismissal applications, approval of enterprise agreements, and completion of the annual wage review.

In addition, the Commission has set performance benchmarks concerning delivery of reserved decisions by a single Member, dealing with applications for the approval of enterprise agreements, the hearing of appeals, and handing down reserved decisions in appeal matters.

The benchmarks set a standard to which the Commission aspires, as well as quantifiable measures of performance that provide transparency and accountability.[89]

410. The FWC website also contains the following:

How long will it take for my agreement to be approved?

The Commission's timeliness benchmarks are intended to set tight performance goals; to an extent they are aspirational. We expect that there will be circumstances where the Commission cannot meet these goals for a variety of reasons, for example, dependent on the complexity of the application. The timeliness benchmarks are as follows.

Applications that are compliant at lodgement and can be approved without undertakings

- *50% to be finalised within 3 weeks*
- *100% to be finalised within 8 weeks*

Applications that require undertakings or cannot be approved, including contested applications and applications requiring a hearing

- *50% to be finalised within 10 weeks*
- *100% to be finalised within 16 weeks*

411. The existing delineation into two groups of agreements, hard and easy to approve, is directly analogous to the proposed division of matters in s 255AA. The FWC is already proving itself quite capable of doing what the proposed amendments will ask of it.

412. The President of the FWC is already tracking and reporting on agreement approval times, reporting in August 2019:

Compared to 2017–18 the median time from lodgement to approval has more than halved, from a median of 76 days to a median of 35 days.

There has also been a significant improvement in the number of applications yet to be determined, down from a peak of 2063 in January 2019 to 660 on 9 August.

The Commission expects performance will continue to improve throughout the 2019–20 financial year, after which the system will stabilise at a point where the following benchmarks will be sustainable.[90]

413. There are already timeliness targets, reported on in 2019 as follows:

[89] FWC Annual Report 2019-20, p.19
[90] https://www.fwc.gov.au/about-us/news-and-events/enterprise-agreement-update

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Performance for s.185 applications lodged and approved from February to August 2019

	Median calendar days lodgment to approval
All agreements approved	35 days
Simple applications	18 days

NOTE: 'Simple applications' are those that can be approved based on the material provided at lodgment, without any further action required by the Commission. 'All agreements approved' includes complex applications that require one or more undertakings, are contested or require a hearing, or that require follow up by the Commission to elicit additional information.

Timeliness targets

Timeliness benchmarks: Enterprise Agreements
50% of simple applications approved in 3 weeks
100% of simple applications approved in 8 weeks
50% of complex applications approved in 10 weeks
100% of complex applications approved in 16 weeks

414. The FWC is already tracking its performance in agreement approval, and FWC members are asked to progress matters within performance timeframes.

415. The FWC also already operates subject to Portfolio Budget Statement performance measures including conducting conciliation conferences in unfair dismissal cases within a median of 34 days and approve enterprise agreements that don't require undertakings in a median of 17 days.[91]

Improved communication / accountability is needed

416. However more accountability is needed and there is clear room for further performance improvement.

417. The FWC's August 2019 Enterprise Agreement Update[92] indicates that:

a. Only 50% of 'simple applications' (that can be approved based on the material provided at lodgement, without any further action from the Commission) are being approved within 3 weeks.

b. 50% of more complex applications are taking more than 10 weeks (2½ months) to approve.

418. The FWC publishes median approval times in numbers of calendar days (which in 2019 was 35 days) in 2019, however:

a. A median of 18 days for simple agreements that can be approved on the papers seems somewhat excessive.

b. A median of 35 days for all agreements, means that 50% of agreements are taking more than 5 weeks to approve.

[91] FWC Annual Report 2019-20, p.9
[92] https://www.fwc.gov.au/about-us/news-and-events/enterprise-agreement-update

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Median information is incomplete

419. Employer users appreciate:

a. The FWC's efforts to date to improve agreement approval times / performance, and responsiveness to concerns from users.

b. The information flow, including the 2019 Enterprise Agreement Update.

420. However, medians provide a partial or incomplete picture of agreement approval experiences. A median tells users nothing about the deciles or quintiles at either the long end or short end of approvals.

421. The FWC publishes a useful table of agreements in progress[93]. ACCI accessed this on 26 January and found the following yet to be determined / 'under consideration' numbers:

a.	Not yet approved agreements lodged in September 2020	2 (4 months +)
b.	Not yet approved agreements lodged in October 2020	1 (3 months +)
c.	Not yet approved agreements lodged in November 2020	22 (2 months +)

422. The Committee can take the following from this:

a. The FWC already has a demonstrated capacity to work to timelines, and report on its performance against enterprise agreement timelines.

b. The FWC can already divide applications into the simple and more complicated, indicating a solid foundation for determining and communicating any agreement applications for which it may find exceptional circumstances exist under proposed s 255AA(2).

c. It is important to track / communicate on or highlight those agreements which are taking / will take longer to approve. The FWC is already doing this to some extent and will be able to deliver on its time frames more effectively under the proposed amendments.

Deadlines are a constant throughout the FW Act

423. Employers / applicants for agreements are made to work to multiple deadlines to transact various the IR system, including:

a. An employer must provide employees with the NERR within 14 days.

b. The FW Act requires that a minimum of 21 clear days pass between the issue of the last NERR and the employer requesting that employees approve the agreement by voting.

c. The access period for a proposed enterprise agreement is the 7-day period ending immediately before the start of the voting process to approve the proposed enterprise agreement.

d. By the start of the access period, the employer must notify employees about the vote.

[93] https://www.fwc.gov.au/awards-and-agreements/agreements/agreements-progress

e. An application for approval of an enterprise agreement must be lodged within 14 days after the agreement is made.

f. There is even a default date for agreement commencement, 7 days after the Commission Member approves it, unless a later day is specified in the agreement.

424. It is hard to understand why users can be put to so many deadlines and timeframes, but should not be able to expect greater clarity and responsiveness from the approval process within the FWC.

a. The various dates / deadlines for agreement making are so complex that the FWC has to provide users with an online calculator[94].

b. Step 9 'Process at the Commission' is pretty glaring in being the only step in bargaining which does not have dates attached to it, in the FWC's publication 'Employer's guide to making a single enterprise agreement'[95].

425. Other FWC processes under the FW Act are also replete with due dates and deadlines, for example:

a. An unfair dismissal application must be lodged with the Fair Work Commission within 21 days after the dismissal takes effect.

b. The Notice of Appeal (Form F7) must be lodged with the Commission within 21 days after the date the decision being appealed was issued [see Rule 56(2)].

c. An application for a protected action ballot must not be made earlier than 30 days before the nominal expiry date of any existing enterprise agreement which covers the employees, and must not be made before there has been a 'notification time' in relation to the proposed enterprise agreement.[96]

The FWC is not a court

426. Any reluctance in attaching deadlines for FWC decision making may arise from a misunderstanding of the role and status of the Commission. It is true that the capacity of parliaments to direct judges and courts may be limited by the separation of powers and may arguably be further limited by the Constitution. However, the FWC is not a court[97] and like other comparable tribunals should be able to be subjected to performance criteria such as proposed s 255AA.

Good faith bargaining demands good faith approvals

427. These amendments will also redress a direct inconsistency in the FW system.

a. Under s 228(1)(c) bargaining representatives must respond to proposals made by other bargaining representatives for the agreement in a timely manner. If we don't do so, remedial orders can be made. Responsiveness and communication are key tenets of good faith bargaining that the FWC requires of employers, employees and unions.

[94] https://www.fwc.gov.au/awards-agreements/agreements/making-agreement/enterprise-bargaining/single-enterprise-agreement-date
[95] https://www.fwc.gov.au/awards-agreements/agreements/making-agreement/enterprise-bargaining/single-enterprise-agreement-date
[96] Section 438
[97] http://www.austlii.edu.au/au/cases/cth/high_ct/94clr254.html

b. However, there are no reciprocal obligations for timely decision making, approval or communications from the FWC to agreement applicants.

428. Businesses work to timeframes, we are accountable to customers, regulators and reporting agencies, and to come back to employees on applications and requests, including for example under the NES.

429. It is legitimate that users should be able to expect the same of the FWC, and not see applications that can fall over for failing to meet lodgement or other action deadlines potentially disappear into a tribunal without communication for an extended period.

430. As stated, employers acknowledge the efforts of the FWC to improve agreement approval timelines to date. This leads us to be confident the FWC can deliver on the proposed 21-day timeline in Part 10.

The 'exceptional circumstances' construction is already in the FW Act

431. There is a clear model or template established in the FW Act – do x within y period (e.g. 21 days), or if not, provide written reasons why not. Examples include:

a. In exceptional circumstances the FWC may order retrospective minimum wage orders (s 165, s 166, and s 297).

b. The FWC may allow more than 21 days for the making of an unfair dismissal application in exceptional circumstances (s 394).

c. The FWC may order more than 7 days suspension of protected action in exceptional circumstances (s 427), and this can again be extended in exceptional circumstances (s 428).

This is a foundation for improved cooperation and communication

432. ACCI expects that the FWC will work with ACCI, Ai Group and the ACTU and our members to make this work, and to refine Commission approaches, paperwork and communications. We are quite confident that this important change will work well, make a positive contribution for all users, and will support increased confidence in and demand for bargaining.

433. The essence of the approach in Schedule 3, Part 10 is consistent, universal communication and performance. The revised legislation will ensure the status all agreement applications is adequately communicated to applicants and others at all points.

434. It will also see more agreements approved on time and delivering on what has been negotiated as rapidly as possible.

Deadlines for Government action are not uncommon

435. Finally, the Commonwealth imposes significant performance criteria and performance standards on its departments and agencies, typified by the Commonwealth Performance Framework. If Government can impose performance criteria on itself, surely Parliament can set performance / responsiveness goals to provide clients and users with greater certainty and confidence in bargaining.

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PART 11—FWC FUNCTIONS

436. A new s 254B would require the FWC to perform its functions in a manner which recognises (or better recognises) the outcomes of bargaining at the enterprise level. This is an obligation to place more weight on what is agreed between the employers and employees that will actually work under an agreement, and their wishes.

437. To ACCI this measure is congruent with the changes to the objects, and will better emphasise to the FWC, applicants, bargaining representatives and others that this is a system unashamedly geared to making agreements, and having those agreements recognise and progress what the negotiating parties actually negotiate based on their needs and priorities, subject to the safety net and BOOT.

438. Speaking plainly, this is about:

a. Not losing sight of the core purpose of the system, and relevantly here, of agreement making.

b. Ensuring that to the greatest extent possible / consistent with other specific considerations, the emphasis is on making agreements that reflect the agreed outcomes of bargaining.

439. This is about elevating the importance of the democratic decision making of the majority of employees, elevating the voice and input of bargaining representatives over non-representatives and to the extent possible not allowing technicalities and procedural considerations to override or displace the clear will and priorities of employers, employees and bargaining representatives.

440. This will signal a system that will better stick to its core purpose, and to the agreed priorities of employers and employees.

PART 12—TRANSFER OF BUSINESS (TOB)

441. COVID-19 and associated recession and operating restrictions have placed significant operating and existential pressures on a wide range of businesses, business structures and jobs.

442. Notwithstanding our community's massive investment in JobKeeper, such major disruption is almost certain to see an ongoing shake out in the commercial structures and the ownership of many operations. Some entities will consolidate, some expand, some diversify.

443. Notwithstanding Australia's epidemiological success to date, risks clearly exist and are intensifying at the geopolitical level (e.g. the UK and South African strains).

444. This makes it more likely that existing employees will see changes in their employer, or in the ownership of their employing entity in 2021 and beyond than in the pre-COVID period. Most will experience no change in employer, but global and domestic changes and uncertainty seem set to lead to more businesses changing ownership in a shaking out due to pandemic and recession.

445. This brings the TOB provisions of the FW Act[98] into play. The PC observes of TOB:

[98] FW Act, Part 2-8

> *The potential for poorly performing businesses to be bought out (whether before or after failure), and/or to transfer work to new businesses, is important for productivity, innovation and structural change.*
>
> *When a firm (or of a business area within a firm) is transferred to a new owner, there can also be pressures to reduce the pay and conditions of the existing workforce.*
>
> *The transfer of business provisions in the Fair Work Act 2009 (Cth) provide protections to employees when a business changes hands.*
>
> - *The provisions purposely capture a wide range of business restructuring activities, including some insourcing and outsourcing arrangements, and some changes of employer within corporate groups.*
>
> - *Transferring employees retain the terms and conditions of their previous employment, unless the Fair Work Commission grants an exemption or variation.*[99]

446. The primary policy imperative must be for as many Australians who have jobs to retain those jobs in the face of labour market adversity and uncertainty, and to support employers keeping people in work. The incentive must be to retain staff across changes of ownership.

447. It is critical that any transfer of business obligations not unwittingly create disincentives to retention of existing employees. As the PC put it well prior to COVID-19:

> *Protecting employee entitlements may also reduce employment opportunities, not least because the new employer may be reluctant to take on employees under the same conditions that contributed to poor business performance for the old employer…*
>
> *Transfer of business provisions need to balance competing goals. They should not frustrate structural adjustment or limit employment opportunities; but nor should they allow an employer to restructure their business specifically to avoid the application of an industrial instrument (typically an unwanted enterprise agreement).*

448. As the EM makes clear of the status quo:

> *283. As a general rule, Part 2-8 of the Act provides, in a transfer of business situation, for an old employer's enterprise agreement or other relevant industrial instrument to continue to cover a transferring employee and their new employer in relation to transferring work, regardless of how the employee came to be employed by the new employer. The only way continued instrument coverage does not occur is if there is an order to that effect from the FWC.*[100]

449. This could all be a great deal simpler, with any change of employer creating a new employment contract subject to the protection of the safety net of the FW Act, NES and awards. Where a case can be made out that the former employer's conditions should somehow transfer and be continued, this should be argued to the FWC on a case by case basis.

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[99] PC (2015) *Inquiry Report: Australia's Workplace Relations Framework*, p.827
[100] EM, p.53

450. Such a scale of reform is not under consideration and has not included in the Bill, dictating that:

a. Australians need as much balance and proportionality in the existing TOB rules of the FW Act as possible, all the more so, given the pandemic.

b. Any changes must be balanced, proportionate, and put jobs first.

PC recommendations

451. In its 2015 inquiry into Australia's Workplace Relations Framework the PC analysed the basis for, history of, and operation of TOB rules in Australia.[101]

452. The PC did not recommend returning to an on-application model for TOB, as ACCI would recommend. However, the PC did recommend a package of measures to improve the TOB rules under the FW Act, encompassing:

a. Greater discretion for the FWC to order terms and conditions not transfer, amending the objects in s 309 of the FW Act (PC Recommendation 26.1).

b. Clarifying that a new employer can make an offer of employment to an employee of the old employer conditional on the FWC granting an order under s. 318 that the employee's employment arrangement would not transfer to the new employer (PC Recommendation 26.2).

c. A transferring employment arrangement automatically terminating 12 months after the transfer, except in transfers between associated entities. (PC Recommendation 26.3).

d. Ensuring an employment arrangement does not transfer between associated entities where the employee seeks redeployment. (PC Recommendation 26.5)

e. Ensuring an employment arrangement does not transfer between associated entities where the employee is redeployed to avoid being made redundant. (PC Recommendation 26.5)

The Proposed Change

453. Part 12 pursues just one of the four PC proposals ((d), above), explained in the EM thus:

> *284. Item 62 inserts new subsection 311(1A), which 'turns off' the transfer of business rules in Part 2-8 of the Act in the case of an employee who becomes employed with an associated entity (as defined by section 50AAA of the Corporations Act 2001) of their former employer after seeking that employment on their own initiative before the termination of the employee's employment with the old employer.*
>
> *That employee will then be covered by the relevant industrial instrument (if any) that covers the type of work performed by the employee for the new employer. This means the new employer is not required to seek orders from the FWC to achieve that outcome…*

454. This directly reflects PC Recommendation 26.4:

[101] PC (2015) *Inquiry Report: Australia's Workplace Relations Framework*, pp.827-846

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> RECOMMENDATION 26.4
>
> The Australian Government should amend the *Fair Work Act 2009* (Cth) so that when employees, on their own initiative, seek to transfer to a related entity of their current employer, they will be subject to the terms and conditions of employment provided by the new employer.

