4 October, 2023

Committee Secretary
Senate Education and Employment Committees
PO Box 6100
Parliament House
Canberra ACT 2600

Email: eec.sen@aph.gov.au

Dear Committee Secretary,

Re: Fair Work Legislation Amendment (Closing Loopholes) Bill 2023.

Please find attached, the AMWU's submission to the Inquiry in relation to the above Bill. I note that submissions were requested by 29 September, 2023 and apologise for the lateness.

If you have any questions or require further information, please do not hesitate to contact Kath Presdee, Senior National Legal Officer,

Yours sincerely

STEVE MURPHY
NATIONAL SECRETARY

Australian Manufacturing
Workers' Union
Registered as AFMEPKIU
National Office
Level 4
133 Parramatta Road
Granville NSW 2142
Telephone: 02 8868 1500
Facsimile: 02 9897 9274
amwu@amwu.asn.au

National Research Centre
Ground Floor, 133 Parramatta Road
Granville NSW 2142
T: (02) 8868 1500
W: www.amwu.org.au

Introduction

1. The "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers Union ("AMWU") represents over 55,000 workers across a range of industries across Australia.

2. For over 170 years the AMWU has fought for significant improvements to the lives of working people. For too long working people have been exploited by loopholes that deny them fair wages and conditions and job security. We broadly support the Bill in its efforts to close those loopholes, however we do not believe that the Bill goes far enough to enable workers to be able to counter years of poor wage growth and a cost of living crisis.

3. The AMWU therefore makes the following recommendations for improvements to the Bill:

   - That the qualifying period for a casual employee to access casual conversion rights be reduced to **three (3)** months.
   - That a new section "Protected rostering conditions" be included with the "protected rate of pay", to be defined as follows:
   - **Protected rostering conditions** for a regulated employee is that the provisions pertaining to rostering and hours of work in the host employer's industrial instrument covered by the regulated labour hire arrangement order would apply to the employee.
   - That the proposed subsection 306G(1) be deleted.
   - To expand the protection for delegates to include actions that are threatened or organised as well as carried out.
   - To expand the rights afforded to delegates and union members in proposed section 350C(3) to include the following
     - Reasonable access to information about the workplace and workforce to better represent member and prospective members interests.

  - Reasonable access to paid time, during normal working hours, to represent the interests of members, and/or perspective members, to the employer and/or to industrial tribunals if necessary.
  - Reasonable access to paid time, during normal working hours, to attend inductions of new employees and discussing workplace relations matters with them.
- that superannuation theft be specifically included within the offense of wage theft under the Fair Work Act
- That a Wage Theft tribunal be established, co-located with the Fair Work Commission
- that the Bill be amended to make it easier for workers to initiate bargaining and take industrial action in support of their claims.

4. The AMWU has had access to a copy of the ACTU's submission and endorses both the submission and the recommendations contained therein.

Casual Employment

5. The introduction of casual conversion conditions into the NES in 2021 was intended to provide a universal minimum standard for national-system employees. Unfortunately, its inclusion has resulted in a substantive reduction in conversion conditions contained in some Modern Awards and Enterprise Agreements.

6. The AMWU welcomes the amendments proposed in the *Closing Loopholes Bill*. However, we propose that the Bill can go further to improve the working lives of casual employees.

Case Study 1 – Joe's Story

Joe* is an AMWU member and his employer is a global food manufacturer. Joe has been employed by the company as a casual production worker/forklift driver for 15 years.

The site operates three shifts across 24 hours each day. The usual workforce for the site is about 100 employees (approximately 90% permanent employees), increasing to about 300 employees during peak season.

Peak season runs for 8-9 months of the year. During peak season, Joe normally works 48-50 hours per week, and works about 30 hours per week during quieter periods. Busier periods became frequent from about 8 years ago, when the company won contracts for two national supermarket chains.

Since 2019, Joe has been given a letter every year saying that there are no permanent positions available, therefore he is not able to convert to permanent employment.

** not his real name*

How the Bill can be strengthened – 3 months casual employment

7. As identified in the ACTU's submissions the majority of casual workers work every week and have been in their job for over a year. The AMWU submits that the laws need to be more responsive to combat the increasing pervasiveness of casual employment and on this basis the qualifying period for an employee to access casual conversion should be 3 months.

