Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020

Queensland Council of Unions

Submission

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Contents

Introduction

The Queensland Council of Unions (QCU) is the peak council of registered organisations representing workers in Queensland. The QCU has provided many submissions concerning employment and industrial legislation to Senate inquiries and other bodies.

This submission commences with an examination of the literature concerning low wage growth and precarious employment in Australia. Within that context of low wage growth and precarious employment, this submission addresses some of the more concerning aspects of the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* (the Bill). Various headings of this submission correspond with some, but by no means all of those aspects of the Bill. The ACTU has provided a more comprehensive submission on all aspects of the Bill and the QCU supports and adopts those submissions. This submission includes a range of recommendations in relation to various aspects of the Bill.

In summary the Bill can be considered as follows:

- It adopts a casual definition that takes away employment rights and offers a conversion, lacking in enforceability, which already exists in modern awards;
- It continues JobKeeper flexibilities that are unnecessary and a potential thin edge of the wedge for further power given to employers for an indefinite period;
- The flexible part-time provisions are dangerous as part-time employment is the new and growing form of precarious casualised employment;
- Changes to the Better off overall test (BOOT) are a weakening of employment rights and potentially will cut wages;
- Other proposals around "bargaining" are intended to create unilateral employer determination over wages and conditions of employment outcomes;
- New "Zombie" agreements resemble the old WorkChoices "Zombie" agreements aimed at cutting wages and conditions; and
- Greenfield agreements being eight years in duration are also about unilateral employer determination and avoiding bargaining in the major construction and resource sectors.

This submission concludes that, having regard to all of the problems for workers associated with the Bill, that the Senate would be best served by rejecting the Bill in its entirety.

Amendments to the Bill, as it is currently drafted, run the risk of letting through some amendments that will adversely impact workers in Queensland and Australia.

Low Wage Growth

A primary reason attributed to low wage growth is the collapse of enterprise bargaining in the private sector (Forsyth 2020; Pennington 2020A; Stanford 2020A:5). This collapse in private sector collective bargaining results from an ongoing shift in bargaining power from labour to capital (Buchanan and Oliver 2016:791; Forsyth 2020; Jacobs and Rush 2015; Kinsella and Howe 2018:43; Kyloh 2018:230; Pennington 2018). Peetz (2018) provides evidence that the financialisaton of the economy, being a shift from wages and profits from other sectors towards the finance sector, reflects this shift in power. With a mere 11 per cent of the private sector workforce now covered by collective agreements, the sharp decline in collective agreement coverage has been the result of expired agreements not being renewed; decline in new agreements being negotiated and a surge in termination of agreements (Allen and Landau 2018:405; Forsyth 2020; McCrystal 2018; Peetz 2018; Pennington 2018; Pennington 2020A). The collapse of private sector bargaining leaves workers whose pay is set by "Collective Agreements[1]" to be largely a public sector phenomenon. Governments, however, since around 2013 have entrenched wage policies limiting wage increases of between 2 and 2.5 per cent (Henderson and Stanford 2020; Stanford 2020C:5). Moreover, several large and high-profile public sector negotiations have been associated with protracted negotiations (Bishop and Cassidy 2019). These protracted negotiations have had the practical effect of a wage freeze for workers covered by collective agreements that have not had a wage increase during negotiation impasses (Henderson and Stanford 2020).

This deliberate low wage growth strategy has been replicated by Governments across Australia (Bishop and Cassidy 2019; Henderson and Stanford 2020) which has resulted in the RBA Governor urging governments to reconsider their low wage growth policy (Birch and Preston 2020:342; Marin-Guzman 2019). Of self-imposed wages policies, Jim Stanford (2020B) of the Centre for Future Work, had this to say:

[1] ABS Publication Employee Earnings and Hours, Australia categorises methods for setting pay for non-managerial employees as award only, collective agreement and individual agreement.

> The motivation for public sector wage austerity seems more ideological than fiscal or economic: pay freezes are justified with appeals to 'shared sacrifice,' and a symbolic desire to 'tighten the purse strings' at a moment when governments are about to incur their largest deficits in history.
>
> However, our research shows these arbitrary pay freezes are both unfair and economically counterproductive. Government policy should be driven by economic reality, not political optics.
>
> Public sector wage austerity imposed after the Global Financial Crisis helped 'lock in' historically slow wage growth in the private sector in the years that followed. Since then, wages in Australia have grown at their slowest sustained rate in the post-war era.

Low public sector wage growth has several compounding effects for the entire workforce. Obviously, the public sector accounts for a significant proportion of the workforce and therefore will impact upon aggregate data. However, additionally the low wage growth in the public sector has a "demonstrator effect" whereby private sector employers take their lead from the low wage growth in the public sector (Henderson 2018:124; Henderson and Stanford 2020:10).

"Individual Arrangements[2]" refers to a category used by the Australian Bureau of Statistics for pay setting. Employers have the greatest capacity to unilaterally determine pay outcomes under individual arrangements, as opposed to awards and collective agreements. Collective agreements are usually set for a period of three years with built in increases and as we have seen, private sector employers are walking away from negotiating new agreements (Pennington 2018, 2020A).

An entrenched wage growth crisis has resulted in declining living standards which has in turn created high levels of financial stress; undermined the RBA inflation target and diminished consumer spending (Peetz 2018). This has the capacity to create a deflationary environment that is likely to turn the impending recession into a depression (Stanford 2020B):

> Australia cannot tolerate a further deceleration of wage and price inflation. Inflation was already close to zero, chronically falling below the RBA's inflation target, even before the economy was hit by the double shock of bushfires and COVID-19.