455. The PC explained the case for this change as follows:

> *When an employee transfers between two associated employers, the transfer of business provisions in the FW Act mean that the employee will keep the terms and conditions from their previous employment unless the new employer successfully applies to the FWC for an exemption or a variation. This is the case even if the employee makes the decision to switch jobs voluntarily.*
>
> *There are two particular considerations for not applying transfer of business provisions to voluntary switches:*
>
> - *voluntary employee movements between associated employers are not uncommon and in many cases benefit the employee and the employers*
> - *applications for exemptions involve costs to all parties, which, in some cases, may discourage the employer from agreeing to the transfer.* [102]

456. The PC notes that the costs for employers of having to apply to exempt employees is prohibitively costly and slow.

> *There are also unavoidable costs associated with obtaining an exemption for a voluntarily transferring employee. Applications require the preparation of documentation, coordination with the employee, consultation with the relevant unions and attendance at a hearing before the FWC, meaning that employers need to commit resources to what is generally described as a relatively automatic process.*
>
> *Despite the apparent ease of obtaining an exemption for a voluntary transfer, in some situations the employer may try to avoid the cost by refusing to facilitate such moves. Where this occurs, employees are prevented from switching jobs even when they consider it to be in their best interests.* [103]

457. This means there can be at present:

a. Significant capacities for redeployment in groups of associated entities of sufficient size.

b. Significant disincentives to do so baked into the current TOB rules, which have the effect of conglomerated entities laying off staff they could otherwise transfer and retain.

458. PC Recommendation 26.4 is directly consistent with the recommendations of Labor's 2012 Post implementation review of the FW Act, as observed by the PC:

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[102] PC (2015) *Inquiry Report: Australia's Workplace Relations Framework*, p.841
[103] PC (2015) *Inquiry Report: Australia's Workplace Relations Framework*, p.842

> *The transfer of business provisions were examined during the 2012 post-implementation review of the FW Act. At that stage, the provisions had been in operation for only about three years and there was little objective evidence of the impact they caused. The post-implementation review concluded the provisions afforded better protections for employees than the previous arrangements and they provided significant flexibility to employers by allowing the FWC to make the range of orders outlined above. The post-implementation review included one recommendation to improve the provisions:*
>
> *... [t]hat s. 311 be amended to make it clear that when employees, on their own initiative, seek to transfer to a related entity of their current employer they will be subject to the terms and conditions of employment provided by the new employer (McCallum, Moore and Edwards 2012, p. 25).*
>
> *This recommendation was not part of the package of reforms pursued by the then Australian Government following the release of the post-implementation review. Following a change of government, it was introduced to the Parliament in the Fair Work Amendment Bill 2014 (Cth) but failed to pass through both Houses.*

459. JobKeeper has been significant in retaining businesses and retaining jobs. However it is coming to an end, and much of the necessary shaking out of corporate structures and business organisation still lies before us. ACCI foresees global market developments and the ending of JobKeeper seeing widespread re-examination of businesses and structures, and of significant TOB situations in recovery during 2021 and 2022. Employers and employees in these scenarios would be assisted by:

a. The proposed change to the TOB rules in Part 12.

b. Greater ambition, and the implementation of all PC recommendations on TOB (outlined below).

Recommendations

460. The proposed amendments in Part 12 of Schedule 3 of the Bill should be passed. ACCI additionally recommends:

Recommendation 3.2

In addition to implementing PC Recommendation 26.4 as proposed in Schedule 3, Part 12, Parliament should implement the remaining PC Recommendations on TOB as follows:

> RECOMMENDATION 26.1 (SECTION 26.3)
>
> The Australian Government should give the Fair Work Commission more discretion to order that an employment arrangement (such as an enterprise agreement) of the old employer does not transfer to the new employer, where that improves the prospects of employees gaining employment with the new employer. This should be achieved by amending the object (at s. 309) of the transfer of business rules in the *Fair Work Act 2009* (Cth) to include the interests of continuing employment for employees of the old employer. Consideration should also be given to whether this should be echoed in the list of factors the Fair Work Commission must take into account in ss. 318 and 320.

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RECOMMENDATION 26.2 (SECTION 26.3)

The Australian Government should amend Part 2-8 of the *Fair Work Act 2009* (Cth) to make clear that a new employer can make an offer of employment to an employee of the old employer conditional on the Fair Work Commission granting an order under s. 318 that the employee's employment arrangement would not transfer to the new employer.

RECOMMENDATION 26.3 (SECTION 26.3)

The Australian Government should amend Part 2-8 of the *Fair Work Act 2009* (Cth) to provide that a transferring employment arrangement automatically terminates 12 months after the transfer, except in transfers between associated entities. The transferring employees should be permitted to commence bargaining for a replacement enterprise agreement nine months after the transfer. If a replacement agreement has not been approved by the 12 month date, the transferring employees would automatically be covered by any other instrument covering the new employer, including the relevant modern award.

RECOMMENDATION 26.5 (SECTION 26.3)

The Australian Government should amend Part 2-8 of the *Fair Work Act 2009* (Cth) so that an employment arrangement does not transfer between associated entities in situations where the employee is redeployed to avoid being made redundant.

PART 13—CESSATION OF INSTRUMENTS

461. This final Part of Schedule 3 provides further evidence of a package of changes that do not all cut one way, nor solely favour employers.

462. The ACTU has long complained of so called "Zombie Agreements" which preceded the FW Act but which were preserved in operation under its transitional arrangements. This includes some Work Choices era agreements that remain in operation due to specific statutory preservation / continuance.

463. Some employers have also expressed concerns at competitors being able to operate on a lower cost base using such agreements.

464. Part 13 of Schedule 3 of the Bill acts on these union concerns by sunsetting the preserved application of remaining transitional instruments made prior to the FW Act. It is to operate as follows:

> *Part 13 amends the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 to provide that all agreement based transitional instruments preserved under that Act, including Division 2B State employment agreements, and enterprise agreements and workplace determinations made during the Fair Work Act 'bridging period' from 1 July 2009 to 31 December 2009, will cease on 1 July 2022.*[104]

465. The Government indicates this will have the following effect:

> *These legacy agreements set the pay and conditions of between 300,000 to 450,000 employees and many provide take home pay and conditions inferior to those provided by the relevant modern award.*
>
> *Ceasing these agreements following the extended transitional period provided upon the commencement of the Fair Work Act more than a decade ago is expected to uplift terms and conditions of employment for many employees in the event they make a new enterprise agreement or are engaged under a relevant modern award.*
>
> *Ceasing these agreements will also mean that employers will no longer have to compete with businesses operating under terms and conditions of employment that were not assessed as leaving employees covered by the agreement better off overall compared to the relevant modern award. This removes the unfair competitive advantage that the continued operation of these agreements may facilitate by allowing some employers to provide entitlements less beneficial than the relevant modern award.*
>
> *Businesses have the option to use the modern award to set employees' pay and conditions alone or in combination with contracts of employment, or to bargain for a new agreement better suited to their circumstances. This will level the playing field, reduce complexity and encourage agreement making.*
>
> *While there may be a small number of employees who may become reliant on terms and conditions provided by the safety net of the NES, the national minimum wage order and modern awards less beneficial than those contained in their preserved transitional instrument, this will be counterbalanced by increases in wages and enhanced conditions of employment for the vast majority of employees.*

What happens at the point of cessation?

466. The EM indicates that:

> *Employers and employees covered by instruments that terminate on 1 July 2022 may transition to the current framework by making new enterprise agreements. If a replacement enterprise agreement is not in place by 1 July 2022, from this date a relevant modern award would apply.*[105]

[104] EM, p.ciii
[105] EM, p.56, para 291

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467. Employers will need to use the next 17 months of so to consider their options, and where appropriate use bargaining under the current Act to preserve any longstanding operational efficiencies. In many cases employers will determine that they need to abandon long standing and well accepted work practices, accepted by employers and employees, as simply too hard after the reversion to the mean.

468. Terms of contracts of employment are likely to ensure few if any reductions in take home pay from the transitions that Part 13 dictates.

Employer position

469. Some employers and employees will be negatively impacted by this disturbance to the status quo and will argue that both they and their employees do not want to make the changes these amendments will compel. Others will welcome the changes.

470. The reality is that where employers are forced to move away from such transitional instruments, this will add to costs, and will disturb the status quo in workplaces. Some employees will lose out and will lose bespoke or unique arrangements that suit them and their priorities.

471. However, regardless of merit, employers are very concerned that any changes be executed properly. Any changes need to be as clear and unambiguous as possible, with due notice and transparency.

472. Schedule 3, Part 13 appears to deliver on this. There is clarity on which arrangements need to change and when, and a due period of notice of the 'drop dead date'.

473. It is important there be no change to the 1 July 2022 deadline.

This destroys the ashes of Work Choices

474. Former Opposition Leader Abbott described Work Choices as dead, buried and cremated.

475. To continue this analogy, these changes will in 2021 dissolve any remaining ashes in acid. They remove entirely the final preserved application of Work Choices era agreements.

476. Those who may vote against this Bill are voting against this change. They would be voting for the continued retention of the last vestiges of Work Choices, and for the continuance of the final AWAs.

RECOMMENDATIONS

477. In summary / tabular form ACCI calls on the Committee to recommend as follows on Schedule 3:

Item	Topic	Recommendation
Sch 3, Part 1	Objects	Pass as introduced
Sch 3, Part 2	NERR	Pass as introduced
Sch 3, Part 3	Pre-Approval Requirements	Pass as introduced
Sch 3, Part 4	Voting Requirements	Pass as introduced

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Item	Topic	Recommendation
Sch 3, Part 5	Better Off Overall Test	Pass, with an amendment to s 189(1A)(a)(iii) to clarify that the FWC should take into account: The negative impact or impacts of the coronavirus known as COVID-19 on the enterprise or enterprises to which the agreement relates.
Sch 3, Part 6	NES Interaction Terms	Pass as introduced
Sch 3, Part 7	Franchises	Pass as introduced
Sch 3, Part 8	Terminating agreements after nominal expiry date	ACCI does not support the proposed 3-month delay in seeking to terminate agreements that pass their nominal expiry date.
Sch 3, Part 9	How the FWC may inform itself	Pass as introduced
Sch 3, Part 10	Time limits for determining applications	Pass as introduced
Sch 3, Part 11	FWC Functions	Pass as introduced
Sch 3, Part 12	Transfer of Business	Pass and also implement the further Productivity Commission Recommendations on TOB.
Sch 3, Part 13	Cessation of Instruments	If this is to be passed, it should be as introduced, without amendment.

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SCH 4 – GREENFIELDS AGREEMENTS

- Greenfields agreements are a long-standing and critically important part of Australia's IR system.
- Some projects are of such size and significance (and benefit to Australians) that they take more than 4 years to construct, and they need agreements to cover all phases of their construction.
- Australia needs extended term greenfields agreements to secure resources project investments and build community infrastructure for the future.
- Both the Coalition and Labor have recognised this and should support these amendments.
- Greenfields agreements are high paying, and virtually always made with trade unions. This will continue after the amendments.
- These amendments will be subject to substantial additional protections and balances, including:
  - Only major construction projects will have access to extended term agreements.
  - There will be an 8-year cap on extended term greenfields agreements.
  - There must be a pay rise in each year of any extended term greenfields agreement.

INTRODUCTION

478. Australia is one of the world's major resource economies and has:

a. Resource deposits of a scale that can require the construction of massive infrastructure to extract, refine, process and export.

b. Geography which requires the construction of significant new export infrastructure (new ports, rail, roads etc) in remote areas.

479. Australia is also a geographically massive G20 economy with a small number of very major urban conurbations where most Australians live and a high proportion of economic activity takes place, and increasingly has cause to construct major infrastructure projects (road and rail) which can take more than four years to construct.

480. There are no employees to approve a collective agreement to apply to a brand-new workplace or construction project (as no one has yet been hired). Equally, investors require industrial relations arrangements to be in place prior to making their final commitments to major projects, and prior to finalising the finance upon which construction proceeds.

481. Our system has for some time facilitated the making of GF agreements, which are a special form of agreement that can be put in place prior to commencing hiring. GF agreement making is already a long-standing part of the FW Act, and an important one, with significant flow on benefits for jobs, industries, taxes and royalties beyond the immediate coverage of GF agreements.

482. A problem has emerged for the construction of massive new projects, which are of such scale that the ordinary maximum agreement duration (4 years) cannot cover their construction. As a key resource economy and a G20 economy with a growing population, some critically important productive and community infrastructure simply takes more than 4 years to build.

483. Renegotiation cannot occur at the critical point of accelerated completion some three to four years into construction and damages for delays due to protected action at that point can cost $1m per day or more. Our IR system needs to provide for GF agreements which can cover the full life of major project construction, however long that takes (in this instance up to 8 hears).

484. The case for extended operation GF agreements was put by then Leader of the Opposition, Mr Shorten, during the 2019 Election:

> *Mr Shorten said, if elected, he would consider changes to the Fair Work Act relating to greenfields agreements - union and employer brokered workplace agreements for a new major project, such as a mine or gasfield.*
>
> *Instead of workplace agreements being renegotiated every three or four years, Mr Shorten said he was open to allowing unions and mine owners to negotiate an agreement that would last the life of the project, giving both workers and investors long-term certainty.*
>
> *"We want to look at the ability for companies to negotiate with unions for extended greenfields agreements, project life, you can go to the global investors who will back it," he said.*
>
> *"They'll be good paying jobs. You get the certainty of the arrangement, the union gets the certainty of the arrangement, the workforce get the certainty of the arrangement.*[106]

485. This is what Schedule 4 of the Bill seeks to do, in Mr Shorten's words, providing all concerned with 'certainty on employment arrangements' for major project construction. To fail to pass these amendments would be to accept ongoing uncertainty and risk for investors and project constructors that deny Australians jobs, deny local economies massive injections of capital and demand, and deny governments massive royalty and tax revenues.

HOW TO CONSIDER THESE AMENDMENTS

486. <u>GF work is highly paid</u>:

a. GF agreements, and projects of short or long duration do not in any way raise considerations for lower paid or award reliant employees. There is no possibility of minimum wage or indeed award wage rates coming into play in GF agreements either under the status quo or under the proposed amendments.

b. The reality is that the construction and engineering expertise upon which project completion relies will not come cheap at any point. Employers and investors recognise that GF agreements, and extended duration GF agreements, attract a substantial pay premium.

c. This is a discussion about IR arrangements for highly paid employees. ACCI's understanding is that:

   i. For ABS ASCO classifications Group 4 (tradespeople and related workers) and Group 9 (labourers and related workers), GF agreement work in resources and infrastructure construction delvers some of the highest wages in the country (at the top end of the distribution for such occupations).

[106] Coorey, P. and Tilllet, A. (2019) "Shorten reaches out to miners" AFR, 15 May 2019.

ii. GF agreements deliver over award pay levels, often well in excess of award rates, or multiples of award rates.

d. In resources in particular, GF agreements for major projects apply to work which attracts a market premium for working remotely / on a FIFO or DIDO basis.

e. Construction employees are not going to be willing to work remotely or on a FIFO basis without securing wages at least equivalent to those they would secure for capital city construction work, plus some premium for the remote nature of the work.

f. Similarly, employees are not going to work in major civic project construction for rates below those they could enjoy in smaller scale or CBD construction work.

487. GF agreements are already part of the FW Act: This is not a proposal for a new form of agreement, it is a proposal to make a long-standing part of the system deliver what it is designed to deliver in all circumstances, and to facilitate major job generating new projects.

488. To date, GF agreements are always made with unions:

a. The FW Act presumes that GF agreements will primarily and overwhelmingly be made with trade unions, on the basis that trade unions effectively stand in for yet to be hired employees and negotiate on their behalf.

b. This is borne out in practice, with GF agreements successfully made with trade unions and generally providing for wage increases in excess of average wage growth.

c. It is no longer possible to make employer GF agreements and has not been since the commencement of the FW Act in 2010. The Act gives unions a privileged and presumptive role in GF agreement making and will continue to do so after these amendments.

d. It has been possible since the passage and commencement of the *Fair Work Amendment Bill 2014*[107] to make GF agreements in the face of union opposition, after 6 months or more of stalled negotiations. However, in more than 5 years of operation this safety valve has not been triggered, and GF agreements have successfully been made with unions, as the defacto or presumed representatives of yet to be hired employees.

489. Any arbitrated GF agreements would be even more protected: It is possible under the existing legislation to have a GF agreement made in the face of union opposition and has been for more than five years. This is subject to various established safeguards which remain unchanged by this Bill:

a. Where employer and union cannot agree, a GF agreement can only be made:

i. After a 6-month negotiation period.

ii. A non-agreed GF agreement can only be made where the FWC determines it is in the public interest to do so.

[107] https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5174

iii. A non-agreed GF agreement can only be made by the FWC where it is satisfied that the agreement considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work.

iv. The FWC may find that this requirement would extend to any pay increases subject to proposed s 187(7) which could not be agreed between employer and union.

490. Thus, in the first instance the level of pay increase payable in each year of operation of an extended term project construction GF agreement will be determined by employer and union negotiation in the context of significant market pressures on the project owner to have reliable IR arrangements in place, negotiated between unions and employers.

491. Only where negotiations are not productive for a period of 6 months can an employer seek to have the FWC make the agreement against union opposition, and the outcome must be both (a) in the public interest and (b) consistent with the prevailing pay and conditions within the relevant industry for equivalent work.

492. GF agreements represent only a marginal fraction of all enterprise agreements, and only a fraction of this fraction will relate to major projects that take more than 4 years to construct. This is a critically important change for jobs, confidence and exports, but numbers of additional GF agreements and numbers of employees working under them will not be significant.

