

FAIR WORK AMENDMENT (SUPPORTING AUSTRALIA'S JOBS AND ECONOMIC RECOVERY) BILL 2021

SENATE EDUCATION AND EMPLOYMENT COMMITTEE – LEGISLATION

ANSWERS TO QUESTIONS ON NOTICE – ACCI

(Follow up to ACCI's appearance of 19 February 2021)

Question 1

Senator SHELDON: Thank you for joining us, Mr Barklamb. I want to go back to something to clarify non-monetary benefits. Someone could be being trained by their employer now in paid time, and yet a new industrial agreement could say, 'You'll now have to pay for that training by having a reduction in your penalty rates, a reduction in your hourly rate or a reduction in other monetary arrangements.' This act allows that to happen, doesn't it?

Mr Barklamb: I'm not aware of the example. We'd have to have a look at that. Our general principle as an organisation is that employers pay for workplace training in accordance with the law and in other areas in accordance with government subsidies, available schemes and the like. But, as a general principle, employers would pay for discretionary training. Something that's a point of optional career development for an employee might be a non-monetary benefit, but I don't accept that you would localise in, necessarily, on a penalty rate. That wouldn't be the way we understand the application of the better off overall test in that circumstance.

1. Senator Sheldon's question appears to be based on the following from the explanatory memorandum¹, fourth dot point:

241. Non-monetary benefits may include, for example:

- flexible working arrangements;
- time off in lieu;
- time off to participate in community service activity;
- provision of training; or
- health care benefits.

¹ Fair Work Amendment (Supporting 46 House of Representatives Australia's Jobs and Economic Recovery) Bill 2020, EM, p.46

2. The amendment concerned is at Item 25 of Schedule 3 of the Bill, for proposed s 193(8)(b). In relation to passing the Better Of Overall Test (BOOT) the amendments would add:

(b) the other matters the FWC may have regard to include the overall benefits (including non-monetary benefits) an award covered employee or prospective award covered employee would receive under the agreement when compared to the relevant modern award; and

3. This arises in relation to essentially optional training opportunities, and not to:
 - a. Training required under an award.
 - b. Training that is a condition of employment.
 - c. Training required to operate machinery or vehicles.
 - d. Training agreed contractually as a term of engagement.
4. Examples of what could be captured under 'provision of training' in this context may include the following (which are not compulsory in any setting but can increase employability and have value to employees):
 - a. Certificate IV in Front Line Management.
 - b. Certificate IV in Training and Assessment, another qualification that has high value for both employer and employee.
5. The further premise of the Senator's question does not stand, and the scenario painted (an employer targeting penalty rates) cannot happen, for the following reasons:
 - a. The employee cannot be worse off. The existing Julia Gillard authored BOOT will remain in s 193 of the Fair Work Act, and an employee cannot be left worse off by the agreement which is approved.
 - i. A scenario in which employees are presently trained at the employer's expense, but under an agreement would assume the cost of training, with a pay reduction rather than increase would trigger very close examination by the Commission, and the applicant would need to satisfy the Commission that such an agreement could or should be approved.
 - b. The employer will still have to explain the terms of the agreement and its impact (s 180(3)(c)) to employees. Any reduction in take home pay would need to be agreed to by employees through an informed vote, and employees would be free to reject any proposal such as that Senator Sheldon is positing. The democratic vote is an important protection against the scenario the Senator posits.

- c. The Commission member this comes before may well take an employer to s 189, and ask why such an agreement should not be considered under that avenue under the Fair Work Act. The Commission may well demand to be satisfied that exceptional circumstances exist to even consider an agreement in the terms the Senator suggests.
 - d. An employer can at no point fail to train people as necessary to work safely. So for example, at no point could an employer make an employee agree to lower rates of pay, or threaten not to pay for forklift license training if that were necessary for their job.
 - e. The highlighting of penalty rates seems misplaced. It seems fanciful to suggest that an employer would ever communicate that the only way it could train employees would be to reduce take home pay and in particular penalty rates.
 - i. The reality is that the third reading version of the Bill which passed the House of Representatives on 23 February 2021 omits the previously proposed changes to s 189².
 - ii. With that, the scare campaign on penalty rates, cuts to take home pay and employees being worse off (which ACCI also considered baseless) must end. There is simply no basis for the Opposition, unions or other interests to continue to assert that pay will be cut by the Bill.
6. Where employer funded training is currently mandatory, or is a term of an employee's contract or engagement we see no basis for that to change under the proposed amendments in Schedule 3, Part 5 of the Bill.
7. We strongly and directly refute any suggestion that employers are going to use clearer scope for the FWC to take into account what employees actually value, in its application of the protective safety net of the BOOT, to cost shift the costs of training to employees through lower take home pay.

