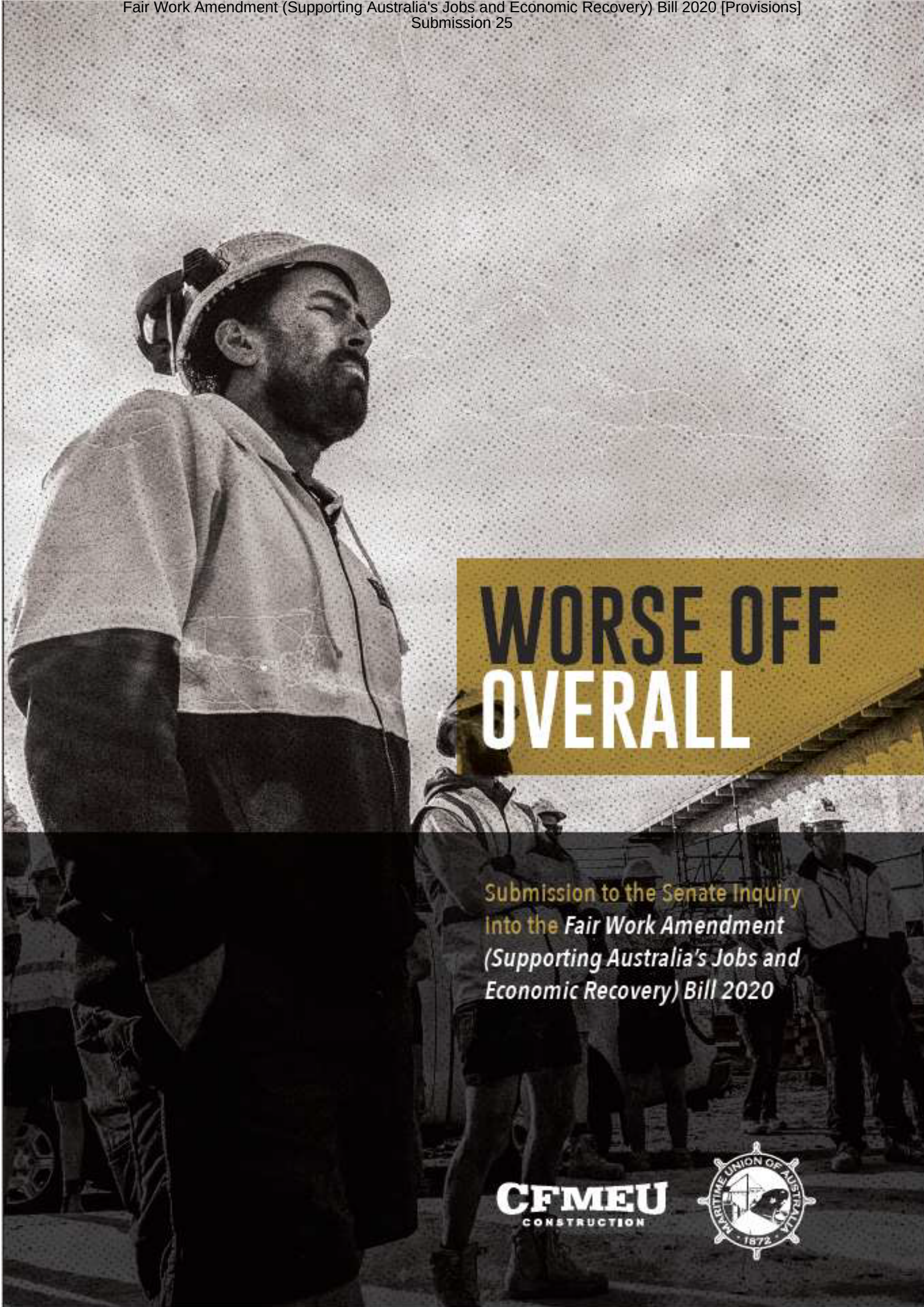

WORSE OFF OVERALL

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

CFMEU
CONSTRUCTION

MARITIME UNION OF AUSTRALIA
1872

Contents

Executive Summary

1. The Construction and General Division of the Construction Forestry, Maritime, Mining and Energy Union (**CFMMEU**), and the Maritime Union of Australia (**MUA**), collectively represent over 114,000 construction and maritime workers. Our members have worked hard to keep essential industries running throughout the COVID-19 pandemic.

2. The Federal Government has recognised the invaluable contribution of our union, and its members. On 11 November 2020 Minister Porter said, in Federal Parliament:

   > *The senior leadership of the CFMMEU, in their efforts with us, in their efforts with state governments, in their efforts to make their workplaces COVID safe, did a massive positive service to this country in playing a significant role in keeping construction going even during the height of the lockdowns. So I praise the leadership of the CFMMEU for that, and the MBA and others. In my observation, that was one of several critical occurrences during the pandemic*[1].

3. It was at about this time that the Federal Government - having recognised the vitally important contributions of workers and their unions to the handling of the pandemic - were winding up a series of "roundtable" meetings. Those meetings were marketed to the public as a bipartisan attempt to reach a middle ground on necessary reform.

4. The *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* (**the Bill**), however, incorporates none of the input that the CFMMEU and other unions brought - in good faith - to the roundtable process. **There is no 'balance' in the Bill**. Rather, the Bill supports ideology promoted by business lobbyists by seeking to embed measures to lower wages, strip workers of existing rights, undermine the legitimate role that unions play in protecting and maintaining minimum industrial standards, and attack collective bargaining.

5. Real wage growth - even in the run-up to the pandemic - was amongst the lowest recorded in modern history. Now, more than ever, it is critical: the key to recovery from the crisis created by the COVID-19 pandemic will *depend* on growth in real wages. Yet the Federal Government has brought to the Senate a Bill which clearly aims to put downward pressure on wages.

6. It is the Senate that now bears the responsibility for the Bill. Each schedule to the Bill will leave workers worse off; **the Bill must be rejected in its entirety.**

7. Schedule 1 of the Bill **removes rights from casual workers** by:

   a. allowing employers to simply call employees 'casual' at the point of employment, and maintain that position even where the worker is required to work full-time hours set well in advance. This is achieved by replacing a well-established, objective legal test with bare assertions by employers. The effect is that **the real substance, practical reality and true nature of the employment relationship is ignored, and the conduct of the parties after the point of engagement becomes irrelevant**. In this way, workers are deliberately stripped of their basic entitlements;

[1] https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/64e5ade0-95db-48ed-81ab-9d2b40737136/0220/hansard_frag.pdf;fileType=application%2Fpdf

b. **changing the goal posts retrospectively** so that employees who have been deliberately misclassified as casuals are prevented from claiming the entitlements that are legally owed to them, even where their claims are already before the courts;

c. allowing employers to avoid the cost of the entitlements owed to the employees by requiring any casual loading paid to be deducted from entitlements owed, even where the worker is paid at minimum wage and even where – as is frequently the case - the misclassification was a deliberate device to prevent the worker from having the benefit of rates in established enterprise agreements; and

d. replacing existing casual conversion provisions with less flexible generic provisions which are harder for employees to access, and less beneficial for employees.

8. Schedule 2 of the Bill **punishes part-time workers with state-sanctioned, permanent pay cuts** via the introduction of "simplified additional hours agreements". These allow part-time employees who are covered by certain awards, and who work an average of at least 16 hours per week, to perform what it currently overtime work at ordinary time rates. In practice, it is highly unlikely that these will be genuinely agreements; a worker will 'agree' to take the pay cut or find themselves out of a job.

9. Schedule 3 of the Bill **undermines collective bargaining and attacks the minimum safety net** by:

   a. facilitating the approval of enterprise agreements which fall below the minimum safety-net standards in modern awards. This will create a **new class of "zombie agreements" that will allow employers to pay below minimum wage for years to come** (well beyond two years);

   b. **preventing unions from undertaking their legitimate role in establishing and enforcing minimum industrial standards** by actively gagging their ability to be heard in applications for approval of sub-standard enterprise agreements;

   c. removing mandatory pre-approval requirements that are designed to ensure that workers understand the terms of agreements and their effect, so that it is **harder for workers to be genuinely informed prior to voting on a proposed agreement**;

   d. allowing employers to more easily manipulate voting cohorts for proposed agreements by **deliberately disenfranchising certain workers**;

   e. allowing employers to **more easily avoid transmission of business provisions**, so that they can transfer employees between corporate entities and avoid obligations in enterprise agreements.

10. Schedule 4 of the Bill introduces 'major project greenfields agreements', which will:

a. **allow employers to lock workers out of having any input at all into the terms and conditions of their employment**, and entirely remove their ability to take protected industrial action, for at least 8 years;

b. **remove any incentive for employers to reach agreement with unions in the making of greenfields agreements.** This will weaponise the Coalition's 2015 amendments to the *Fair Work Act 2009* (**FW Act**), which already allow employers to unilaterally make non-union greenfield agreements. Under the Bill employers will be able to make agreements with themselves, years before a project even commences, and for a period longer than the construction phase of almost all projects. This is *even worse than WorkChoices*, where employer-only greenfields agreements were limited to a 12 month operation;

c. **deliberately drive wages down**. Employers will be positively incentivised to put "base line" agreements into place, and will be able to meet the requirement for annual wage increases by increases as low as 5 cents per annum;

d. **exacerbate the mental health crisis that characterises fly-in, fly-out (FIFO) and drive-in, drive-out (DIDO) work** by failing to provide any mandatory mechanism for resolving disputes during the 8 year life of an agreement. The need for mandatory dispute mechanisms were a significant part of the roundtable discussions, in large part because the most common disputes that plague large projects are about unreasonable roster demands and unliveable conditions in camps. Despite this, any mechanism for resolving these types of disputes have been purposefully omitted from the Bill;

e. **apply to a deceptively wide class of construction projects.** The Bill defines "major projects" by reference to a very low threshold for "project value", which is deliberately calculated to include capital costs that are unrelated to the actual cost of construction (e.g. the cost of purchasing land and equipment). The definition is likely to apply, for example, to CBD construction. The Minister would also be gifted with a very wide ability to declare projects to be "major projects", whilst removing any Parliamentary oversight on such declarations; and

f. **encourage the use of temporary visa workers on greenfields projects, at the expense of local workers**.

11. Schedule 5 of the Bill increases civil penalties payable for wage theft contraventions, but:

a. **makes no effort to encourage or require federal regulators to actually prosecute employers**. The actual prosecution of employers by these regulators is exceedingly rare and – in the case of the Australian Building and Construction Commission – virtually non-existent;

b. **makes no attempt to correct existing provisions which are clearly deficient**. Sham contracting laws, for example, are not currently utilised because the bar is set too high. Long-standing, non-partisan recommendations to fix this – including from the Productivity Commission and the Black Economy Taskforce – are entirely ignored; and

c. **only allows certain improved penalties to be paid to the government; *not* to the employees who were the victims of wage theft,** or to any union that goes to the effort and expense of litigating the claim. The penalties are payable for large-scale wage theft and can be increased to 3 times the value of the actual theft.

12. Schedule 5 of the Bill also implements a regime for the criminalisation of wage theft, but does so in a way that sets the relevant tests unachievably high. It is reasonable to assume that this is **a deliberate attempt to override the more accessible laws available in Victoria and Queensland**.

13. Schedule 6 of the Bill **undermines procedural fairness and natural justice** by giving the Fair Work Commission (**FWC**) unnecessary additional powers to dismiss applications, prevent parties from filing further applications or filing appeals, and prevent parties from being able to make oral arguments at appeal hearings. The Bill would also allow FWC to undemocratically vary or revoke decisions relating to enterprise agreements, bypassing requirements for employee ballots.

14. **The Bill is an irredeemable, blatant and widespread attack on workers and their unions; it must be rejected in its entirety.**

Schedule 1 – Casuals

The proposed statutory definition of 'casual employees' allows employers to disregard the reality of the employment relationship

15. There has been a long-accepted legal meaning of the term "casual", developed over decades of case law. It is based on an objective assessment. It simply requires consideration of the "*conduct of the parties to the employment relationship and the real substance, practical reality and true nature of the relationship*"[2]. This is not remarkable; it is practical.

16. The Full Federal Court's *WorkPac Pty Ltd v Skene* decision[3], and the case law that led to it, does not prevent employers from engaging regular and systematic casuals; it simply reinforces the requirement that any assessment is of the true nature of the relationship. A case will always turn on its facts.

17. The statutory definition of casual employee at s.15A of the Bill replaces this objective, practical assessment so that the assertions of an employer, at the point of engagement, will prevail over the true nature of the employment relationship. The Bill is blunt:

    a. employers will be able to call someone a casual at the point of employment, and their actual conduct thereafter is to be disregarded (s.15A(4));

    b. even where a worker is required to work a regular pattern of hours, set in advance, this will not (of itself) indicate at "firm advance commitment" (s.15A(3)). E.g., hours of work don't matter, and casuals can be required to work full-time hours set well in advance.

18. The only considerations that can be considered, under the Bill's statutory definition, provide no comfort. Regard must <u>*only*</u> be had to:

    a. "whether the employer can elect to offer work and whether the person [worker] can elect to accept or reject work". E.g., the worker either gets a job or they don't;

    b. "whether the person will work only as required". E.g. the worker will be required to perform the work that they are told to do;

    c. "whether the employment is described as casual". E.g. the employer will unilaterally call a worker a 'casual', irrespective of the practical reality of the job; and

    d. "whether the person will be entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a fair work instrument".

[2] *WorkPac Pty Ltd v Skene* [2018] FCAFC 131
[3] [2018] FCAFC 131

19. The last requirement at (d) above is remarkable because it does not even require minimum casual loadings (as defined in an Award) to be paid to a worker; the worker can be engaged on a flat rate.

20. Where a worker is paid a loading it is also important to note that it cannot be assumed that this will result in a worker being appropriately compensated, by reference to their colleagues. It is common, in the construction industry, for workers to be engaged through the use of labour hire contracting firms whose employees who sit outside the coverage of well-established, negotiated enterprise agreements. Those workers are almost invariably paid significantly less than permanent workers who perform the same tasks, even taking into account the 25% casual loading paid to casuals, and even where they are doing the exact same work, on the same site, and under the same set rosters.

21. The reason that labour hire companies are able to provide cheaper labour is because the pay rates they tender under are generally based on minimum award rates, rather than the rates that apply to any permanent workforce who are more likely to have the benefit of a negotiated collective agreement. For the next two years, those same labour hire employers will be emboldened - under Schedule 3 of the Bill, which is discussed below - to base their tenders on rates *less* than minimum wage.

