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Central Committee

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Senate Education and Employment Legislation Committee

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The Committee Secretariat

Fair Work Amendment (Supporting Australia's Jobs Economic Recovery) Bill 2020 (SAJER bill).

The Communist Party of Australia welcomes the opportunity to make this submission to the Senate Education and Employment Legislation Committee Inquiry into the SAJER Bill.

We make this submission to raise concerns we have that this Bill will seriously undermine the rights of workers and their unions hitting the most vulnerable parts of the workforce hardest. This bill is deceptive in the way its provisions are couched. The Bill maintains the language and structures of Labor's Fair Work Act (FWA) but cuts key measures contained within it. A more honest name for the bill would be "Supporting Private Profit Growth."

For decades now businesses have been making money by taking more of the economic pie from their workers rather than growing it. The process of suppressing wage growth in Australia began 40 years ago accompanied by numerous waves of "IR reform" that have allowed businesses to escape bargaining with employees represented by their trade unions, and weakening unions. In most private-sector workplaces, bargaining has been eliminated and replaced by managerial decree. During this time, we saw the rise of the "working poor".

Already Australia violates international legal standards. The International Labour Organisation has repeatedly found that Australia's anti-union laws breach its international legal obligations and has requested the federal government amend them to bring them into line.
At its core the current neoliberal project this government is trying to implement can serve no purpose but to transfer even more wealth away from workers in favour of business.

The Communist Party of Australia rejects any further undermining of rights and conditions for workers and their organisations in this country and calls on Senators to reject this anti-worker SAJER Bill.

Enterprise Agreements (Schedule 3)

This Bill sets out to further deregulate the workforce under the guise of streamlining approval processes. It removes much of the current provisions for the Fair Work Commission (FWC) to forensically examine proposed agreements that, although weak in the current Act, provides at least some level of scrutiny over workers' rights, wages and working conditions.

The Bill also allows the FWC to approve EBAs that fail the "better off overall test" (BOOT), for the next 2 two years. The proposed test is that the FWC must be satisfied that it is "appropriately taking into account all the circumstances", emphasising the view of parties, the "likely effect" of approving or not approving the agreement, the impact of COVID-19, and the extent of employee support based on the outcome of the vote.

The inquiry should note the provisions of a sunset clause after two years does nothing to allay the inherent dangers, as agreements approved under the changes to the Act will continue to be in place until replaced or terminated.

In addition, the Bill proposes permanent changes to the BOOT requiring the FWC to give "substantial weight" to the views of employers and employees, even if the agreement leaves employees worse off compared with the relevant award, and employees are unrepresented. Where employees are unrepresented this is of particular concern, creating a considerable imbalance of power in favour of the employers.

NES undermined

The ten National Employment Standards (NES) are minimum entitlements for workers that must be included in EBAs, excluding casuals. They cover various forms of paid leave, maximum working hours, termination notice provisions, redundancy pay, public holidays, and flexible work arrangements. Casuals are entitled to leave provisions, but unpaid. The bill removes the requirement that EBAs must include the NES, replacing it with a "model NES interaction term," expressing the interaction between the EBA and the NES. The wording of this term is to be determined by regulation. This transfers the legislative power from the scrutiny and vote of Parliament to the Federal Executive Council which is composed of Coalition (government) Ministers.
The FWC is also bypassed, no longer able to determine whether an EBA includes the NES. At the same time, the requirement that the terms of the NES are met in an agreement is deleted. The CPA is concerned about the impact on workers if the so-called safety net of the NES no longer applies.

Voting for EAs

Under the current Act an employer applying for certification of an agreement must conduct a ballot of employees who will be covered. Mandatory procedures must be followed; the employer is required to "take all reasonable steps to ensure that relevant employees have

access to the agreement, an appropriate explanation of its terms, and details of the voting process".

The proposed Bill will substantially weaken the pre-approval requirements so that it reads: "Employers take reasonable steps to ensure that the relevant employees are given fair and reasonable opportunity to decide whether or not to approve the agreement." Note the removal of 'all' in the amended text.

Employers will not be required to provide copies of incorporated documents which are "publicly available"; or required to explain terms and their effect for roll-overs; and the voting pool will be narrowed through the exclusion of casuals from voting on EBAs where they do not perform any work during the access period, and employees engaged after the beginning of the access period.

Employers will be seen to comply if employees have access to a copy of the written text of the agreement, and any "other material incorporated by reference in the agreement that is not publicly available."

Workers will need to follow up references if they are publicly available and be able to interpret them. The CPA believes this will effectively mean many workers will have to cast uninformed votes that may undermine their conditions. This is especially true for the 85% of the workforce who are not in a union.

The Bill allows FWC to vary or revoke decisions, including decisions to approve EBAs and variations to EBAs.

Casual Employment (Schedule 1)

The centrepiece of the Coalition government's industrial relations Omnibus bill is the schedule on casual employees. The Government asserts that the bill will "solve the problem of uncertainty, provide better avenues for job security, remove the burden of double-dipping claims and recognise employee choice."

This deceptive claim hides the threat it presents to leave entitlements, low wages, poverty and job insecurity. The Bill in reality provides employers with incentives to replace permanent workers with casuals.

Casuals have been amongst the hardest hit during the pandemic not only in losing jobs, but also having hours reduced with many of them not qualifying for JobKeeper. They accounted for around two-thirds of workers who lost their job early in the COVID (ABS Media Release 11/12/20).

The Bill allows a person to be defined as "casual" if, at the time of being hired, the offer of employment is made "on the basis that the employer makes no firm advance commitment to

continuing and indefinite work according to an agreed pattern of work…". The worker accepts the offer on that basis and becomes a casual employee as a result of that acceptance.