DEFINITION OF MAJOR PROJECTS

493. Item 2 of Schedule 4 adds a new s 23B to the FW Act defining a major project for the purposes of allowing extended duration GF agreements (i.e. those that last beyond four (4), but fewer than eight (8) years).

494. A significant threshold of $500 million or more has been set for what constitutes a major construction project, with an additional avenue for the responsible minister to declare additional projects of between $250 and $500 million as major for eligibility to extended term GF agreements.

495. In considering these amendments we urge the Committee to consider:

a. Any project of less than $250m capital value will not be considered major for the purpose of extended term GF agreements.

b. The primacy of unions agreeing to any GF agreement under the FW Act dictates in practice that unions will have a significant initial veto over any proposed extended term GF agreements, including those between $250 and $500m in value.

i. If an employer is trying to secure a construction period / GF agreement duration at odds with the apparent value or scale of a project, a union will question this and withhold agreement until satisfied the period is needed / appropriate.

ii. Or the union would use the fact that an employer wants an extended agreement to attempt to leverage a higher pay outcome / union friendly provisions which help the union organise the workplace. So a union official may effectively say 'sure you can have X years to build a project of Y scale, but its going to cost you Z% wage increases per year'.

c. In situations in which a union does not agree, the FWC would only be arbitrate areas of disagreement (including potentially the duration of the agreement):

   i. After 6 months or more negotiations.

   ii. In the public interest.

   iii. Based on prevailing industry standards at the time the agreement is made by the FWC.

d. The fact is that the smaller the project, the less likely it is to take four or more years to construct, and the less likely it is that:

   i. The Minister would be willing to declare the project as major for the purposes of extended term GF agreement making.

   ii. A union will agree to an extended period of operation for the GF agreement.

   iii. The FWC would find an extended period of operation to be consistent with the public interest, or the merits of an employer seeking to press that duration in the face of union opposition.

e. That s 23B directs the Minister to take into account various matters in considering any request for a project of between $250 and $500m)to be deemed major.[108]

PROJECT DURATION

496. An amended s 186(5)(b) will allow GF agreements to have a nominal expiry date of up to 8 years after the agreement comes into operation. This is shorter than the life of project / no fixed duration model Labor committed to prior to the last election.

497. This is an absolutely essential recognition that massive resource projects and major infrastructure projects can now and will in future take more than 4 years to construct, based on their sheer scale, remoteness and need for globalised construction equipment and expertise.

498. Australia's success in attracting major resource projects to this country relies on our being able to guarantee stable and reliable industrial relations arrangements across the life of constructing such projects, which is in the interests of both employers and employees.

499. Any extended term GF agreements, exceeding 4 years duration, will be subject to a series of express protective requirements in the FW Act:

   a. Any extended term agreement must be a Greenfield Agreement, applying to 'a genuine new enterprise', that is being established and that has not yet employed 'any of the persons who will be necessary for the normal conduct of that enterprise and will be covered by the agreement'.[109]

[108] Bill, Schedule 4, Item 2, proposed new s 23B(4)
[109] S 172 of the FW Act

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b. The extended term GF agreement must apply to work only on the construction of major projects, as defined[110]. However, we do recommend one change to ensure the amendments operate as intended, see below.

c. An extended term GF agreement must provide for a wage increase in each year of operation.[111]

d. In practice such a GF agreement effectively must be made with a trade union (the clear presumption under the FW Act, and how GF agreement making proceeds in practice).

e. Where unions and employer cannot agree, the FWC can make the agreement and resolve non-agreed issues based the dual protections of:

i. It being in the public interest to approve the agreement.[112]

ii. The agreement on an overall basis provides pay and conditions consistent with 'prevailing industry standards'.[113]

500. *What protections are there against employers asking for GF agreements to last as long as possible and 8 years becoming the norm*?

a. Extended term agreements can only apply to major projects as defined in new s 23B, and it can only apply to project construction, not operation.

i. Construction completes when it completes, and the operation of a mine, road or rail is a distinctly different phase after commissioning, approval and handover.

ii. These are matters of fact, clarified by both construction law and the terms of contracts. The life of construction of any project is an objectively identifiable matter, albeit that it is always a best estimate until construction is actually completed (for example a major cyclone or geopolitical crisis, or other exigency could protract construction).

b. Major projects must be of a value of $500m or more, or the relevant Minister must declare a project of between $250 and $500 capital value as major for the purposes of GF agreement making (see above).

c. Under proposed s 23B(4)(d) we foresee Ministers seeking evidence and information from any protect proponent seeking an extended duration. A Minister is likely to want to know how long the project is forecast to take to construct if he or she is being asked to declare it a major project which can make an extended term GF agreement.

d. The duration of the agreement must be negotiated with unions in the first instance (and to date in all instances), and it is open to unions acting in place of the yet to be hired employees to question the proposed duration of project construction and withhold agreement if it is excessive or unmerited.

[110] Proposed new paragraph s 186(5)(b)(i).
[111] Proposed new s 187(7)
[112] Paragraph 187(5)(b)
[113] Subsection 187(6)

e. Where there is no agreement with the union or unions and the FWC arbitrates a GF agreement (which has not happened to date), it will do so on merit and evidence, in the public interest and based on prevailing industry standards. The Commission is very likely to question an employer on:

i. Any proposed agreement duration that is not agreed by employer and union.

ii. Any proposed agreement duration that is at odds with the market value of the project. If an employer attempts to tell unions or the FWC that a $300m mining project is going to take as long to construct as Gorgon, it is going to need to provide evidence support the period sought.

A union or unions that have been negotiating towards a GF agreement may also seek to be heard by the FWC.

f. Market controls: There are additional protections against misuse outside the IR system. Employers cannot say one thing to markets and investors on project duration, and another to unions and the FWC. The anticipated duration of project construction is information that must be disclosed to markets under continuous disclosure requirements.

g. It also seems unlikely that an employer or constructor would want to send a signal to markets and investors that it takes longer to construct projects than their scale dictates, at presumably a higher cost, and delaying the shift from the investment phase to the revenue yielding production phase.

501. *Aren't employees at risk of being stuck under agreements for years with no pay increases*?

a. No:

i. Sch 4, Item 4 of the Bill requires annual wage increases in each year of operation of any extended term GF agreement.

ii. Construction projects have phases and different construction contractors and expertise come on and off construction projects. ACCI understands that in practice very few employees will remain onsite across a construction period of 4 years or more. The project may take 4, 5 or 6 years to construct overall but most construction employees will spend far shorter periods working on it.

ANNUAL WAGE INCREASES

502. Sch 4, Item 4 seeks adds to add an additional subsection (7) to s 187 of the FW Act, to the effect that GF agreements for the construction of major projects that are to last for more than 4 years, must provide for at least annual increases in wages payable under the agreement for each year of their operation.

503. The price or reassurance being provided for longer term GF agreements is that they must deliver at least annual wage increases.

504. Thus, for example, were a GF agreement for the construction of a major project to remain in place, in term, for a fifth and sixth year, it must provide for a wage increase to be payable in that fifth and sixth year, as well as for each year of its operation. For clarity:

a. No other agreements do now or would in future require a wage increase in each of their up to four years of 'in term' operation.

b. It is possible to entirely front end or back end wage increases in standard EBAs, or to provide periods of wage maintenance. This will not be possible for extended term GF agreements.

505. On balance, employers can accept a requirement for annual wage increases as a precondition for extended operation of GF agreements for major projects, beyond standard 4-year terms.

506. This should dispose of any concern / claims that an extended period of operation for agreements would see employees 'stuck' on stalled or stagnant pay set years in advance; that will simply not be possible under any GF agreement which extends beyond 4 years.

507. In fact, those employed under extended duration GF agreements will enjoy a guarantee enjoyed by few if any other employees subject to the FW Act, that of guaranteed annual wage increases in each calendar year.

508. <u>What about inflation? / There is no guarantee of real wage increases!</u> The answer to any charges that there is no guarantee against future inflation is threefold:

a. Unions (and it will be unions) and employers already make four-year agreements hedged against economic changes and beyond realistic or reliable economic forecasts. An extended term GF agreement for a major project simply requires a bringing together and negotiation of expectations across an extended period, which experienced IR practitioners in unions and major employers will be quite capable of.

b. There remains an overwhelming presumption and pressures in the construction of the existing FW Act to finalise GF agreements with trade unions, and for unions act in place of the yet to be hired employees. There has been an alternative or pressure valve to negotiating GF agreements with unions since 2015, and to date it has not been used.

c. Economic and bargaining logic dictates that the further an agreement extends, and the more uncertain and inherently unknowable an economic climate the agreement seeks to cover, the more unions will press for higher wages beyond the period of inflationary forecasts. If anything, extended duration risks being a wage inflating factor.

d. Alternatively, an extended-term GF agreement may provide for a process of negotiation or arbitration of the level of an increase in its later years of its operation, based on updated information available at that time. Thus, an agreement might provide for (purely as an example):

i. Increases of 3% per year in years 2, 3 and 4, on top of what would always be a base rate significantly in excess of the award safety net.

ii. For years 5 and 6, increases at a level to be determined by an agreed arbitrator, provided that the increase will be between 1% and 4%.

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OTHER MATTERS

509. **Scope of construction work**: Proposed s 187(7)(b) restricts access to extended term GF agreements as follows:

> *the FWC is satisfied that the work to be performed under the agreement relates only to the construction of a major project; and*

510. ACCI agrees with the policy intent that extended term GF agreements apply only to project construction and not to ongoing production and operations.

511. Construction for these purposes should include the various completion / handover functions during the final phases of building productive and transport infrastructure relating to commissioning, testing, cleaning and approval.

512. **Interaction with the BCIIP Act**: Amendments made by Schedule 4 should not however give rise to circumstances which require building industry participants to be compliant with the Building and Construction Industry (Improving Productivity) Act 2016 ('BCIIP Act') and the associated Code for the Tendering and Performance of Building Work 2016 ('2016 Building Code').

a. The misuse and exploitation of enterprise agreements by certain registered organisations of employees in the construction industry is well known and it is essential that Code-covered entities are at all times able to remain compliant and not be subject to any coercion, commercial pressure or undue influence as a result.

b. The importance of the BCIIP Act, Code and ABCC cannot be overstated in combatting a culture of lawlessness that has been forensically documented over several decades and the resulting ramifications for the cost of construction. This is particularly the case for non-resource major infrastructure projects which are almost always funded by Governments that need to ensure that taxpayers money delivers maximum value for money.

RECCOMMENDATIONS

513. Schedule 4 should be passed. This will send a clear signal that:

a. Australia is open for major project investment, securing global market share in resources for decades to come, generating jobs and providing royalties which help the states and territories fund hospitals, schools etc.

b. Employers and employees can pursue work on GF project construction with reliable certainty of high pay, annual wage increases, and work free from disputation based on claims for additional pay or entitlements during the life of project construction.

c. Global investors can inject money into Australian projects confident that high wages in global terms will secure stable and reliable collective agreements that will remain in place without re-negotiation throughout the period of project construction even where the scale of the project is such that it will take 4 years or more to complete.

d. Employees can enter into work on major project construction confident not only of higher pay than attaches to comparable work in the community generally, but also with a guarantee of a wage increase in each year of employment.

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SCH 5 - UNDERSTANDING AND REDUCING NON-COMPLIANCE

- Australia has a persistent underpayment problem.
- When the ABC, Maurice Blackburn, major charities and major employers investing millions to get it right get it wrong, we need to rethink the rules as well as how we enforce them.
- Australia will not significantly improve compliance until we tackle complexity, ambiguity, subjectivity, and inconsistency in how we regulate work, and terms and conditions.
- The Migrant Worker Taskforce (MWT) recommendations, which the Bill seeks to implement:
  - Recommend massive changes to compliance which should be approached with significant caution.
  - Were not based on evidence beyond migrant employment, for the employment of citizens and permanent residents.
  - Are in cases not well supported by analysis and explanation, nor any indication of how common or representative concerns were.
- Recommend substantial changes to compliance which warrant significant caution.
- Reflect government agencies' consideration of the experiences of some visa holders and were not based on any wider analysis of the employment of citizens and permanent residents.
- Are not well supported by analysis and explanation, nor any indication of how common or representative concerns raised with the MWT were.
- Australia needs to be smarter in how we tackle underpayment / non-compliance.
- There are numerous other initiatives government should take to tackle non-compliance without further increasing employer liabilities at such a fraught time.
- Any changes to the FW Act need to be very sensitive to their impact on employer confidence to recover and hire as we continue to tackle COVID19, and ongoing risks / uncertainty.

THIS DOES NOTHING TO SUPPORT JOBS AND ECONOMIC RECOVERY

514. The changes in Schedule 5 are not consistent with the aims of the remainder of the Bill. They will not create or retain a single job in the private service, nor support the recovery of any industry or business.

515. In fact, additional liabilities, higher fines and perceived risk of incarceration risk discouraging employers from offering jobs or trying to recover to pre-COVID staffing levels.

516. Significant caution and moderation is needed. There is a very real danger that if these changes are not framed, executed and targeted correctly the compliance measures will:

a. Place confidence to hire at risk when we need it most.

b. Detract from other moderately positive measures in the Bill.

517. ACCI appreciates the endeavours of Government to land the proposed changes in a balanced and practical manner. However, implementing ACCI's recommendations below is essential to minimising risks and damage.

518. Schedule 5 makes clear that any political claims that the Bill is biased in favour of employers or is anti-employee are false. Employers are genuinely concerned that the proposed further ramping up of penalties for non-compliance and the prospect of criminal charges and possible jail simply for offering someone a job, may discourage employers from taking the risks and creating the jobs Australia needs for sustained recovery.

519. In reality, these changes deliver on key elements of the ACTU's Change the Rules campaign relating to compliance and Wage Theft (sic) rather than any reform proposals from employers.

INTRODUCTION

520. Employers oppose underpayment and non-compliance with our IR laws.

a. No Australian should be underpaid for their work.

b. Minimum wages should be observed as universally as possible, noting however that no country has 100% compliance with its minimum wage or wages.

c. Some employers are concerned about being undercut by competitors minimising labour costs through underpayment.

d. Effective compliance and enforcement mechanisms (including fines) play an important part in our endeavours to see as many Australians paid correctly and in full as possible.

e. ACCI member organisations play a critical role in supporting compliance through IR advice to assist employers in getting the payment of terms and application of conditions right.

f. Employers recognise that underpayments reflect poorly on Australia's IR system and create reputational risks to businesses, including where weaponised in the media at the stage of being no more than allegations and prior to employers looking into claims and any clarification of fact and law.

521. It should be recalled that:

a. Non-compliance is complex and multi-causal and addressing it should rely on a proper balance of information, promotion, inspection, and enforcement.

b. Punishment and sanctions alone will not reduce non-compliance.

c. Significant measures have already been taken in recent years to improve compliance.

i. Pecuniary penalties for non-compliance have already been increased substantially in response to high profile compliance problems.

ii. Fines increased tenfold in late 2017, and given the long tail of prosecutions, cases and signal effects are still realising their intended effect.

iii. Until the full extent of the impact of these changes can be observed and assessed, there is no case for further increases in penalties or the introduction of criminal penalties.

d. These changes are still flowing through the system and their full impact to improve compliance has not yet been realised.

e. There is no evidence to suggest that another round of increases in fines will improve compliance.

f. Adding criminal penalties to the system will not improve compliance.

g. There are other, alternative measures available to government that will deliver better outcomes and see more employees paid lawfully and correctly.

h. The complexity, subjectivity, ambiguity and inconsistency of our employment laws drives a substantial proportion of non-compliance, in particular compliance with awards. Substantively combatting and reducing the incidence of non-compliance will be determined by our national appetite to genuinely reform and simplify awards, the NES, and IR rules more widely to make them comprehensible and applicable by non-experts.

i. ACCI is firm in our conviction that Australia can deliver our employment safety net far more simply, far more clearly, and far more enforce-ably without any loss of entitlements or erosion of the safety net.

Understanding underpayments

522. Underpayment is complex and multi-causal. Why for example does this happen in as well-resourced an organisation, spending as much per employee on compliance as any in the country, our public broadcaster?

> *The ABC has agreed to a $600,000 "contrition payment" and has back paid current and former casual staff $11.9 million to settle a damaging worker underpayment scandal.*
>
> *The national broadcaster has entered into an enforceable undertaking with the Fair Work Ombudsman (FWO) after an investigation found instances where 1,907 "flat rate" casuals had not received overtime, penalties and some allowances.*
>
> *The investigation also found that some casuals employed between October 2012 and February 2019 had been paid less than the minimum hourly rate.*[114]

523. How can we have massive underpayments in organisations, public, private and charitable, that invest millions of dollars to get compliance right, and cannot in any way be characterised as driven by greed or any intention to underpay?

[114] https://www.abc.net.au/news/2020-06-19/abc-to-pay-contrition-fine-for-underpaying-casual-staff/12373236

524. At some point pervasive problems from those who strive to get it right have to tell us something about the rules themselves.

