



Fair Work Legislation Amendment (Closing Loopholes No 2) Bill 2023

Supplementary ACCI Submission

20 December 2023





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Introduction

The purpose of this supplementary submission to the Senate Education and Employment Legislation Committee (hereafter, the Committee) is to note the changes which have occurred to the Fair Work Legislation Amendment (Closing Loopholes No 2) Bill (hereafter, the Bill) and set out ACCI's position on some of the amendments which passed the House of Representatives.

ACCI refers the Committee to its previous submission of 13 October 2023, and the testimony of witnesses representing ACCI of 10 November 2023, regarding ACCI's views on the now passed Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 and provisions of the Bill which have not been amended.

This supplementary submission will detail ACCI's response to the Australian Greens' amendment to the Bill as passed by the House of Representatives on 29 November 2023 as it relates to the new provisions relating to intractable bargaining workplace determinations as well as the proposed, but yet to be cited, amendments commonly referred to as the 'right to disconnect'.

These Greens' amendments have not been subject to any form of consultation or formal consideration. The Government has accepted, or proposed publicly to accept, what are very significant changes to the Australian workplace relations system without any form of formal scrutiny or proper process – this is disappointing.

The Australian Greens' amendments to intractable bargaining workplace determinations will fundamentally reshape enterprise bargaining in Australia. They are of grave concern. Not only do they represent a need for further investigation by the Committee, but they also warrant a new regulatory impact analysis.

Additionally, the Government's further announcement that they are working with the crossbench to deliver an agreed Greens amendment, enshrining a 'right to disconnect in law', is also concerning. The Australian Greens have previously had a Bill before the Parliament, which was radical and would have had serious ramifications for employment relationships in this country.

This supplementary submission will seek to outline our concerns in detail with the above matters for the benefit of the Committee, in the absence of a proper consultation, and regulatory impact, process by Government.

1 Greens' Amendment to Intractable Bargaining Workplace Determinations

OVERVIEW

- 1.1. The proposed amendment creates new proposed section 270A of the Bill.
- 1.2. Section 270A provides that in any arbitration of a bargaining dispute, any disputed term that relates to a term in an existing enterprise agreement applicable to the parties (e.g., terms about hours of work, shifts, rosters etc) cannot be changed in the arbitration to make the term less favourable to the employees or a union than the existing enterprise agreement.¹
- 1.3. The only exception to this requirement relates to wage increases, which are exempt from the operation of section 270A.
- 1.4. The amendment also changes the Bill so that, if it secures passage through Parliament, existing subsection 274(3) of the Fair Work Act would be substituted for new section 274(3) which outlines that an agreed term for the purposes of an intractable bargaining workplace determination is a term that was agreed to at the time the application for the declaration was made. This means that the Fair Work Commission must disregard decisions that the parties have already agreed to, regardless of whether the parties do in fact agree that the decision has been made.
- 1.5. In summary, these changes will remove the ability of the Fair Work Commission to make a determination which considers the totality of the bargaining process because of the need to disregard:
 - a. Any clause which may be less favourable than an existing enterprise agreement between parties; and
 - b. Decisions that the parties have allegedly already agreed to.
- 1.6. Rather than considering any bargained outcome overall, and on its own merits, the Fair Work Commission must ensure each term it arbitrates (on a term-by-term basis) is either as favourable or more favourable for employees and any relevant union bargaining representatives.
- 1.7. This will have the serious consequence of making arbitration one sided in favour of employee representatives, and disincentivise unions from making compromises, instead they will be encouraged to drag out bargaining to have the matter arbitrated before the Fair Work Commission where they will almost always be better off.
- 1.8. This would be a disappointing outcome as our system should encourage proper "agreement" making between the parties at the enterprise level, and not a system where more matters are determined by a third party (the Fair Work Commission). Arbitration should be a last resort for both

¹ Bandt Amendment, Item (4)

parties, not something regularly sought by one party because of the additional benefits it would provide.