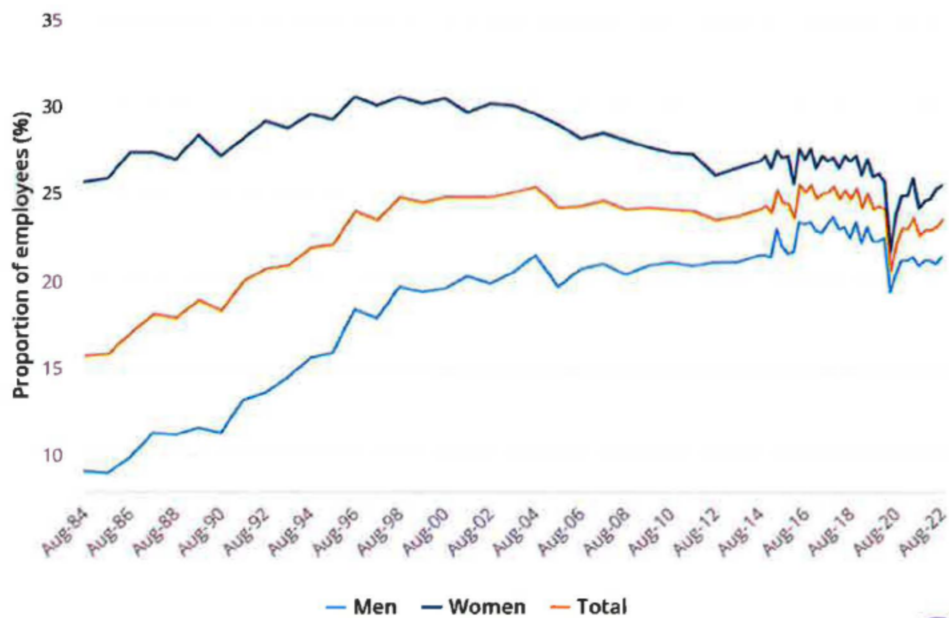
8. Chart 1 demonstrates the long term historical data of the share of casual employment Australia and indicates that casual employment is steadily on the rise.[1]The share of casual employment was at its lowest at 15.7% in August 1984 and has hovered at around 25% since August 2005 until August 2020 which saw a sharp decline.[2] The sharp decline is mainly attributed to the COVID-19 Pandemic which largely affect casual employees due to trading restrictions on businesses.[3] However, casual employment is again on the rise with the share of casual employment rising to 23.5% in August 2022.[4]

1 Australian Bureau of Statistics, Working Arrangements, August Quarter 2022 (Catalogue Number 6336.0, 14 December 2022),

2 Ibid.

3 Geoff Gilfillan, Recent and long-term trends in the use of casual employment (24 November 2021)

4 Australian Bureau of Statistics (n 1).



9. Employers have exploited legal ambiguities to use casual employment as a long term employment strategy. Case study 1 underscores the reality of the permanent casual worker loophole. Joe has worked regular, ongoing hours over an extended period of time however he has not been converted to a permanent position. This 'loophole' benefits the employer as they can pay employees less in the long term. However, the reality for casual workers like Joe is that they miss out on annual leave, personal leave, long service leave, paid public holidays, redundancy and other entitlements afforded to permanent employees, over an extended period of time. The precarity of his employment affects his ability to secure a home loan or credit for essential purchases such as a car, a cascading effect on the quality of his life and that of his family.

10. The Closing Loopholes Bill needs to go further than changing the definition of the casual employee and reverting to a 6-month minimum employment period (which had an entitlement in the Manufacturing and Associated Industries and Occupations Award 2020 prior to the Morrison Government's amendments). A 3-month employment minimum for casual conversion would have a meaningful impact to clamp down on the prevalent practice of the permanent casual worker loophole.

Recommendation: That the qualifying period for a casual employee to access casual conversion rights be reduced to three (3) months.

Closing the Labour Hire Loophole

11. The AMWU is a strong supporter of "Same Job, Same Pay". Workers who perform the same tasks, at the same site, working the same rosters, under the supervision of the same company should not be covered by different industrial arrangements because of the identity of their employer. While the AMWU endorses the steps taken to close this loophole in the Bill, it is our belief that there needs to be further changes to the proposed Bill to ensure more workers can take advantage of these measures.

12. The AMWU recommends further amendments to the Bill namely:

    - Removing the exclusion for workers under training arrangements, so apprentices employed by Group Training Companies are also paid a protected rate of pay;
    - Expanding the "protected rate of pay" to include "protected rostering conditions".

The experience of the AMWU and labour hire

13. The AMWU represents thousands of members who are employees of labour hire companies, as well as employees who work alongside labour hire workers. AMWU members are also employed by companies who compete and are successful in winning contracts for services. These companies may be engaged for specialist projects (such as annual shut down maintenance projects) or for general and ongoing maintenance projects. As such our members are exposed to varying scenarios and expectations in terms of rates of pay and other conditions on worksites.

14. The AMWU is concerned that, for too many employers, labour hire is being used solely to cut labour costs. It is one thing to use labour hire to supplement the existing workforce during an annual maintenance shut-down, or to provide specialist knowledge or skills for defined projects, but labour hire is also being used as replacement labour on cheaper wages and lesser conditions.

15. In representing its members who are employed by labour hire and contracting companies, the

AMWU has entered into enterprise agreements with some of these companies. Sometimes, particularly when a site specific enterprise agreement has been negotiated, similar rates of pay apply to employees of both the labour hire company and the host employer. The AMWU has bargained for labour hire workers to be paid the same rate as directly hired employees performing the same work.

16. However not all enterprise agreements are negotiated equally. In some sectors and for some employers, the AMWU was prevented from negotiating for clauses guaranteeing equal pay for labour hire workers as it was prohibited under the Code for the Performance and Tendering of Building Work.

17. Another type of enterprise agreements covering labour hire workers has been negotiated without union involvement and were likely to have been "small cohort" or "baseline" agreements, negotiated with a small number of employees who were not representative of the breadth of work that was to be carried out using that enterprise agreement. These agreements place labour hire workers at a significant disadvantage, both regarding rates of pay but also allowances or other paid entitlements that may pertain to the site where work is being performed.

