Submission to the Senate Education and Employment Legislation Committee Inquiry,

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

Submission by

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Dear Honourable Members of the Committee,

We welcome this opportunity to make a submission to the Senate Education and Employment Legislation Committee's inquiry into the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 ('the Secure Jobs, Better Pay Bill').

Our submission is based our latest, forthcoming blind peer-reviewed research on the termination of nominally expired enterprise agreements under s.225 provision of the Fair Work Act 2009. This is the most comprehensive analysis available to date on this topic and has been accepted for publication with the *Australian Journal of Labour Law*.

Below, we outline some of the key insights from our study, that we hope may be of assistance to the Committee, particularly in relation to two aspects of the Secure Jobs, Better Pay, namely**:**

- PART 12—TERMINATION OF ENTERPRISE AGREEMENTS AFTER NOMINAL EXPIRY DATE, and
- PART 13—SUNSETTING OF "ZOMBIE" AGREEMENTS ETC.

Key points

We make the following key points:

1. We support narrowing the circumstances in which enterprise agreements may be terminated after the nominal expiry date
2. We support automatic termination of enterprise agreements created under legislation prior to the Fair Work Act
3. We have undertaken extensive analysis of every application to the FWC from 2009 to March 2022 to terminate enterprise agreements. Following is a is an overview of key insights from our attached research article.

Background of the Study

Following the Fair Work Commission Full Bench's decision in *Re Aurizon Operations Ltd* there was a rise in applications to terminate nominally expired enterprise agreements under s.225 of the Fair Work Act. This led some to claim that the *Aurizon* decision precipitated an increase in managerial assertiveness, while others viewed it as a sign of a broken bargaining system.

The main question that we sought to answer with our study was:

- *What explains changes in the rate of s.225 termination applications since introduction of the Fair Work Act?*

We further examined the related sub-questions:

- *To what extent have s.225 termination applications been contentious?*
- *How did the 2015 Aurizon decision affect the observed rate of applications?*
- *What is the prevalence of parties making s.225 applications during enterprise bargaining?*
- *How has the Fair Work Commission dealt with s.225 applications?*

To answer these questions, we evaluated every published s.225 decision of the Fair Work Commission (FWC) from the commencement of the Act to March 2022. Where earlier scholarship on this issue was based on relatively small sample sizes, we undertook a comprehensive analysis based on 1807 publicly available s.225 decisions as well as considered appeal decisions (s.604) of the Full Bench in relation to s.225 decisions. In the 2015 *Aurizon* decision, a Full Bench of the FWC found that the employer's request to terminate its 12 remaining enterprise agreements, which were then being re-negotiated, was not 'counter to the object of a fair framework for collective bargaining and facilitating good faith bargaining'.[1] This decision was significant as it reversed the previous approach to the 'public interest test' that had considered the parties' private interests are not public interest considerations. The FWC Full Bench found that this previous approach had resulted in a predisposition against the termination of nominally expired enterprise agreements.[2] However, since *Aurizon*, there has been a high threshold that employees and unions must satisfy to obstruct an employer-initiated application to terminate a nominally expired enterprise agreement. McCrystal has argued that under current case law 'it is virtually impossible to construct the impact of termination of an agreement on the employees concerned as contrary to the public interest'.[3]

Our main findings

- The vast majority of s.225 applications over the assessed period were uncontroversial, and 42% of them related to nominally expired agreements covering no employees.
- The rate of contested terminations — measured as where an application was opposed by an employee, union, or employer — has remained relatively stable over time. Prior to the Aurizon case the annual application rate was already increasing, although there does appear to be some correlation between the FWC's reframing of the public interest test and employer applications to terminate enterprise agreements. Given that few enterprise agreements had nominally expired in the early years of the FW Act's operation, the raw number sheds little light on the existence of a causal connection.
- The majority of applications under s.225 between 2010-2022 were made by employers (93.7 percent) while employees and unions (6.0 percent) applied infrequently.
- 1.3% of all employer-initiated applications that resulted in a decision by the FWC were made in the context of ongoing enterprise bargaining negotiations.
- This number, however, does not reflect nor capture the likely significant 'shadow effect' of the Aurizon decision, whereby some employers felt emboldened to use the threat of invoking the s.225 provisions. Threats to make a s.225 application can have a significant effect on negotiations
- The most common reason given by employers (42 percent) for seeking to terminate a nominally expired agreement was that there were no employees covered by the instrument. The next most common reason given was to revert to the conditions of the modern award (13 percent). We recognise that employers may not fully disclose to the FWC their motivations for applying to

[1] (2015) 249 IR 55; [2015] FWCFB 540 (22 April 2015) *(Aurizon)*; upheld by the Full Federal Court, see [2015] FCAFC 126.
[2] *Aurizon,* above n 1, at [142].
[3] S McCrystal, 'Termination of Enterprise Agreements under the Fair Work Act 2009 (Cth) and Final Offer Arbitration' (2018) 31 *AJLL* 131.

terminate agreements, although the details of the decisions generally provided sufficient detail to ascertain whether the termination was taking place in the context of enterprise bargaining.