22. Many of the largest and most powerful companies in Australia are already deliberately pursuing this model of employment precisely because it allows them to engage cheaper and more disposable workforces. They do this precisely because the Federal Government's policy settings have allowed and encouraged them to do so. The Bill, if passed, will make it *even easier* for those employers to purposefully foster insecure work.

Restrospective application, and a required set-off, will unfairly change the goal posts in order to punish workers who seek to assert their rights

23. Not only does the Bill enforce and entrench the idea of a "permanent casual" going forward, it also allows employers to apply the definition *retrospectively*[4] so that workers who have had all the obligations of permanent employment, but none of the associated benefits, will lose the ability to make legal claims to assert their long-established common law rights. Even those with claims that are currently in the courts, but not yet resolved, will be stripped of their rights.

24. This is nothing short of the government seeking to change to goal posts mid game, in order to punish employees who have done nothing more than seek to assert their existing legal rights.

25. The Bill also introduces a mandatory offset under s.545A of the Bill, which <u>*requires*</u> a court to offset any casual loading that has been paid against any amount owing to an employee for unpaid entitlements (where the person is described as a casual but found not to be a casual). The offset can reduce the claim for entitlements to - but not below - $0. This offset will apply retrospectively.

26. The offset requirement is a response to self-serving employer rhetoric around "double dipping". Those complaints conveniently ignore the fact that – even when paid a casual

[4] Schedule 7, s.46(1),(4); Explanatory Memorandum at [495]-[496]

loading – casual workers are usually paid significantly less than workers who are directly employed (as described above).

27. The overall effect of the offset provision is that employers who have profited off the back of the deliberate misclassification of workers will be entitled to maintain that profit by claiming back any loading amount paid.

The conversion provisions in the Bill will replace existing rights that are more beneficial to employees, will be essentially unenforceable

28. It is important to note, at the outset, that the existence of casual conversion provisions do *not* moderate the loss of rights that employees will suffer as a result of the introduction of the proposed statutory definition described above.

29. First, the conversion provisions in the Bill give employers a very wide scope to decide not to make offers of conversion, including for reasons that are peculiar to an employers' own knowledge or within their own control. For example, an employer could decline to offer conversion based on a flat assertion that an employee's working hours will be reduced within a 12 month period, based on projections or factors which it could claim are commercial-in-confidence. It will not matter whether or not, in practice, the employee's hours actually end up being reduced.

30. Second, the proposed casual conversion provisions are essentially unenforceable. The default dispute process set out at s.66M of the Bill:

    a. does not allow arbitration except with the consent of the employer; and

    b. can be displaced by either a fair work instrument (such as an enterprise agreement) or – more alarmingly – a common law contract or any other written agreement between an employer and employee (where is it likely that an employee will have little, or no, bargaining power).

31. In the construction industry, temporal restrictions upon the engagement of casuals have been a long-standing feature of Awards.

32. Prior to 2002 there were two casual provisions under the *National Building and Construction Industry Award 2000*: one dealt with casual labour in weekly hire operator classifications and limited engagement as a casual to 2 week; the other dealt with casual labour in daily hire tradespersons and labourer classifications and limited a casual to employment of less than 5 days[5].

33. In 2002 the *National Building and Construction Industry Award 2000* was varied by consent[6] to include one casual clause for all classifications. That clause limited all casual employment to a period not exceeding 6 weeks (except where they were employed on an occasional basis only). The consent variation also increased the casual loading from 20% to 25%, specified what the casual loading was paid for, and introduced the requirement for the casual to be advised

[5] See PRS0643
[6] See PR919660

in writing on a number of issues related to the engagement, including the actual or likely hours of work.

34. In 2012, as part of the award "modernisation" process, the 6 week limitation was removed and casual conversion clauses were inserted into (amongst other modern awards), the *Mobile Crane Hiring Award 2010*, the *Building and Construction Industry General On-site Award* 2010, the *Electrical, Electronic and Communications Contracting Industry Award 2010* and the *Plumbing and Fire Sprinklers Contracting Industry and Occupational Award*[7].

35. The Bill now seeks to displace those casual conversion provisions and replace them with terms that are even worse for construction workers[8]. That is – workers who currently already have access to casual conversion entitlements will be worse off, and have less rights.

36. The removal of the temporal limits on casual employment was a dramatic step which facilitated the ongoing casualization of construction workers. It is unsurprising that Australia has one of the highest levels of casualization in OECD countries; successive Government reforms have steadily stripped away protections and the Bill continues that pattern.

37. The Federal Government knows that these provisions will leave construction workers worse off. Indeed, the explanatory memorandum to the *Fair Work Amendment (Right to Request Casual Conversion) Bill 2019* – which lapsed at the dissolution of parliament before the 2019 federal election – explicitly noted that *"in the manufacturing and construction industries, the right to request casual conversion in the relevant modern awards have been a long-standing features in those industries. The government, with this Bill, does not intend to disturb these arrangements"*. Accordingly, that Bill sought only to "fill the gap" for employees who do not have an award entitlement[9].

38. The current Bill, however, ignores the history of these provisions altogether. Instead it will require FWC to review and vary the existing Award provisions to resolve any "uncertainty or difficulty" in reconciling the interaction between the Awards and amended Act[10]. We take this to mean that the current provisions will undermine or destroy the more beneficial provisions that already exist.

39. Construction workers would be worse off under the Bill than under the current conversion provision at cl 14.8 of the *Building and Construction General On-site Award 2010* (**BCGOA**) because:

    a. they will need to be engaged for twice as long before they have the right to request. The BCGOA provisions apply after 6 months, whereas the Bill requires 12 months service;

[7] E.g. see [2017] FWFCB 3541 at [344]
[8] This would seem to be the effect of the Award Review required by Schedule 7, s.48, which requires FWC to vary awards to resolve any "uncertainty or difficulty" relating to the interaction between the Award and amended Act.
[9] Explanatory Memorandum to *Fair Work Amendment (Right to Request Casual Conversion) Bill 2019*, at (iii). The CFMEU does not endorse the approach in this Bill for the reasons set out in the ACTU submission to the Senate Inquiry which can be seen here.
[10] Schedule 7, s.48 of the Bill

b. the options for conversion are less flexible for both the employee and employer. Under the BCGOA the parties can agree on whether the employee converts to part-time or full-time, whereas the Bill requires conversion "consistent with the regular pattern of hours" that the employee was working in the previous 6 month period;

c. the employer will have a wider discretion to refuse conversion. Under the Award the employer must not unreasonably refuse and, if the request is refused, must fully state the reasons for refusal and discuss the reasons including by making a genuine attempt to reach agreement;

d. it requires employers to give a pro forma "Casual Employment Information Statement" to employees at the start of employment (12 months before the conversion option is available to them), whereas the Award currently requires employers to give written notice after 6 months (the same point of time that the request is available);

e. it reduces the time periods for response from 28 days to 21 days;

f. it limits the casuals to whom a conversion option applies. Under the Bill the option only applies to employees who worked a regular pattern of hours on an ongoing basis in the 6 months prior to the offer. The BCGOA applies a right to convert to an employee who has been engaged by a particular employer for a sequence of periods of employment during a period of six month, and applies to casuals other than "irregular casuals";

40. The erosion of rights is not limited to undermining the current casual conversion provisions. The requirement that FWC review and vary the existing Award provisions to "ensure consistency with the Bill" also means:

    a. the removal of the current obligation on employers to "inform the employee, in writing, that the employee is to be employed as a casual, stating by whom the employee is employed, the job to be performed, the classification level, the actual or likely number of hours to be worked, and the relevant rate of pay"; and

    b. because the proposed definition of casual has no minimum engagement period, it could be argued that the 4 hour minimum engagement under the construction awards is inconsistent with "work as required".

41. Nothing in this Schedule will create jobs. What it will do is undermine existing jobs by encouraging, and further entrenching, insecure work.

Schedule 2 – Modern Awards

"Simplified Additional Hours Agreements" are state-sanctioned, permanent pay cuts

42. The "simplified additional hours agreements" set out in Schedule 2 of the Bill will allow part-time employees who are covered by certain modern awards, and who work an average of at least 16 hours per week, to perform what it currently overtime work at ordinary time rates.

43. Put simply, the 'agreements' will allow employers to pay workers less than they are currently entitled to, for the same work. The term 'agreement' is, of course, used loosely – in practice, employees are likely to either 'agree' or find themselves out of a job.

44. The Bill limits these agreements to a list of 12 specific modern awards including (but not limited to) the retail, hospitality, restaurant and meat industries. However, the Bill allows for more awards to be added via regulation.

45. If the government is willing to so brazenly encourage the cutting of wages of part-time workers in some the industries which have been hardest hit by the COVID-19 pandemic, then we have no confidence that it will not seek to indiscriminately add to the list of relevant awards over time.

46. It is clear that these agreements are not aimed at providing short-term assistance to businesses negatively affected by the economic effects of the COVID-19 pandemic. This is because the making of these 'agreements' is not time-limited; it is a permanent reform. In fact, the 'agreements' will contribute to the lowering of the award safety net because they will be treated as terms of the relevant Awards, including for the purposes of the Better Off Overall Test (**BOOT**).

47. The 'agreements' also have no oversight mechanism, and cannot be varied or revoked by the Fair Work Commission. There is also no compulsory dispute mechanism, and no stand-alone civil penalty provisions for abuse (e.g. where the agreement is not genuine).

48. These 'agreements' are, in reality, the first step towards the permanent eradication of overtime rates for part-time workers.

Flexible Work Directions

49. The Bill retains the ability of employers to issue directions, for the next two years, relating to work duties and location. The directions are similar to the equivalent JobKeeper directions but with a lower bar because the threshold tests are watered down (there is no 'decline in turnover' test).

50. These directions are currently limited to the same list of 12 awards that are subject to "simplified additional hours agreements". Again, that list can be expanded via regulation. This is concerning; any extension to other awards ought to be the subject of consultation, if only because many modern awards already contain industry-appropriate provisions which allow

for the variation of ordinary hours, and which are subject to more stringent protections for workers.

51. Nothing in this schedule will create jobs or contribute to economic growth. All it will do it lower wages for part-time workers, and shift power further in the direction of employers by giving employees less rights in relation to their work duties.

Schedule 3 – Enterprise Agreements

52. The introduction of the enterprise bargaining model constituted a seismic shift in industrial relations that, at the time of its inception, was forecast to reduce unemployment and improve the living standards of Australian workers. However, the system has been forced to endure consistent and sustained attacks by conservative governments designed to drive up the profits of business, whilst cutting the pay and conditions of workers.

53. Schedule 3 of Bill – which proposes sweeping changes to the enterprise bargaining regime – confirms that the Federal Government has no intention of hanging up its ideological gloves.

54. Under the cover of COVID-19, it is proposing an overhaul of the enterprise bargaining system that will have a lasting and dire impact on wage growth and conditions for workers in this country. The most damning elements of the Bill will:

    a. facilitate the approval of enterprise agreements that fall beneath the minimum standards enshrined in modern awards through the inclusion of a new public interest mechanism;

    b. direct the FWC to have regard to limited matters when determining whether the proposed agreement passes the 'better off overall test' (**BOOT**), which will undermine the ability of employees and their unions to genuinely bargain;

    c. extend the time period for employers to provide a Notice of Representational Rights (**NERR**), which is vital to ensuring that workers are aware of their rights to be represented in the bargaining process by their union;

    d. relax important pre-approval requirements and remove the current obligation on employers to provide information and material to employees. Such changes will result in employees being asked to approve enterprise agreements that they may not fully understand, and which may undercut safety net standards (including minimum wages);

    e. remove the right of unions - who have detailed knowledge of the modern awards that apply in their industries - from making submissions regarding whether an agreement meets the minimum legislative standards for approval; and

    f. alter the objects of Part 2-4 of the FW Act, and the provisions concerning the FWC's functions, to elevate the views of the parties immediately involved in bargaining over an objective assessment of the agreement.

55. These amendments constitute a hostile pro-business offensive by the Federal Government that will slash the wages and conditions of workers who have already been forced to endure the economic crisis created by the COVID-19pandemic.

The objects of the FW Act, and FWC Functions

56. The Federal Government's intention to use the Bill to further shift the balance of power in favour of employers becomes immediately clear when the proposed amendment to the objects at section 171 of the FW Act are considered.

57. The Explanatory Memorandum has sought to minimise the significance of these changes by stating that they *"do not impact the operative provisions in Part 2-4 which determine how agreement making occurs or how the FWC performs its functions".*[11] However, they must be read in the context of the raft of reforms to the enterprise bargaining regime proposed by the Bill.

58. The Bill proposes to amend the objects of Part 2-4 by emphasising that the enterprise bargaining system should *"enable business and employment growth"*[12] and "*reflect the needs and priorities of employers and employees".*[13]

59. The significance of objects is discussed in section 578 of the FW Act, which requires the FWC to - amongst other matters - take into account the objects when determining a matter before it.

60. As noted above, the first of the changes to the objects requires the FWC to consider business and employment growth when determining applications to approve enterprise agreements (or otherwise when exercising its functions and powers under Part 2-4).

61. Whilst business growth is to be generally supported, placing greater emphasis on this in the objects will result in the FWC having little option but to prioritise profits over the interests of the workforce, particularly when applying the revised BOOT. It is also notable that, despite placing a renewed emphasis on business growth, the revised objects do not extend to reducing the scourge of insecure work or indeed, increasing wages at a time when Australian workers have endured eight years of low wage growth.

62. The introduction of wording to 'reflect the needs and priorities of employer's and employees' is clearly intended to complement the proposed changes to section 590. It will be used to limit the ability of unions to play an active role in scrutinising enterprise agreements. This is in addition to the requirement introduced in the new section 254B that the FWC perform its functions and exercise its powers 'in a manner that recognises the outcome of bargaining at an enterprise level.'

63. The combined effect of these changes is that the FWC will be required to elevate the subjective views of employers and employees over more objective assessments as to whether the minimum legislative requirements for approval have been met. This will inevitably result in the certification of agreements that serve the interests of business but will see the pay and conditions of workers suffer.

[11] *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 – Explanatory Memorandum* pg lxvi
[12] *The Fair Work Amendment (Supporting Australia's Economic Recovery) Act 2020*, section 171(b)(ii)
[13] *The Fair Work Amendment (Supporting Australia's Economic Recovery) Act 2020*, section 171(b)(iii)

Notice of Representational Rights

64. The purpose of the Notice of Employee Representational Rights (**NERR**) is to ensure that workers are aware of their right to representation throughout the bargaining process, which is particularly important in a system that permits the making of non-union agreements.

65. The NERR advises workers that they may appoint a bargaining representative to represent them in bargaining for a proposed enterprise agreement and that, if a worker is a member of their union, that the union will be their default representative.