- 1.9. This change, combined with the re-introduction this year of compulsory arbitration and other changes by the Government which increase conflict in our workplaces (i.e. multi-employer bargaining without consent), risks returning us to the days of compulsory conciliation and arbitration, where the employment tribunal, not the enterprise, sets terms and conditions of employment – this is unproductive and will hurt our economy.
- 1.10. The very concept of an “intractable bargaining declaration”, which this amendment relates to, has only been in effect from 6 June 2023. The Greens’ amendment is clearly not in response to any demonstrated unintended consequence, but an item on the union wish list.
- 1.11. The change would also undo the Government’s own reforms, introduced last year as part of the Secure Jobs, Better Pay legislation, to the application of the Better-Off-Overall-Test. Critically, one change ensured that the Fair Work Commission would apply the BOOT as a ‘global assessment’ (i.e. not a line by line comparison between the proposed agreement and relevant modern award). The explanatory memorandum for the Secure Jobs, Better Pay legislation, confirmed that this change was introduced to “address concerns about the workability of the current framework” and that they “implement a primary outcome of the Jobs and Skills Summit in removing unnecessary complexity in agreement-making process for workers and employers”.²
- 1.12. This change would require the Fair Work Commission to undertake a line-by-line comparison of the proposed term being arbitrated not against even the relevant modern award, but the existing enterprise agreement.

ANALYSIS

ARBITRATED TERMS “NO LESS FAVOURABLE”

- 1.13. As stated above, this amendment would mean that an arbitrated term of an intractable bargaining workplace determination can be no less favourable to an employee than a corresponding term in an existing agreement, where the assessment will necessarily be undertaken on a “term-by-term” basis. This would see a significantly higher bar than the Fair Work Commission must be satisfied has been met when approving enterprise agreements outside of arbitration. I.e. where the employees must be “better-off-overall” when compared against the relevant modern award - not existing enterprise agreement. This usual assessment is undertaken on a ‘universal’ basis, not “line-by-line” or “term-by-term”.
- 1.14. This change, therefore, will create a two-track, and unequal, path to term and conditions setting, where the Fair Work Commission must apply a more favourable test for union claims during

² Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, explanatory memorandum para 764

arbitration than it does when the parties have reached agreement outside of the arbitration process.

- 1.15. In the arbitrated “track”, the Fair Work Commission will only be adding conditions and wages to an existing enterprise agreement. It will not have the power to reform enterprise agreement terms in a way that removes unproductive or obsolete provisions for an employer, regardless of the merit of such change. Arbitration based on merit is a sensible and fair approach to resolving industrial disputes and avoiding costly industrial action.
- 1.16. By opening up a significantly more favourable track for unions to condition setting through arbitration, Government will be incentivising unions to drag their feet during bargaining, by refusing to reach agreement (encouraging industrial action) until the required 9 month period ends and they can apply for an intractable bargaining declaration and have the matter arbitrated. This is because they will know that once arbitration commences, conditions can only be ‘ratcheted up’.
- 1.17. Ultimately this means that productivity gains will no longer be able to be achieved through bargaining. Employers will struggle to secure trade offs for new claims because unions will know that these trade-offs are not available during arbitration.
- 1.18. Desperate employers will be forced to secure changes to unproductive arrangements through expensive and unsustainable wage increases. As such, these changes will deepen our productivity crisis, potentially fuelling inflation and exacerbating cost of living pressures for Australians.
- 1.19. Additionally, these changes must be seen as a part of a broader concerning and insidious trend and do not operate in isolation – the Government appears intent on fundamentally shifting the better off overall test to be a measurement against existing enterprise agreements as opposed to the relevant award.
- 1.20. Take for example, schedule 1 part 4 of the Bill, which would insert provisions into the Fair Work Act with regard to enterprises seeking to transition off a multi-enterprise agreements onto a single enterprise agreement. Businesses who have been roped-in to a multi-enterprise agreement who wish to bargain for a single enterprise agreement must ensure that the replacement is better off overall than the multi-enterprise agreement, not the award. This in and of itself is an unwelcome step, which can be seen as part of the abovementioned broader trend. However, it will interact with the intractable bargaining amendment, adding to the woe by allowing employee representatives to drag out this process to arbitration to ensure that all terms, not the universal agreement, is better off overall than the multi-enterprise agreement.
- 1.21. The below case studies illustrate our point:

Case Studies

Example 1:

Dom runs a welding business employing shift workers 6 days a week, over 8 hour shifts.

Demand has dropped over the recent period and as a result Dom wants to scale back his business operations to 4 days a week, operating 10 hour shifts.

This will enable lower costs of running the business, by using the machinery less and operating less days a week.

Dom's business' enterprise agreement currently only provides for the existing shift arrangements, however.

Under the new laws, Dom could be prohibited from changing this shift arrangement to make his business more efficient.

If he cannot reach agreement with the new employees about their shifts then the FWC could be prevented from determining that he can operate the new shift structure.

This is because some employees might prefer the previous arrangement.

This could therefore constitute a less favourable term even though it would enhance productivity and improve efficiency.

Example 2:

Sophie operates a chain of nail salons.

Sophie's employees commence work at 8:30am.

However, recently there has been greater demand for early morning appointments.

She accordingly wishes to introduce new shifts that will begin at 8am.

Hours of work will increase from 7 hours per day to 7.5 hours per day (plus the customary meal break).

However, the enterprise agreement currently only has shifts operating from 8.30am.

Under the Greens' amendment, Sophie can be prohibited from introducing these new operating hours, even though customers desire them because her employees might not prefer it.

This is because the FWC will be prevented from determining that she can introduce the change due it being less favourable in the eyes of employees, regardless of how much merit it might have.

Sophie would then be forced to forego the extra customers and enhanced productivity her business may have induced from the change.

Example 3:

James runs an on-demand delivery business that requires 2 persons to travel on trips because sometimes the trips require unloading of large furniture at the customer end.

James has decided to remove the unloading aspect of his operation (only smaller items will be shipped).

This means 2 persons are no longer needed and he can run the main part of his business (transportation) more efficiently.

Smaller deliveries can be delivered more quickly, and more deliveries can be taken on one trip.

The second person can now be used to do another, separate truckload.

This makes the business more productive and more efficient.

However, James' business' enterprise agreement currently only provides for 2 person trips as this is how his business currently operates.

Under the new laws, James could be prohibited from removing a driver from the trips and can be compelled to keep 2 drivers, even though 2 are not required.

This is because, if he can't reach agreement with the employees or union, the FWC will be prevented from determining that he can operate with 1 driver.

It would not matter that this is safe and all that is required as it may be considered less favourable.

The unions and employees can block the change regardless of how much merit it might have.

CHANGES TO THE NATURE OF AGREED TERMS

- 1.22. When making intractable bargaining workplace determinations, the FWC cannot arbitrate matters that are already "agreed terms". These amendments would expand the definition of "agreed term" to not only include terms that have been agreed at the end of the period stipulated in an intractable bargaining declaration, but also any term that was agreed to at the time the application for the declaration was made. This represents an expansion of the current definition.
- 1.23. The nature of the wording in subsection 274(3)(a) of the Greens' amendment, "a term that the bargaining representatives for the proposed enterprise agreement concerned had agreed, at the time the application for the intractable bargaining declaration concerned was made, should be included in the agreement" will mean that bargaining and negotiations will need to proceed with caution.
- 1.24. Contingent agreements or conditional promises will, in practice, be made under limited circumstances, further discouraging good faith bargaining.
- 1.25. For example, take a situation where an employer and a union are negotiating for a new agreement. The employer makes a proposal to increase rostered hours with a detailed forward plan on the condition that employee representatives will return with a proposal to reduce the number of workers on public holidays. Both parties could have accepted that the increase to the employer's detailed proposal should be included in the agreement. However, the union fails to return to the employer with their public holiday proposal. Intractable bargaining ensues. In this situation, under the Greens amendment, the Fair Work Commission could interpret the employer proposal as an agreed term, but the employee representatives conditional promise may not meet this bar.
- 1.26. If passed, these changes will mean that employers will also have to take far more caution when advancing or accepting claims during bargaining that are tentative or contingent on the acceptance of other claims because there is a risk that these could be classified as "agreed terms". This is because new proposed section 274(3)(a), substituted in the Greens amendment, will mean that any term which was agreed to cannot be arbitrated. It is taken to be a settled matter and therefore will be included in the enterprise agreement.