525. Some measure of underpayments[115] stem from inadvertence or mistakes, some proportion from a level of ignorance that should not be sustained and some (small) proportion in deliberate deprivation of entitlements.

526. Without research, we cannot know with any certainty what is actually driving underpayment and this should dictate caution and a bias towards evidence based, sequential measures to improve compliance.

527. Understanding the causes and drivers of underpayment is an area in which further research should usefully be commissioned by Government.

Caution on the conclusions of the Migrant Worker Taskforce (MWT)

528. The majority of the proposed amendments in Schedule 5 seek to implement the early 2019 recommendations of the Migrant Workers' Taskforce (MWT).

529. ACCI is of the view that the MWT:

a. Failed to sufficiently take into account what had already been done in the 2017 Vulnerable Workers amendments, and the time that would be required to assess the positive impacts of the 2017 changes. The MWT jumped the gun in recommending even higher penalties.

b. Was only focussed upon the underpayment of migrants and visa holders, and not underpayment generally, and its recommendations should not form the basis of changes to compliance generally under the FW Act.

c. Was solely made up of government agencies and representatives and lacked any representation of business, unions or the wider IR policy community beyond government.

d. Recommended importing regulatory approaches from other areas of law without sufficient regard to their applicability in the IR context, or their transplant-ability into IR. As a result, the MWT report failed to make a proper case for importing approaches from competition and consumer law, nor to properly analyse the impacts, pros and cons of attempting to do so.

e. Provided insufficient explanation for its recommendations, and in particular how representative or common some of the cited concerns and examples were.

a. Paid insufficient regard to the interests, capacities and circumstances of smaller businesses, which constitute a significant proportion of those who would be subjected to higher fines and possible criminal offences recommended in the final report. This is a serious concern as the MWT report and its recommendations fail to give proper regard to to different challenges, experiences and relationships small businesses have with their employees and the drivers of underpayment within them.

[115] Also overpayments

f. Considered only enterprises that employ migrants (which is logical for a report on migrant employment but dictates that its work and recommendations cannot stand for authority on how to approach compliance more generally).

530. ACCI and its members urge significant caution in seeking to further implement the MWT recommendations.

What has already been done - The 2017 Vulnerable Workers Amendments

531. Australia has already taken significant steps to improve IR compliance in the wake of the 7-Eleven and other high-profile underpayment cases, and indeed prior to that. Foremost was the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*.

532. These amendments:

a. Introduced a higher scale of penalties (up to 10 times the current amount) for a new category of 'serious contraventions' of prescribed workplace laws

b. Expressly prohibited employers from unreasonably requiring employees to make payments (i.e. 'cash-back' arrangements)

c. Strengthened the evidence gathering powers of the FWO to ensure that the exploitation of vulnerable workers can be properly investigated and

d. Introduced stronger provisions to make franchisors and holding companies responsible for breaches of the FW Act in certain circumstances where they are culpable for the breaches.[116]

533. The EM to the 2017 Bill was explicit on what the vulnerable workers changes were designed to do:

> *In summary the proposed amendments will more effectively deter unlawful practices including those that involve the deliberate and systematic exploitation of workers. It will also ensure the Fair Work Ombudsman has adequate powers to investigate and deal with serious cases involving the exploitation of vulnerable workers and the deliberate obstruction of its investigations.*[117]

534. This legislation very clearly increased the liabilities and responsibilities of employers for lawful payment and increased potential penalties significantly.

535. Through the 2017 Vulnerable Workers legislation, Parliament has already recognised and responded to underpayment in contemporary Australia, through a range of measures which include higher penalties and increased deterrents.

536. In the wake of the 2017 upratings, changes in penalty units have inflated the financial penalties further.

537. It is inaccurate and untruthful for anyone to claim that:

[116] https://ministers.employment.gov.au/cash/turnbull-government-delivers-stronger-protections-vulnerable-workers
[117] Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, Explanatory Memorandum, p.ii

a. Australia is tackling a contemporary problem with outdated powers and sanctions; we are tackling a problem using updated powers and penalties which we have not yet realised the full impact of which is still flowing through the system.

b. The 2017 changes have not worked and will not work without the amendments in Schedule 5 of the Bill. The MWT did not pay sufficient regard to what had already been done, and failed to recognise that further substantial disincentives to underpayment had already been implemented through recent legislative changes.

Complexity has consequences

538. Complexity is not an excuse for non-compliance, but it is a key factor contributing to too many Australians being underpaid.

539. Australia has one of the most complex IR systems of any country. Immense complexity and overregulation is our antipodean IR idiosyncrasy – and its making things worse here not better.

540. This complexity is not confined to litigation and individual rights, to collective bargaining, or to what organisations can or cannot do. The regulation of day to day work, rosters, hours and pay in Australia is mind-numbingly complex, and is spread across modern awards, enterprise agreements, the national employment standards etc which increase the complication and risks.

541. With the best will in the world, and substantial investment of time and money to get compliance right, mistakes are still made, regularly, across all industries and all sizes of business. When organisations such the ABC and Maurice Blackburn, and major businesses that invest millions to get pay right end up underpaying, often substantially, there is clearly something more than intentional 'theft' going on.

542. It is not good enough to assert that we should have zero tolerance for non-compliance when the law itself is flawed. Poor laws, poorly executed let down employers and employees alike.

543. The complexity, subjectivity, ambiguity and inconsistency of our workplace relations system is, in ACCI's firm view, contributing to a level of risk of non-compliance that (a) should not be acceptable, and (b) needs to be taken into account in considering how compliance can be improved.

544. IR and award complexity should raise a range of considerations, including:

a. Relieving complexity in favour of simpler, more effective regulation.

b. Ensuring that the law is better understood, and that community awareness of rules, their complexity and the need for expert advice, is increased.

c. Ensuring that investigation, enforcement and compliance is genuinely cognisant of the inherent and unacceptable risks of inadvertently getting things wrong, and that enforcement works positively with industry and individual employers to respond to questions and promote getting it right in more instances.

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545. **To be 100% clear**:

a. **Until we make our employment rules substantially simpler, clearer and more comprehensible, we will continue to damn an unacceptable proportion of Australians to payroll errors, not through employer failure, but through regulatory failure**.

b. **Until we make our employment rules substantially simpler, clearer and more comprehensible, we will continue to damn an unacceptable proportion of small business people to be in breach of our employment laws, exposing them to enormous fines and the loss of their businesses, and even the potential risk of criminal charges**.

c. **A legislative package that focuses solely on sanctions without attacking the root causes of many underpayments fails to properly address the problem.**

546. The role complexity plays in non-compliance and the need to address complexity in the system was recognised by former Fair Work Ombudsman, Natalie James, who this has said:

> *"The sheer number of different pay rates and payments triggered by a range of factors makes it very challenging to capture and systemise those events and ensure that workforces are appropriately paid.*
>
> *While complexity is no excuse for non-compliance, especially by large and established businesses, surely we must ask: if the system is so complex that large organisations are unearthing these legacy underpayments, is it not time to really take a look at the system?"*[118]

547. The complexity of the Australia's employment system should not be accepted as a given nor a necessity for Australians enjoying appropriate standards of living and fair treatment.

548. Our OECD counterparts in the UK, the EU, New Zealand, the US, Canada, Japan etc enjoy comparable or superior standards of living and retirement and enjoy world leading rights and freedoms at work without myriad, highly detailed and overlapping regulations that are difficult to comprehend, apply and comply with. **There is a better, fairer way for Australia**.

549. Employees and employers in comparable, high-income countries don't have to be initiates into a specialist caste of mysterious cognoscenti to understand and apply employment rules, as they do in Australia.

a. Comparable countries don't pay different rates determined by whether an employee in a café or restaurant is putting down or picking up plates.

b. Comparable countries don't need or attempt to generate 90 page guides or summaries to help employers apply 99 page awards.

[118] https://www.afr.com/work-and-careers/workplace/ir-system-hits-workers-and-business-20190625-p520yp

c. Comparable countries don't have workplace legislation the size of a phone book, plus 122 modern awards setting out thousands of separate minimum wages, plus national employment standards that confusingly overlap with awards.

d. Comparable countries don't generate 30 different applications or scenarios (such as penalties and overtime) for each classification, of which there are thousands.

e. Comparable countries don't chop and change employment rules multiple times across a decade, as we have in Australia.

f. And yet comparable countries enjoy high living standards, lower levels of measured inequality, and substantial rights and protections at work.

550. To further complicate matters, our workplace laws are so unclear that much of the law is left to interpretation, for example in the Broadcast, Recorded Entertainment and Cinema Award 2020 the difference between four grades of pay is put down to a person's level of 'maturity' – a highly subjective assessment, which employers are asked to undertake without any further guidance. This lack of clarity often leads to dispute which are frequently lodged in the FWC under s 739 over things as basic as the interpretation of meal breaks, entitlements to overtime and classifications. In 2019-2020 alone there were over 1,700 disputes lodged under section 739 of the FW Act.

551. Our IR laws have so many layers and intersecting requirements that have been developed and changed so many times over decades that they are really only understood by an exclusive club of IR specialists, peak union officials and barristers. This is no longer acceptable.

552. To expand on some of the above examples about complexity, take the example of a Level 1 Food and Beverage Attendant, who is over 20 years of age, working as a casual under the Restaurant Industry Award 2020.

a. When most people consider what a casual employee might be paid, they might assume there would likely be the regular casual rate, and potentially a higher rate for weekends / public holidays or late night work.

b. This would of course be incorrect. Using the FWO's Pay Calculator, which generated a 25 page 'pay rates summary', it is apparent that there are 19 possible rates of pay for a level 1 Food and Beverage Attendant, over 20 years of age, working as a casual employee. This does not include allowances, which would extrapolate the pay rates even further.[119]

[119] The rates in the following table do not reflect the most recent increases awarded during the 2019/20 annual minimum wage review.,

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Possible pay rates: Level 1, Casual employee, over 20 years

Hours	Rate
Hourly Rate	$25.08
Saturday	$30.09 per hour
Sunday	$30.09 per hour
Public holiday	$50.15 per hour, with a minimum payment of 2 hours
Late night - Mon to Fri - 10pm to 12am	$25.08 per hour plus $2.27 per hour or part of an hour
Early morning - Mon to Fri- 12am to 6am	$25.08 per hour plus $3.41 per hour or part of an hour
Overtime – Mon to Fri - first 2 hours	$30.09 per hour
Overtime - Mon to Fri - after 2 hours	$40.12 per hour
Overtime - Saturday - first 2 hours	$35.11 per hour
Overtime - Saturday - after 2 hours	$40.12 per hour
Overtime - Sunday	$40.12 per hour
No meal break - Mon to Fri - 6am to 10pm	$35.11 per hour, from 6 hours after starting work until the meal break is given or the shift ends
No meal break – Saturday / Sunday	$40.12 per hour, from 6 hours after starting work until the meal break is given or the shift ends
No meal break - Public holiday	50% of the ordinary rate plus the appropriate public holiday rate per hour, from 6 hours after starting work until the meal break is given or the shift ends
No meal break - Late night - Mon to Fri - 10pm to 12am	$35.11 per hour plus $2.27 per hour or part of an hour, from 6 hours after starting work until the meal break is given or the shift ends
Mon to Fri - midnight to 6am	$35.11 per hour plus $3.41 per hour or part of an hour, from 6 hours after starting work until the meal break is given or the shift ends
No meal break - Overtime	50% of the ordinary rate plus the appropriate overtime rate per hour, from 6 hours after starting work until the meal break is given or the shift ends
Working through a meal break - Mon to Fri - 6am to 10pm	$35.11 per hour, from the time the meal break was scheduled to start until it's given or the shift ends
Minimum break after overtime	overtime rates until a break of 8 hours is given

Allowance	Rate
Meal allowance	$13.38 for a meal
Laundry reimbursement	reimbursement of the demonstrated costs of laundering special clothing
Working away from usual workplace - travelling time allowance	payment at the ordinary pay rate for the time occupied in travelling between the employer's place of business and work or between the employee's residence and work
Special or protective clothing reimbursement	reimbursement of the cost of purchasing special clothing such as coats, dresses, caps, aprons, cuffs
Working away from usual workplace - country or seaside work involving 80km or more of travel	payment for transport to and from the workplace

553. To further complicate matters in relation to an employee working under the Restaurant Industry Award 2010:

a. A level 1 Food and Beverage Attendant is allowed to clear plates from tables, but is not allowed to take plates out to customers.

b. A level 2 Food and Beverage Attendant is allowed to clear plates, and can also take plates out to customers.

554. This means that if, for example, a café gets particularly busy and a Level 1 employee helps out by taking a plate out to a customer (either by direction or initiative), that employer may then be required to pay that employee the Level 2 rate.

555. The Award does not provide sufficient or clear guidance as to at what point that Level 1 employee will be entitled to the higher Level 2 pay rate.

a. Is it after taking out one plate to a customer, or multiple?

b. Is it for the hour in which they did it, or their entire shift?

c. Does it make a difference if the employer directs them to take out the plate, or they do it at their own initiative?

556. At a difference of almost $1 per hour, acting on mistaken assumption can quickly add up to a substantial underpayment for each such employee. It is pretty simple to see how even in the smallest businesses massive liabilities can accrue as a direct function of rank over-complication.

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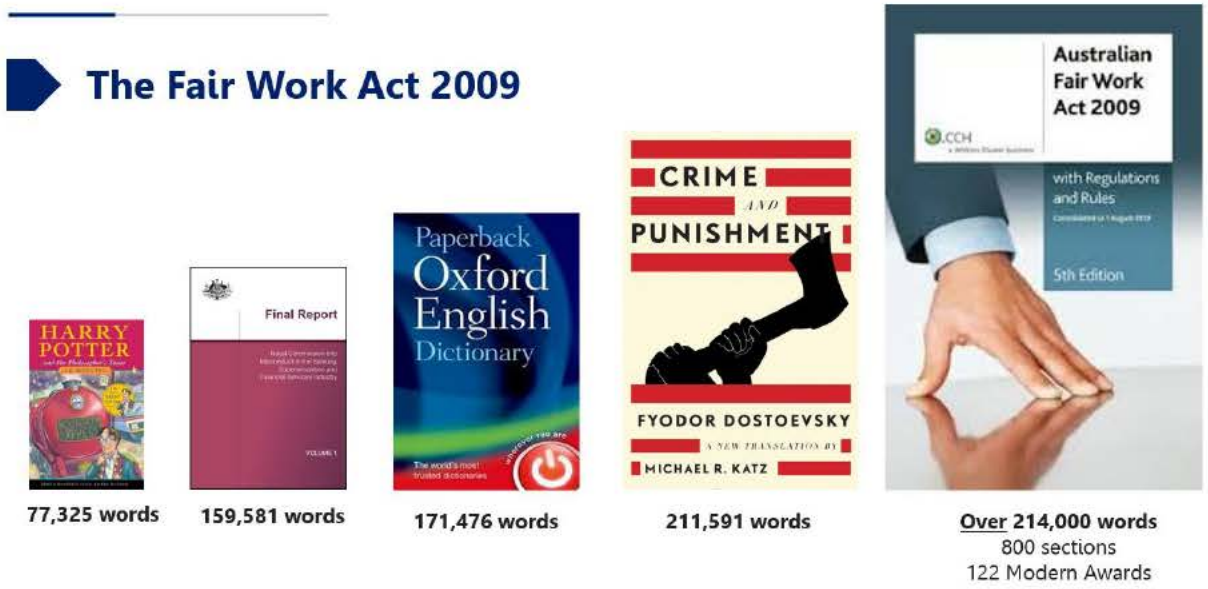
557. The Restaurant Industry Award is not alone in its complexity about pay rates:

a. The Hospitality Industry (General) Award 2020 is 129 pages. The FWO Pay Guide for this award is **75 pages**.

b. The Building and Construction General On-site Award 2010 is 147 pages. The FWO Pay Guide for this award is **130 pages**.

558. Further, in addition to pay rates and entitlements in one Award, employers must also be across the matter of whether any of their other employees are covered by one of the other 122 Modern Awards, as well as the employment conditions in the FW Act, which contains over 247,000 words, and well over 800 sections.

559. The following figure illustrates how over the top our regulation of work is in Australia, without factoring in residual state awards and state employment laws.[120]



Yes, employers do also overpay

Finally, this is a suitable point to bust an absolute myth that does the rounds in relation to compliance.

This is the claim that "you never hear about employers overpaying anyone".

In fact, we do. 50% of businesses audited by the Australian Payroll Association have made overpayments to their employees.[121] ACCI members field calls from employers daily that realise they have over paid and are seeking advice on their options.

It is regularly the case that having reviewed scope to recover overpayments and taking into account the personal and organisational implications and limited employer rights, recovery is not pursued.