- Three primary factors contributed to the increase in terminations of nominally expired agreements under s.225 of the Fair Work Act.
    - Collective agreement-based transitional instruments (CABTIs), which should have been lodged under Sch. 3, Item 16 of the *FW Transitional Act*, contributed 16.6 percent of s.225 applications related – i.e., there is considerable pollution in the aggregate data. The termination of collective agreement-based transitional instruments relates to agreements made under previous regimes, primarily 'Work Choices', which were not subject to the better-off-overall-test. FWC members frequently used their discretion[4] to waive this irregularity, reflecting a level of bureaucratic efficiency and pragmatism on part of the FWC.
    - Almost one fifth of all terminated agreements related to the resources sector and its economic activities. The large number of s.225 applications from the sector results from the way in which the agreements are structured, the economic context during which they were concluded, and the appetite for industrial risks of lead firms within the sector.
    - The increase of termination applications during the operation of the Fair Work Act, should be considered in light of the current safety-net, particularly the functioning of the modern award system. The data suggest that a growing number of employers, particularly in relatively low-paid sectors like retail and hospitality, reverted to the applicable modern awards, not to reduce pay and conditions, but because they provided greater administrative and operational efficiency and certainty in comparison to the dated, expired agreements.

Insight for the Secure Jobs, Better Pay Bill

<u>Re termination of nominally expired enterprise agreements (PART 12—TERMINATION OF ENTERPRISE AGREEMENTS AFTER NOMINAL EXPIRY DATE).</u>

As our findings revealed, termination applications by employers during protracted negotiations represent only a small proportion of all s.225 applications. Nonetheless, the ability to terminate nominally expired agreements in such instances heavily favours employers over employees in the bargaining process — with employers effectively wielding the threat to materially reduce conditions of employment and in most instance the income and living standards of employee.

The proposed changes to s.226 will, if passed, likely make it less attractive for employers to use the termination provision of the Act as a bargaining tactic. It is further likely to reduce the 'shadow effect', taking some of the sting out of the threat of termination. We anticipate that although not fully preventing inimical terminations, these proposed amendments will go some way to mitigate the impact of terminations on affected employees. The amendments outline in the proposed s.226 a range of matters that the Commission should 'consider' (s.226(3)) and have 'regard to' (s.226(4)) before termination, what the FWC can impose upon parties as conditions for termination could however be made more explicit. This could give the Commission greater discretion in dealing with unforeseen circumstances.

We further note that the proposed 'guarantee of termination entitlements' protections (s.226A) only relate to one adverse outcome of the termination of a nominally expired agreement, namely

[4] FW Act s.586(b)

watered-down redundancy provisions. The Committee may want to consider whether it appropriate to widen the scope of the of undertakings that the FWC could demand from employers as part of a termination in the context of organisational redundancies, insolvency, or bankruptcy. It is still feasible under the amendments to encounter situations where terminations can have a material impact on conditions of employment and result in a reduction in earnings. Moreover, the Committee may want to consider that the more narrow grounds under which termination can be pursued may invite some employers to initiate organisational change and redundancy processes in order to qualify for the termination of an unwanted nominally expired agreement.

Re transitional-instruments (PART 13—SUNSETTING OF "ZOMBIE" AGREEMENTS ETC).

We welcome the Bill's intention to deal with the ongoing issue of agreements from previous workplace regimes. As reflected in our findings, there was a significant stock of CABTI-agreements, at times referred to as zombie-agreements,[5] that were dealt with by the FWC under s.225. Under these agreements employers are legally able to provide for pay and conditions inferior to applicable modern awards. The current lack of a sunset provision for transitional instruments under the Act was a fundamental flaw in its original design.

The current safety net of modern awards operates differently in terms of purpose, coverage, and content to awards of the past,[6] nonetheless we found that the modern awards system often can provide advantages to employees in comparison to the alternative of remaining on inferior nominally expired agreements, both CABTIs as well as nominally expired enterprise agreements. For instance, modern awards offer open-ended and ongoing annual wage increases whereas wages under nominally expired agreements are often frozen. This problem, while addressed for CABTIs through the proposed amendment, will remain however for employees whose enterprise agreements have not kept up with increases in the modern award system. The Committee might want to consider the latter issue as well.

[5] See, eg, 'Retrospectivity rejected as bench exhumes zombie deal', *Workplace Express*, 29 January 2021; see also 'Time's up for zombie deals: FWC', *Workplace Express,* 13 January 2022.
[6] A Stewart and M Bray, 'Modern Awards under the Fair Work Act' (2020) *AJLL* at 52.