18. These baseline agreements are paid considerably below market rates, with many struggling to pass the BOOT test, and are used to win contracts for work based solely on delivering the lowest possible labour costs.

19. In some instances, the baseline enterprise agreement explicitly states that the rates are minimum rates and refer to a "Jump Up Clause". These clauses provide for pay to be increased to be made by entering into "Letters of Agreement" based on a particular site; however these "letters of Agreement" often contain secrecy clauses so that workers do not know what others might be receiving, and also make it difficult to determine actual market rates for that work.[5]

Benefits of the proposed amendments

Case Study 2 - A tale of two agreements – ASC and Snowy 2.0

ASC Pty Ltd built and maintains Australia's Collins Class submarines. At its Osborne site it employs workers directly, and also employs workers through labour hire arrangements with companies such as Workpac, Chandler and Trojan.

The AMWU and other unions have negotiated enterprise agreements with the labour hire companies that ensure that all workers on site have access to the same pay and conditions, regardless of employer.

This compares with the initial construction and tunnelling phase of the Snowy 2.0 project. Construction work, including the assembling and maintenance of tunnelling equipment was performed by workers employed by a mix of labour hire companies. A number of AMWU members on the site were employed by NX Blue Pty Ltd.

The NX Blue Pty Ltd Enterprise Agreement 2019 was an agreement that covered all workers employed by that company on projects throughout Australia. It covered workers engaged in building and construction, concrete products and manufacturing.

Because it was a generic agreement, it had limited improvements on the relevant Awards. While it might have been sufficient for construction projects in capital cities, it was not fit for the unique nature of the Snowy 2.0 site. As such, there were deficiencies in relation to payment and recognition of travel time/sign on time and penalties for frequent inclement weather.

20. These amendments are strongly supported by the AMWU. The impact of the proposed amendments is two-fold. Firstly, it will increase rates of pay for labour hire workers to better reflect market conditions. Secondly, it will increase the job security of directly hired employees, as the cost of using labour hire as permanent replacement labour, or permanent supplementary labour will be less attractive.

21. The AMWU is aware of companies who make workers redundant, only for the worker to return

[5] *The AMWU has members who are paid under such baseline agreements such as the SimpecPty Ltd Enterprise Agreement 2019*

to site within a very short period of time, this time employed by a labour hire company. While noting that the contracting out of functions might be a legitimate business decision, it is too often exploited as the work still needs to be performed, but the company prefers to pay someone less for that work. It is an exploitation of the worker; who loses job security, pay and conditions while still performing the same work as before.

22. The AMWU is also aware of sites where the host employer uses labour hire as a screening tool for their own permanent recruitment. Workers are initially engaged by the labour hire company and some are then offered employment after they have worked for the host for about 12-18 months. Workers not selected by the host employer remain with the labour hire company on the site. Some workers have been with the labour hire company at that site for close to 10 years. It is noted that directly hired workers are covered by an enterprise agreement negotiated by the AMWU. The labour hire workers are not covered by any enterprise agreement; and are receiving little more than the Award rate for casual workers at that classification..[6]

A concern about the application of the legislation – contracts for services

23. The AMWU notes that in some workplaces the host employer engages the labour hire company on a "contract for services" arrangement – requiring that they perform a certain function at the workplace, rather than just provide supplementary labour.

24. In many cases this may be bringing in of specialist skills that the employer does not have to perform a specific project, particularly if the project is a temporary one – such as specialist installation of new production equipment. The AMWU notes that these arrangements should properly be excluded from the proposed arrangements.

25. However, in instances where the contract for services involves a specific project (eg maintenance or decommissioning of a particular part of a site), but the skills required of the labour hire employees are not dissimilar of those of the host employer, and employees of the host employer work alongside, or supervise the employees of the contracted company, then this should not be treated as a specialist arrangement.

26. The AMWU urges that these arrangements be determined on a case by case basis by the Fair

[6] *Based on the advertisements for manufacturing process workers in Adelaide on the labour hire company's website.*

Work Commission and not excluded from the Bill.

Case Study 3 – Tomago Aluminium Smelter

The Tomago Aluminium smelter is one of Australia's largest producers of Aluminium. It operates 24 hours per day, seven days per week. It employees over 1000 FTE positions directly, as well as having a contractor workforce of over 200 people.

The AMWU has a significant presence on site, covering maintenance trades. Based on our density, and the coverage of other unions, we are confident in saying that there are over 200 directly hired maintenance employees working on the site.

Over time, the smelter has contracted out different maintenance functions to companies such as Programmed Maintenance and Veolia, as well as smaller companies including All Engineering Services. Programmed Maintenance, for example, have the contract to perform maintenance relating to structural steel. All the contracted companies have teams embedded on site, who perform maintenance on an ongoing basis within the scope of their contract.

While the company has contracted out various aspects of their maintenance, much of this work does not require specialised skills or equipment. In many instances directly employed tradies work with the tradies engaged by the contractor on the same projects and tasks. For example, the cutting and welding of anode bars is performed by employees of both Tomago Aluminium and All Engineering Services.