[120] The FW Act now exceeds 247,000 words, not the previous count of 214,000+ words.
[121] https://smartcompany.com.au/finance/payroll-managers-confused/

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ALTERNATIVES TO HIGHER FINES AND CRIMINAL LIABILITIES

560. ACCI has previously proposed alternative ideas to tackle non-compliance, some of which are being taken up.

561. The principal opportunity to improve compliance lies in simplifying the ask. We set out above the case for reducing the complexity subjectivity and inconsistency of award pay rules in particular.

562. Beyond that, alternatives to increased fines and criminal penalties include:

a. More funding for the FWO to put more inspectors on the streets / working with those asserting they have been underpaid.

b. More funding for both the FWO and employer organisations to inform and assist employers on wages compliance matters.

c. Better promoting / publicising IR rules and compliance obligations to employers, employees, parents etc through a major national advertising campaign.

d. Improved marketing and branding for the FWO.

e. Using the ACCI network and the organisations employers know and trust to promote and support compliance, including innovatively spreading information to culturally and linguistically diverse business communities.

f. Supporting voluntary accreditation and assurance schemes offered by established employer representative organisations.

g. Focussing the FWO's work more explicitly on lower paying, award covered work.

h. Ensuring the FWO can provide more legally reliable information.

i. Exploring the opportunities which new technologies such as regtech and big data offer to support improved compliance with pay obligations.

563. We now turn to the proposed amendments in Schedule 5 of the Bill, reordered for clarity.

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SCH 5 – PARTS 1, 3, 4, 5 AND 6

- The Migrant Worker Taskforce (MWT) report does not provide sufficient basis for a further significant increase in fines.
- The MWT and the amendments did not adequately consider the tenfold increase in fines in 2017 vulnerable workers amendments.
- Excessive fines will discourage employers from hiring and recovery when we need it most.
- Australia cannot punish its way to greater compliance.
- Higher fines and criminal penalties should be suspended for small business for two (2) years.
- Small businesses need confidence to hire, not the threat of a criminal record and jail time.
- There is no basis to regulate job advertising through the FW Act.

PARTS 1, 4 AND 5 – EVEN HIGHER FINES

Position

564. The Bill firstly seeks to increase fines by a further 50%, on top of the tenfold increase in late 2017, through the Vulnerable Workers legislation introduced after the high profile 7-Eleven case. This follows Recommendation 5 of the final report of the MWT.

565. ACCI cannot support such increases.

a. The MWT examined a narrow subset of cases for some migrants and visa holders. Such a narrow inquiry cannot stand as authority for an across the board increase.

b. The MWT recommended higher fines without adequate regard to the vulnerable workers changes of late 2017 and did not allow the previous tenfold increases to realise their intended impact prior to recommending further increases. The MWT acknowledged that the serious contravention changes of 2017 had not been tested in court[122], but still recommended higher fines. This was a fundamental failing of the MWT Report.

c. Penalties for underpayment are already substantial, and existential for many businesses, particularly small and family businesses. Those who underpay already risk losing their business and personal assets such as their homes, and those who would be scared into compliance based on perceptions of risk versus punishment will have overwhelmingly already been scared into compliance.

d. Given the fines are already massive and existential for many businesses why it cannot be assumed that any additional non-compliance will be discouraged by increasing them further.

e. The MWT did not adequately make out the case for recommending substantial further increases in penalties.

[122] Migrant Workers' Taskforce (2019) Final Report, p.86

i. The MWT acknowledged that the existing law saw a 46% increase in penalties secured by the FWO between 2016 and 2017.[123]

ii. The MWT acknowledged that the existing law was seeing a growing number of FWO prosecutions before the courts. [124]

iii. The MWT's findings were far from definitive: *"the prevalence of underpayments, particularly in the case of vulnerable workers such as temporary migrant workers, might suggest that penalty levels for underpayments are insufficient to deter wrongdoing or drive behavioural change."*[125]

iv. The MWT appears to have been pursuing an unrealistic goal of zero underpayment cases being brought[126], which is unrealistic given human behaviour and a complex labour market of 12.5m Australians working for over 100,000 employing businesses. No country eliminates underpayments.

v. The MWT acknowledges it only recommended increased fines because of *"the limited availability of other policy levers to affect the situation."*.[127] We are surprised by this. ACCI has in fact put forward multiple positive ideas to improve compliance with IR obligations, a number of which can be pursued without any changes to the FW Act.

vi. Properly analysed the written report of the MWT provides little evidence and analysis to support the further massive increases in fines that are proposed. Ultimately, the answer recommended by the MWT (even higher fines) does not flow from its workings.

Exempt small businesses for two years

566. In focusing on high profile cases such as 7-Eleven, and disparities between the fines for breaching IR laws and those administered by the ACCC, the MWT missed a fundamental point; the differing capacities of smaller versus larger businesses, and the long-standing recognition throughout our IR laws that differential approaches are often necessary for smaller businesses.

567. If Parliament choses to increase fines, there should be a differentiated approach for the small to the medium sized businesses Australia will rely upon to hire and retain staff as our nation confronts the ongoing risks and damage of COVID-19, and its emerging variants, here and globally.

568. ACCI's welcomes the Bill not exposing small businesses to the 2 or 3 x benefit derived alternative for calculating penalties for non-compliance.[128] This is some recognition of the lower financial and technical IR compliance capacities of smaller businesses, and the greater parity between incomes derived from most small businesses and wages paid, compared to larger organisations.

569. The recognition of small business under the Bill needs to go further however, as recommended below.

[123] Migrant Workers' Taskforce (2019) Final Report, p.86
[124] Migrant Workers' Taskforce (2019) Final Report, p.86
[125] Migrant Workers' Taskforce (2019) Final Report, p.86, emphasis added
[126] Migrant Workers' Taskforce (2019) Final Report, p.86
[127] Migrant Workers' Taskforce (2019) Final Report, p.86
[128] Schedule 5, Part 1, Item 4, Table at s 546(2), Lines 5 and 6, Columns 1 and 2.

570. ACCI calls on the Committee to recommend that there be no further increases in maximum fines that can be awarded against small businesses, nor the imposition of criminal liabilities for such businesses, for a period of two years from the wider commencement of the amendments (i.e. the same period proposed for the sunsetting of Schedule 3, Part 5, Division 2)[129].

Recommendation 5.1

All increases in fines (Schedule 5, Parts 1, 4, and 5) and the imposition criminal penalties (Schedule 5, Part 7) be suspended for two years / or removed entirely for small businesses to promote confidence to hire and recover in the small business sector.

Australia cannot punish our way to compliance

571. We have learnt as a community across various areas of the criminal law that simply increasing financial or other penalties, including jail terms in the criminal law often does not reduce propensity to break the law, and can risk unintended consequences such as discouraging people to come forward with small problems and seek to redress them.

572. The ultimate impact of excessive punishments can also be more damaging than the wrong or ill they are addressed to.

573. It is of concern that the MWT adopted a solely penalty-based approach of further ramping up fines, ignoring the tenfold increase in penalties in late 2017.

574. The 2017 changes need to be allowed to do their work and have their intended deterrent effect. It is very hard to see how it can be legitimate to double down[130] when the previous increases haven't been allowed to run their course.

575. ACCI's firm position remains that more than adequate disincentives are already built into the system, and that the MWT did not provide sufficient evidence for its recommendations to increase penalties and cross the Rubicon into criminalisation.

Benefit derived based penalties

576. ACCI notes the alternative 'benefit derived' formula for calculating penalties in Schedule 5, Part 1, and that this implements a recommendation of the MWT. We welcome the exemption of small businesses from this proposal, but emphasise that courts must be able to take into account the impact on businesses, services, products and jobs in awarding financial penalties up to such levels.

577. No one gains where penalties against underpaying businesses put them out of business, everyone loses their job, owners lose assets, and communities lose products and services.

578. We urge the Committee to review and recommend amendments to proposed s 546A 'Value of the benefit of a remuneration-related contravention'.

[129] Bill, p.2
[130] In fact fines would go up a further 50% in most instances.

579. Specifically, this seems to be based on the short-fall of underpayment rather than any benefit ultimately retained by an employer. Consider a scenario in which an employer rectifies an underpayment or moves to pay it back (which has been near universal in high profile cases of inadvertent underpayment). They have derived or retained no benefit, except perhaps in interest, and no value of that benefit.

580. How could it be legitimate to calculate penalties based on a benefit derived if the employer did not retain the benefit or rapidly surrendered it when errors came to light.

581. Section 546A (and 546(2) and (3)) should be amended to provide the alternative of fines based on benefits derived where the benefits have actually been derived, not where they have been surrendered immediately any errors or problems come to light.

582. Specifically, there cannot be presumption of an intention to deprive outside perhaps recidivism or where there is evidence to support such a conclusion, and any higher penalty option should only be triggered in such circumstances.

PART 3 – JOB ADS

583. Schedule 5, Part 3 of the Bill would insert a new Part 3-6, Division 4 requiring employers to not advertise jobs at rates less than the NMW or special NMW.

584. The amendment responds to a specific and apparently unique problem experienced by some migrants and visa holders, reported to the MWT, however it is being implemented through a proposal to amend the FW Act with application to all employers.

585. Employment law / the FW Act and employer liabilities to penalties would be expanded by this proposal, based on a small number of cases in unique circumstances relating to migration and we understand employment in languages other than English. We do note further research in this area released by Unions NSW in December last year, showing ongoing problems for migrant workers.[131]

586. It is clearly a breach of the law to pay less than the required minimum rates, regardless of offer and acceptance or the rate advertised in advance of work and payment. For a century or more our employment laws have focussed on whether pay packets are compliant, not any preceding actions or representations.

587. ACCI cannot see sufficient basis to depart form this approach, nor to regulate jobs ads in this manner. Rather:

a. Any job ad which advertises a rate of pay less than the minimum wage should be brought to the attention of the FWO or other authorities and should trigger an investigation of:

i. The actual rates paid and their compliance with award and statutory obligations. If someone follows through on a pay level which is non-compliant then they should face enforcement and possible sanctions.

[131] https://www.abc.net.au/news/2020-12-14/jobs-ads-targeting-migrant-workers-offering-below-minimum-wage/12976454

ii. Whether migration and visa obligations have been met, which in regard to wages are threefold (a) meeting minimum wage obligations under awards, (b) to pay market rates through the 'annual market salary rate (AMSR)', and (c) to meet the Temporary Skilled Migration Income Threshold (TSMIT).

b. If necessary, the FWO should specifically update the information it provides to migrant workers to clarify that it doesn't matter what was originally advertised to them and it doesn't matter what they signed or agreed to, they are entitled to the appropriate wage rates for their work.

What employers need to be able to do in job ads

588. If this is going to be done, and the proposed new Division 4 is added to Part 3-6 of the FW Act regulating "Employers must not advertise employment with rate(s) of pay less than the National Minimum Wage", care will need to be taken to preserve long standing capacities in advertising jobs.

589. Specifically, there is a long-standing series of phrases (or variants on these phrases) that must remain legitimate and lawful in advertising work. Existing employer capacities which must be preserved, and not curtailed or restricted by such amendments include:

a. Capacity to advertise a job without identifying any rate of pay. For example, simply advertising for a qualified carpenter, the type of work, and the location, without any reference to what she or he will be paid. It is only when employment commences / separately negotiated that pay rates are considered, and they must then always be in compliance with any applicable award.

b. Capacity to advertise a job with a general descriptor such as "at applicable award rates", or "paid the appropriate minimum wage for the role", or "paid not less than the appropriate minimum or award wage" without specifying a particular rate.

c. Capacity to advertise a job with a general descriptor such as "competitive pay arrangements will be offered based on your experience and qualifications", or some variant thereof, without identifying a rate, or minima.

590. These are all variants that have been used for decades in offering work, and employers need certainty they can continue long standing practices in advertising roles. Any revised EM should provide this certainty, and ideally there would be a statutory note to new s 536AA clarifying that nothing in this provision obliges any employer to advertise a position or to advertise a rate of pay.

Exclude inadvertent errors

591. Employers make errors in interpreting and applying complex award classifications, and even where rates are accurate, they rise, meaning that a rate that is correct and compliant on one day (e.g. 30 June) may be wrong the next (1 July).

592. An advertisement that runs for multiple weeks across the period in which any advertisement is posted may be legally compliant at the point of being posted, but slip behind an actual award rate during its time online (for example for an increase on 1 July).

593. The approach in the Bill of focussing on the minimum wage seems to minimise this risk in regard to misclassification, but the National Minimum Wage is amended each year, and acts done in good faith and based on current advice can become outdated. There needs to be scope for the excusing of inadvertent errors.

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Is this misleading?

594. We caution that the proposed approach may mislead some employers into thinking:

a. Their wage obligation is to the NMW where it is actually to a higher rate including the TSMIT.

b. The NMW applies to particular work being advertised where in reality a higher award rate should apply.

c. They have access to special minimum wages where they do not.

Liability for publications and websites

595. Any newspaper or online website that publishes an advertisement that breaches proposed s 536AA should not be caught up in involvement in the contravention under s 550, save for where there was some knowing and deliberate conspiracy to mislead and underpay.

596. The same way newspapers were not responsible for publishing classified ads that passed coded information to criminals in years past, or personal ads for then illegal prostitution did not trigger prosecutions of platforms (with the focus on those committing the actual crimes), online job services should not be caught up in breaching these new provisions merely for publishing ads brought to them.

597. It is not the responsibility of a job website to in any way vet job ads against jobs to see that any nominated wage rates comply with these requirements.

Recommendation 5.2

Proposed Schedule 5, Part 3 not be included in the package of amendments passed by the Senate.

If these changes are progressed, there be a statutory note clarifying that new s 536AA would not require any job advertisement to identify a wage rate.

PART 4 – NOTICES AND UNDERTAKINGS

598. ACCI will focus on the proposed changes regarding the FWO[132] and leave others to address the comparable changes for the ABCC[133].

599. Consistent with ACCI's principal recommendation on Part 5 of the Bill, small businesses should be exempted from the proposed 50% increases in penalties for two years, as set out in:

a. Item 33, relating to Infringement Notices.

b. Item 34, relating to Compliance Notices.

[132] Schedule 5, Part 4, Items 33-35
[133] Schedule 5, Part 4, Items 28-32

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Proposed new s.715(2A)

600. ACCI supports greater clarity on the decision-making process the FWO follows in relation to enforceable undertakings, and the factors it will take into account (Item 35, inserting a new s 715(2A)).

601. However, proposed s 715(2A) should be improved:

a. In s 715(2A)(c), 'cooperate' seems a superior construction to 'fully cooperate'. An employer may be quite cooperative and want to work with the FWO to address various purported conventions but may maintain a well-founded difference of opinion on some matters of fact or law that it is engaging with the FWO upon.

b. Employers would be concerned if 'fully cooperate' were interpreted as demanding complete acquiescence to an inspector's view of facts and law rather than constructive cooperation, dialogue and problem solving with the FWO. Employers and their advisers regularly persuade or clarify obligations to the FWO during constructive dialogue on how particular obligations should be interpreted, and this must remain possible.

c. Paragraph s 715(2A)(g) should be amended as follows:

> *(g) the person's history of compliance with this Act, within the period within which records must be kept under s 535, as well as their contemporary policies and practices on compliance.*

d. The policy intent should be that the FWO's consideration of undertakings be based on the attitudes, approach and compliance behaviours of the contemporary management of the organisation, in relation to matters the FWO could action under current legislation.

e. Employers can have a compliance history going back decades, but surely it is their more contemporary approaches that are relevant to the exercise of FWC discretion.

f. We remind the Committee of the importance of contrition and change. An organisation with a notorious, brand tarnishing reputation for underpayments might change management, and the new management may strive to become a leader in IR compliance, elevating its importance in the running of the business to rank with safe operations.

g. This is the 'learning organisations' argument in which those who experience problems and act to correct them need to be recognised and encouraged not forever linked to the conduct of a previous generation of management.

Recommendation 5.3

Amend proposed s 715(2A)(c) in Schedule 5, Part 4 to replace "fully cooperate" with "cooperate".

Amend proposed s 715(2A)(g) in Schedule 5, Part 4 as follows:

> *(g) the person's history of compliance with this Act, within the period within which records must be kept under s 535, as well as their contemporary policies and practices on compliance.*

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PART 6 – FUNCTIONS OF THE ABCC AND FWO

602. ACCI supports requiring the ABCC and FWO to publish information on the circumstances in which enforcement proceedings will be instituted or deferred.

603. We agree with the intent identified in the EM that employers need '*greater certainty about possible enforcement outcomes, to further encourage identification of remuneration-related and other contraventions*'.[134]

604. Employers do however have two issues with Part 6 of Schedule 5 of the Bill.

a. Small business policies: it would be beneficial for the FWO to publish information on how it is assisting SMEs in compliance, rather than just how it will commence legal action against employers. Employers currently have access to the Annual reports of the FWO, but in order for the Bill to be entirely consistent with ILO Convention 81, it is vital that there be communication on both supporting measures and sanctions to support compliance.

b. This could be implemented by the addition of a new paragraph 682(1)(db), along the lines of the following:

> *To publish information on the information, advice and assistance the Fair Work Ombudsman offers to employers and employees to support compliance.*

c. Commencement date: It is not appropriate that the FWO have 6 months to publish its policies, but the additional fines would be triggered from commencement[135]

i. Given the regulator needs 6 months' notice to be able to be able to communicate when and how it will commence proceedings, those against whom proceedings may be brought also need comparable time to review and change their practices, audit compliance etc.

ii. In considering this, we ask the Committee to recall that Schedule 5 contains entirely new obligations, as well as increased liabilities.

iii. This is not withstanding ACCI's wider recommendation that any increases in fines against small businesses and new criminal penalties be suspended for 2 years, or not be progressed.