66. The requirements surrounding the provision and content of the NERR are set-out in section 173 and section 174 of the FW Act. The prescribed form of the notice is found at schedule 2.1 of the *Fair Work Regulations 2009* (**FW Regulations**). These provisions require an employer that will be covered by a proposed enterprise agreement[14] to take 'all reasonable steps' to give notice of the right to be represented to each worker employed at the notification time[15] and who will be covered by the agreement.

67. Section 174 requires employers to provide the NERR as soon as possible but no later than 14 days following the notification time. Crucially, an employer cannot put an agreement to a vote until at least 21 days since the last valid NERR has been provided.[16]

68. There are two proposed changes to the current requirements relating to the NERR. The first of these changes will extend the time for an employer to provide the NERR from 14 days to 28 days after bargaining commences.[17] The second change will impose an obligation on the FWC to publish the NERR in the prescribed form on its website.[18]

69. In making these changes, it appears that the Federal Government has accepted claims by employer associations that pre-approval steps – such as the timely provision of an accurate NERR – are mere administrative technicalities that are preventing agreements being certified. Not only does this position downplay the importance of the notice but it is without basis, particularly following the introduction of section 188(2) of the FW Act.

70. Section 188(2) confers a power of the FWC to approve agreements notwithstanding 'minor procedural or technical errors', provided that they are unlikely to disadvantage employees. Indeed, it is clear from the relevant explanatory memorandum that section 188(2) was introduced to address the very issues now being complained of – that non-compliance with NERR requirements is stalling agreement approvals.[19]

71. Section 188(2) has not been sitting dormant since its introduction, which is illustrated by the fact that it was relied on some 270 times between its introduction and July 2020 to approve agreements affected by minor procedural and technical errors . Accordingly, claims that non-

[14] Other than a greenfields agreement
[15] The notification time is the date the employer first agrees to or initiates bargaining. Otherwise it is the date that a majority support determination, scope order or low-paid authorisations comes into effect.
[16] *Fair Work Act 2009* (Cth) s.188(1)
[17] *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020,* s 173(3)
[18] Ibid, s 174(1C)
[19] *Fair Work Amendment (Repeal of 4 Yearly Reviews and Others Measures) Bill 2017 – Revised Explanatory Memorandum*, paragraph 47.

compliance with these provisions is preventing the certification of otherwise compliant agreements are without merit.

72. Further, any suggestion that the NERR is no more than administrative technicality significantly downplays its importance in the enterprise bargaining process and its role in ensuring that workers are well informed and aware of their right to be represented. This is supported by comments of Vice President Hatcher of the FWC, who also warned of the risks of not providing the NERR within in a timely fashion:

> *" [If] the Notice could be given at any time without adverse consequences provided that this occurred 21 days before a vote to approve the enterprise agreement occurred, it would have potential consequences which would be destructive of the Notice's statutory purpose. It might mean that bargaining for an enterprise agreement is well advanced or even completed before all employees are advised of the fact that bargaining is occurring and are made aware of the means by which they may participate and be represented in that bargaining process."*[20]

73. We agree with these observations. Ultimately, the change is unnecessary and could mean that employers will advance bargaining and be in a position to finalise the content of an agreement without having any interaction with the representatives of the relevant workers. It undermines collective bargaining and the crucial role of the NERR as an important safeguard in the bargaining process.

Pre-approval requirements will undermined

74. The Bill will considerably weaken the current pre-approval requirements at section 180 of the FW Act by:

    a. replacing the current – and separately enforceable – mandatory requirements with a generalised requirement that employers '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'*;*

    b. no longer requiring employers to provide copies of incorporated documents which are 'publicly available'; and

    c. no longer requiring employers to explain the terms of an agreement and their effects, in the event that the proposed agreement reflects the content of the existing agreement (or in other words, in instances where the agreement is a 'roll-over').

75. The pre-approval steps contained in section 180 are not a mere formality; they are crucial to ensuring that employees are in a position to make an informed decision as to whether to accept an agreement proposed by their employer. This is reflected in the current legislation, where the FWC cannot approve an agreement unless these requirements have been complied with.[21]

[20] *Transport Workers Union of Australia v Hunter Operations Pty Ltd* [2014] FWC 7469 [78]
[21] *Fair Work Act 2009* (Cth) s.186(2)(a) & s.188(a)(i)

76. The changes to section 180 will absolve employers of their existing obligations to provide vital information concerning a proposed agreement and will result in workers having to make their own enquiries as to the fairness of the deal on offer. This will particularly disadvantage vulnerable cohorts of workers, such as those who do not have the benefit of union representation, do not speak English as their first language and those who lack computer literacy. For these workers in particular, the existing pre-approval steps contained in section 180 are important safeguards that enable them to give their informed consent to a proposed agreement.

77. Section 180(1) of the FW Act contains mandatory steps that must be complied with by an employer before they ask employees to vote on an enterprise agreement. This includes a requirement to take 'all reasonable steps' to ensure that during the access period[22] employees are provided a copy of, or access to, the written text of the proposed agreement and any material incorporated by reference.[23] Employers are also required to advise workers of the place and time of the vote - as well as the voting method to be used - at the commencement of the access period.[24]

78. Section 180(5) places an obligation on employers to take 'all reasonable steps' to ensure that the terms of the agreement and the effect of those terms are explained to workers. This explanation must take into account the particular circumstances of the group, such as those from culturally and linguistically diverse backgrounds and young employees.

79. Whilst the current provisions are expressed in mandatory terms, they are sufficiently flexible and fair in their current form. They do not require amendment. Employers only have to take 'all reasonable steps' to comply with the requirements contained in s.180. This means that employers are afforded some latitude in how they satisfy these pre-approval steps. For instance, the requirement to provide the text of an agreement and incorporated material has been satisfied by employers providing the information by including attachments and links to emails.[25]

80. Further, there have been instances whereby section 188(2) has been used to forgive departures from these pre-approval steps. Whilst we oppose such a liberal application of the section to what are important procedural safeguards, such cases illustrate that employers already have a number of legislative tools available to them to avoid allegations that they have not complied with the section.

81. Notwithstanding this, the proposed changes would see the existing and separately enforceable requirements of section 180 replaced with a general requirement that an employer 'takes reasonable steps to ensure that the relevant employees are given fair and reasonable opportunity to decide whether or not to approve the agreement' (**General Requirement**). Notably, employers will no longer be required to take 'all reasonable steps' to satisfy the relevant pre-approval steps

82. This must be read together with the new section 180(3), which suggests that the obligations contained in section 180 - such as providing access to the agreement and an appropriate explanation of its terms - are not intended to limit the ability of the FWC to approve an

[22] Seven day period prior to employees voting on an agreement
[23] *Fair Work Act 2009* (Cth) s.180(2)
[24] *Fair Work Act 2009* (Cth) s.180(3)
[25] *Civil Sydney Pty Limited Enterprise Agreement 2019 - 2023* [2020] FWCA 1033

agreement if satisfied that the General Requirement has been met. This means that an agreement may be approved despite a failure of employer to meet one or indeed, any of the obligations set out in the section.

83. These changes will inevitably be exploited by employers who will ask workers – who have not had the benefit of having received a proper explanation or receiving the information required to reach an informed view - to vote in favour of substandard non-union agreements that cut their pay and conditions.

Material incorporated by reference

84. The Bill also proposes to significantly weaken the obligations on employers to provide or give access to any material incorporated by reference at the beginning of, or during, the access period.

85. Section 257 of the FW Act permits an agreement to incorporate material as it was in force at a particular time, or as it is in force from time to time. This includes modern awards, State or Territory laws and workplace policies.

86. Enterprise agreements will often include a clause that expressly incorporates the terms of a modern award and as such, this triggers the obligation on employers to *'t*ake all reasonable steps' to provide or give access to a copy of the incorporated document during the 7-day access period.

87. The proposed amendments to section 180(3) will remove the obligation on employers to take *all* reasonable steps to provide the relevant incorporated material. Further, the proposed amendments absolve employers of the obligation to provide incorporated material that exists in the public domain. The combined effect of these changes is to severely limit the ability of many workers to reach an informed view regarding the terms and conditions of their employment. These changes are particularly damning when considered in light of the proposed changes to the BOOT.

88. Relieving employers of the obligations to provide or give access to incorporated materials (such as modern awards) that are already in the public domain, will undoubtedly leave some workers without access to these incorporated materials. It is an unreasonable assumption that all workers will have the industrial knowledge and – indeed - technological literacy to locate the award(s) and other materials in question. Accessing these documents will likely prove to be particularly difficult for workers in industries and workplaces that are not unionised.

89. Further, in the context of enterprise agreements that cover work performed across a number of different industries, it is foreseeable that workers will also be required to undertake the difficult task of not only finding the relevant awards but also identifying the award that would otherwise be applicable to the work they perform.

90. The rationale for employers being required to take active steps to provide incorporated materials is clear – workers are entitled to know how the entitlements and obligations contained in such documents will apply to their employment should they vote in favour of an agreement.

Explanation of the terms of a proposed agreement

91. The attack in the pre-approval steps in section 180 is not limited to subsections 180(2) and 180(3) – the adoption of the General Requirement will also weaken the operation of section 180(5).

92. Section 180(5) requires employers to explain the terms of an agreement, and their effects, to employees. The content of this explanation is often focussed on any terms and conditions in an enterprise agreement that differ from those that are contemplated by the otherwise applicable modern award. However, the section also requires an employer to explain the terms of an agreement, and their effects, by reference to any existing enterprise agreement.

93. The effect of the introduction of the General Requirement on the operation of section 180(5) is explained at page 40 of the Explanatory Memorandum, which confirms that in the event that a proposed agreement substantially identical to the terms of an existing agreement (in other words, is a 'roll-over' agreement) an employer will not be required to explain terms that have not changed.

94. This change could see employers 'roll-over' enterprise agreements time and time again despite the composition of the workforce being subject to considerable change, including turnover of the employees.

95. This is of particular concern for the construction industry, where labour is largely transient as a consequence of workers moving from project to project. Accordingly, at the time they are requested to vote of an agreement, workers may not have the same level of familiarity with the terms of an existing agreement as a person would in a different industry. The changes to section 180 would deny these workers a full and proper explanation of an agreement on the assumption that they are informed and aware of their existing employment conditions.

96. Ultimately, the importance of section 180 and the obligations contained therein cannot be gainsaid – they are designed to ensure employees are fully informed and in the best possible position to determine whether to accept the terms proposed by their employer or return to the bargaining table. The existing section 180 is integral to the fair operation of Australia's enterprise bargaining regime and changes to the General Requirement and subsections must be opposed.

Workers are disenfranchised

97. The Bill proposes to amend section 181 of the FW Act to ensure that people who are requested by an employer to vote in support of the approval of an enterprise agreement must *exclude:*

    a. casual employees who did not perform any work at any time during the access period; and

    b. people who were employed after the commencement of the access period.

98. The Federal Government has claimed in the Explanatory Memorandum that the amendments to section 181 are necessary to clarify which casual employees are entitled to vote on a proposed enterprise agreement. Further, that the changes will ensure that the FW Act

requirements align with the position at common law regarding which employees may vote to approve an agreement.[26]

99. However, the inclusion of express provisions that disenfranchise certain employees will embolden employers to manipulate the voting cohort. For instance, it is entirely possible that an employer who is familiar with the requirements of the FW Act may not offer casual employees shifts during the access period if they suspect they will be hostile to the terms of a proposed non-union agreement. The opposite is also true - that employers may choose to engage a small cohort of casual workers that they know will deliver the voting outcome they want. This is particularly concerning when a proposed agreement has broad geographical and/or industry coverage.

CATALYST: REPLACING WORKFORCES AND SLASHING WAGES AND CONDITIONS, BY STEALTH

A prominent example of an employer engaging a small cohort of casual workers for the purpose of securing the vote on a contentious agreement is the *Catalyst Services Enterprise Agreement 2014.*

The employer that was party to the Catalyst Agreement was a company by the name of Catalyst Recruitment, which is a subsidiary of Programmed Skilled. The Catalyst Agreement had national coverage, and was expressed to cover all employees across Australia in any of the classifications contained in seven modern awards. Despite this, it was later revealed that the agreement was voted on in Perth by three casual workers, one of whom was reportedly engaged for only six days at the time the agreement was made.

Approximately eighteen months later, fifty-five electricians and fitters at Carlton United Brewery (**CUB**) in Abbotsford, Victoria were advised that Quant (with whom they just negotiated a new enterprise agreement) had lost the maintenance contract and would be getting replaced by employees of Catalyst Recruitment. The maintenance workforce fell within the coverage of the Catalyst Agreement, which contained significantly reduced terms and conditions of employment.

[26] For instance, from the decision in *National Tertiary Education Industry Union v Swinburne University of Technology* [2015] FCAFC 98

PIMS MINING: HOW EMPLOYERS ARE ALREADY ABLE TO ABUSE THE SYSTEM

A more recent example involves the approval of the *PIMS Mining (NSW) Pty Ltd Enterprise Agreement 2019* in April 2020.

PIMS predominantly operated in Queensland but were invited to tender for a development contract at South 32's Appin Mine in New South Wales. After having its tender proposal rejected, PIMS decided to outsource production and engineering to WorkPac – a labour hire company who had a national agreement in place with the union.

PIMS then registered a new company, PIMS Mining (NSW) Pty Ltd (**PIMS NSW**). PIMS NSW then employed six individuals to perform work at the Appin site, whose first duty was to vote on a new agreement. Of the six employees, four had never worked in a coal mine, one was a tradesperson and one was a mineworker. All employees were on probation and were aware that their employment on the site would only continue in if an enterprise agreement was made.

The CFMEU argued that there was a mismatch in the skill, experience and geographic location of the six employees and the scope of the agreement. They claimed that all of the employees that negotiated the agreement were engaged in the Illawarra and most of them were inexperienced, but they were negotiating an agreement for the whole of NSW for both experienced and inexperienced mineworkers.

Despite the Commissioner stating that *"the negotiation and approval process appears to be a contrivance"* and observing that *"the Agreement is bordering on being a 'sham' due to the deliberate and calculated steps taken by the Applicant in choosing its six employees"* the agreement was approved.

(Application by PIMS Mining (NSW) Pty Ltd T/A PIMS Group [2020] FWCA 2189)

100. These examples serve to illustrate how some employers can - and do - manipulate voting cohorts to get substandard and non-union agreements approved. The proposed changes to section 181 will make it even easier for this practice to occur.