Those workers directly hired by Tomago are covered by the Tomago Aluminium Company Pty Limited – Maintenance Trades Enterprise Agreement 2020 (**Tomago Agreement**). The workers receive an annualised salary based on 1981 ordinary hours worked and all penalties and allowances (including shiftwork allowances). Employees can opt in to receive supplementary hours as part of their annual salary or be paid as worked. The Agreement contains an ordinary rate for the purposes of calculating additional payments.

The ordinary hourly rate for the lowest grade employee under that agreement in 2020 following a 2% increase was $41.19 (Grade 6); while the ordinary hourly rate for the highest classification was $47.47 (Grade 9).

The Tomago Agreement does not contain a clause that requires the company to pay contractors the same as direct hire employees. Even those labour hire workers covered by enterprise agreements are paid at lower rates than the directly hired workers, sometimes with fewer classifications recognising additional skills. As a result, the contracted workforce, particularly the more skilled workers, are paid significantly less than their direct hire colleagues, despite performing the same work.

Further amendments suggested by the AMWU

27. The AMWU notes that the proposed amendments are limited in coverage, which may disadvantage some labour hire workers both in terms of pay and in terms of conditions on site.

Extension to protect conditions on site – roster entitlements

28. While the proposed amendment guarantees that labour hire workers will receive the same pay as a directly employed worker, performing the same job and working the same roster, it does not provide other benefits that may extend to workers on site.

29. It is not clear whether entitlements pertaining to changes of roster would be extended to labour hire workers. The AMWU would argue that while penalty rates that apply under an enterprise agreement for late change of roster or loss of meal breaks would be passed on to a labour hire worker, any entitlement to notice of roster changes or the need to agree to changes in roster will not. It is also unlikely that benefits extending to where employees are allowed to "sign on" and "sign off" and recognised travel time will apply to labour hire employees; particularly if workers are required to travel to other sites to perform work.

Recommendation: That a new section "Protected rostering conditions" be included with the "protected rate of pay", to be defined as follows:

Protected rostering conditions *for a regulated employee is that the provisions pertaining to rostering and hours of work in the host employer's industrial instrument covered by the regulated labour hire arrangement order would apply to the employee.*

Removal of the exclusion of workers covered by training arrangements

30. The legislation does not recognise the significant pay disparity between apprentices and trainees who are employed directly by an employer with an enterprise agreement, and those who are employed by a Group Training Company. This is not acceptable.

31. The AMWU acknowledges that Apprentices and Trainees will not perform work to the same level of skill and ability as a worker who is fully qualified. This difference is recognised with minimum rates of pay for Apprentices and Trainees being proportionate to a worker at the same classification. It is also recognised that Apprentices who have completed the off the job component of their apprenticeship will be performing most of their work at the job site.

32. There should be no reason why an apprentice employed by a Group Training Company is not paid a proportion of the rate of pay that would apply under their host employer's enterprise agreement rather than the rate of pay for that classification under the Award. It is a difference

of several dollars per hour, which will assist young workers who face the same increased costs for petrol and food as fully qualified workers.

Recommendation that the proposed subsection 306G(1) be deleted.

33. By maintaining this exclusion it will effectively create a loopholes for employers to engage workers through a labour hire company who are covered by "training arrangements".

Delegate's rights

34. The AMWU commends Parliament's initiative to strengthen the rights and protections for workplace union delegates. Their significance in the modern workplace cannot be overstated, and their role is deeply rooted in both national and international principles of labour relations. Workplace union delegates are not merely representatives; they are the embodiment of the collective voice of workers, ensuring that this voice is heard, respected, and acted upon. Their role is multifaceted, encompassing negotiation, mediation, advocacy, and education. They ensure that the rights of workers are upheld, that their concerns are addressed, and that the workplace remains a space of collaboration and mutual respect.

35. For these reasons, the AMWU strongly supports the introduction of new workplace rights and protections for union delegates with this Bill. The inclusion of a union 'delegates' rights term' in both Modern Awards and Enterprise Agreements is a progressive step towards recognising the importance of workplace union delegates in the industrial relations landscape.

36. Furthermore, the proposed protections under proposed section 350A, which prohibit employers from unreasonably hindering or obstructing the rights of a workplace union delegate, are essential to ensure that union delegates can effectively represent their members without fear of reprisal.

37. The AMWU supports the introduction of positive rights specific to workplace union delegates. In particular we welcome proposed subsection 350C(2).

Case Study 4 – Lou, AMWU Delegate

Lou* is an experienced delegate at a heavy equipment company, who has received extensive union training. This has empowered this delegate with the tools needed to address workplace issues effectively. However, the importance of delegate rights cannot be understated because of the repercussions the delegate has faced on site.

- Lou was suspended for numerous weeks after reporting a culture of bullying and micromanagement. The skills learned through delegate training, such as thorough record-keeping, supported their complaint and their return to work.
- Delegates and HSRs are involved in the development of company policies, including the company's drug and alcohol policy. Lou recently represented a member who had disclosed prescription medication in line with the policy and was wrongfully suspended. Lou's knowledge of the policy, together with other tools gained through training, ensured that the member was promptly returned to work.
- Training in the AMWU's coverage and possible demarcation issues enabled Lou to navigate those issues in the workplace, which ensures greater trust and understanding across the broader workplace (not just within the AMWU membership).