² Previous Schedule 3, Item 19, amending s 189.

Question 2 (Scott)

Senator SMALL: I have one more question, if I can. You mentioned increased earnings for employees under agreement making. Are you aware of what that is, on average?

Mr Barklamb: I knew there would be one piece of data I didn't have with me. If we may take that on notice, we'll give you a further answer on that.

Senator SMALL: Thanks.

8. Delivering higher returns to both employers and employees lies at the very core of the enterprise bargaining system.
 - a. The fundamental purpose of bargaining is as an alternative option to negotiate pay and conditions, which can deliver mutual reward and higher wage outcomes.
 - b. Whilst advancing very different recommendations for change from different perspectives, both employers and unions are effectively arguing that enterprise bargaining that works better, and delivers higher wage increases to more employees, would be an important part of returning Australia towards longer-term trend levels of average wages growth.³
9. ACCI cites two (2) pieces of evidence on what could be termed the agreement making premium of pay in excess of award rates.

AWRS Survey⁴

10. In 2015 the Fair Work Commission (FWC) released the findings of its Australian Workplace Relations Study, which was a major study of outcomes under the Fair Work Act, and followed the major AWIRS study of 1995.
11. This survey showed the following on pay outcomes between awards and enterprise agreements:

³ Albeit that reduced average aggregate wages growth and changes in the wages v capital share of growth appear to be increasingly common across developed economies with very different collective bargaining systems, and both strong and weak union representation.

⁴ <https://www.fwc.gov.au/documents/awrs/AWRS-First-Findings.pdf>

Table 5.12: Average hourly ordinary time cash earnings (AHOTCE) for non-casual employees, by method of setting pay and ratio of female to male earnings

	Female (\$)	Male (\$)	Ratio of female to male
Non-managerial employees	42.36	51.20	0.83
Negotiated amount with my employer	47.98	57.58	0.83
By an enterprise agreement	44.12	43.53	1.01
By an award	32.77	35.54	0.92
Market rate (more than the award/standard rate)	41.49	50.45	0.82
All employees	44.43	55.79	0.80
Negotiated amount with my employer	51.21	63.49	0.81
By an enterprise agreement	45.26	45.14	1.00
By an award	33.09	36.11	0.92
Market rate (more than the award/standard rate)	42.46	51.55	0.82

Source: AWRS 2014, Employee survey.

Base = 4128 non-managerial employees and 5090 employees in total. Excludes persons aged below 21 years. Also excludes persons employed under an apprenticeship or traineeship and persons who reported hourly earnings in the top and bottom 5% of the hourly earnings distribution.

Note: Hourly wage rates are calculated using employees' reported standard hours earnings in the last pay period. Respondents who did not receive remuneration for standard hours (a base salary) are excluded.

For the purposes of this table, non-managerial employees are those classified to ANZSCO categories other than the ANZSCO

Note: 1-digit group Managers.

12. This shows that:
 - a. Women on enterprise agreements (\$45.26) earned 36.8% more than women on awards (\$33.09).
 - b. Men on enterprise agreements (\$45.14) earned 25.0% more than men on awards (\$36.11).
13. This is a demonstration of the 'agreement making premium', above average earnings under awards. As a nation to do better we need to better support and facilitate more employees securing this premium through agreement making.
14. The following further table from the AWRS Survey (2014) is also relevant:

Table 5.13: Enterprise agreement pay setting structures compared to awards by Industry, per cent of enterprises with an enterprise agreement in place