Employees no longer need to be "Better Off Overall"

101. Whilst the changes to the enterprise bargaining regime discussed above - and the likelihood that they will undermine important procedural safeguards - are of significant concern, the proposals surrounding the operation of the BOOT threaten to open the floodgates to agreements which cut the pay and conditions of Australian workers below minimum standards, for years to come.

102. The changes to the operation of the BOOT can be summarised as follows:

    a. the introduction of a new public interest exemption that will allow enterprise agreements that fail BOOT to be approved;[27] and

    b. the prescription of what FWC must, or must not, have regard to when determining whether an enterprise agreement passes the BOOT.[28]

103. To understand the significance of the changes, it must firstly be acknowledged that enterprise agreements approved under the FW Act displace the award safety net that would otherwise apply to worker's employment.[29] As a consequence of this, FWC is tasked with ensuring that agreements lodged for approval provide for terms and conditions of employment that - at the least - meet the minimum requirements prescribed by modern awards and the FW Act.

104. Section 193(1) of the FW Act sets out the BOOT and states that the FWC must be "satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant award applied to the employee".

105. Workers – particularly those who do not have the benefit of union representation at the bargaining table – depend on the FWC to closely and rigorously apply the BOOT to ensure that an agreement builds upon the safety net conditions enshrined in awards. The changes proposed to section 189 and section 193 of the FW Act threaten to do the opposite and will ultimately slash the pay and conditions of Australian workers who have already been forced to weather the economic impacts of COVID-19.

<u>The public interest exemption</u>

106. Currently, section 189 confers a power on the FWC to approve enterprise agreements that do not pass the BOOT in 'exceptional circumstances' where approval 'would not be contrary to the public interest'.[30] This includes where the FWC is satisfied that the agreement is 'part of a reasonable strategy to deal with short-term economic crisis in, and to assist in the revival of, an enterprise'.[31]

107. The Bill inserts a new provision at section 189(1A), which allows the FWC to approve an enterprise agreement which would otherwise fail the BOOT where the FWC is satisfied that it is appropriate taking into account a non-exhaustive list of circumstances, including:

    a. the view of employees, the employer(s) and bargaining representatives;

    b. the circumstances of employees, employers and unions that have given notice that they wanted to be covered by the enterprise agreement, including 'the likely effect that approving or not approving the agreement will have on each of them';

    c. the impact of COVID-19 on the enterprise; and

[27] *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* s.189(1A)
[28] *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020,* s.193(8)
[29] *Fair Work Act 2009* (Cth) s.57(1)
[30] *Fair Work Act 2009* (Cth) s.189(1) & s.189(2)
[31] *Fair Work Act 2009* (Cth) s.189(3)

d. the extent of employee support for an agreement 'as expressed in the outcome of the voting process'.

108. Significantly, the new section 189(1A)(b) has the effect of shifting the language from acknowledging that the FWC has the power to approve an enterprise agreement in exceptional circumstances where approval 'would not be contrary to the public interest', to language that indicates that the approval of an agreement would not be contrary *because* of the existence of the circumstances listed in section 189(1A). Accordingly, the existing two limb test – which requires the FWC be satisfied that there are exceptional circumstances *and* that approval is not contrary to the public interest - has been replaced with a significantly weakened test.

109. The reluctance of FWC to certify agreements that will result in workers receiving below safety net conditions is illustrated by the fact that it has only relied on this existing provision a small number of times to approve enterprise agreements. However, the reformulation of the provision - which will place greater pressure on the FWC to approve enterprise agreement subject to the considerations of section 189(1A) - *will* result in a deluge of substandard agreements being lodged for certification by opportunistic employers seeking to exploit the current COVID-19 situation.

110. The Federal Government has sought to allay concerns about the ramifications of relaxing the BOOT for workers by stressing that the provision will sunset after two years in operation. However, this conveniently disregards the fact that agreements approved within the two-year window following commencement of the Bill can apply to a workforce long after the provision sunsets. The obvious consequence is that workers will be forced to endure inferior terms and conditions of employment for an undefined period if employers do not initiate bargaining for a replacement agreement. This is particularly concerning for non-unionised workforces who are unaware of the legislative mechanisms available to them to bring a reluctant employer to the bargaining table.

111. Further, claims by the Federal Government that the introduction of the reformulated public interest exemption is necessary to help business recover from the economic shocks of COVID-19 must be dismissed. The current public interest exemption – which contemplates the section being relied on in response to 'short-term economic crisis' – is sufficient to allow businesses genuinely recovering from COVID-19 to avoid a strict application of the BOOT.

112. Importantly, cutting the take-home pay of workers who would otherwise spend at the businesses suffering the impacts of COVID-19 will do nothing to assist the economy. The Bill sends a clear and unequivocal message that the Federal Government expects workers to shoulder the burden of Australia's economic recovery to COVID-19 alone.

<u>Relevant and irrelevant matters for determining the BOOT</u>

113. The Bill also attacks the operation of the BOOT through the inclusion of subsection 193(8), which sets out matters that the FWC must, or must not, have regard to when deciding if an agreement leaves workers better off when compared to the underlying award.[32]

114. Under the new provisions, the FWC:

[32] Note that these provisions also apply to agreement variations

a. may *only* have regard to patterns or kinds of work or types of employment only if they are engaged in by award covered employees for the agreement or if they are reasonably foreseeably at the test time (subsection 193(8)(a));

b. *may* have regard to the overall benefits (including non-monetary benefits) compared to the modern award (subsection 193(8)(b)); and

c. *must* give significant weight to any view relating to whether the agreement passes the BOOT that have been expressed by the employer, employees or bargaining representatives (subsection 193(8)(c));

115. Significantly, these changes will *not* sunset two years after commencement (as is the case with the proposed amendments to section 189). These are permanent changes.

116. The first of these new considerations (subsection 193(8)(a)) is particularly damning as it will allow employers to address concerns raised by the FWC that an agreement does not pass the BOOT by providing evidence of *current* roster patterns. This is notwithstanding the fact that the employer may have every intention of directing employees to perform longer hours and different patterns of work in the future. That is, there is nothing preventing an employer from immediately changing rosters after an agreement is approved.

117. For instance, an employer may seek certification of an agreement that contains 'loaded rates', which incorporates overtime penalties and allowances. Whilst the agreement may result in a worker only performing ordinary hours being better off when compared to the award – this may change in the event the employer issues that same employee a direction to start performing regular overtime in the future. If the workforce is only performing ordinary hours at the relevant test time,[33] under the new provisions the employer would simply provide evidence of this fact and the FWC would be prevented from considering future changes to the hours of work.

118. The effect of this is that employees could be compelled to perform overtime work at ordinary time (loaded) rates. The more overtime they work, they lower they would fall below the minimum rates set out in the relevant award.

119. Similarly, an employer might only engage full-time employees at the time an agreement is lodged with the FWC. After approval they can successfully tendered for a project that will commence in the near future and which requires additional casual labour. The agreement may not include the same penalties or benefits otherwise available to casual employees under the relevant award but, in the absence of casual employees being engaged at the point of approval, this would not be a relevant matter for FWC to consider.

120. This marks a significant departure from the status quo, which requires the FWC to have regard to the types of work and roster arrangements that are objectively foreseeable at the test time when applying the BOOT. An important part of this exercise is considering the hours and working arrangements *actually permitted by the terms of an agreement,*[34] which helps ensure that workers are protected regardless of a change in business direction (foreshadowed or otherwise).

[33] Section 193(6) of the FW Act states that the 'test time' is the time the application for approval is made with the FWC.
[34] *Loaded rates in agreements case* [2018] FWCFB 3610

SPECIALIST PEOPLE PTY LTD

In the Full Bench matter of *CFMMEU & Ors v Specialist People Pty Ltd,*[1] the CFMMEU, the AWU, the AMWU and the CEPU (**the Unions**) appealed a decision of Deputy President Beaumont to approve the *Specialist People Enterprise Agreement 2018*. The primary ground of appeal advanced by the Unions was that the Deputy President failed to consider all relevant reference awards when scrutinising the agreement for the purposes of determining whether it passed the BOOT. The Unions argued that the breadth of work captured by the agreement meant that the *Building and Construction General On-Site Award*; the *Electrical, Electronic and Communications Contracting Award* and the *Hydrocarbons Industry (Upstream) Award* should have been considered. However, the Deputy President only performed the BOOT assessment by reference to the *Manufacturing and Associated Industries Award.* As a consequence of this, the agreement was deemed to pass the BOOT.

On appeal, the Unions provided modelling of various roster scenarios permitted by the terms of the agreement and that are frequently performed on major infrastructure projects in North Western Australia (where the applicant employer was primarily contracted to perform work). Under these scenarios, the Full Bench agreed that the agreement failed the BOOT by reference to the awards not considered by the Deputy President at first instance. The agreement was, however, subsequently approved on the basis of undertakings provided by the employer.

(Construction, Forestry, Maritime, Mining and Energy and others v Specialist People Pty Ltd [2019] FWCFB 6307)

121. Turning to the other considerations outlined above, subsection 193(8)(b) is broadly consistent with the current requirement that the FWC have regard to 'overall benefits' (including non-monetary benefits) when applying the BOOT .[35] However, the requirement that the FWC give 'substantial weight' to the views of bargaining parties - which in the case of employees, can only be expressed through the outcome of the vote – could mean that agreements get approved despite objectively undercutting the award safety net.

122. This is of particular concern when considered in the context of the broader package of reforms, such as the Bill's attack on the pre-approval steps (discussed earlier in these submissions) and its attempt to diminish the role of unions in scrutinising substandard agreements.

123. Employees are routinely pressured to vote up enterprise agreements proposed by their employer. They are often told that – if they do not – they will no longer have a job. Elevating the outcome of a vote over a requirement that the agreement meet a *basic safety net* does nothing but elevate the power of employers over employees, and create a more unequal bargaining process.

[35] See discussion in *Loaded rates in agreements case* [2018] FWCFB 3610

Terminating agreements after the nominal expiry date

124. Under the existing section 225 of the FW Act, an application can be made to terminate an enterprise agreement that has passed its nominal expiry date (**NED**) if the FWC is satisfied that it is not contrary to the public interest to do so. The proposed change to this provision will mean that such an application cannot be made until at least three months after an agreement's NED, rather than immediately from the date of expiration.[36]

125. Whilst this is a marginal improvement on the current position, it does nothing to address serious concerns held by unions that these provisions get weaponised by employers, who use the threat of termination as a means to compel workers to accept pay cuts and inferior working conditions.

126. Ultimately, this amendment does little to address the fundamental problems concerning the unilateral termination of agreements – that as long as such a provision exists, employers will threaten to use it to gain an unfair advantage at the bargaining table.

Limiting how FWC may inform itself will inevitably lead to an increase in approvals of agreements that do not meet minimum standards

127. The Bill proposes changes that are clearly intended to significantly limit the ability of unions that are not bargaining representatives from making submissions in relation to the approval of enterprise agreements. This will extend to instances whereby agreements have been negotiated with an unrepresented workforce and there will be no contradictor if it were not for union intervention.

128. Based on the CFMMEU's experience in agreement approval matters, this will inevitably lead to an increase in the number of agreements being certified that do not meet the minimum legislative requirements set-out in the FW Act.

129. The Bill confines the discretion of the FWC in subsection 589 and 590 of the FW Act to consider any information it sees fit in applications to approve or vary an enterprise agreement. It does this by inserting a new section 254AA, which qualifies the current section 590 by preventing unions that are not bargaining representatives from being involved at the FWC approval stage. This is unless the FWC is satisfied that 'exceptional circumstances' exist.[37]

130. These changes have presumably been proposed to appease employer bodies who regularly complain about alleged delays in the approval on enterprise agreements due to the intervention of unions who are not bargaining representatives. **However, members of the FWC have reported that a non-party would intervene in less than 2% of all matters.** Using 2019 as an example, this would equate to less than 106 of the 5292 of applications made to have an agreement approved. Accordingly, the extent to which such interventions have resulted in delays in the approval of agreements are clearly overstated.

[36] *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* s.225

[37] The Explanatory Memorandum refers to 'exceptional circumstances' where a union that was not a bargaining representative may be heard as "where there are significant public interest concerns about the enterprise agreement (e.g. possible human rights issues, or implications for the economic or public health and safety)".

131. Further, the capacity of unions who are not bargaining representatives to make submissions to the FWC about the impact of an agreement is an important safeguard in ensuring that substandard agreements do not slip through the cracks - as was demonstrated in *CFMMEU v A1 Earthworx Mining & Civil Pty Ltd*[38].

A1 EARTHWORX MINING AND CIVIL

Whilst the CFMMEU did not seek leave under s.590 to be heard in the context of this matter, its does serve as a good example of how the involvement of non-bargaining parties in agreement applications can ensure that an agreement complies with the minimum requirements stipulated by the FW Act.

The Full Bench quashed a decision by Deputy President Bull to approve the *A1 Earthworx Mining and Civil Pty Ltd and Employees Enterprise Agreement 2019 – 2020.* The CFMMEU contended that the Deputy President erred in four respects in determining to approve the agreement. One of the errors contended that the agreement failed the BOOT.

Prior to filing a notice of appeal, the union obtained a copy of the file relating to the agreement approval from the FWC's library. The file contained an assessment undertaken by the FWC's triage team. FWC's own assessment raised a number of concerns regarding the agreement's failure to comply with the FW Act. The assessment also recommended that the Member invite undertakings from the applicant employer to remedy these issues.

Notwithstanding this, the Deputy President approved the agreement without seeking undertakings from the employer to address these issues.

As the agreement provided for loaded rates, the CFMMEU prepared modelling which indicated that some workers under the agreement would be worse off by between $79 to $169 per week. Based on this, the Full Bench quashed the decision to approve the agreement.

If it were not for the involvement of the CFMMEU, the agreement would have seen workers receive below the minimum rates of pay contained in the award.

(Construction, Forestry, Maritime, Mining and Energy Union v A1 Earthworx Mining & Civil Pty Ltd [2019] FWCFB 5836)

[38] [2019] FWCFB 5836

GEOGIOU GROUP PTY LTD

In the matter of *Georgiou Group Pty* Ltd,[1] Deputy President Beaumont dismissed an employer's application for approval of the *Georgiou Group (Operations) Enterprise Agreement 2018* on the basis that the applicant had not complied with the pre-approval steps requirements set out at section 180(2) and section 180(5) of the FW Act.

At hearing, the employer challenged the CFMMEU's status as a bargaining representative but the Commission ultimately found in the union's favour. Further, the Deputy President noted that - in the event that she was wrong about the CFMEU's status as a bargaining representative for the agreement - the Commission would nevertheless be assisted 'by a considered contribution by a contradictor'.[1]

During cross-examination by the CFMMEU, the National Human Resources Officer made a number of frank admissions regarding non-compliance with section 180, including admissions relating to failure to distribute the incorporated award to workers and providing a deficient explanation regarding the terms of the agreement to employees. Ultimately, the application was dismissed on this latter basis but may have been approved if not for the scrutiny of the union.