Recommendation 5.4

Amend the commencement table at Item 2 of the Bill to ensure that to the extent possible all Parts of Schedule 5 commence simultaneously, and that increased pecuniary penalties (Parts 1 and 4) do not commence prior to the FWO being obliged to publish its policies on the circumstances in which it will commence proceedings to enforce them (Part 6).

[134] EM, para 399, p.75
[135] See Item 2 of the Bill, re Commencement

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SCH 5 – PART 2 – SMALL CLAIMS

- The existing small claims avenue for small underpayments is not as ineffective as claimed.
- However, the proposed revised small claims avenue is generally well designed.
- ACCI is supportive of, as proposed:
  - The courts determining which claims it will hear / be responsible for, and which will go the FWC.
  - The FWC only arbitrating with the express written consent of both employee and employer.
- Any arbitration needs to be subject to both appeal rights and rights to seek judicial review.
- The FWC should not be restricted in the outcomes it can facilitate or award by inconsistency with fair work instruments (proposed 548C(9) and 548D(7) should be deleted).

INTRODUCTION

605. There is already a dedicated avenue for special / bespoke consideration of some smaller subset of underpayment claims.

606. Existing s 548 of the FW Act provides that the applicant (in this case an employee alleging underpayment) seeking redress of $20,000 or less may elect to have their claim heard as a small claim.

607. Small claims are heard differently:

a. The court is not bound by rules of evidence or procedure.

b. The court may act in an informal manner and without regard to legal forms and technicalities.

c. The court may amend the papers commencing the proceedings (a statement of claims) at any stage.

d. Employer or employee may only be represented by a lawyer with leave of the court, and this representation can be subject to limitations or conditions.

608. Employers do not consider the existing small claims avenue for small underpayments to be as ineffective as claimed. However, employers understand the rationale for this avenue being included in the FW Act, and the more informal and lower cost approach may work for some small business respondents to claims. Equally, this must be recognised as a less legally rigorous mechanism to resolve financial disputes and needs to be approached with caution.

Another union concern addressed in the Bill

609. Unions have for some time contended that the small claims process was not working and needed to be reformed. They have succeeded in prosecuting this change into the Bill as the key mechanism most likely to be used to address alleged underpayments.

610. This is further evidence of a far more balanced package of changes than is being painted in the media and in Parliament to date.

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WHAT CONSTITUTES A SMALL CLAIM?

611. The current threshold for a small claim is $20,000, which has not increased since its commencement in 2010.

612. The threshold may need to be updated, but many of our members would not have gone from the existing $20,000 to the $50,000 proposed in the Bill.

613. For the information of the Committee:

a. If the $20,000 was updated for inflation since 2010 it would be $24,162.33.[136]

b. If the $20,000 was updated for a decade of minimum wage increases, it would be roughly $29,000.

CONCILIATION

Referral to the FWC

614. Step 1 is that an underpayment claim is lodged which is a small claim under amended s 548.

615. The next step is that the court must determine whether to refer the claim to the FWC for conciliation under s 548A.

616. This is an important step, and the court needs to be able to make this decision.

a. Some matters may be elements of much larger circumstances and have larger financial implications.

b. An employer or applicant may wish to mount an argument that a matter raises complex legal or factual matters than warrant proceeding in the court.

c. An employer or applicant may wish to mount an argument that a matter merits being heard more rigorously or legally.

d. An employer or applicant may wish to mount an argument that a matter merits being heard be the courts due to notoriety or sensitivity.

e. There will be a difference between informal small claims consideration in the courts and the FWC which parties will want to consider.

f. It will be apparent that conciliation will be unlikely to resolve some matters and a court may wish to have carriage of a matter throughout that it considers is particularly likely to ultimately come to it for determination.

g. A court may think its powers and capacities to settle are more appropriate to a particular matter than those of the FWC.

[136] Using https://www.rba.gov.au/calculator/annualDecimal.html

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617. The matters set out in proposed s 548B(3) underscore the importance of the court being able to determine whether matters are referred to the FWC for conciliation

618. Employers welcome the approach in proposed s 548A. The decision of whether a matter stays with the court or is referred to the FWC must remain with the court and parties must be able to be heard on this if they wish to.

619. In practice we foresee:

a. The courts creating or amending existing forms which ask applicants and respondents whether there is any objection to a small claim proceeding to the FWC.

b. The significant majority of such small claims proceeding to the FWC, but not all.

Conciliation by the FWC

620. ACCI has examined proposed s 548C[137]

621. This seems an appropriate foundation to empower the FWC to undertake the conciliation functions it is being asked to assume.

622. We emphasise the importance of:

a. Conciliation conferences being private in these instances (proposed s 548C(3)).

b. The importance of the FWC's role being strictly confined to conciliation (proposed s 548C(4)).

CONSENT ARBITRATION

623. Employers were quite concerned throughout the working group discussions at the introduction of FWC arbitration of small claims, and remain concerned that the natural expertise and experience of FWC members does not innately equip them to determine such matters, even where they arise under awards of the FWC.

624. On balance however proposed s 548D appears well executed and balanced. If there is to be arbitration of small claims in the FWC, it needs to be by consent, and the process between court and FWC needs to be clear and well-articulated.

625. The primary priority for employers is that such arbitration be strictly and in all cases by consent, and with the agreement of both applicant employee and respondent employer. Paragraph 548D(1)(c) will be absolutely critical to this working as intended and to the new FWC jurisdiction enjoying the confidence of employers, employees, organisations and other users of the system.

Access to judicial review

626. Employers welcome proposed s 548D(8) which clarifies that arbitrations of small claims matters may be appealed under s 604.

[137] Bill, Schedule 5, Part 2, p.75

627. However, this cannot be the sole appellate or review option. It is important that there also be access to judicial review. Various decisions call into question whether the FWC exercising a private arbitration power can be subject to judicial review, including *Endeavour Energy*[138].

628. This needs to be clarified in relation to the proposed new power to arbitrate small underpayment claims (proposed new s 548D). ACCI's firm position is that if there is any doubt of the capacity for such arbitration decisions to be judicially reviewed, this should be clarified by way of an express power for such reviews in the FW Act.

629. This change can be incorporated without disturbing the balanced and interlocking nature of the amendments.

Recommendation 5.5

Government seek advice on whether arbitration under s 548D may be subject to judicial review.

If this is not clear cut, the Bill be amended to ensure there is an express avenue for such a review of FWC arbitration decisions.

REMOVE IMPRACTICAL RESTRICTIONS ON CONCILIATION AND ARBITRATION

630. Two restrictions have been included in the proposed small claims process which are understandable in intent but appear inapplicable and impractical in effect. They are:

> s 548C - *FWC must not facilitate an outcome inconsistent with this Act etc.*
>
> *(9) The FWC must not facilitate an outcome as part of the conciliation that would be inconsistent with this Act, or a fair work instrument that applies to the parties to the proceedings.*
>
> s 548D - *FWC must not make an order or facilitate an outcome inconsistent with this Act etc.*
>
> *(7) The FWC must not make an order, or facilitate an outcome, as part of the arbitration that would be inconsistent with this Act, or a fair work instrument that applies to the parties to the proceedings.*

631. To be very clear, this is not being raised to in any way rip people off or short circuit the intended purpose of the small claims avenue; getting money owed to employees back to them. Nor is this being raised to in any way attempt to see employees 'nickelled and dimed' on what they are entitled to.

632. However, conciliation is about settling matters and it is about employing the sensible guidance of experienced FWC members to secure pragmatic outcomes which are as win-win as possible, and which often do not deliver on any party's claims or initial position in full.

633. A conciliator needs to be able to advise an applicant employee to consider taking a deal, which may be fair but less than their full claim, and less than what they contend they are entitled to under a fair work

[138] Endeavour Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia [2016] FCAFC 82, matter reviewed: [2015] FWCFB 6750

instrument. A conciliator also needs to be able to encourage a respondent to settle where appropriate, without being restricted to a settlement that delivers 100% of the amount claimed.

634. We are concerned that on its face s 548C would preclude a conciliator from using the proper range of pragmatic tools and encouragement necessary for fair and effective conciliation.

635. This is not any attempt to preclude employees seeking their full entitlements. However, we are concerned that narrow interpretation of s 548C(9) and s 548D(7) may rob the conciliation process of scope for compromise and settlement, and may rob employees and employers of options other than expensive and time consuming court proceedings.

636. We are concerned that:

a. In saying that the FWC must never facilitate outcomes inconsistent with a fair work instrument, that FWC conciliators will be robbed of the full range of conciliation tools necessary to facilitate agreed outcomes, as a practical, pragmatic, human exercise between aggrieved individuals.

b. Proposed 548C(9) may render the whole point of introducing conciliation of these claims by the FWC moot.

637. On consent arbitration and proposed s 548D(7)

a. This seems to cut across the bespoke, looser approach to the determination of small claims in s 548.

b. This would seem to preclude a finding along the lines of

> *The applicant claims they worked X hours per week in work attracting the AB allowance, and the employer claims they worked only Y hours. I could not establish with 100% certainty what the hours worked were, but I find on the balance of probabilities that the employee worked .8X hours, and should be paid the AB allowance for Z% of these hours.*

c. This may be argued to be inconsistent with a fair work instrument, but may be the merited finding in arbitration.

d. Again, the point is not to short change employee applicants, but to ensure the arbitrator has the proper range of options open to them.

e. We note in saying this that the principal objects of the FW Act, the role and functions of the Commission and any objects to the underpayment provisions would apply and weigh against unfair or unwarranted outcomes (i.e. this is a further level of protection were our recommendation below implemented).

Recommendation 5.6

Delete proposed 548C(9) and 548D(7).

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RECOMMENDATION

638. ACCI opposes Schedule 5 of the Bill as a whole.

639. However, we appreciate the thorough consideration that has gone into formulating Part 2.

640. It appears overall, bar the excessively wide access threshold of $50,000, an attempt to construct a practical and balanced system.

641. We see Part 2 as akin to a Swiss watch, carefully calibrated and interlocking. Distorting the careful balances in Part 2 the Bill, excising any key parts risks unbalancing the whole and an inoperative and damaging small claims avenue.

642. This said, on balance there is one element of Schedule 5, Part 2 which can and should be removed and one amended as recommended above. We do not believe that this will disturb the calibration of the proposed refreshed small claims jurisdiction.

643. If these amendments are passed, we urge government to carefully monitor and communicate how the small claims system is used, in relation to which claims, at what levels, and for the FWC and courts to survey users on the experience.

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SCH 5 – PART 7 – CRIMINALISATION

- ACCI opposes the proposed criminalisation of underpayments:
  - This will not reduce non-compliance.
  - It risks discouraging hiring when we need it most.
  - Small and family business people appear in greater danger of being jailed.
  - The MWT provided little supporting analysis and justification for recommending criminal sanctions against employers.
- Compliance matters are often contested in both fact and law and are generally inherently not exact enough to provide a foundation for criminal penalties.
- The federal workplace relations system has historically relied on civil remedies for breaches of employment standards and there has been a long-standing bipartisan approach at the Commonwealth level of not criminalising workplace relations matters / removing the penal provisions from the legislation.
- If criminalisation is introduced into the compliance measures in the FW Act:
  - The federal law must comprehensively cover the field to the comprehensive exclusion of any state and territory legislation seeking to enforce the FW Act.
  - There should be a 2-year suspension of criminal penalties against small businesses, if not an outright exemption for our smallest employers.
  - Conduct should be both serious and systematic to trigger any consideration of criminal penalties.
  - Only the Commonwealth DPP should be able to bring criminal prosecutions, on reference from the FWO or ABCC.
  - The statute of limitations for bringing criminal proceedings should be a strict 6 years.

INTRODUCTION

644. Part 7 of Schedule 5 of the Bill seeks to amend the Act to introduce a new criminal offence for the dishonest and systematic underpayment of employees by employers.

645. ACCI does not consider the FW Act should be amended to include the imposition of criminal penalties or incarceration in relation to the underpayment of wages.

646. State and territory criminal laws already set out offences related to stealing and theft. For example, under the Crimes Act 1958 (Vic) in Victoria a person can be jailed (section 74). Section 72 defines theft as circumstances in which a person dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.

647. Another example is section 94(b) of the Crimes Act 1900 (NSW) which provides that a person who 'steals any chattel, money or valuable security from the person of another' shall be liable for imprisonment. There are a range of other more specific offences such as larceny by bailee (section 125).

648. In South Australia section 134 of the *Criminal Law Consolidation Act 1935 (SA)* provides that a person is guilty of theft and can face imprisonment if they deal with property:

> *(l) dishonestly;*
>
> *(m) without the owner's consent; and*
>
> *(n) intending –*
>
> *(i) to deprive the owner permanently of the property; or*
>
> *(ii) to make a serious encroachment on the owner's proprietary rights.*

649. Therefore, it is already possible for underpayments to be subject to criminal sanction where the behaviour constitutes theft and falls within the types of offences already in existence at a state level (notwithstanding the additional state legislation for example in Victoria and Queensland).

650. In addition, at the federal level, the *Criminal Code 1995* (Cth) provides that a body corporate may be found guilty of any offence in the Criminal Code, including those punishable by imprisonment. In particular, section 12.2 of the Criminal Code provides that if a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or with his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

651. ACCI therefore strongly opposes any changes to the current workplace relations framework, which would result in criminal liability including the imposition of custodial sentences for non-compliance.

652. ACCI does not condone the conduct of the relatively small number of businesses and individuals who intentionally evade their legal obligations.

653. The poor actions of a few sadly reflect on entire industries, damaging reputations and increasing pressure on governments to do more including potentially criminalising certain types of conduct.

654. However, the imposition of criminal liability for contraventions is not a step that should be taken lightly and we consider is unlikely to improve compliance as intended.

655. As highlighted by the Office of Industrial Relations in the Queensland Wage Theft Inquiry (Qld Inquiry), there is a long-standing principle that criminal laws have no place in an industrial context.[139] ACCI considers such a major departure from traditional civil remedy provisions relating to underpayment issues would constitute a regressive development which would reverse more than a century of modernisation in workplace laws, returning our system to approaches analogous to the nineteenth century when debtor prisons existed.

656. Characterising underpayments as a criminal offence akin to theft will only serve to set a concerning precedent in our workplace laws where any behaviour that does not completely accord with the law (and we argue often complex, subjective, inconsistent and ambiguous laws) can suddenly be considered criminal in nature. It may sound far-fetched but if underpaying someone becomes a criminal offence then so too could the misuse of sick leave (an activity which surveys suggest almost 1 in 5 employees engage in every year) as a form of 'time theft'.

[139] Briefing paper – Department brief by the Office of industrial Relations, June 2018, page 27.

657. A similar consideration could apply in relation to workers who falsely report their time sheet, who falsely inflate mileage claims, or who 'clock off' others who have already left the workplace.

658. It is also likely that the risk of a custodial sentence and even higher penalties will discourage people from participating in decision making or taking responsibility for essential functions within organisations and will push non-compliance by persons operating 'outside the system' even further underground or to the lowest possible levels.

659. Where a significant penalty or imprisonment is imposed, this may also result in the business ceasing to operate (e.g. because the financial penalty affects the viability of the business or because key personnel necessary to run the business are serving custodial sentences or can no longer hold the necessary licenses and accreditations) with the effect that wider number of employees may lose their jobs or be less likely to recover unpaid entitlements.

660. Further in 2009 the Council of Australian Governments (COAG) developed guidelines to assist in achieving a nationally-consistent and principles-based approach to the imposition of personal criminal liability for directors and other corporate officers as a consequence of a corporate offence. Whilst these guidelines are not concerned with circumstances where directors and individuals may be held criminally liable directly or where they personally commit an underpayment or some other offence, principles referenced within the guidelines are worthy of consideration.

661. They are worthy of consideration in the context of establishing criminal liability for contraventions in relation to a failure to provide employee entitlements strictly in accordance with the complex letter of the law that characterises Australia's IR system. In particular, among the COAG principles referenced in the guidelines is the follow principle:

> *The imposition of personal criminal liability on a director for the misconduct of a corporation should be confined to situations where:*
>
> *(a) there are compelling public policy reasons for doing so (for example, in terms of the potential for significant public harm that might be caused by the particular corporate offending);*
>
> *(b) liability of the corporation is not likely on its own to sufficiently promote compliance; and*
>
> *(c) it is reasonable in all the circumstances for the director to be liable having regard to factors including:*
>
> *i. the obligation on the corporation, and in turn the director, is clear;*
>
> *ii. the director has the capacity to influence the conduct of the corporation in relation to the offending; and*
>
> *iii. there are steps that a reasonable director might take to ensure a corporation's compliance with the legislative obligation.*[140]

[140] COAG Meeting Communique, 7 December 2019.