* not their real name

Further amendments suggested by the AMWU

38. While the Bill is a significant step forward, the AMWU believes there are areas where it can be further strengthened to ensure comprehensive protection and rights for workplace union delegates:

39. As a starting point the AMWU agrees with the ACTU's recommended amendments that, as it stands, the scope of the union delegates' rights protections does not mirror that of the adverse action protection. The union delegates right protections only apply to action actually taken and not action that is planned or threatened. We support the ACTU's proposal that the scope of union delegates' rights protections should be expanded to include "threatening and organising" the actions covered by proposed ss 350A(1) and 350B(1), which would mirror s 342(2).

40. The AMWU welcomes the measures contained in new subsection 350C(3), that facilitate the exercise of the representational rights contained in subsection 350C(2). However, we do not believe that this is sufficient to enable union delegates to properly exercise their role in the workplace.

Recommendation: To expand the rights afforded to union delegates and union members in proposed section 350C(3) to include the following

- Reasonable access to information about the workplace and workforce to better represent member and prospective members interests.
- Reasonable access to paid time, during normal working hours, to represent the interests of members, and/or perspective members, to the employer and/or to industrial tribunals if necessary.
- Reasonable access to paid time, during normal working hours, to attend inductions of new employees and discussing workplace relations matters with them.

Wage Theft

41. The AMWU supports the ACTU recommendations regarding Wage theft.

42. The AMWU also believes that the wage theft offence should include penalties for the falsification of records regarding the underpayment and establish a small claims tribunal, ideally co-located with the Fair Work Commission. This will create a simple, affordable, accessible, and efficient process for employees to pursue wage theft, including Superannuation Guarantee noncompliance as suggested by the Senate Economics References Committee report: Systemic, sustained and shameful: unlawful underpayment of employees' remuneration.[7]

Effect on State wage theft laws

43. Both Victoria and Queensland have already introduced criminal liability for wage underpayments, under the Wage Theft Act 2020 (Vic) and section 391(6A) of the Criminal Code (Qld). The Victorian model is very different to that proposed in this Bill. It criminalises

[7] : *Systemic, sustained and shameful: unlawful underpayment of employees' remuneration*

'dishonestly' in withholding employee entitlements, with the standard of dishonesty determined according to the standards of a reasonable person.

44. As matters stand in this Bill, it is not clear that these existing State laws can validly be used to prosecute a national system employer for conduct that involves a breach of the Federal Act. There is no mention in the Bill of any intent to preserve State laws. Without any explicit provision to that effect, the creation of the new federal offence will greatly strengthen the argument that the State provisions are inconsistent with the Fair Work Act.

Further Recommendations from the AMWU

Inclusion of Superannuation

45. The AMWU is of the view that the wage theft offence should apply to the theft of all employee remuneration (including loadings, penalty rates, overtime, leave, allowances and superannuation guarantee). In particular this must include unpaid superannuation as a wage theft offence.

46. Superannuation contributions are not just an optional benefit provided by employers. They are a compulsory part of an employee's overall compensation package. Just like regular wages, superannuation is intended to support an employee's financial security in retirement.

47. Superannuation theft can have a significant economic impact on employees. The loss of superannuation contributions over time can lead to inadequate retirement savings, potentially forcing employees to rely more on government welfare programs and diminish the dignity of workers into their retirement. This places an additional burden on the social safety net and can have broader economic and social consequences.

48. The Fair Work Act is designed to protect the rights and interests of employees. By including superannuation theft within the offense of wage theft, it reinforces the commitment to safeguarding employees' financial well-being and retirement security.

49. Combining wage theft and superannuation theft into a single offense simplifies the enforcement process. It allows authorities to address both issues in a unified manner, reducing bureaucratic hurdles such as pursuing a claim through the ATO. It will make it easier to hold employers accountable for wage and superannuation theft.

50. Broadening the scope of the offense to include superannuation theft sends a clear message to employers that any form of financial misconduct involving employee compensation will not be tolerated. This reflects the evolving nature of employment compensation and the importance of safeguarding employees' financial well-being. Such a move not only aligns with the principles of fairness and equity but also strengthens the legal framework for protecting employee rights and ensuring compliance with superannuation obligations. It will also serve as a powerful deterrent against such unethical practices.

Recommendation: that superannuation theft be specifically included within the offence of wage theft.

Wage Theft Tribunal

51. While the expansion of the small claims process in the Federal Court/Federal Circuit Court and Family Court of Australia is a welcome step forward, the AMWU believes that wage theft matters would be better serviced by a tribunal co-located within the Fair Work Commission.

52. The AMWU believes that, even in a small claims process, the Court system can still be intimidating and complex for many workers to navigate. This is especially so for more vulnerable workers including young people, migrant workers, and older workers. The establishment of a specialist "wage theft" body, with expertise on the interpretation of Modern Awards and enterprise agreements would handle these matters more efficiently.

Recommendation: That a Wage Theft tribunal be established, co-located with the Fair Work Commission

Empowering Workers to obtain better wage outcomes – simplifying bargaining and taking industrial action

53. Although the Minister has noted that the Government's previous amendments to the Fair Work Act increased wages and that wages are rising faster than at any time during the past decade, the AMWU believes that broader and fairer wage increases are achievable through greater simplification of the bargaining system. In particular, this should involve:

- Fewer restrictions on what can be included in enterprise agreements
- Improving the ability to bargain with employers

- Minimising incentives to surface bargain
- An elimination of the costs and bureaucracy around the taking of industrial action.