(Georgiou Group Pty Ltd [2019] FWC 211)

MECHANICAL MAINTENANCE SOLUTIONS PTY LTD

In the matter of *Mechanical Maintenance Solutions Pty Ltd* (AG2018/1899),[1] the applicant employer - Mechanical Maintenance Solutions (**MMS**) - sought approval for an enterprise agreement that would replace two greenfields agreements (previously struck by the AMWU/CFMEU and ETU respectively) to cover the terms and conditions of employees performing work on power stations in the La Trobe Valley in Victoria. It was not in dispute that the new agreement would ultimately cover hundreds of employees during maintenance outages, however it was voted on during an ebb in work demand by just five employees, some of whom were only employed immediately prior to the vote and whose employment ceased shortly thereafter. The new agreement provided for substantially reduced terms and conditions of employment.

The CFMMEU sought to oppose to the approval of the agreement however, at first instance, Commissioner McKinnon refused to hear from the union and approved the application. The CFMMEU then appealed to a Full Bench of the Fair Work Commission who determined that the Commissioner erred in refusing to hear from the CFMMEU under the circumstances.[1]

On rehearing, with the benefit of the CFMMEU's submissions, Commissioner McKinnon accepted that there had been material omissions in the explanation afforded to employees prior to the vote on the new agreement regarding the effect of the new agreement on the changes to the terms and conditions of employment. Ultimately the Commissioner approved the agreement subject to undertakings aimed at restoring a range of terms and conditions such that the Commissioner considered rendered the deficient explanation moot.

The case highlights that, if the unions were not heard, the agreement would have been approved (as it initially was) despite non-adherence to the democratic procedures required under the FW Act, including a failure by the employer to properly explain the loss of terms and conditions that employees would suffer.

The new agreement was eventually approved after some of these terms and conditions were restored, but at the time of writing the approval process remains subject to judicial review before a Full Court of the Federal Court.

(Mechanical Maintenance Solutions Pty Ltd [2019] FWC 6801; Construction, Forestry, Maritime, Mining and Energy Union v Mechanical Maintenance Solutions Pty Ltd [2019] FWCFB 3585)

Time limits for determining applications

132. Section 225AA of the Bill imposes time limits on the FWC for the approval of agreements and variations. It states that enterprise agreement approvals and variations must, as far as practicable, be determined within 21 working days of the application being made.[39] In the event that this time limit is not adhered to, the FWC is required to provide written notice setting out the reasons for the delay (including any 'exceptional circumstances') to the

[39] *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* s.255AA

employer and the relevant employee associations.[40] The FWC will also be required to publish the notice on its website.[41] The proposal is ill-conceived.

133. These changes will act as a drain on FWC resources that could be better directed elsewhere, and could result in agreements being prematurely rejected on the basis of non-compliance with the regulatory framework.

134. The alternative and more likely scenario is that it will result in agreements being rubber stamped in the absence of proper scrutiny. This is particularly concerning given the proposed changes to section 590.

Transfer of business provisions are undermined

135. Currently, where there is a transfer of business the new employer needs to seek orders from the FWC to prevent an enterprise agreement from transferring over to the new employer.[42]

136. The Bill inserts a new provision at section 311(1A), which will have the effect that an employer will *not* need to make an application to prevent the transfer of an enterprise agreement if:

    a. the new employer is an associated entity of the old employer when the employee becomes employed by the new employer; and

    b. before the employee's termination of employment with the old employer, the employee sought to become employed by the new employer at their own initiative.

137. The glaring difficulty with this proposed change is that it will be challenging to assess whether a transfer is genuinely at the initiative of an employee. For instance, it is entirely foreseeable that - in order to avoid a foreshadowed company restructure and the possibility of unemployment - a worker might pre-emptively seek employment at a related company.

138. Whilst the Explanatory Memorandum states that section 311(1A) is 'not intended' to apply when an employee seeks alternative employment in the context of a company restructure,[43] there are no sufficient protections embedded in the provision to prevent this from occurring in practice.

Automatic sun-setting of 'zombie' agreements on 1 July 2022

139. The Bill proposes to introduce a new Division, which will automatically sunset all 'agreement-based transitional instruments' and all 'Division 2B State employment agreements' on 1 July 2022.

140. This will capture instruments that were preserved by the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, including enterprise agreements, workplace determinations, pre-reform agreements and individual agreement-based instruments.

[40] *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* s.255AA(2)
[41] *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* s.255AA(3)
[42] *Fair Work Act 2009* (Cth) s.311
[43] *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 – Explanatory Memorandum* pg 54

Additionally, any enterprise agreement made during the 'bridging period'[44] will sunset on the same date.

141. We are generally supportive of the proposal to sunset 'zombie agreements' however there appears to be little justification for the delay in the provision taking effect. Further – and whilst this will likely be rare – the changes do not contemplate instances whereby a worker may be worse off as a consequence of the termination of a 'zombie agreement'.

142. It is also difficult to celebrate the sun-setting of these old zombie agreements in circumstances where the Bill is introducing a new form of zombie agreement under the provisions which will allow agreements to be made that undercut BOOT, as described above.

Schedule 4 - Greenfields Agreements

143. The right to bargain collectively, and to strike, are fundamental rights that are enshrined in international law. They represent an essential means available to workers and their unions to promote and protect workers' social and economic interests. Indeed, protected industrial action is often the *only* means available to workers to assert their interests against employers in an already unbalanced negotiation environment.

144. Because greenfields agreements are negotiated prior to any workers being employed, these agreements are already anomalous. Greenfields agreements are able to dictate the terms and conditions of employment for years, while removing any ability for workers to take protected industrial action during that same period. It is already a serious incursion into workers' rights to allow these agreements to be made without the participation and approval of workers.

145. Because of this, any amendments to the greenfields provisions must be very carefully and soberly considered. The Bill, however, seeks only to support the business lobby's desire to avoid any negotiations, or re-negotiations of working conditions. In doing so, the Bill fails to consider the significant impact it will have on workers, and ignores the true nature of the problems which plague large projects.

The Bill will exacerbate the already alarming mental health issues which pervade FIFO and DIDO work

146. Before considering the detail of the proposal in the Bill, it is important to understand the nature of the work being performed on the large resource projects that the Bill is presumably intended to apply to (although, as discussed below, the application is much broader).

147. The single biggest issues for workers engaged on very large construction projects – where fly-in, fly-out (**FIFO**) and drive-in, drive-out (**DIDO**) work is common – is related to mental health. Studies suggest that the prevalence rate of mental health problems amongst the FIFO workforce have been estimated to be approximately 30 per cent, which is significantly higher than the national average of 20 per cent[45]. The $47 billion Inpex Ichthys gas project alone

[44] 1 July 2009 to 31 December 2019

[45] Western Australia Legislative Assembly, Education and Health Standing Committee, *The impact of FIFO work practices on mental health*, final report, p i. See also, pp 16-22.

had *at least* 14 workers commit suicide[46].

148. The multiple factors which are associated with the FIFO lifestyle, that contribute to mental health problems, include separation from family, transitioning between home and work, maintaining meaningful relationships while missing out on key life events, and the living conditions at camp (including the low level of control over work and life while at work).

149. One of the main sources of concern for FIFO workers is the length of rosters worked, with higher compression rosters negatively impacting on work-life balance, feelings of isolation and loneliness, higher levels of psychological distress and adverse effects on family relationships. **These roster arrangements, and the often sub-standard living conditions at remote and isolated FIFO camps, are - in our experience – the most common and single biggest issue that is raised by members at the time of any re-negotiation of greenfields agreements for genuinely large projects.**

150. The Bill will exacerbate these issues by removing the opportunity workers on longer-term projects have, every four years, to try to improve their working conditions. Where an employer makes a non-union greenfields agreement - which the FW Act allows - it may well mean that *all* legal avenues of enforceable dispute resolution are effectively cut off for the life of a project (this is discussed more below).

THE REALITY OF LIFE ON MAJOR CONSTRUCTION PROJECTS

The Gorgon Project is a US50+billion LNG plant, located on Barrow Island, located about 130 kilometres off the northwest coast of Western Australia. It is one of the largest natural gas projects in the world. Gorgon is led by Chevron Australia in partnership with ExxonMobil, Shell, Osaka Gas, Tokyo Gas and Chubu Electric Power. Barrow Island has a humid climate, with temperatures regularly reaching above 30°C, inconsistent rainfall and accompanying cyclones.

Chevron Australia contracted Kellogg Joint Venture – Gorgon (KJVG) to design and construct the plant who in turn awarded the largest construction package to CBI and Kentz electrical (CKJV). In the initial construction phase, the roster was set at 26 days on, 9 days off for most of the construction workforce. By contrast, workers directly engaged by Chevron were on a more worker-friendly 2 week on / 2 week off roster.

The CKJV workers performed 12 hour shifts, six days a week plus overtime; an average of up to-80 hours per week.

[46] See media articles at https://www.abc.net.au/news/2018-03-09/former-inpex-worker-lambasts-fifo-workplace-culture-recent-death/9528418 and https://www.ntnews.com.au/business/inpex-death-sparks-call-for-action/news-story/eb65e4d92c2402714262b103f3e6c260

For some 9000 plus construction workers, these roster arrangements resulted in extremely difficult working conditions which created, and exacerbated mental health problems. In addition to punishing working hours and conditions, the time associated with travelling back to places of residence after a 26 day swing caused problems. Intrastate workers would travel home on their 1st day off and start their journey back to work on the last day of leave, effectively only giving those workers 7 actual days leave in 5 weeks. For interstate workers, the problem was worse; factoring in travel time, those workers would only have 7 or 6 days with their families/at home, due to travel.

Communications with family and loved ones was also difficult, with phones banned while at work and poor communications networks often crashing during peak periods after hours. This was particularly distressing when workers were contacting their loved ones during long stretches away from home.

These issues contributed to high anxiety, low morale and a widely reported spate of suicides, although the statistics around suicides linked to the project were notoriously inaccurate. For example, a number of workers ended their lives while traveling or during their R&R cycle; this was not considered by their employers to count as a workplace-related fatality.

Fatigue was also an ongoing issue. Workers would arrive from the plane in the afternoon and commence night shift in the evening. By the time those workers went to bed after their shift, they had been awake for a period of over 24 hours. Again, this was particularly difficult for interstate workers who would have to fly from the Eastern States to Perth, and then fly to Barrow Island. The climatic conditions on the island also contributed to fatigue.

Flight scheduling was also a major concern during the construction of the Gorgan Project. Workers would sometimes arrive in the morning, but their shifts would not commence until the evening. On many occasions, no accommodation was ready for those workers. They would need to "dump" their belongings in the main mess area, get trained for work, then be required to get changed in the toilets in the common area. Chevron would also regularly change flights to give preference to the directly-employed Chevron workforce.

The CFMMEU regularly attended the site, seeking to address these issues. The union had delegates on the island and held regular meetings with management in an attempt to address the above issues. However, any major issues - such as issues raised relating to the roster arrangements - were ignored by management.

The only way the workforce was able to force a change was through the negotiations for a replacement enterprise agreement, after 4 years. The issues described above formed the central part of the log of claims, with wage outcomes being a secondary issue. It was only through negotiations (and the associated ability of workers to collectively organise and stand together) that any of these issues were able to be substantively addressed.

No industrial action was taken.

151. In 2015, the Western Australia Legislative Assembly's Education and Health Standing Committee tabled its final report on the impact of fly-in, fly-out (FIFO) work practices on mental health and suicide. The Standing Committee made a number of findings and recommendations in its report, which is available here. To this day, only 3 of the 30 recommendations from the 2015 Inquiry have been acted on.

152. One thing that did come out of the 2015 report was the development, by the WA Labour government, of a Code of Practice designed to ensure mentally health workplaces for FIFO workers in the resources and construction sectors. The Code of Practice is available here. While large resource companies have indicate some willingness to consider the Code of Practice, our experience is that the Code is not broadly applied, particularly down the contracting chain during the construction phases of projects.

153. The Code requires further work, but it is a start. There is consensus amongst construction unions in WA that a version of the Code needs to be legislated. This would significantly improve the ability of workers to ensure safe workplaces, and avoid disputation.

154. The need to develop and implement a code of practice was raised and recognised at the greenfields roundtable meetings; but – unsurprisingly - overlooked entirely by the Bill.

The Bill will remove any practical means for workers to address serious concerns, including relating to mental health - for 8 years

155. The reason why it is important to understand the context of the major projects is because the Bill provides no enforceable or mandatory mechanism for the resolution of disputes during the life of a greenfields agreement.

156. Greenfields agreements, like any enterprise agreement, are required to incorporate a model dispute resolution term, but that term does not allow for the arbitration of disputes by FWC except with the consent of both parties. That is, access to arbitration is available only where an employer agrees.

157. Legitimate industrial issues, including relating to the mental health crisis, will only be worsened without:

    a. mandatory dispute settlement procedures that allow for the efficient resolution, by conciliation *and* arbitration, of matters pertaining to the employment relationship including in relation to living standards and roster arrangements; and

    b. provisions which allow workers to access the support, advice and assistance of their unions, and the right to non-disruptive access to sites by union representatives.

158. Not only does the Bill ignore these central matters, it increases the likelihood of disputes arising by essentially stripping workers of any viable means of resolving legitimate disputes for *8 years* – a period which is likely to be longer than the construction phase of almost all major projects.

The construction phase of most 'major' projects is less than 4 years, and project delays are largely outside the control of workers

159. The Bill seeks to extend the nominal maximum length of greenfields agreements from 4 to 8 years. However, most major projects have either construction phases that are less than 4 years, or are conducted in multiple stages with construction phases that are less than 4 years.

160. A review was conducted into greenfields agreements in 2017 by the Department of Jobs and Small Business. The review was required by *Fair Work Amendment Act 2015* (**the 2015 Amendment Act**), and conducted independently by a former Senior Deputy President of FWC, Matthew O'Callaghan. A report was issued on 27 November 2017 (**the 2017 Review**[47]).

161. The 2017 Review specifically considered the question of whether the nominal expiry date for greenfields agreements should be extended to five years or the life of a given project, including by reference to the Productivity Commission's earlier report into the Workplace Relations Framework (**the 2015 Productivity Commission Report**).