While it does contain conditions that must be met when the offer is made, the worker can elect to accept or reject the work. If the worker accepts the offer then they will work only as required; will be entitled to a casual loading or a specific rate of pay for casual employees; their employment is described as casual employment. These factors are the only ones that can be considered.

The bill is silent on the question of how wages and conditions are determined. It is the employer who makes the offer.

Schedule 1 includes amendments introducing a statutory definition of "casual employee" that allows employers to designate employees as casual based on offer and acceptance at the beginning of employment. The definition will apply retrospectively, inserting casual conversion provisions into the NES which will override current Award provisions. The scheme is less beneficial than many current Awards.

A new requirement will also be introduced into the NES that casuals be given "Casual Employment Information Statement" when they are employed (something akin to the current Fair Work Information Statement).

Permanent changes to the BOOT test requiring the FWC to give "substantial weight" to the views of employers and employees, even in circumstances where the agreement leaves employees worse off compared with the relevant award, and employees are unrepresented.

COVID 19 exposed the dangerous nature of insecure and casual employment. Any signs of COVID-19 or sickness in general represents a choice between pay or no pay. When pay means making rent this week, going to the doctor, eating food, and basic survival, then there is little choice for casual workers. The extensive use of casual and insecure employment is dangerous where workers have a lack of choice: work or starve.

Age care highlighted some of the dangers very well; a highly casualised workforce raises the risk of fatalities. Over 350 elderly people lost the lives when COVID spread like wildfire in aged care when the flames were fanned by the many casualised staff working across a number of centres to secure their hours and income. This also contributed greatly to the spread of the virus between centres. Senators should not agree to a Bill that carries such a risk.

High levels of casualisation, and use of "independent contractors," "self-employed," and labour hire along with privatisation increases the vulnerability of workers and their workplaces.

Conversion Provisions

The Bill contains Casual Conversion provisions described by the Government as providing a clearer pathway for conversion to permanent roles after 12 months. The bill obliges employers

to make a written offer to a casual employee if that employee has been employed for the past twelve months and during at least the last 6 months of that period, the employee has worked a regular pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to work as a full-time employee or a part time employee (as the case may be).

The offer must either for part-time or full-time work depending on the hours worked during the past six months. The worker must either accept or reject the offer in writing.

The bill, however, provides for an employer not to make a conversion offer in spite of the above conditions being met where there are “reasonable grounds” not to make the offer. The reasonable grounds are based on facts that are known, or reasonably foreseeable, at the time of deciding not to make the offer. It contains the proviso that in defining a casual worker a regular pattern of hours does not of itself ~~indicate~~ a firm advance commitment to continuing and indefinite work according to an agreed pattern of work. That will allow employers to override the earlier provision in particular during times like the pandemic.

Any employer wishing to avoid conversion could easily do so by shuffling work patterns and creating breaks in employment. Workers on the receiving end are the ones at risk and should be protected by rejecting this Bill.

Further, where an employee is found to be wrongly classified as casual the Bill will require courts to offset any casual loading paid against any underpayment claims made by employees who have been wrongly classified as casual workers. This Bill seeks to retrospectively annul the findings of *WorkPac v Rossato* effectively reversing two Court decisions, Federal and High Court, eliminating billions in back-pay owed to employees falsely classed as casual employees.

The title of the bill – Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Bill 2020 – is misleading. It will not do anything of the sort. It will encourage employers to take on more casuals in place of full-time and part-time workers.

Casuals are notoriously underpaid. They are amongst the lowest paid and most vulnerable workers. This will only drive down the wages and working conditions of all workers, resulting in lower living standards and hardship. It will not result in the creation of “real” jobs.
In terms of economic outcomes, lower wages mean reduced demand for goods and services. In the long-run this Bill will be counter-productive.

Compliance and Enforcement (Schedule 5)

Wage theft has become the business model of the 21st century with many companies taking billions of dollars out of the pockets of workers. This has been the result of government policies, laws designed to facilitate theft, loss of trade union rights and failure of government agencies to enforce legal minimum standards. This Bill will only further entrench this rising problem and should be rejected.

While the Bill increases penalties for wage-related civil contraventions it is only for corporations not small business employers. It includes an option that is calculated based on the value of the underpayment (where it is larger than the relevant civil penalty) but this penalty is only payable to the Commonwealth.

Among other things the Bill allows courts to make adverse publicity orders; increase penalties for the sham contracting provisions in the FW Act (but doesn't otherwise change them); criminalises underpayment contraventions, but utilising a strict test that is more onerous than current state and territory legislation which it will override. E.g., the offence requires a systematic pattern, dishonesty and a subjective requirement of being knowingly dishonest. The offence will not apply where the employer believes that there was no underpayment even if that belief is unreasonable or unfounded.

This is not an exhaustive list, there are several significant parts to this bill that will have a devastating impact on the working class in Australia and their communities. Workers will be subjected to lower wages, poorer working conditions, the undermining of awards, EBAs, and OH&S standards, increased casualisation, and the vulnerability and insecurity that comes with it.

For workers and the wider community, living standards would fall, and unemployment, poverty, and homelessness surge. At the same time, the share of wealth produced by workers and pocketed by big business would continue to rise, to even higher levels than the record share that exists at present.

Workers, especially low-income earners, have been the ones who have propped up the economy during COVID. In contrast, reports have found high income earners – defined as those earning above $104,000 a year – have reduced discretionary spending by 36% during COVID. Many experts now recognise there can be no economic recovery with wages stagnating or going backwards.

The Communist Party of Australia asks Senators to help stop the attacks against, and erosion of, living standards of the Australian working class.

We would welcome the opportunity to give evidence at a public hearing.

Yours sincerely,

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