Improvements pertaining to bargaining

54. The AMWU notes that the recent changes to bargaining have enabled workers to engage in bargaining for multi-employer agreements, however many restrictions remain in place.

55. The first restriction is a limitation as to what can be included in an enterprise agreement. While "matters pertaining to the employment relationship" is quite broad, it does not cover clauses that may extend beyond this relationship, particularly in relation to the use of contractors and labour hire. If the parties are prepared to agree on such matters, they should be able to do so.

56. The ability for employees to initiate bargaining for enterprise agreements is extremely difficult. To obtain a majority support determination a bargaining representative must demonstrate, as well as comply with strict processes, a majority of workers who will be covered by a proposed agreement are wanting to bargain. In workplaces where there are varying numbers of casual employees, employees on labour hire arrangements, or workers are located across different sites and shifts there are impediments to being able to determine who would be covered. Even if a majority support determination is obtained, there is limited recourse for an employer who only engages in surface bargaining. There needs to be more efficient way for bargaining to commence and for bargaining assistance to be provided by the Commission.

57. Similarly, the threat of intractable bargaining declarations is likely to result in employers who are unwilling to bargain to engage in surface bargaining for as long as possible, before seeking an intractable bargaining declaration as close to nine months, with the aim of minimising the conditions that would be contained in an enterprise agreement.

Improvements pertaining to industrial action

58. The right to strike is an internationally recognised human right. However, in Australia it is extremely difficult, and purposely delayed, for workers to engage in industrial action when they decide to. When workers decide to take industrial action, they are required to jump through various legislative hoops before they can engage in protected industrial action. The recent changes to the process of seeking a protected action ballot that commenced on 6 June 2023 have introduced more obstacles which impedes bargaining and industrial action, drains union

resources (members money), and ultimately fails to improve the ability for workers to bargain for better wages.

59. The Act already places a number of obstacles on workers and unions ability to take protected industrial action. The barriers which applied prior to 6 June 2023 can be broadly grouped as following:

   - The steps taken to apply for a protected action ballot order, without which any action cannot be considered protected industrial action;
   - The holding of a secret ballot, and the requirements for the ballot to be successful
   - The limitations on what action can be taken
   - The requirements to notify action;
   - The ability for action to be suspended or terminated by the Fair Work Commission and/or the Minister
     - A full list of obstacles is at Appendix A.

60. Despite these obstacles, a survey of AMWU officials and officers reported that prior to 6 June 2023, the overwhelming majority of industrial disputes resulted in a successful agreement vote 1-3 months after engaging in industrial action.[8]

61. From 6 June 2023 the requirement for the Commission to direct bargaining representatives to attend a mandatory conference where a PABO has been granted and before the ballot closed came into effect. At the conference, the Commission may mediate, conciliate, make a recommendation or express an opinion.[9] While not explicitly set out in the Act, the Commission has emphasised that the conference is intended to be a *'meaningful dispute resolution process'*.[10] Further, all bargaining representatives for the proposed agreement must attend the

[8] *Australian Manufacturing Workers Union, 'AMWU PABO Applications' (2023).*
[9] *Ibid s.448A(5).*
[10] *'Compulsory conciliation conferences during ballot period', The Fair Work Commission (Web Page) <https://www.fwc.gov.au/issues-we-help/industrial-action/organise-protected-action-ballot/compulsory-conciliation>*

conference.[11] If the bargaining representative does not attend, then the party they represent cannot engage in industrial action.[12]

62. The *Explanatory Memorandum* to the amendment provided that the aim of the mandatory conference was to de-escalate disputes before industrial action is taken and after industrial action has been authorised.[13] However, this fails to recognise that for many workers and unions, industrial action is already a last resort, is not a decision that is endorsed lightly given that employees do not receive pay when they engage in industrial action and in any event industrial action has been in rapid decline. The Australian Institute observes that the relative frequency of industrial action declined 97% from the 1970s to the present decade.[14]

63. Employers already have available avenues to deescalate disputes with respect to bargaining, namely through an application for the Commission to deal with a bargaining dispute[15] or an application for bargaining orders[16]. Further, while a union and its members are taking industrial action, they must abide by good faith bargaining principles including but not limited to giving genuine consideration to proposals and responding to proposals made by other bargaining representatives.[17] If all else fails, an employer can apply to terminate or suspend industrial action.[18] The sum of these safeguards for employers and the above-mentioned restrictions on employees to taking industrial action underscores how far the legislature has swung the pendulum in favour of employers.

64. As a consequence, unions and workers now face an overregulated and burdensome statutory framework that has already or is likely to result in the following:

- Unnecessary delays;
- Drain union resources;
- Fragments collective bargaining; and
- Exacerbates sluggish wage growth.