162. The 2017 Review noted that a majority of "workplace relations professionals involved in the resource development and infrastructure construction projects" observed that:

    a. most contractors complete their work within a four-year time frame;

    b. in most instances greenfields agreements applying in both resources projects and infrastructure projects operate so that they expired at different times over the life of a project, and thereby minimised the potential for disruption associated with the renegotiation process[48].

163. Similarly, the 2015 Productivity Commission report noted:

    a. almost half of projects in construction (the sector where greenfields agreements are primarily used) have durations of less than two years;

    b. the average duration of current greenfields agreements is 3.2 years[49].

164. It is no concession that the Federal Government has backed-off its previous push for 'project-life agreements'; extending the nominal expiry length to 8 years effectively achieves the same object. It is also important to note that there is already a mechanism in the FW Act which allows parties to start negotiations prior to the nominal expiry date.

165. Where a construction project (or a stage of a construction project) does last longer than 4 years, it is often because there has been an unexpected delay. The CFMEU has recently released a report relating to infrastructure investment in Australia titled *Bad Customers: The*

[47] https://www.ag.gov.au/industrial-relations/industrial-relations-publications/Documents/greenfields_agreements_review.pdf
[48] At 46
[49] At 21.2, page 713

billions going missing from infrastructure investment in Australia[50]. This report describes the massive failures in the procurement processes for major building and infrastructure projects currently utilised by the Federal and State Governments.

166. Delayed projects have been characterised by cost blowouts, time delays, significant safety concerns, a high level of defects and massive litigation between the respective client governments and the principal contractors responsible for delivering them. Notably, however, the delays in these projects have nothing whatsoever to do with the negotiation of union agreements. Rather, they relate to:

a. governments choosing to accept low bids with very small, or no margin for error. Competition on cost alone has driven adversarial relationships in the construction industry, with companies looking to drive down labour costs by adopting opaque company structures. This has led to the growth of hierarchical pyramid contracting, where a head contractor sits above multiple layers of sub-contractors. This encourages non-compliance with statutory employment requirements, poor health and safety, and failures of quality assurance systems. It also encourages insecure work, and contributes to the high rate of insolvency amongst subcontractors;

b. a complex and reactionary regulatory environment, with significant duplication of commonwealth and state regimes, which contributes to significant delays in obtaining approvals;

c. the outsourcing of project delivery to the private sector, which has encouraged the denuding of the public sector of the staff, skills and expertise required to oversee projects. Indeed, a recent report by Deloitte Economics compiled for Consult Australia found that "conservatively, public sector clients could save 5.4% of professional services costs alone through better procurement"[51];

d. poorly scoped projects, resulting in variations, rework and interface issues between trades and sub-contractors;

e. unclear contract drafting, poor contract administration and overly optimistic scheduling and costs estimates; and

f. skills shortages.

167. It is not construction workers, or their attempts to negotiate fair wages and entitlements, which have led to the major cost blowouts and delays that arise on large projects.

[50] The report is available here: https://www.cfmmeu.org.au/sites/www.cfmmeu.org.au/files/uploads/bad-customers.pdf
[51] Deloitte Access Economics (2015) *Economic benefits of better procurement practices*. Retrieved from www.consultaustralia.com.au/docs/default-source/infrastructure/better-procurement/dae---consult-australia-final-report-050215---96-pages.pdf

The Bill will weaponise existing provisions which allow employers to make greenfields agreements with themselves (without union agreement)

168. Since the enactment of the *Fair Work Amendment Act 2015* (**the 2015 Amendment Act**), the relevant provisions of the *Fair Work Act 2009* (**FW Act**) operate so that:

    a. an employer is able to issue a written notice to commence a notified negotiation period for a greenfields agreement;

    b. the good faith bargaining provisions (and other provisions of the FW Act which are designed to facilitate fair bargaining) will apply, but fall away six months after the written notice is issued[52]; and

    c. after a six month period, if agreement is not reached, the agreement is taken to have been made, and an application for approval can be made to the Fair Work Commission (**FWC**) without the employer reaching agreement with the relevant union[53].

169. The obvious problem with the 2015 amendments is that they allow employers to engage in 'hard bargaining' for a period of 6 months, after which they can determine the terms and conditions of employment entirely unilaterally. This is precisely *why* the Government ought to exercise particular care when dealing with any reform to the greenfields agreement regime.

170. The 2015 amendments were based on assertions by employer associations alleging capricious conduct by trade unions in the greenfield bargaining processes[7]. Those claims were disingenuous and have proven, over time, to be wrong. Since the 2015 amendments were put into place, *not one single greenfields agreement* has been made under these provisions[54]. We are also unaware of any applications for good faith bargaining having been made, probably because any utility associated with those provisions – which do not require agreement to be reached in any event - ceases at the end of the 6 month period.

171. A significant reason why the 2015 amendments have not been used is because there has been, in the last few years, a noticeable shift away from greenfields agreements towards "baseline" brownfields agreements.[55] These are enterprise agreements that are voted on by a very small, often hand-picked cohort of usually casual employees but which cover a very large cohort of employees and a broad geographic scope. The most common practice is that an employer will deliberately 'negotiate' such an agreement prior to engaging a substantive workforce. These 'brownfield agreements' are being used to avoid coverage of existing agreements and to prevent workers from being able to bargain when existing agreements nominally expire (often by transferring those employees to a different corporate entity), as well as being used to avoid the greenfield agreement making obligations in the FW Act. This strategy has been facilitated

[s] Section 255A of the *Fair Work Act 2009*
[53] Section 182(4)of the *Fair Work Act 2009*
[54] In 5 years there have been 4 applications made by employers under s.182(4). Two were erroneously made under the wrong provision, and did not proceed. The only decision which has been issued was in relation to AG2018/6254 and AG2018/6255, on 21 February 2019 – see [2019] FWC 1122. In that case the applications were not successful because FWC determined that the projects were not genuine new enterprises.
[55] See, e.g., Senate Standing Committee on Education and Employment, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, ch 3

by the Western Australian Chamber of Commerce and Industry, who sign employers up to an industry template baseline agreement.

172. While the CFMEU has had some success in challenging brownfields / baseline agreements, our ability to do so is separately attacked in the Bill (addressed elsewhere in this submission).

173. Under the Bill, employers won't even need to go through the motions of "negotiating" brownfields / baseline agreements. Instead the Bill will inevitably prompt the widespread use of the 2015 amendment provision - because, under the terms of the Bill, the 8 year maximum term will start to run from the day on which the agreement came into operation which may be either 7 days after the agreement is approved *or a later date specified in the agreement*. By contrast, the current provisions in the FW Act require a 4 year maximum term which always begins to run from 7 days after FWC approves an agreement.

174. Because of the ability to delay commencement under the Bill, an employer will be able to seek FWC approval for a greenfields agreement *years* before the operation of the Agreement actually commences. Employers will say that this is necessary in order to secure investment. What it is really designed to achieve is the removal of the time pressure associated with the 6 month negotiation period, because the approval of the greenfields agreement will no longer risk eating into the start of the 8 year period.

175. This will be a powerful and active disincentive for employers to seek agreement with unions, or – for that matter – the small cohorts typically used to vote up baseline agreements.

176. Union involvement in enterprise agreement making is an important safeguard for workers. Evidence has long established that collective agreements deliver better outcomes for workers[6]. The scenario whereby employers can make agreements with themselves, years before a project even commences and for a period longer than the construction phase of most projects, is ***even worse than Workchoices***. Under *WorkChoices* employer-only greenfields agreements were limited to a 12 month operation. If the Bill passes, greenfields agreements will be able to operate for 8 years.

177. If the nominal period of greenfields agreements is to be extended, or delayed start times allowed, the 2015 amendments *must* be repealed.

The definition of *"major project"* is too broad

178. The Bill seeks to justify 8-year nominal terms by limiting application to "major projects". However, the definition adopted in the Bill is by reference to "project values" which are far too low, and are artificially inflated by the inclusion of capital costs. The Bill will inevitably expand well beyond the kind of large-scale infrastructure projects that attract international investment and include, for example, CBD high rise construction.

179. A "major project" is defined by the Bill to include any project where "the total expenditure of a capital nature that is being incurred, or it reasonably likely to be incurred, in carrying out the project" is":

    a. at least $500 million; or

b. at least $250 million, where the Minister has made a declaration taking into account:

i. the national or regional significance of the project;
ii. the contribution the project is expected to make to job creation; and
iii. any other matter they considered relevant.

180. Although it is not expressly stated, we assume that the value of the project will be applied as that of an entire project rather than the value of the work being performed by the actual employer that is a party to the agreement. We assume this because, in construction, large-scale projects tend to be broken into stages. In each stage, the bulk of the construction work done is performed by complex networks of specialised contractors. The failure of the Bill to understand this is, at best, bad drafting.

181. The Explanatory Memorandum states that the phrase "total expenditure of a capital nature" is intended to cover expenditure for acquisition of assets such as land, equipment and technology or construction of structures"[56]. Other than this comment, there is no legislative guidance.

182. For the purposes of industrial relations, "project value" is generally understood as a reference to the cost of the construction itself. It does not include capital expenses such as the purchase of land, equipment and technology. Indeed, if the purchase of land were included then the 'project value' of any construction project in or near a capital city would increase by millions if not tens or hundreds of millions.

183. Even before capital costs are included, determining project value is notoriously non-transparent. BCI Australia[57] is a leading provider of building and construction information which researches and reports on construction projects within the public and private sectors, from concept design and planning states to documentation, tender, the awarding of contracts and commencement of construction. Their approach to determining project values varies; the only thing that is consistent is that they report the cost to build (including tax). This does *not* include land purchase or capital expenditure, or other site fees.

184. Project values may be able to be roughly estimated where there are precise government budget items (e.g. where money is allocated by government to build public infrastructure), but those figures may or may not be inclusive of things like architect and consultant fees. Specific breakdowns are generally not publicly provided. Planning application documents may also contain information, but will not be conclusive. Where no details are given publicly, estimates can become very unreliable because the estimate will involve assessment of different components of a project and come to an approximate total. This total is often progressively amended as more exact details announced over the timeline of the project.

185. For example:

[56] Page 58, at [309
[57] https://www.bciaustralia.com/about/our-business/

a. the Poly Centre project is a 26 floor private office building located at 210 George Street in central Sydney, build by the Chinese developer Poly. In the BCI database, the project has an approximate value of 116.523 million:

OFFICE BUILDING - 28 storey (POLY CENTRE)

Value	116.523 million approximate	Town	Sydney	Category	Office / Retail / Infrastructure
Stage	Construction	Council	Sydney	Subcategory	Office / Shop, Shopping Centre, Supermarket / Civil Works, Excavation
Status	Construction Commenced	State	NSW	ProjectID	39112021
Const start	February 2020	Floor Area	19,718 m²	Ownership type	Private
Const end	4th quarter 2021	Site Area	0.143 hectares	Development type	New construction
Time stamp	10 Dec 2020 16:50	Storeys	31	BCI Researcher	Danica Perez
Green Star		Units		Master Plan	No
DA Number	D/2017/1750 / 2017				
Opportunity Value:		Product Specified:		Quoted:	
Probability:		Order Expected:		Order Received:	
Won/Lost:		Won Value:		Lost To:	

By contrast, an article in the Australian Financial Review dated 24 February 2020 referred to the project being "$500 million-plus".

b. a proposed 50 story commercial tower at 55 Pitt Street in central Sydney, being developed by Mirvac, has an estimated value of $500 million on BCI:

OFFICE BUILDING | SHOPS - 50 storey (55 PITT STREET)

Value	500 million approximate	Town	Sydney	Category	Office / Retail / Infrastructure
Stage	Concept	Council	Sydney	Subcategory	Office / Shop, Shopping Centre, Supermarket / Road, Surface, Car Park / Civil Works, Excavation
Status	Rezoning	State	NSW	ProjectID	200086017
Const start		Floor Area	70,000 m²	Ownership type	Private
Const end		Site Area	0.429 hectares	Development type	New construction
Time stamp	18 May 2020 15:20	Storeys	53	BCI Researcher	Angelo Usi
Green Star		Units		Master Plan	No
Opportunity Value:		Product Specified:		Quoted:	
Probability:		Order Expected:		Order Received:	
Won/Lost:		Won Value:		Lost To:	

OFFICE BUILDING | SHOPS - 50 storey (55 PITT STREET)

By contrast, media reports indicate a project value of over $1 billion.

186. The type of commercial projects which the definition in the Bill will cover are unlikely to take more than 4 years to construct. *However*, the fact that they would be covered by the provisions in the Bill mean that employers will be incentivised to use the 2015 amendments to make unilateral (non-union) greenfields agreements simply because they will be able to do so months or years prior to commencement. Many contractors may also seek to do this prior to successfully winning a tender. This will inevitably drive wages down, while excluding even more construction workers from having any say at all in their own workplace conditions.

187. The Bill also has no mechanism for determining project value, and makes no effort to require transparency. It is common in the construction industry for site allowances to apply which are based on a scale pegged to project value (for the construction work only). That is, the larger projects attract a higher site allowance. For this reason, employers tend to downplay the value of a project in order to pay a lower site allowance. It is not uncommon for disputes about project value to be escalated to industry boards for resolution. The industry boards

themselves are a long-standing feature of the construction industry, and were set up jointly by employer associations and unions.

188. Under the Bill, and unless it is agreed with a union, there would be no access to this type of dispute resolution to determine an accurate project value. FWC will need to make a determination as to whether or not a project meets the definition of a major project in the Bill, at the point of an application. However, it will inevitably be forced to rely on the self-interested submissions of employers. Schedule 3 of the Bill will then be used against Unions who seek to be heard on this point, where non-union agreements are made under the 2015 amendments.

The Bill is designed to - and will - supress wages and conditions

189. The major issues that tend to arise on large resource projects are, in our experience, far more likely to be related to rosters and working conditions than they are to wages (as discussed above). That being said, our members who work on large infrastructure, resources and energy projects often work in remote areas, on a FIFO basis, under dangerous safety conditions and to almost around-the-clock shifts. They deserve their share of the profits generated by these projects.

190. The Bill provides a mechanism for annual wage increases at s.187 which requires "at least an annual increase of the base rate of pay payable to each employee" on or before each anniversary of the date the EBA comes into operation (after the initial 4 years). But this wage mechanism is so weakly worded that it is effectively useless.

191. First, the "Better Off Overall Test" is applied only at the time an agreement is approved, meaning that – the longer the agreement lasts – the more likely that the wages and conditions in the agreement will fall below the minimums in the relevant awards. Because of the delayed start of the operational period of greenfields agreements under the Bill, BOOT is also likely to be applied at a point in time that is well before the actual commencement of work.