662. The guidelines provide the following examples of underlying offences where compelling public policy reasons may exist for imposing liability on directors and non-compliance will create a real risk of serious public harm, such as:

a. death or disabling injury to an individual;

b. serious damage to the environment and/or serious risk to public health and safety;

c. conduct likely to undermine confidence in financial markets; or

d. conduct that would otherwise be highly morally reprehensible (e.g. serious offences under child protection or animal welfare legislation).

663. Failures to provide employee entitlements strictly in accordance with workplace legislation do not give rise to significant public harm along the lines of that described above. This has the implication that a person could be sent to jail for a contravention even in circumstances where the impact of the contravention upon the individual employee or former employee is not significant.

664. Sentencing must balance real and symbolic acts. Responding to public perceptions around the issues of underpayments by introducing criminal sentences will serve a symbolic purpose but is unlikely to achieve the real or practical aims of general and specific deterrence, which should be at the heart of any public policy intent for introducing a new or expanded criminal penalty offence.

665. The use of the prison system should be reserved for the most grave and threatening offenders, those who must be incapacitated to reduce harms to society.

666. By definition, an employer found to have not met their legal wages and entitlement obligations under the FW Act would be a 'white collar criminal' who is non-violent and who poses no physical threat to society. In taking away a persons' liberty and segregating them from their fellow citizens, a court is acknowledging that the offender has not only committed a serious crime, but that they are at risk of doing so again and that re-offending constitutes a sufficient threat to the public that imprisonment is the only option. People found guilty of murder, rape, assault, burglary should expect to spend time in custody as they represent a threat to the public, the same cannot be said for employers who underpay their employees.

667. The general and specific deterrence aims of punishment can be equally achieved through other means. There are other less expensive and extreme penalties than criminal liability and incarceration (noting this submission recalls existing financial penalties and identifies options to further encourage compliance).

668. ACCI does not suggest that errors should be without consequence but in many cases of underpayments the conduct has arisen through mistake, error and/or miscalculation, and in these circumstances entirely different sanctioning protocols should be applied if offenders are unlikely to pose a physical threat to the community.

669. In addition, exposing employers to the general prison population is unlikely to achieve any rehabilitation goals, with research suggesting that incarceration actually leads to around 40% of prisoners being re-imprisoned within two years of release from prior offending.[141]

[141] Jason Payne, Recidivism in Australia: findings and future Research, Australian Institute of Criminology, Research and Public Policy Series, no. 80 Canberra, 2007.

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670. Further, given the significant funding issues faced by our prison systems through Australia, with the Australian Productivity Commission revealing the cost of incarceration being on average $292 per day (around $106,000 per year)[142], appropriate alternatives to incarceration should always be considered first where appropriate.

671. Accordingly ACCI does not consider that current circumstances warrant the introduction of criminal penalties, incarceration or the imposition of a criminal record.

672. In addition, ACCI is concerned that not only is this sea change in approach to enforcement unwarranted, but that criminalisation may put at risk the very goals of supporting jobs and economic recovery that motivate this Bill.

673. Specifically, we are concerned that:

a. Small business people may unintentionally be discouraged from taking risks and employing new staff.

b. Small business families will be acutely aware that when their family member steps out the door of a morning to open their small shop, or restaurant they may be subjecting themselves to the risk of being imprisoned under an increasing range of laws. Many may decide it is not worth the risk, and will close businesses, or opt to work longer hours themselves or only employ family members in order to limit or eliminate their risk.

c. Small business people will be at particular risk of criminal charges as it is usually far clearer in small businesses which individual controls and directs financial and employment affairs than it is in larger operations.

i. It would be inconsistent with community expectations, if a small business person was criminally charged for underpayments in a restaurant or shop amounting to tens of thousands of dollars, but no charges were brought against those controlling a major corporation which may have underpaid many millions of dollars.

ii. Specifically, if (by way of example) criminal charges are brought against a small restaurateur or retailer, but not against Michelle Guthrie of the ABC for an almost $30m underpayment[143], or the partners of Maurice Blackburn[144], or against World Vision or the Red Cross[145] (organisations which have been involved in underpayments) Australians would be entitled to ask why.

674. Despite our opposition to introducing criminal sanctions in this area and concern regarding small and family businesses, ACCI seeks to comment on the technical aspects of the Bill with respect to criminalisation of underpayment of wages.

COVERING THE FIELD

675. Whilst ACCI does not support criminal penalties, if criminal penalties are to be introduced then ACCI is supportive of the Bill making abundantly clear that the Commonwealth covers the field. That is, that the Bill operates expressly to the exclusion of all States and Territories, in order to avoid any confusion that may have arisen through attempts by some state jurisdictions to legislate in contravention of both s 109

[142] Productivity Commission, Report on Government Services 2015, 'Corrective Services', Chapter 8, Volume C.
[143] https://www.actu.org.au/actu-media/media-releases/2019/report-shows-abc-wage-theft-from-casuals-of-229-million
[144] https://www.smh.com.au/business/workplace/maurice-blackburn-s-1-million-pay-muck-up-short-changes-400-staff-20180720-p4zspi.html
[145] https://www.smh.com.au/politics/federal/we-apologise-unreservedly-world-vision-admits-underpaying-nearly-250-staff-20200311-p548zg.html

of the Commonwealth Constitution and s 26 of the FW Act which excludes a state law that has its main purpose as providing for the establishment or enforcement of terms and conditions of employment.

676. The Bill attempts to confirm this existing position at law via s 26, which provides that the Act is intended to exclude the application of State and Territory industrial laws to national system employers and national system employees. Specifically, paragraphs 26(2)(da) and (2)(db) confirm that State or Territory laws that criminalise underpayment or record-keeping failures by national system employers in relation to their employees, but not general criminal laws of theft or fraud, are intended to be excluded.

677. However, ACCI is somewhat concerned that the drafting as it currently stands may lead to some confusion as to the current status of the law, particularly in relation to s.26(da). The current drafting of s.26(da) as set out in the Bill is as follows:

> *(da) a law of a State or Territory providing for an employer, or an officer, employee or agent of an employer, to be liable to be prosecuted for an offence relating to underpaying an employee an amount payable to the employee in relation to the performance of work; or*

678. There any many circumstances where employees have a right to an entitlement but are not performing work at the relevant time (i.e. not strictly payable in relation to the performance of work). The applicable legislation in Victoria (the Wage Theft Act 2020 (Vic)), for example, refers to the withholding of an "employee entitlement owed by the employer to an employee". Employee entitlements in the context of the Victorian legislation includes amounts or other benefits payable in respect of an employee such as wages or salary, allowances and gratuities, and the attribution of annual leave, long service leave, meal breaks and superannuation – including some matters which are not directly related to the performance of work.

679. ACCI therefore is concerned the terminology in the Bill may unwittingly imply or give credence to state enforcement agencies that these types of underpayment claims are still open to be pursued under state legislation, even though this is at law not presently the case and the objective of s 26 is to simply make this commonwealth 'covering the field' position expressly clear.

680. To address this, ACCI proposes the wording of s.26(2)(da) be amended as follows to ensure there is no confusion as to the responsibility and jurisdictional coverage of the Commonwealth with respect to criminal industrial law offences to the exclusion of all other states and territories:

> s.26(2)(da) *a law of a State or Territory providing for an employer, or officer, agent or an employee of an employer, to be liable to be prosecuted for an offence relating to underpaying an employee an amount payable to the employee in relation to the performance of work, an employee entitlement owed by the employer to an employee, or the employee's employment;*

Recommendation 5.7

Schedule 5, Section 26(2)(da) of the Bill be amended as follows:

> s.26(2)(da) *a law of a State or Territory providing for an employer, or officer, agent or an employee of an employer, to be liable to be prosecuted for an offence relating to underpaying an employee an amount payable to the employee in relation to the performance of work, an employee entitlement owed by the employer to an employee, or the employee's employment;*

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OFFENCE RELATING TO UNDERPAYMENTS

681. Item 46 inserts new section 324B into the Act which makes it a criminal offence for an employer to dishonestly engage in a systematic pattern of underpaying one or more employees, as follows:

> **324B Offence relating to underpayments**
>
> *(1) An employer commits an offence if the employer dishonestly engages in a systematic pattern of underpaying one or more employees. ...*

682. ACCI reiterates that we are strongly opposed to underpayment of wages attracting criminal penalties or incarceration and that there are other, superior ways to reduce the incidence of underpayments.

683. If the offence is to be retained, the Bill should be amended to provide for a two-year delay in commencement for small businesses, in order to promote confidence to hire and recovery in the small business sector.

684. As set out in the introduction to this part of our submission, now is not the time to be sending negative signals to employers on their confidence to create and retain jobs. Employers need to be encouraged to take risks and give people a go, not receive a message that in doing so they might risk not only their livelihood, but also their liberty.

685. ACCI also seeks to comment on the proposed drafting of the offence.

686. With respect to s.324B(1), ACCI submits that it is entirely appropriate that the offence is limited to situations involving dishonesty. The Bill defines 'dishonest' in s.12 as follows:

> ***dishonest*** *means:*
>
> *(a) dishonest according to the standards of ordinary people; and*
>
> *(b) known by the defendant to be dishonest according to the standards of ordinary people.*

687. This is consistent with the meaning applying to dishonesty offences across numerous Acts of Parliament including in seven Commonwealth statutes including the Criminal Code[146]. This definition is based upon the definition of dishonesty in the UK Court of Appeal case of Ghosh.[147]

688. In that case the court explained that the test for dishonesty should be a two-step process:

> *In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails.*

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[146] Corporations Act 2001 (Cth), ss 1041F(2) and 1041G(2); Defence Force Discipline Act 1982 (Cth), s 47A; Military Rehabilitation and Compensation Act 2004 (Cth), s 205(2); Australian Passports Act 2005 (Cth), s 27; Australian Participants in British Nuclear Tests (Treatment) Act 2006 (Cth), s 4(2); Future Fund Act 2006 (Cth), s 5.
[147] [1982] 3 WLR 110.

> *If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest.*[148]

689. As was acknowledged in the explanatory memorandum to the first Criminal Code Amendment[149] which adopted the definition of dishonesty in Ghosh, this test is preferable because:

a. It is "a straight-forward definition" and

b. It is "a familiar concept in Australia" that has "been used in all jurisdictions".

690. Accordingly, the accused behaviour must be dishonest on an objective view and dishonest on a subjective view. The latter requirement in part constituting a core part of the *mens rea* of the offence. ACCI submits the dishonesty element as set out in the Bill is an appropriate element of the offence, if there is to be a criminal offence.

691. Section 324B(1) provides that for the offence to be made out it must relate to a 'systematic pattern' of underpaying one or more of its employees, and s.324B(5) sets out the matters to which the court may have regard in determining whether the employer engaged in a systematic pattern of underpaying employees. This is largely in line with current section 557A which established a regime for serious contraventions which provides that a contravention is only a serious contravention where the contravening conduct was deliberate and part of a 'systematic pattern of conduct' relating to one or more other persons.

692. Reference to a 'systematic pattern' is vital to ensure the criminal offence does not apply to one-off conduct or one-off conduct that is replicated multiple times because of the frequency of payment, or across multiple employees, for instance in relation to a single error or misunderstanding not discovered over numerous payment periods, and instead rightly focuses on behaviour which indicates a culture of complicity. In determining matters to which the court may have regard in determining whether an employer engaged in systematic pattern of underpaying employees (as set out in s.324B(5), ACCI submits it is appropriate to limit the consideration of matters to the current period actionable under the FW Act, being 6 years (see s.544).

693. Further, ACCI submits the conduct should be serious to justify a crime and exceed the trivial or technical.

694. Underpayments often occur in large part due to fundamental misunderstandings about modern awards and grey areas which give rise to multiple interpretations of the same entitlement, leading to genuine mistakes and accidental payroll errors.

695. For example, a restaurant or cafe owner must be across 24 award classifications, each with different rates of pay which change depending on the time of the employee shifts, how long they work for and when an employee takes a break. Such as:

a. Waiters and waitresses who are called 'Food and beverage attendants' can pick up glasses and wipe tables but must be paid more if they answer the phone, greet a guest or "attend a snack bar".

b. Kitchenhands who are called "Kitchen Attendants" are allowed to do "general pantry duties" but must be paid more if they are "engaged in specialised non-cooking duties".

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[148] Ibid at 118-9.
[149] Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000 (Cth).

c. Administration staff who are called 'Clerks' can photocopy, file and deliver messages but must be paid more depending on whether they deliver the message verbally, or in writing and depending on the accuracy and speed of any typing.

696. With the best will in the world and substantial investment of money to get compliance right, under our current workplace laws mistakes can still easily be made. If employers hold back from hiring or shut up shop because they are concerned about the risk they may face of imprisonment when they make mistakes, it will adversely affect the entire community.

697. ACCI therefore submits that if the offence is to be retained, s.324B(1) should be amended as follows:

> *(1) An employer commits an offence if the employer dishonestly engages in a serious and systematic pattern of underpaying one or more employees.*

698. The same suggestion would consequentially apply to s.324B(5), as follows:

> *(5) In determining for the purposes of subsection (1) whether the employer engaged in a serious and systematic pattern of underpaying one or more employees, a court may have regard to:*

699. This is supported by the Final Report from the Migrant Worker's Taskforce which observed:

> *"The criminalisation of wage underpayment is gaining increasing support, particularly in cases of deliberate, serious and intentional contraventions".*

700. With respect to the penalty set out in s.324B(1), the penalty for an individual is imprisonment for 4 years or 5,000 penalty units (currently $1,110,000), or both. The penalty for a body corporate is 25,000 penalty units (currently $5,550,000).

701. ACCI supports courts being empowered to determine that a fine may be imposed instead of imprisonment.[150]

702. Fixing a penalty is discretionary, and it has been widely acknowledged by the courts that it is "not an exact science".[151] The task of deciding where to place an offence along the scale of maximum penalties requires an examination of the intrinsic nature of the offence along with where the offence ties in with other criminal behaviour.[152]

703. In considering the maximum penalty in the Act it is appropriate to consider current sentencing practices to determine where a new offence sits in the scale of relative offence severity, as a maximum penalty should serve as an expression of the gravity with which the community views the offence and should provide guidance about the seriousness of the offence relative to other offences.[153]

[150] See for example section 4B of the Crimes Act 1914 (Cth).
[151] Mason v Harrington [2007] FMCA 7 at [18]
[152] Richard Fox and Arie Freiberg, Sentencing: State and Federal Law in Victoria (2nd ed, 1999) 236.
[153] Arie Freiberg, Pathways to Justice: Sentencing Review 2002 (2002) 55.

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704. Consequently, in order to ensure consistency with penalties for dishonest conduct, ACCI submits that any penalty applicable for underpayment of wages and entitlements should not meet or exceed the current penalties for the most comparable offence under the Criminal Code: s135.2 - Obtaining a financial advantage (Penalty: Imprisonment for 12 months).

Recommendation 5.8

Remove Section 324B – *Offence relating to underpayments* of the Bill.

If it is to be retained, the Bill should be amended to provide for a two-year suspension in commencement for small businesses, in order to promote confidence to hire and recovery in the small business sector.

Recommendation 5.9

Schedule 5, Section s.324B(1) of the Bill be amended as follows:

> *(1) An employer commits an offence if the employer dishonestly engages in a serious and systematic pattern of underpaying one or more employees.*

The same would consequentially apply to s.324B(5), as follows:

> *(5) In determining for the purposes of subsection (1) whether the employer engaged in a serious and systematic pattern of underpaying one or more employees, a court may have regard to:*

Recommendation 5.10

Amend the penalty in s.324B(1) of the Bill to align with current penalties for the most comparable offence under the Criminal Code: s135.2 - Obtaining a financial advantage (Penalty: Imprisonment for 12 months), rather than the 4-year term of imprisonment currently in the Bill.

COMMENCING CRIMINAL PROCEEDINGS RELATING TO UNDERPAYMENTS

705. The FWO and the ABC Commissioner, their respective inspectors, and the Australian Federal Police, may investigate a possible substantive offence against new subsection 324B(1), using their existing powers.

706. In terms of commencing proceedings, proceedings for an offence against new subsection 324B(1) may be commenced by the FWO, or, if the proceedings relate to a matter that involves a 'building industry participant' or 'building work' within the meaning of the *Building and Construction Industry (Improving Productivity) Act 2016*, the ABC Commissioner. The Commonwealth Director of Public Prosecution (CDPP) also has the ability to institute criminal proceedings.