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[11] *FW Act (n 1) s.448A(1).*
[12] *FW Act (n 1) s.448A(1).*
[13] *Explanatory Memorandum, Secure Jobs, Better Pay Bill, 34.*
[14] *Jim Standford, 'Historical Data on the Decline in Australian Industrial Disputes' (Research Brief, The Australian Institute, 30 January 2018).*
[15] *FW Act (n 1) s.240.*
[16] *Ibid s.229.*
[17] *Ibid s. 228.*
[18] *Ibid ss.423-426.*

Delays

65. The new minimum ballot period has unduly restricted unions and their members ability to lead a flexible and proactive industrial action campaign. The Full Bench has confirmed that the minimum ballot period for a PABO is 10 working days, even if the ballot agent and employer have no objections. Prior to the changes the AMWU has successfully sought and been granted a ballot period of less than 10 days in a number of PABO applications. The AMWU Survey revealed that the purpose and benefits of seeking a ballot period of less than 10 days included:

- Keeping up momentum as members have confidently made the decision to take industrial action and were ready to take action;
- The timing of industrial action may be time sensitive and strategic for maximum effect;
- Expediting bargaining;
- Only needing a small amount of time to hold the ballot because of the size of the site;
- Where the company has not opposed the PABO application there is no need to delay the application.

Drain on union resources

66. The PABO amendments to the FW Act now require unions to allocate additional resources to prepare and participate in compulsory conferences which may have little to no benefits in bargaining, as shown in case study 5. Unions are now required to engage in a range of preparatory work ahead of the mandatory conferences, because of burdensome and inconsistent directions from the Commission.

67. The AMWU Survey revealed that since 6 June 2023, AMWU officials, officers and staff spend anywhere between 1-4 hours or more in preparing for the mandatory conferences. The administrative work to comply with FWC orders detracts from the essential work and the objectives of bargaining.

68. Aside from preparatory work, parties may also spend substantial time at a mandatory conference and may be required to attend more than one conference. Nearly all respondents to the survey (95%) agreed or strongly agreed that, on average, the majority of outstanding claims remain unresolved after attending the compulsory conference.

The additional resources and time now spent on a PABO does not necessarily result in better bargaining outcomes.

69. There are additional drains on union resources concerning the ballot itself. Under the Act ballots can only be conducted by eligible protected action ballot agents. These include the Australian Electoral Commission (AEC) and others who have been approved by the Commission as meeting certain criteria.

70. Since the outbreak of COVID-19, the AEC conducts postal ballots for industrial action. Such ballots take longer to be held, as workers are dependent on the postal system for both the receipt and return of their ballot. On average, this could be 10 – 20 working days longer than ballots conducted electronically by other eligible protected action ballot agents.

71. Bargaining representatives are required by the Act to pay a fee for service to any eligible protected ballot agent who is not the AEC. As such, unions either pay for momentum to continue or wait for the longer delay ballot to be conducted by the AEC.

72. The AMWU is of the view that if a ballot is required to occur then it should be able to be held by the union itself, under proper safeguards to ensure the legitimacy of the ballot. This would minimise additional costs of paying for ballot agents, ensuring that member's money is not ill spent.

Case Study 5

After 9 bargaining meetings throughout Apil – August 2023, the AMWU applied for a PABO on behalf of its members at a Steel Manufacturing company and the order was granted on 8 August 2023. Two other union bargaining representatives were involved in the process (Combined Unions)

On 8 August 2023, the Commission directed the bargaining representatives to attend a compulsory conference on 21 August 2023 and prepare a summary of bargaining positions ahead of the conference. The summary of combined unions included the following outstanding claims; duration of the Agreement; wage increases; superannuation; manning levels; paid parental leave and PRPs (Performance Recognition Scheme) dealing with employee bonuses.

The Combined Unions, Delegates and employer bargaining representatives attended the conference at 10am, 21 August 2023. The conferences played out as followed:

i. Commenced with a joint discussion with all bargaining representatives to expand on the matters contained in the summary;
ii. The Commissioner led a private conference with the combined unions at 12.45pm;
iii. The Commissioner led a private conference with the employer bargaining representative at 1.15pm;
iv. Joint discussions with bargaining representatives resumed at 2.35pm; and
v. The conference concluded at 2:45 pm.

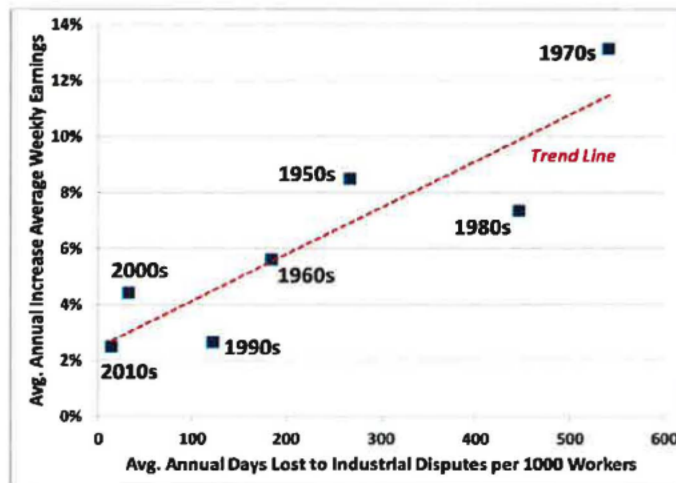
Over the nearly 5 hours spent in the conference there was no substantial progress on the outstanding items. For the AMWU the only takeaway from the conference was a request by the Commission to provide the specific metrics for the PRPS bonus.