192. In usual circumstances, this risk is mitigated by the fact that employees are under no obligation to agree to (vote up) an enterprise agreement during the bargaining process. No such protection applies for greenfields agreements, and under the Bill employers are positively dis-incentivised from reaching agreement with unions because they will be able to make an agreement unilaterally after 6 months.

193. Second, the wage adjustment provision in the Bill does not require any particular level of increase. It does not even require an employee to meet the annual increases that FWC makes to Award (minimum) wage rates. Indeed, according to the explanatory memorandum, the requirement could be satisfied merely by an employer agreement to conduct a (unilateral) annual wage review[58], as long as it "at least results in an increase to the base rate of pay for each employee who will be covered".

194. That is, an employer could satisfy the provision simply by awarding a 5¢ annual increase.

[58] Explanatory Memorandum at [323]

195. Third, the test at s.187(6) for the approval of non-union greenfields agreements is that FWC must be 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". The test is also point in time; it may not be possible to accurately foresee what the "prevailing pay and conditions" will be at the time the agreement actually starts to operate, let alone 8 years after that.

196. More generally, it is a fundamentally unfair proposition to seek to fix the price of labour over long periods of time. Inflation, interest rates and other cost of living changes will affect workers over the life of any project. Employers would retain the ability to pay more than an agreement provides if the labour market tightens and labour is in short supply. However, workers could not demand a higher price for their labour in those circumstances, nor could they seek cost of living adjustments even if there are significant cost of living pressures on them. It is an entirely one-sided equation. We are not alone in having this view. Indeed, the 2017 Review expressed a concern that "wages and conditions agreed at the commencement of one project could adversely affect other projects, commenced in entirely different commercial circumstances"[59].

197. The idea that employers would incorporate competitive or high wages in a greenfields agreement in order to attract workers to a project is a nonsense. The more likely outcome would be the continued proliferation of so-called "baseline" agreements which set wages and conditions that are at, or only very slightly above, minimum award requirements with either a nominal annual wage increase or a requirement for an annual wage review that is entirely within the employers' discretion. The rationale that is already commonly put forward by employers engaging in this practice is that these arrangements provide "certainty" which allows them to tender for projects, and that employees will be able to (individually) contract above those minimum rates and conditions. This practice completely undermines the scheme for collective bargaining set out in the FW Act, and intentionally deprives workers of the ability to take protected industrial action in support of their own wages and conditions.

198. The setting of conditions via greenfields agreements also not only has the potential to drive down the wages and conditions of employees who are covered by particular agreements, but also the wages and conditions of contractors and sub-contractors down the chain. This is because competitive pressure is placed on them to adopt similar, or less beneficial conditions. Employers then say to their employees that – in order to win the work - they have to accept a cut in conditions. This rationale is also used to dissuade employees from taking strike action in furtherance of their own interests.

199. The overall outcome of the proposed reform is that a small number of employers with substantial market power would be able to use greenfields agreements to drive wages and conditions down well below the competitive market level industry wide. Greenfields agreements will devolve into little more than a convenient mechanism which allows employers to prevent any form of collective negotiation whilst simultaneously making any form of industrial action unlawful, and moving the negotiation of wages into individual contracts where workers have little, or no, bargaining power.

[59] At 47

The proposal is based on a false policy assumption

200. The Schedule itself is premised on the assumption that the risk of having to re-negotiate industrial standards (and the associated risk of industrial action) in the course of a project is a major determinant for foreign investment decisions.

201. Comments from employers and big business speculating about the determinants for foreign investment are self-serving. While the industrial frameworks which apply in certain jurisdictions may be a consideration, there is no evidence that mid-project bargaining is even a significant consideration, let alone a determinative one. Indeed, greenfields agreements are not a feature of the industrial relations systems in other modern democracies; the current provisions are already more beneficial for both business and foreign investors than comparable jurisdictions.

202. Policy factors which are likely to be examined for the purposes of investment go far beyond labour regulation alone. They include uncertainty concerning the administration of current regulations, environmental regulations, regulatory duplication, the legal system and taxation regime, uncertainty concerning protected areas and disputed land claims, infrastructure, socioeconomic and community development conditions, trade barriers, political stability, quality of the geological database, security, and labour and skills availability[60]. The government has not given any indication that it will review any of these matters for the purposes of giving Australia a competitive advantage. Rather, their focus is on gaining a perceived advantage entirely at the expense of fundamental workers' rights.

203. In reality, Australia's competitive position is not so dire. The 2019 Annual Survey of Mining Companies produced by the Fraser Institute, published in February 2020, found that "[t]he top jurisdiction in the world for investment based on the Investment Attractiveness Index is Western Australia, which moved up from 2nd place in 2018"[61]. Similarly, Australia performed extremely well in the Institute's Policy Perception Index (**PPI**).

204. It is worth setting out the commentary of the Fraser Institute in relation to Australia, because it shows not only that Australia is globally attractive for investors, but also that reductions in perceptions of attractiveness have nothing to do with the cost of labour or the possibility of re-negotiations of labour conditions:

> *In considering of both policy and mineral potential, Australia retained its position as the second most attractive region in the world for investment. This year, Western Australia was rated to be the most attractive jurisdiction in the region and in the world based on its Investment Attractiveness score. Western Australia (1st) and South Australia (6th) appeared in the global top 10 on the Investment Attractiveness Index in this year's survey.*
>
> *However, all of the Australian jurisdictions saw declines in their PPI scores this year in comparison with 2018 results. Tasmania was the Australian jurisdiction with the highest decrease in its PPI score (-10.8 points) since last year. When evaluating Tasmania, miners expressed increased concern about the uncertainty regarding the administration, interpretation, or enforcement of existing regulations (+34 points), regulatory duplication and inconsistencies (+25 points), and the availability of labour/ skills (+20 points). Queensland saw its PPI score decline by almost 8 points this year, and its rank of 31st (of 76) was similar to last*

[60] Fraser Institute (2020), Survey of Mining Companies 2019, page 6
[61] https://www.fraserinstitute.org/sites/default/files/annual-survey-of-mining-companies-2019.pdf at page 24

> *year. Respondents cited increased concerns about uncertainty concerning disputed land claims (+10 points), socioeconomic agreements and community development conditions (+6 points), and security (+5 points).*
>
> *New South Wales continues to be Australia's lowest ranked jurisdiction when considering policy factors alone. New South Wales saw its PPI score decrease by almost 5 points this year, and it ranked 46th (of 76) this year compared to 47th (of 83) last year. This year, miners expressed increased concern over trade barriers (+11 points), and decreased concern over political stability (-19 points). In addition, 81 percent of respondents for New South Wales cited uncertainty regarding the administration and enforcement of existing regulations and uncertainty concerning environmental regulations as deterrents to investment.*

205. None of this commentary touches upon industrial relations.

206. The business lobby also consistently argues that the cost of industrial action, or the cost of the *threat* of industrial action, is a major disincentive for investors and – therefore – employees should not be given the opportunity every four years to consider taking it. That is, industrial action - or the threat of it - is too disruptive and costly to occur mid-project.

207. It is widely acknowledged that industrial action – both protected and unprotected – is at historically low levels, both in the construction industry and elsewhere. It is also important to note that protected industrial action:

    a. can only be taken in a protected form during bargaining for a new enterprise agreement, following the expiry of any previous enterprise agreement, and then only after the forms of proposed industrial action are approved by a majority of the relevant employees in a ballot and the employer is given at least 3 clear working days notice, in writing[62]; and

    b. is defined broadly so as to encompass the performance of work in any manner that is different from that in which the work is customarily performed[63]. Industrial action is not just 'strikes'; it can be as basic as workers refusing to follow a policy that they feel is unsafe, but which does not reach the high legal threshold of 'imminent risk'.

208. These requirements are already onerous. The Bill, however, will do go much further by essentially preventing any protected industrial action from *ever* being taken on a 'major project'.

209. Further, the laws which seek to enforce prohibitions against unlawful industrial action are already far stricter and more punitive for construction workers, compared to any other category of Australian worker.

210. For any other worker, an order stopping unprotected action must be issued by the Fair Work Commission. It is only after that order is breached that any civil penalty can be imposed; the maximum penalty is 60 penalty units (currently $13,320). By contrast, under the *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP Act), there is no requirement that FWC issue an order; workers – as individuals - can be the subject of proceedings immediately. The maximum civil penalty is also $44,400, *more than 3 times higher than the equivalent penalty for any other worker*.

[62] See Part 3-3 of the FW Act

[63] See s.19 of the *Fair Work Act 2009* and s.7 of the *Building and Construction Industry (Improving Productivity) Act 2016* is

211. The ABCC, and its predecessors, are ruthless in seeking to enforce these punitive laws. For example, amid widespread problems including non-payment to sub-contractors, pay disparity and safety issues rife across Perth construction sites, 101 workers were individually prosecuted for allegedly attending a union meeting that was held almost two years before the proceedings[64]. Charges against 28 of the workers were dropped 17 months later when the then-Fair Work Building Commission realised that 28 of the workers were not rostered to work on the day in question. Ultimately, findings were made against 53 of the 101 workers and fines imposed.

212. The 2016 Building Code, which is issued under the BCIIP, also requires code covered entities (employers) to report any actual or threatened industrial action (that is not protected) within 24 hours of becoming aware of it.

213. The existing, heavy-handed regulation around industrial action has also negatively influenced the ways in which workers are able to resolve disputes in their workplaces. Whereas the previous, long running industry practice had allowed parties to seek resolution of disputes before the relevant industrial tribunal, the current government regime is more focussed on litigation and imposing penalties at the expense of resolution of the underlying issues.

The Bill will risk local jobs

214. Australian citizens and permanent residents have a right to work in their own country, on fair terms; but there are numerous examples of workers on temporary work visas being exploited on large construction and infrastructure projects. There is nothing in the Bill that seeks to address this issue. Rather, the Bill continues to encourage employers to use greenfield arrangements to bring in cheaper workforces from overseas.

215. Allowing employers to unilaterally set the wages and conditions on a project will lead to some employers setting the wage rates at just above minimum award rates so as to meet the Annual Market Salary Rate (AMSR) (which can be the rate set by an industrial award) and the minimum salary requirements of the Temporary Skill Shortage visa (**TSS**) (formerly the 457 visa). The Temporary Skilled Migration Income Threshold (**TSMIT**) is supposed to be the annual salary floor for temporary skilled migrants so that their salary does not undercut the Australian labour market. The TSMIT is currently AUD $53,900.00. It hasn't increased since July 2013. The total inadequacy of this amount is starkly brought into focus when compared to the current award (minimum) rate for a carpenter which is $1171.84 per week, and over $60,000 per year. These employers could use the low wage rates in the greenfield agreements for shoddy labour market testing to justify the need to bring in workers from overseas.

216. The other avenue where greenfield agreements could be used to undercut Australian workers is where they are used to bring in labour under the current free trade agreements that Australia is a signatory to that don't require labour market testing. Labour market testing is not required where it would conflict with Australia's International Treaty Obligations in any of the following circumstances:

    a. the worker nominated is a citizen/national of China, Japan, Mexico, Thailand or Vietnam, or is a citizen/national/permanent resident of Canada, Chile, South Korea, New Zealand or Singapore; or

[64] *Australian Building and Construction Commission v McCullough & Ors* [2016] FCA 1291

b. the worker nominated is a current employee of a business that is an associated entity of your business and the associated entity is located in an Association of South-East Asian Nations (ASEAN) country (Brunei, Myanmar, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand or Vietnam), Canada, Chile, China, Japan, Mexico, South Korea or New Zealand.

217. A further example of where greenfield agreements determined by employers could be used to undercut Australian workers is the China-Australia Free Trade Agreement (ChAFTA). Under the ChAFTA, Australia provides guaranteed access to Chinese citizens for contractual service suppliers for up to four years and installers and servicers for up to 3 months. Through a Memorandum of Understanding allowing for Investment Facilitation Arrangements (**IFA**), Chinese-owned companies registered in Australia undertaking large infrastructure development projects above $150 million are able to negotiate, similarly to Australian business, increased labour flexibilities for specific projects[65].

218. In the roundtable discussions in 2020, unions proposed that – if the nominal life of greenfields agreements were to be extended - the Fair Work Commission should not be able to approve them without having regard to:

a. the employment of Australian citizens and permanent residents;

b. the promotion of the welfare of the project's workers, their families and local communities; and

c. the promotion of apprenticeships, vocational training and workplace diversity.

219. Disgracefully, employer groups opposed these measures. The Federal Government's failure to consider or adopt these measures can only be seen as helping to facilitate the flooding of greenfields projects with temporary visa workers, whilst driving down wages and working conditions.

SCHEDULE 5 – Compliance and Enforcement

Increased penalties for wage-related contraventions will mean nothing if employers are not prosecuted

220. Schedule 5 of the Bill introduces higher civil penalties for remunerations-related contraventions. While increased penalties are positive:

a. increased penalties are no substitution for then active litigation of wage theft. In the construction industry, the regulator (the Australian Building and Construction Commission, (**ABCC**)) is tasked with prosecuting wage theft, but has utterly failed to do so;

b. increasing the maximum penalty payable for sham contracting, in particular, means nothing because the relevant provisions of the FW Act are woefully deficient; and

[65] https://www.dfat.gov.au/trade/agreements/in-force/chafta/fact-sheets/Pages/chafta-fact-sheet-movement-of-natural-persons)

c. the introduction of penalties calculated by reference to the "value of the benefit" is welcome, but can only be paid to the Commonwealth. There is no reason why these penalties should not also be available to the workers who were the victim of the wage theft, and to the unions who prosecute on their behalf; and

Wage theft is rampant in the construction industries, but is not being prosecuted

221. Wage theft is a serious problem in construction. In November 2019, PwC's chief economist Jeremy Thorpe undertook modelling using Fair Work Ombudsman (**FWO**) data. That modelling estimates that there is in the order of $1.35 billion in underpayments to workers per year. The construction sector is most at risk, with approximately $320 million in underpayments each year. This is $100 million more than the next most vulnerable industries, which include healthcare and social assistance (~$220 million), accommodation and food services (~$190 million) and retail (~$180 million) [66].

222. The fact that the construction industry accounts for about 10% of the national workforce but almost 25% of total estimated underpayments is nothing short of shocking.

223. The reason why wage theft is so rampant in the construction industry are structural; wage theft occurs when unscrupulous employers see opportunity, and where the regulatory regime allows it to occur. The CFMMEU has previously made detailed submissions on the structure nature of wage theft in the construction industries, and the reforms which are necessary to truly address the problem. We do not seek to repeat those submissions here, but we draw the Inquiry's attention to the Construction & General's 2020 submission to the Senate Standing Committees on Economics Inquiry into the Unlawful Underpayment of Employee's remuneration, which is available here.