Industry	Replicate award rates (%)	Sit just above the award wage rates (%)	Sit well above award wage rates (%)	Enterprise agreement wages have not been compared to award(s) (%)	Other (%)	Unsure (%)
Mining	0.0	6.6	84.4	6.8	0.0	2.2
Manufacturing	4.7	24.9	70.6	1.2	0.7	0.7
Construction	3.6	17.8	74.0	0.5	0.0	4.1
Wholesale trade	2.8	14.2	69.6	0.0	0.0	13.3
Retail trade	27.4	30.9	28.1	0.0	11.1	0.0
Accommodation and food services	13.1	42.7	33.7	1.1	1.1	7.7
Transport, postal and warehousing	5.3	34.2	58.9	1.9	1.1	1.9
Rental, hiring and real estate services	15.1	39.3	75.8	0.0	0.0	0.0
Professional, scientific and technical services	8.3	8.3	83.5	0.0	0.0	0.0
Administrative and support services	13.7	27.3	45.9	0.0	3.1	6.2
Education and training	12.2	24.6	54.3	1.0	0.0	7.1
Health care and social assistance	21.8	42.9	34.4	0.9	0.9	0.9
Arts and recreation services	7.1	40.3	44.4	0.0	0.0	8.2
Other services	2.2	37.3	44.0	14.2	0.0	4.5
All Industries	9.1	27.3	58.8	1.3	1.1	3.7

Source: AWRS 2014, Employee Relations survey.
Base = 812 enterprises.

15. This shows that 58.8% of all enterprise agreements pay well above award wage rates, and that only a small or very small minority of enterprise agreements in any industry fail to provide a clear and significant pay premium in excess of awards.
16. It also shows that in most private sector industries, the majority of enterprises that have an enterprise agreement in place, pay well above award rates.

Trends in Enterprise Bargaining and the Wage Price Index

17. ACCI has also compared changes in the ABS Wage Price Index (WPI) to average annual wage increases under private sector agreements approved during that quarter, as recorded by the Attorney General's Department's long running Trends in Federal Enterprise Bargaining series⁵.

⁵ <https://www.ag.gov.au/industrial-relations/enterprise-agreements-data/trends-federal-enterprise-bargaining>

18. We have produced the following table based on this data.

	Q1-18	Q2-18	Q3-18	Q4-18	Q1-19	Q2-19	Q3-19	Q4-19
EBA AAWI ⁶	2.7	2.8	3.0	3.0	2.9	2.9	2.7	2.7
WPI ⁷	2.0	2.1	2.3	2.3	2.3	2.3	2.2	2.2

	Q1-20	Q2-20	Q3-20
EBA AAWI	2.9	3.0	2.7
WPI	2.2	1.8	1.4

19. As would be expected, enterprise bargaining consistently yields higher wage outcomes for employees (EBA AAWI) than employees secure generally across the Australian economy (the WPI).
20. Despite a decade of decline in enterprise bargaining, and too few Australian workplaces pursuing this course, when bargaining does occur and agreements are made, they deliver higher wage increases than are payable to the average level across all methods of setting pay.
21. In 2020 as wage growth slowed further, enterprise agreements continued to deliver increases in excess of growth in both the WPI and the CPI.

The take-out point

22. Enterprise bargaining is good for employees; at all stages of the economic cycle it delivers higher wage increases than employees are securing on average across the system, and higher wages than employees working on awards.
23. The Fair Work Act should encourage more employees and employers to bargain and secure higher wage outcomes. However it is having precisely the opposite effect as bargaining coverage declines, year on year. The mechanism that clearly delivers higher wages has been dying a slow and painful death since the major amendments of 2009.
24. Those who are genuinely interested in reversing slow wage growth and seeing employees contribute to and benefit from recovery should support the Bill, not oppose it.
25. The changes in Schedule 3 of the Bill will in combination make employers and employees more confident to give bargaining a go and make agreements based on genuine negotiations, and in doing so will give more Australians access to higher pay increases.
26. Senators should not be bystanders to the death of enterprise bargaining, they should step in and resuscitate it by passing the measures in the Omnibus Bill.

⁶ Average Annualised Wage Increases in Enterprise Agreements newly approved in each quarter.

⁷Percentage change in the Wage Price Index.