- 1.27. This change will disincentive concessions in bargaining, seeing more and more matters being arbitrated. This is because employers will be discouraged from making conditional or contingent offers out of fear that the union will not accept the conditional offer by agreeing to a concession in turn, and then the conditional offer will be taken as an “agreed term” for the purposes of arbitration.
- 1.28. This change also tips the balance too far in favour of unions and employee representatives to the detriment of genuine enterprise level “agreement” making.

ACCI POSITION

- 1.29. ACCI opposes this amendment.

2 “Right to disconnect”

OVERVIEW

- 2.1. The Australian Greens have confirmed publicly that they expect to see a right to disconnect legislated within the National Employment Standards (NES) in exchange for their support for the Bill in the Senate.
- 2.2. The Government, through the Minister for Employment and Workplace Relations, has stated that they are working with the crossbench to deliver an agreed amendment to the Act which would legislate a right to disconnect.³ It's unclear what form this amendment would take.
- 2.3. Government has confirmed its support for this proposal without consulting with the business community. ACCI has not had an opportunity to discuss this policy with Government or the Greens.
- 2.4. In summary, ACCI is concerned that this is an unnecessary change which will undermine the existing concept of ‘reasonable additional hours’, disincentivise employers from offering greater flexibility and hinder employers’ ability to effectively manage their workforces.

ANAYSIS

EXISTING PROTECTIONS FOR EMPLOYEES

- 2.5. The primary reason proponents of a so called legislated right to disconnect say that it is needed to protect employees’ mental health and to stamp out unpaid overtime. However, the current legal framework already imposes obligations on employers to protect employees’ mental health if it is being harmed by workplace stress (such as excessive working hours) and employees who are working unreasonable hours in addition to their usual working hours have a right to seek compensation for unpaid overtime.
- 2.6. Employers, as persons conducting a business or undertaking (PCBUs), already have duties to take appropriate steps to eliminate or minimise health and safety risks to employees at the workplace under work, health and safety laws. In practice, this means that employers should be monitoring the working hours of employees to ensure that additional working hours aren’t leading employees to suffer from workplace stress leading to a psychiatric injury⁴.
- 2.7. Additionally, under the general protections provisions of the Fair Work Act, employees are protected against adverse action from employers for raising a complaint that working hours are having a negative impact on their mental health. As stated above, employers are obligated to take such complaints seriously.

³ Closing Loopholes, Media Release, the Hon Tony Burke MP, 7 December 2023

⁴ See for example, *Joseph Roussety v Castricum Brothers Pty Ltd* [2016] VSC 466.