707. ACCI submits, as the lead prosecutor of Commonwealth criminal conduct, the CDPP should be responsible for any criminal prosecutions relating to the new criminal offence contained in the Bill. This could occur as a result of a matter being referred by the FWO or ABCC, but the FWO or ABCC themselves should not be responsible for prosecuting criminal conduct. This is critical to ensuring that the organisations charged with providing advice to employers are not the same organisations that will be prosecuting them, which is likely to create distrust resulting in employers being less likely to seek assistance with respect to correct wages and conditions or bringing small matters forward for assistance , thus detracting from the aim of greater compliance.

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708. New subsection 324C(3) limits when proceedings may be commenced in relation to an offence against new subsection 324B(1) or a related offence provision. Proceedings in respect of particular conduct (which is defined to include an omission) may be commenced within seven years after that conduct occurred. The Bill also provides the ability for the Minister to consent to longer timeframe.

709. ACCI submits that the appropriate statute of limitations is 6 years. This is consistent with the time limit for civil remedy provisions, safety net contractual entitlements, and entitlements arising under s.542(1), as set out in the current FW Act under s.544. The current FW Act also provides a time limit with respect to orders in relation to underpayments, being a period of 6 years before the proceedings commenced (s.545(5)).

710. Further, under s.324C(3)(b), the Minister may consent to proceedings being commenced with respect to conduct occurring more than seven years ago. Employers are not required to keep records beyond seven years and will often not have the records necessary to meet the criminal level of proof after that time. The possibility of proceedings being able to be commenced related to conduct occurring more than seven years ago is highly concerning particularly given the possibility of the extremely serious penalty of imprisonment, and possibility of disqualification from managing a corporation if a breach is found.

711. ACCI therefore submits s.324C(3) be amended as follows:

> *(3) Despite anything in any other law, proceedings for an offence against subsection 324B(1), or for an offence against section 6 of the Crimes Act 1914 or a provision of Part 2.4 of the Criminal Code that relates to an offence against subsection 324B(1), in respect of particular conduct may only be commenced:*
>
> > *(a) within ~~7~~6 years after that conduct occurred; or*
> >
> > ~~*(b) at any later time with the Minister's consent.*~~

Recommendation 5.11

Schedule 5, Sections 324C(1) and (2) of the Bill be deleted, ensuring that only the CDPP can make criminal prosecutions, on reference from the FWO or ABCC, but no the FWO or ABCC themselves.

Recommendation 5.12

Schedule 5, Section 324C(3) be amended as follows:

> *(3) Despite anything in any other law, proceedings for an offence against subsection 324B(1), or for an offence against section 6 of the Crimes Act 1914 or a provision of Part 2.4 of the Criminal Code that relates to an offence against subsection 324B(1), in respect of particular conduct may only be commenced:*
>
> > *(a) within ~~7~~6 years after that conduct occurred; or*
> >
> > ~~*(b) at any later time with the Minister's consent.*~~

712. In summary / tabular form ACCI calls on the Committee to recommend as follows:

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Item	Topic	Recommendation
Sch 5		Schedule 5 should not be progressed. Alternative initiatives, other than higher fines and criminal penalties would be more effective.
Sch 5, Part 1	Higher fines	If progressed, exempt small businesses for two years.
Sch 5, Part 2	Small claims	Ensure there is an express avenue for judicial review of FWC arbitration decisions. Delete proposed 548C(9) and 548D(7).
Sch 5, Part 3	Job Ads	A statutory note clarify that new s 536AA would not require any job advertisement to identify a wage rate.
Sch 5, Part 4	Higher fines	If progressed, exempt small businesses for two years.
Sch 5, Part 5	Higher fines	If progressed, exempt small businesses for two years.
Sch 5, Part 6	Functions of the ABCC and FWO	Ensure increased pecuniary penalties (Parts 1 and 4) do not commence prior to the FWO being obliged to publish its policies on the circumstances in which it will commence proceedings to enforce them (Part 6)
Sch 5, Part 7	Criminalising underpayments	If progressed, exempt small businesses for two years. Any criminal offence comprehensively cover the field to exclude state and territory laws seeking to enforce the FW Act and FW instruments. Ensure that any criminal conduct be both serious and systematic. Align any criminal penalty with the most comparable offence under the Criminal Code: s135.2 - Obtaining a financial advantage (Penalty: Imprisonment for 12 months),

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Item	Topic	Recommendation
		rather than the 4 year term of imprisonment currently in the Bill. Ensure on the Commonwealth DPP can bring criminal prosecutions. Only allow criminal prosecutions within 6 years, not 7, without Ministerial discretion for later prosecutions.

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SCH 6 – FAIR WORK COMMISSION

- Frivolous, vexatious and similar litigation by often deluded, unrealistic and poorly motivated applicants not only waste public resources, they unnecessarily cost employers time and money.
- On balance ACCI supports the amendments in Schedule 6.
- The General Manager of the FWC should report on the use of expanded powers to dismiss applications, after two years.

VEXATIOUS, FRIVOLOUS ETC CLAIMS

713. Ensuring court and tribunal resources are not wasted on vexatious or wrongly conceived litigation is an area of long-standing concern across our legal system. Powers to dismiss and limit such matters [154][OBJ][155][OBJ].

714. The gatekeeping role of courts and tribunals is always a delicate and difficult one to balance, including against public expectations of a right to 'have one's day in court'. It has long been recognised that such rights are not absolute and that it is not in the public interest to have some subset of possible actions heard, in particular where baseless or vexatious.

715. Lawmakers (and the FWC) must balance rights to access to justice against administrative effectiveness, the efficient conduct of matters / use of resources.

716. Section 187 of the FW Act already empowers the FWC to dismiss certain applications on prescribed grounds, being that the application:

a. Is not made in accordance with the FW Act.

b. Is frivolous or vexatious.

c. Has no reasonable prospects of success.

717. This is a longstanding power of the FWC. Former s 111(1)(e) of the *Workplace Relations Act 1996* was as follows:

> *(1) The Commission may do any of the following in relation to a proceeding under this Act or the Registration and Accountability of Organisations Schedule:*
>
> *(e) dismiss a matter or part of a matter on the ground:*
>
> *(i) that the matter, or the part of the matter, is trivial; or*
>
> *(ii) that further proceedings in relation to the matter are not necessary or desirable in the public interest;*

[154] Such as s 42B of the Administrative Appeals Tribunal Act 1975, and Para 22(3)(b) of the Superannuation (Resolution of Complaints) Act 1993.
[155] FW Act, s.587

718. In considering the changes proposed in Schedule 6, the Committee should be mindful that employers almost always incur additional costs in such circumstances.

719. Where there is a vexatious litigant in IR, this is generally in relation to claims against a former employer or manager, who incurs costs and must allocate time to addressing meritless matters, often repeatedly over some years. Employers have often attempted to settle the matter on commercial terms at a much earlier stage, but former employees' sense of grievance outweighs both reason and legal merit.

720. Schedule 6, Item 1 would replace s 587 of the FW Act with a new provision:

Current s 587	Proposed new s 587
(1) Without limiting when the FWC may dismiss an application, the FWC may dismiss an application if: (a) the application is not made in accordance with this Act; or	(1) The FWC may dismiss an application if the application is not made in accordance with this Act.
(1) Without limiting when the FWC may dismiss an application, the FWC may dismiss an application if: (b) the application is frivolous or vexatious; or	(2) The FWC may dismiss an application at any stage in dealing with the matter if: (a) the FWC is satisfied that the application: (i) is frivolous, vexatious, misconceived or lacking in substance; or
(c) the application has no reasonable prospects of success.	(ii) has no reasonable prospects of success; or
	(iii) is otherwise an abuse of the process of the FWC; and
	(b) the applicant has been given a reasonable opportunity to make submissions to the FWC in relation to whether the application should be dismissed.
(2) Despite paragraphs (1)(b) and (c), the FWC must not dismiss an application under section 365 or 773 on the ground that the application: (a) is frivolous or vexatious; or (b) has no reasonable prospects of success.	(3) However, subsection (2) does not apply to an application under section 365 or 773.

Current s 587	Proposed new s 587
(3) The FWC may dismiss an application: (a) on its own initiative; or (b) on application.	(4) The FWC may dismiss an application on grounds set out in this section: (a) on its own initiative; or (b) on application.
	(5) This section does not limit when the FWC may dismiss an application.
Note: For another power of the FWC to dismiss an application for a remedy for unfair dismissal made under Division 5 of Part 3-2, see section 399A.	Note: For another power of the FWC to dismiss an application for a remedy for unfair dismissal made under Division 5 of Part 3-2, see 28 section 399A.

721. The Bill effectively seeks one new ground and one expanded ground to dismiss applications:

a. New: Applications can be dismissed on the basis of a new catch-all provision that they would "otherwise be an abuse of the process of the FWC".[156]

b. Expanded: The existing grounds to dismiss an application on the basis that it is "is frivolous or vexatious" would be expanded to "frivolous, vexatious, *misconceived or lacking in substance*".

722. **Orders against further applications**: Proposed additional s 587A would allow the FWC to order that further such applications not be made where an application is dismissed on the basis that it is "frivolous, vexatious, misconceived or lacking in substance" without the permission of the President, a Vice President or Deputy President of the FWC. This is a discretionary power.

723. It would not be an offence to attempt to make a further application, but presumably the FWC would refuse to hear it.[157] The EM indicates that similar powers are available to the AAT.[158]

724. **Appeals:** A new subsection 616(4A)[159] will provide that only a Full Bench can make an order against making further applications, and s 587A(7) would preclude FWC appeals. ACCI understands however that:

a. Such orders would be subject to potential judicial review and appeal to the High Court if there was any denial of justice or due process to an applicant.[160]

b. The President of the FWC would be well aware of this and would be very likely to constitute a Full Bench for this purpose of senior and legally qualified members of the FWC.

[156] New para 587(2)(iii), inserted by Schedule 6, Item 1 of the Bill.
[157] New para 675(2)(ib), inserted by Schedule 6, Item 5 of the Bill.
[158] The EM, paragraph 472, p.88
[159] The Bill, Sch 6, Item 4
[160] The EM, paragraph 476, p.89

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725. Expanding grounds to dismiss applications in cases of abuse of process, lack of substance or on the basis that they are misconceived should be approached with the significant caution applicable to any mechanisms which limit access to justice.

726. ACCI would generally err on the side of matters being heard and ensuring the grounds upon which applications can be dismissed remain narrow.

727. However, in this instance:

a. Section 587 is already part if the FW Act, and comparable mechanisms can already be used to dismiss applications / matters in appropriate circumstances.

b. We understand there remain additional circumstances in which applications are being made which are in practice a waste of time and resources, and which are of a similar nature to those addressed in existing s 587.

c. The proposed changes appear of a similar nature to well established capacities for comparable tribunals and courts to dismiss or cease hearing matters.

d. Any expanded powers to dismiss will be applied in the context of substantial higher court precedent on access to justice, and the knowledge of FWC members of the importance of matters being heard and of legal principles governing such considerations.

728. ACCI proposes that:

a. The amendments in Sch 6, Item 1 be progressed as introduced.

b. The Parliament and the IR policy community be equipped to monitor the impact of these changes in practice, and to understand which applications are being dismissed, and the circumstances in which they are being dismissed.

c. The General Manager of the FWC be tasked with reporting on the impact of the amendments to s 587, including any appeals within the FWC and any judicial reviews or appeals brought in the Courts against the use of an expanded s 587.

d. This new reporting obligation be progressed through:

i. A new s 653A directing the General Manager of the FWC to research and report on matters dismissed using an expanded s 587, or

ii. A regulation conferring such a reporting obligation on the General Manager of the FWC using s 796.

729. A new s 653A might be in terms such as the following:

653A. Report about dismissing applications under Sect 587

(1) The General Manager must review and report on:

(a) Developments in the dismissal of applications under s 587 of this Act, and in particular the use of the additional grounds for dismissing applications introduced in the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021.

(b) Numbers of applications being dismissed and any changes in the dismissal of applications following the commencement of Schedule 6 of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021.

(c) The specific grounds on which applications are dismissed by the Commission from those set out in s 587(2)(a).

(d) Any appeals or applications for judicial review of Commission decisions to dismiss applications under s 587.

(2) The review and research must be conducted in relation to a period of 2 years after the commencement of amendments to s 587:

(3) The General Manager must give the Minister a written report of the review and research as soon as practicable, and in any event within 6 months, after the end of the period to which it relates.

(4) The Minister must cause a copy of the report to be tabled in each House of the Parliament within 15 sitting days of that House after the Minister receives the report.

(5) Subsections 34C(4) to (7) of the Acts Interpretation Act 1901 apply to the report as if it were a periodic report as defined in subsection 34C(1) of that Act.

VARYING AND REVOKING DECISIONS

730. Schedule 6, Item 2, seeks to delete existing paragraphs 603(3)(b) and (c) of the FW Act. This would allow the FWC greater scope to correct errors by revoking, correcting and reissuing decisions relating to:

a. Enterprise agreements

b. Workplace determinations

731. The FWC is currently expressly barred from doing so, although on examining the EM to the 2008 FW Bill, we could not find clear explanation for why agreements and determinations were originally excluded from the s 603 powers to revoke or vary orders.

732. Employers' concern is that such discretion always be strictly corrective, consistent with the stated intention for the amendments, and not allow any prejudice or harm to employers through the exercise of expanded corrective powers.

733. **Enterprise agreements** (proposed deletion of existing s.603(3)(b)): This appears a positive change in relation to agreement making, where it is not unknown for minor errors or omissions to come to light at the point at which decisions are issued. As the EM observes:

479. For example, if the FWC approved an enterprise agreement under section 186 in circumstances where the employer mistakenly lodged the wrong version of the agreement (such as an earlier draft), the FWC could revoke or otherwise vary the decision to approve the agreement.[161]

734. **Workplace determinations** (proposed deletion of existing s.603(3)(c)): The FWC explains the role of such determinations as follows:

> *The expectation is that in the overwhelming majority of cases bargaining will result in an enterprise agreement being submitted to the Fair Work Commission for approval.*
>
> *However, if the bargaining representatives for a proposed enterprise agreement cannot agree, in special cases (after specific requirements are met) the Fair Work Act 2009 allows for a Full Bench of the Commission to determine terms and conditions of employment.[1]*
>
> *If the Commission makes such a determination, it is called a workplace determination.*[162]

735. In short these are effectively 'imposed agreements' imposed in whole or part by the FWC in some circumstances in which bargaining does not yield a negotiated outcome.

736. Scope to revoke, vary and correct such determinations appears useful, as they have been determined by a third party that does not know the particular workplace, the terminology it uses or the organisation of work. These will be disputed matters, and an employer will have generally lost a case in whole or part where they are exercised/imposed.

737. Being able to correct such instruments after the 'dust settles' of the dispute that led to their creation appears useful.

738. Employers would be concerned if what is intended to be a remedial capacity were used to materially alter such instruments to the detriment of employers without an opportunity to be heard.

739. However, to the extent such matters are appealable or can be raised with the Courts, on balance ACCI does not oppose the proposed amendment.

APPEALS

740. This amendment seeks to expand situations in which appeals are able to be conducted 'on the papers' without a hearing. Currently this can only occur where (a) it appears to the FWC that the appeal can be determined without a hearing and (b) the parties' consent.

741. The Bill would remove the requirement for consent, and instead to require the FWC to 'give consideration' to the views of the appellant, original applicant and respondent etc, as follows:

[161] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, Explanatory Memorandum, Paragraph 479, p.89
[162] https://www.fwc.gov.au/enterprise-agreements-benchbook/associated-applications/workplace-determinations

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(1) An appeal from, or a review of, a decision of the FWC, the General Manager or the Registered Organisations Commissioner may be heard or conducted without holding a hearing only if:

(a) it appears to the FWC that the appeal or review can be adequately determined without persons making oral submissions for consideration in the appeal or review; and

(b) the persons who would otherwise, or who will, make submissions (whether oral or written) for consideration in the appeal or review consent to the appeal or review being heard or conducted without a hearing. (Current)

(b) the FWC has taken into account the views of the persons who would otherwise, or who will, make submissions (whether oral or written) for consideration in the appeal or review as to whether the appeal or review should be heard or conducted without a hearing. (Proposed)

742. Applications and appeals to the FWC are remarkably stable[163]:

2019/20	33, 989 Applications	221 Appeals
2018/19	31,415 Applications	175 Appeals
2017/18	31,554 Applications	190 Appeals
2016/17	33,071 Applications	237 Appeals
2015/16	34,215 Applications	283 Appeals
2014/15	34,152 Applications	336 Appeals
2013/14	37,066 Applications	214 Appeals
2012/13	36,616 Applications	143 Appeals

743. It appears that consistently year on year, <1% of all applications are appeals.

744. In light of the problems cause by vexatious matters, ACCI recommends the Committee also support this proposed amendment

[163] Source: FWC Annual Reports online.

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RECOMMENDATION

Recommendation 6.1

An additional requirement be inserted into the Bill, by way of an additional s 653A requiring the General Manager of the FWC to report on the use of expanded powers to dismiss applications, after two years of the operation.

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

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

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

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

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