224. One thing that does bear repeating, however, is that the ABCC has utterly failed to prosecute wage theft, despite having statutory responsibility for ensuring that building employers and contractors comply with their wage and entitlement provisions in enterprise agreements and awards. Since 2016, and according to its own website, the ABCC has commenced only *three* prosecutions against employers for breaches of wages and entitlement[67]. One of those cases was for breach of a notice to produce, and didn't recover any wages for the employee concerned. Meanwhile, the ABCC have launched *six times* as many prosecutions against the CFMMEU, and have also found the time to prosecute over 200 individual construction workers.

225. Even worse, in Senate Estimates on 4 March 2020 the ABCC openly admitted that it is actively telling contractors that – under the Federal Government's *Code for the Tendering and Performance of Building Work 2016* - they are *prohibited* from auditing their own sub-contractors for compliance with wage requirements, where the sub-contractor has an enterprise agreement[68].

[66] *Fair Work Ombudsman, National Building and Construction Industry Campaign 2014/15 Report, July 2015*
[67] https://www.abcc.gov.au/legal-cases?field_case_year=All&field_case_status=All&field_breaches%5B%5D=472&field_case_decision=All&search=
[68] Apparently as a result of the operation of 11(3)(k) and (4) of the Code.

226. The fact that the ABCC is actively telling contractors not to take active compliance measures on their own sites, whilst simultaneously failing to prosecute employers, is making wage theft in the construction industry worse. Indeed, it is difficult to understand how the ABCC or Federal Government reconcile this prohibition with the obligation in the 2016 Code on contractors to ensure sub-contractor compliance with industrial instruments[17]. Contractors themselves may legitimately wonder how they are meant to protect themselves from the accessorial liability provisions of the FW Act[18] if they cannot exercise appropriate due diligence to ensure their subcontractors comply with the minimum conditions enterprise agreements, awards and under the FW Act.

227. But, of course, this Bill does nothing to stop this perverse situation. Similarly, there is nothing in the Bill that would incentivise the ABCC to actually prosecute employers for wage theft. Instead, the Bill bolsters the ability of the ABCC to accept undertakings for remuneration-related contraventions as an alternative to prosecution.

228. The fact that the Bill increases penalties for wage theft contributions is a nice distraction in a Bill which is otherwise replete with proposals that attack and cut workers' rights, but it meaningless lip service in circumstances where the industry regulator is so clearly failing.

Increasing penalties payable for sham contracting means little where the laws are deficient and not applied

229. Sham contracting is where workers are deliberately misclassified as independent contractors. This allows employers to avoid costs associated with standard forms of employment such as the minimum wage, annual leave, sick leave and redundancy payments, as well as statutory obligations such as payroll tax, workers compensation insurance and superannuation payments.

230. The Bill increases the maximum penalties payable for breaches of the sham contracting provisions of the FW Act from 60 to 80 penalty units (from $13,320 to $19,980). The contravention provisions themselves are otherwise unchanged.

231. This represents an incredible missed opportunity, because the current provisions in the FW Act have proven notoriously ineffective. Indeed, the ABCC (and its predecessors going back 20 years) has *never* sought to prosecute any employer for sham contracting, despite the construction industry being absolutely notorious for sham contracting.

232. None of the current FW Act provisions actually prohibit sham contracting *per se*; they are confined to circumstances involving misrepresentation, dismissal and inducement[33]. This is not enough. The FW Act needs to be amended to recognise the fact that sham contracting itself warrants serious sanction. It is a practice which wholly undermines not only the provisions of the FW Act itself, but also the superannuation and taxation regimes at large. As was noted in the CFMMEU's *Race to the Bottom* report back in 2011, "[t]he absence of this type of provision allows the entire regulatory regime established by the *Fair Work Act* to be subverted by the single device of sham contracting"[69].

[6969] *Race to the Bottom – Sham Contracting in Australia's Construction Industry*, at 49

233. If the government were serious about enforcing sham contracting, then it should introduce a specific, strict liability offence associated with sham contracting which applies not only to a person (or employer), but also to any interposed entity (including corporations, partnerships and trusts) used to engage the worker.

234. It should also remove the ability of a respondent to escape prosecution if they can demonstrate that they were not acting "recklessly". The "reckless" requirement in s.357 of the FW Act (which prohibits the misrepresentation of employment as independent contracting arrangement), for example, requires established knowledge of a substantial risk, harm or illegality, and that a person was aware of the substantial risk[70]. It is a higher bar than reasonableness. An employer should not be able to successfully defend a contravention by proving that they simply did not turn their minds to the legal distinction between a contractor and employee.

235. This should not be controversial. The Final Report of the Black Economy Taskforce, released in 2017, agreed with the Productivity Commission before it that the legal threshold for a defence of a contravention of sham contracting provisions should be lowered, because the 'recklessness; test is too high a bar for regulators and others to prove[71].

236. If the government is serious about eradicating the problem of sham contracting, then significant reform is needed. Increasing penalties for the current provisions will achieve nothing.

Workers should also be able to benefit from "value of the benefit" penalties, not just the Commonwealth

237. Under the Bill, where serious contraventions are committed by employers (who are not small businesses), the employer may be subject to a civil penalty which is:

    a. the greater of either three the amount the employee would have received, retained or been entitled to if the contravention had not occurred (the value of the benefit); or
    b. 5 times the maximum penalty.

238. The usual practice, with respect to the imposition of civil penalties for industrial contraventions, is that regulators and workers are entitled to initiate proceedings and recover civil penalties. However, under the Bill, any penalties paid under the "value of the benefit" option are only payable to the Commonwealth.

239. Ironically, this reform was proposed by unions. But the Bill makes sure that neither unions, nor their members, can benefit from it.

240. There is no reason why these penalties should not be available to the workers who are actually underpaid, and to their unions if they undertake the prosecution on the workers' behalf (noting that underpayment claims are not generally a cost jurisdiction). Failure to allow this to occur is not only unreasonable, it is an active disincentive against workers for serious

[70] E.g. see *Hann v Commonwealth DPP* [2004] SAC 86
[71] https://treasury.gov.au/review/black-economy-taskforce/final-report at 236

contraventions where the value of the underpayment is less than the maximum penalty payable.

Prohibition on job advertisements with pay rates less than the national minimum wage

241. The Bill inserts a new civil remedy provision into the FW Act which seeks to prevent employers from advertising a job specifying a rate of pay less than the national minimum wage (s.536AA).

242. In 2020, Unions NSW recently published a report titled *Wage Theft: The Shadow Market* which surveyed 3000 foreign language job advertisements seeking workers in NSW, which were published in Chinese, Korean, Vietnamese, Nepalese, Spanish and Portugese[72]. The Report found that 88% of ads that provided a rate of pay were below the minimum wage stipulated by the relevant Modern Award. At 97.3%, the highest percentage of jobs advertised below the minimum wage were in the construction industry.

243. The extent of such advertisements is clear. What isn't clear is why prosecution of the new offence is limited to the regulator. If wage theft itself is not currently being prosecuted by regulators, the chance of this offence being prosecuted is virtually nil.

244. Unions should be able to bring prosecutions under this new provision. Otherwise, it is likely that the provisions will simply never be used.

Criminalising Underpayments

245. The Construction and General division of the CFMMEU has previously raised concerns as to the utility of criminalising wage theft in circumstances where it is simply unrealistic to believe that regulators – who don't prosecute employers under civil provisions - will suddenly start prosecuting employers once criminal sanctions are available.

246. The Judicial College of Victoria puts it this way:

> *Classic deterrence theory recognises that individuals are deterred from breaking the law if they perceive a likelihood of detection is high and calculate that the potential gains are not worth the risk of being sanctioned.*
>
> *As such, a model of criminalisation focusing on deterrence may not be adequate to bring about the necessary changes in business behaviour to prevent wage theft from occurring, particularly if this is not accompanied by an increase in inspectorate and prosecution resources[73].*

247. Rather than focussing on criminalising wage theft, the federal regulators would be better off adopting a significantly more focused prosecution policy, including routine and high profile prosecutions.

248. That being said, both Queensland and Victoria have passed legislation criminalising certain underpayments. Those schemes are, in a number of respects, more workable in a number of respects. They would, however, be overridden by the scheme in the Bill.

[72] https://www.unionsnsw.org.au/wp-content/uploads/2020/12/Foreign-Ads-2020-online.pdf
[73] See Judicial College of Victoria, "6.4 – Totality Principle", available at http://www.judicialcollege.vic.edu.au/eManuals/VSM/14959.htm

249. For example, dishonesty is defined in s.12 to include a subjective element of intent. An employer will not be 'dishonest' even if their belief that they did not engage in underpayments is unreasonable or unfounded[74]. Neither the Victorian nor the Queensland legislation hinge on such a subjective assessment.

250. We share the concerns publicly expressed by the ACTU, and by the State Governments in Victoria and Queensland, that the bar to securing a conviction is set so high that the Bill appears to be more of a device to override state and territory wage theft criminalisation provisions than a serious attempt to combat wage theft by holding non-compliant employers to account"[75].

SCHEDULE 6 – the Fair Work Commission's Procedural Powers

FWC already has broad power to dismiss applications

251. The FW Act currently gives FWC the power to dismiss applications without limitation, including where the applications is not made in accordance with the Act, is frivolous or vexatious, or has no reasonable prospects of success[76].

252. The Bill proposes to add an additional ground allowing FWC to dismiss applications where the application is "misconceived or lacking in substance". It is unclear what utility the additional ground will have. The current provision is not prescriptive; the grounds are set out "without limiting" FWC's general power. Anything that is "misconceived or lacking in substance" is overwhelmingly like to fall within the existing power.

Proposed s587A is unnecessary, and undermines procedural fairness

253. Section 587A of the Bill would give FWC the power to make orders preventing a person or organisation from making further applications – including applying for appeal - without the permission of a Full Bench of FWC[77]. Where these orders are made, there is no right of appeal.

254. This proposal is remarkable in its disregard for procedural fairness. It is also entirely unnecessary given that FWC already has broad powers to dismiss applications. Indeed, it would take FWC the same amount of time and effort to utilise the existing powers, as it would the new power. The former option, however, would not deprive the applicant of their basic right to agitate a claim or appeal a decision.

255. The Fair Work Commission is meant to be a workers' tribunal. Legal representation requires permission; it is meant to be the exception, rather than the rule[78]. Giving FWC the power to dismiss an application without any right of appeal - other than application to the Federal Court

[74] As stated in the Bill's Explanatory Memorandum
[75] ACTU Submission to the Bill
[76] S.587
[77] The Full Bench must include a President, Vice President or Deputy President of the Fair Work Commission (s.616(4A))
[78] See s.596

under s.39B of the *Judiciary Act*, which is a complex and costly prospect that is simply out of reach for most workers – is unfair, unreasonable, and unnecessary.

Variation of revocation of FWC decisions

256. Section 603 of the FW Act currently allows FWC to vary or revoke certain decisions. The provision does not apply to certain decisions relating to enterprise agreements, including decisions to approve or vary enterprise agreements.

257. The Bill seeks to amend s.603 so that decisions relating to enterprise agreement approvals and variations can be varied or revoked.

258. This may seem benign; it is not. Both approvals and variations of enterprise agreements require a vote of employees who would be, or are, covered by the agreement. The Bill will allow employers to bypass that process.

259. The example given in the explanatory memorandum is that an enterprise agreement could be revoked where an employer has lodged the wrong version of an EBA. If that were to occur, then currently the situation would be remedied by a variation vote. E.g., workers would vote to vary the agreement so as to bring it in line with the correct version. That is, the problem the Bill seeks to fix is already able to be democratically, and efficiently fixed.

260. What the amendment will do is allow employers to re-submit enterprise agreements which FWC have refused to approve, without the need for a further vote and with the benefit of the ability to fall below BOOT under amendments made in Schedule 2 of the Bill.

261. Enterprise agreements are not unilateral documents. With the exception of greenfields agreements, they always require the approval of employees via a democratic vote. There is no valid reason which justifies those agreements to the altered without that democratic process being utilised.

Removal of the right to appeal hearings

262. Section 697(1)(b) of the FW Act currently says that appeals can be held without a hearing (so that it is determined based on written submissions only, or "heard on the papers") only with the consent of the parties who will be make submissions.

263. The Bill repeals and replaces this section so that consent is no longer required. That is, FWC must take the parties views into account, but – irrespective of those views – it can decide not to hold a hearing even where a party seeks to be heard in person.

264. There is no policy reason why this amendment is necessary. To the contrary, it undermines the basic right for parties to be heard and procedural fairness. It also favours legally represented parties, punishes unrepresented workers and those who struggle with written communication, and removes rights of reply.

Conclusion

265. The Bill must be rejected as a whole. No set of amendments will redeem it.

266. In large part this is because the Bill is not really designed to mitigate the negative effects of the COVID-19 pandemic by creating jobs. The contents of the Bill are actually little more than a recitation of the long-standing wish-list of big business which tilt the industrial relations framework further in favour of employers, and leave workers worse off.

267. Schedule 1 is designed to overturn well-established case law so that employers can designate workers as casual without regard to the practical reality of the employment relationship, and avoid the legitimate wage claims of employees including those that are currently before the courts. Nothing in this Schedule will boost employment, other than by entrenching a class of "permanent casual" workers. It will drive wages and conditions down.

268. Schedule 2 will empower employers to remove overtime rates for part-time workers, cutting the wages of workers who have helped carry the economy through the pandemic. These changes are not designed to boost employment as a response to the pandemic; they are permanent changes designed to lower wages.

269. Schedule 3 explicitly allows business to negotiate enterprise agreements which undercut minimum wage, and removes protections for workers which undermine their ability to genuinely agree to such cuts. The Schedule also overtly prevents unions from scrutinising those same agreements. It will result in a flood of sub-standard agreements which will continue to operate years after the pandemic is over.

270. Schedule 4 will allow essentially allow employers to lock construction workers out of having any input into the terms and conditions of their employment at all, on projects worth over $250 million. This will drive wage growth down, and exacerbate the mental health crisis in large construction projects by deliberately overlooking mandatory dispute resolution procedures.

271. Schedule 5 makes a tokenistic effort to increase penalties applicable for wage theft, which is meaningless in circumstances where Federal Government agencies are failing to prosecute employers under existing provisions, and deliberately overlooks reforms which would encourage prosecution. It does nothing to help the economy, or create jobs.

272. Schedule 6 gives FWC unnecessary powers which undermine procedural fairness and natural justice. It does nothing to help the economy, or create jobs.

273. **The Bill is irredeemable; it must be rejected as a whole.**