- 2.8. This means that, in practice, employees already have a 'right to disconnect' to the extent that working hours or expectations being "on-call" are having a negative impact on their mental health.
- 2.9. Similarly, to the extent that employers contacting employees outside their regular working hours is leading employees to work excessive overtime, an employee may be entitled to be compensated for that unpaid overtime, which would be treated as an underpayment.
- 2.10. It is a well-established practice that employers can require employees to work "reasonable additional hours" in addition to their usual working hours. For instance:
- a. Section 62 of the Fair Work Act 2009 (Cth) provides that an employer must not request or require to work more than 38 hours, or ordinary hours of work agreed to (i.e. under the contract) and less than 38 hours in part-time, plus reasonable additional hours (where s 62 lists factors in favour of whether additional hours are "reasonable").
 - b. Modern Awards typically prescribe that employers may require employees to work reasonable overtime – many include an "on-call allowance", which compensates employees for making themselves available to be contacted by their employer.
 - c. Employment contracts will typically include a term where employers may direct employees to work reasonable additional hours.
- 2.11. The more generously remunerated an employee is, the more likely they will be required to work reasonable additional hours.
- 2.12. Furthermore, it's clear that to work additional hours employers will, from time to time, need to, and be allowed to, contact employees outside their ordinary hours. It follows that legislating some kind of blunt instrument such as a legislated right to disconnect will hinder the well-established concept of "reasonable additional hours", which has its basis in contract law, under statute and under our Modern Award system. While an employee is "working" the employer has a right to contact them.

PRACTICAL CONSEQUENCES

- 2.13. Not only is a so-called legislated right to disconnect superfluous to its purported aims of protecting employees (noting that those protections already exist) what is being proposed is a blunt instrument which will do more harm than good, including for employees.

Less flexibility in our workplaces

- 2.14. In particular, advances in modern technology has allowed employers to offer more flexibility for employees. For instance, as technology such as email and the use of mobile phones became more prominent in Australian workplaces, employees have been afforded more freedom to work away from the office and outside of working hours. This has provided much needed flexibility not only for employees with caring responsibilities but also for employees looking for greater work-life balance.

- 2.15. For example, an employer in receipt of a flexible work request from an employee who wants to change their working hours from 8am to 4pm to 7am to 3pm so that they can collect their children from school is much more likely to agree to this arrangement knowing that if an emergency arises in the office that the employee is still contactable between 3 and 4 (noting that the business hours still extends to 4pm regardless of the agreement with the employee). While the employer does not expect the employee to always work outside their ordinary hours, there is an expectation that the employee be willing to answer the phone in an emergency in exchange for that employee getting to depart from the expectations of the whole office.
- 2.16. If the employer is legally unable to contact that employee after 3pm (from time to time), there is a good chance that the employer would be unable to accommodate the request.
- 2.17. This is also true in less formal arrangements. For instance, in circumstances where employers feel they can contact their employees if a work issue arises after hours, that employer will be more willing to allow an employee to pop out of the office to attend to a personal matter for a few hours without requiring them to take personal leave. This 'give and take' mentality is a positive development of the modern era.
- 2.18. While it's true that historically employees did not have to deal with employers contacting them outside working hours at the same rates as today, it is also true that historically employees were expected to work a standard 9am-5pm day (or equivalent) and to remain at their place of work for the entirety of the day. This traditional work practice acted as a barrier to many workers who have thrived in the modern era with its increased flexibility and focus on work-life balance (women, those with caring responsibilities etc).
- 2.19. This proposal risks taking us back to this undesirable, rigid working environment.

Hinder reasonable business practices

- 2.20. There are a whole range of reasons why an employer may need to contact their employees after hours from time to time, including:
 - a. In an emergency, including to obtain information about a serious incident that has occurred or may occur and which could harm other employees or the public.
 - b. Because an urgent work matter has arisen, it may not be an "emergency" per se but rather another kind of pressing matter outside the employer's control, such as a law firm being asked to prepare an urgent injunction for a client after hours or even to meet the needs of a demanding, but important client or customer who may pose a commercial risk to the business if their needs are not met and they stop being a client/ customer.
 - c. To ask a question which facilitates the work of another employee after hours (as stated above, some employees volunteer to work outside their ordinary hours from time to time for various reasons). One employee refusing to be contacted after hours will likely hinder the ability of other employees to work flexibly.