Hinders bargaining and wage Growth

73. The complex and restrictive industrial relations framework provides inadequate support for workers to flex any bargaining power through industrial action.[19] Historical data supports that more frequent industrial action is associated with faster wage growth.[20] Figure 2demonstrates that higher averages of industrial disputes coincide with higher averages of weekly earnings, and vice versa, lower averages of industrial disputes coincide with lower averages of weekly earnings.[21] While declining industrial action is not the sole reason for wage stagnation, industrial action plays a significant role in empowering workers to bargain for better wages.

> *"The right to strike is necessary to support collective bargaining. Without the right to strike, collective bargaining is no more than collective begging."*
> **John Hendy, QC, President, International Centre for Trade Union Rights**

Figure 2: Work Stoppages and Wage Growth, 1950-2017



Recommendation that the Bill be amended to make it easier for workers to initiate bargaining and take industrial action in support of their claims.

[19] *Josh Bornstein, 'Employees are losing: Have workplace laws gone too far?' (2018) 61(3) Practitioner Review 439, 448.*
[20] *Standford (n 22) 6.*
[21] *Ibid*

APPENDIX A – LIST OF OBSTACLES TO TAKE PROTECTED ACTION

1. Before workers can take industrial action, the employee claim action must be authorised by a protected action ballot order (PABO) and the employees must vote in favour of taking the action.[22]
2. A bargaining representative must first apply to the Fair Work Commission (FWC) for approval to hold a protected action ballot. [23]
3. An application for a PABO must not be made earlier than 30 days before the nominal expiry date of any existing enterprise agreement[24] and must not be made before there has been a notification time in relation to the proposed enterprise agreement.[25]
4. Only employees who will be covered by the proposed enterprise agreement, or their bargaining representative, can apply for a PABO. [26]
5. Only employees who will be covered by the proposed enterprise agreement and covered by the PABO can vote and engage in industrial action. [27]
6. After a bargaining representative has applied for a PABO an employer can object to the PABO on the following basis
    i. The bargaining representative is not genuinely trying to reach agreement. [28]
    ii. There are exceptional circumstances that mean that the 3 working day notice needs to be extended to up to 7 days. [29]
    iii. The proposed actions are not sufficiently clear.[30]
7. Industrial action can be taken by workers only if at least 50% of people who are on the roll of voters vote in the ballot and more than 50% vote in favour. [31]
8. Employee claim action must not be in support of or to advance claims to include unlawful terms in the agreement.[32]

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[22] *Ibid s.437 and s.459.*
[23] *Fair Work Act 2009 (Cth) s.437.*
[24] *Ibid s.438.*
[25] *Ibid s.437(2A).*
[26] *Ibid s. 437(5).*
[27] *Ibid s. 453.*
[28] *Ibid s. 443(1)(b).*
[29] *Ibid s.443(5).*
[30] *Total Marine Services Pty Ltd v Maritime Union of Australia [2009] FWAFB 368 (Watson VP, Hamberger SDP, Roberts C, 9 October 2009)*
[31] *Ibid s. 459.*
[32] *FW Act (n 1) s.409.*

9. A bargaining representative of an employee who will be covered by the proposed enterprise agreement must not be engaging in pattern bargaining.[33]
10. Employee claim action must not, if it is being organised or engaged in by a bargaining representative, relate to a significant extent to a demarcation dispute or contravene a Commission order that relates to a significant extent to a demarcation dispute.
11. Industrial action may only take the form as prescribed in the FW Act.[34]
12. Secondary boycotts are prohibited.[35]
13. Prior to any industrial action being engaged in, written notice must be given to the employer by the bargaining representative that is organising the industrial action.[36] If the notice or industrial action fails to comply with the PABO, than any action taken will not be protected.
14. The industrial action must be a type of action authorised by the results of the PABO[37].
15. Industrial action must commence within 30 days of those results being declared.[38]
16. The Commission must suspend or terminate protected industrial if the following is satisfied:
    i. Endangering the life, personal safety, health or welfare of the population or part of it.[39]
    ii. significant damage to the Australian economy or an important part of it.[40]
    iii. significant economic harm to the employer or employees who will be covered by the agreement.[41]
    iv. Significant harm to third party.[42]
    v. bargaining representatives would benefit from a cooling-off period (on application by a bargaining representative).[43]
17. The Minister for Employment can make a ministerial declaration terminating protected industrial action if that action is threatening or would threaten to[44]:
    i. endanger the life, personal safety, health or welfare of the population or part of it; or
    ii. cause significant damage to the Australian economy or an important part of it.

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[33] *Ibid*
[34] *Ibid s.19.*
[35] *Competition and Consumer Act 2010 (Cth) s. 45D.*
[36] *FW Act (n 1) s.414(1).*
[37] *Ibid s.409(1)(b).*
[38] *Ibid s.459(d).*
[39] *Ibid s. 424*
[40] *Ibid s.424.*
[41] *Ibid s.423.*
[42] *Ibid s. 426.*
[43] *Ibid s.425.*
[44] *Ibid s.431.*