- d. To ask an employee to work a different shift on short notice, i.e. because another employee is unwell.
- 2.21. It will not always be reasonable for employers to make employees work additional hours because of these reasons – again, existing laws only promote “reasonable” additional hours and impose obligations on employers to monitor the mental health of employees – but its clear that employers will need to contact employees for these reasons from time to time and should be free to do so.
- 2.22. Telling employers that they cannot contact employees after hours will clearly hinder the effective management of their business. Depending on the type of work being undertaken and the makeup of the workforce, no one of these reasons is more important than the others. While proponents of the so-called legislated right to disconnect have floated the idea of providing exceptions to the general rule, such as for “emergency circumstances”, it’s clear from the list above that there are a whole range of valid reasons why business operations may be harmed because of this amendment, meaning that Government should not legislate a one-sized fits all approach. A one-sized fits all approach will clearly hinder employees looking for greater flexibility in their work and also workplace productivity.
- 2.23. As such this is a matter best left to individual employers and their employees, a concept that is already working in practice. Employee representatives are already negotiating so called rights to disconnect as part of enterprise bargaining. This is the appropriate vehicle, as it allows each enterprise to work out what is best for itself, including what the relevant exemptions should be and whether additional allowances should be provided.
- 2.24. Alternatively, this is something that non-Award covered employees can negotiate as part of their employment contracts or something that particular businesses can promote as a wellbeing policy to attract staff.
- 2.25. Additionally, such a model could also have adverse impacts on employees. If businesses are uncertain about their ability to contact an employee to offer additional work, said employee would miss out on taking extra work which may have suited their circumstances. Another consideration in such a scenario is that some employees are undoubtedly seeking to take on as many shifts as they can due to cost-of-living pressures. Such employees, if a right to disconnect is legislated, may now not even be offered additional shifts because an employer may not feel they have the ability to contact their employee in the first instance.
- 2.26. This is not an appropriate area for Government to interfere in, especially as the law already protects employees from unreasonable contact from employers.

EXISTING GREENS’ BILL AND INTERNATIONAL COMPARISONS

- 2.27. Earlier this year the Australian Greens, attempted to pass such legislative changes through the House of Representatives with their Fair Work Legislation Amendment (Right to Disconnect) Bill 2023. In that Bill, the Greens sought to legislate measures which would have prevented

employers from contacting employees outside of work hours and provided that employees are not required to monitor, read or respond to work communications from their employer outside of work hours.

- 2.28. This Bill would prevent employers from contacting staff outside of work hours except in an emergency or where they have provided an 'availability allowance'.
- 2.29. While its unclear whether the Government and the Greens intend to proceed with this approach, if they were it would be inconsistent with the approach taken with other countries around the world.
- 2.30. In France, for example, where the right to disconnect exists, employers are not prevented from contacting their employees outside of work hours, they are simply prevented from taking adverse action against employees for failing to action contact from their employer.⁵ Similarly in the EU, the Parliament approved a Resolution which stated that workers should have a right to not work and switch off devices after or outside hours and employers are prevented from taking adverse action against that employee.⁶
- 2.31. ACCI would be very concerned with any proposal which would see employers penalised simply for contacting their employees outside of regularly working hours – the margin for error (i.e. not realising the time or senior members of staff not being aware that a particular employee has directed the employer not to contact them after hours) is very broad.

ACCI POSITION

- 2.32. ACCI does not support a so-called legislative right to disconnect. It notes that that employees are already protected under the existing law from an employer unreasonably contacting them after hours where this contact leads to unreasonable additional hours being worked or where this contact is causing harm to the health and wellbeing of staff.
- 2.33. The rights of employers to manage their workforce effectively must be balanced with the differing preferences of employees regarding how they work. Noting that adequate protections are already in place, employers and their employees should be left free to determine what's best for them at the workplace level.

⁵ Telework and the French "Right to Disconnect", Nicolas Boring, Library of Congress, 21 August 2020

⁶ EU parliament Resolution on the right to disconnect, IOE, February 2021

About ACCI

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ACCI strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth, and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education, and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

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