[2] See footnote 1 on previous page re ABS categories

> Economy-wide deflation is associated with long-term depression. Australia cannot risk letting any COVID-19 recession turn into a depression. At this pivotal moment, governments' priority should be anchoring price expectations, supporting nominal incomes, and contributing to aggregate demand.

Precarious Employment

Inextricably linked to the crisis of low wage growth is the incidence of precarious employment. Precarious employment compounds the low wage growth crisis in Australia (Carney and Stanford 2018:9). Even before the economic crisis caused by COVID-19, the high incidence of precarious employment had long been a cause for concern. The relationship between the collapse of bargaining, low wage growth and precarious employment has been a noted feature of the Australian labour market:

> In the absence of institutional interventions to lift wages, it is likely that wages growth will remain sluggish for the foreseeable future given the limited bargaining capacity of the Australian workforce (reflected in low levels of union membership, precarious employment arrangements and a large incidence of underemployment) (Birch and Preston 2020:357).

For several decades, the high levels of precarious employment have also loomed large on consumer confidence and adversely impacted upon the growing cohort of workers dependent on employment with questionable quality. Standard employment is now the minority (Carney and Stanford 2018:17; Laß and Wooden 2020:11) and only one third of the full-time work force is in permanent full-time employment (Peetz 2020).

Unfortunately, the impact of COVID-19 has been most dramatically felt amongst those workers in precarious employment. Ordinarily, a relative decline in casual employment from one in four workers to one in five workers would be cause for some celebration. However, the impact of COVID-19 on the workforce has meant that casual employees have been the first to suffer as a result of the economic downturn through unemployment (ABS 2020). Many casual employees were also excluded from JobKeeper payments that were available for other workers (Pennington 2020B).

There are several ways in which precarious employment is manifested. Precarious employment includes casual employment, marginal self-employment (particularly part-time self-employment), temporary migrant workers, temporary employment, irregular employment, employees engaged through labour hire, and the recently growing cohort of part-time employees who are often treated as casual employees (Carney and Stanford 2018).

Self-employment reached 18 per cent of total employment in 2017. This included workers supporting themselves in the absence of regular employment, sham contracting and the gig economy (Carney and Stanford 2018:11; Laß and Wooden 2020:15). Notably, two thirds of the self-employed are not incorporated and have no employees. To illustrate the impact of the gig economy, 35 per cent of self-employed worked part-time and the average income of 60 per cent of self-employed was less than full time employees (Carney and Stanford 2018:11).

The recent growth in part-time employment has contributed to both precarious employment and the associated phenomenon of underemployment (Birch and Preston 2020; Laß and Wooden 2020; Peetz 2020). Between 2012 and 2017, part time work increased by two percentage points as a proportion of the workforce to become nearly one third of the workforce and 57 per cent of jobs created in that time were part-time (Carney and Stanford 2018:7). A concerning trend has been part-time workers being treated like casual workers (Carney and Stanford 2018:7).

Commencing in the 1980s and advancing in the 1990s and 2000s, (Carney and Stanford 2018:10; Laß and Wooden 2020:13; Peetz 2020) casual employment is perhaps the most commonly known form of precarious employment. It is apparent that casual employment is contributing to low wage growth (Healy and Nicholson 2017; Whelan 2020). While casual employment has long been a cause for concern for the union movement, it has recently become the focus of attention to a much broader audience as a result of cases in the Federal Court of Australia (de Flamingh and Bell 2020; Workplace Express 2020).

Peetz (2020) considers how we define casual employment, particularly in the context of the oxymoron that has developed of the "permanent casual". Using 2012 ABS data, Peetz breaks down casual employment as it is currently considered, as being employees who do not receive leave entitlements. It is possible to consider the broad definition used by the ABS and within that a subset that might be more akin to the narrow definition, and some would say a more realistic definition that was applied by the Federal Court in recent case law. Peetz, within what he describes as leave-deprived employees, differentiates between employees that are narrowly

defined and others that are described as unsubstantiated casuals. This narrow definition of a casual is an employee with less than 12 months employment, with no expectation of a further 12 months of employment, variable hours and pay from week to week, and no leave entitlements. In contrast to the 23.3 per cent of the workforce that fall into the category of leave deprived only 1.4 per cent of the workforce meet this narrow definition of casual employment.

The conclusion that can be drawn is that employers do not want flexibility in their workforce and that the use of casual employment is more about deprivation of entitlements to employees and deliberately creating precarious employment.

> Rather than seeing what is described in Australia as 'casual' employment as a source of flexibility for employer and employee, enabling short-term business needs to be met in the most efficient way, it may be more accurate to view it (for the majority of cases) as simply a means of depriving employees of their leave entitlements and promoting precarity and hence dependence on the employer's prerogative. (Peetz 2020:24)

The following sections of this submission address aspects of the Bill in the context of contemporary literature in relation to the fundamental economic challenges of low wage growth and precarious employment.

Casual Conversion

The proposed Section 15A of the Bill seeks to define casual employment as follows:

> **15A Meaning of casual employee 9**
>
> (1) A person is a casual employee of an employer if:
>
> (a) an offer of employment made by the employer to the person 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 for the person; and
> (b) the person accepts the offer on that basis; and
> (c) the person is an employee as a result of that acceptance.
>
> (2) For the purposes of subsection (1), in determining whether, at the time the offer is made, the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person, regard must be had only to the following considerations:

> (a) whether the employer can elect to offer work and whether the person can elect to accept or reject work;
> (b) whether the person will work only as required;
> (c) whether the employment is described as casual employment;
> (d) whether the person will be entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a fair work instrument.
>
> (3) To avoid doubt, 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.
>
> (4) To avoid doubt, the question of whether a person is a casual employee of an employer is to be assessed on the basis of the offer of employment and the acceptance of that offer, not on the basis of any subsequent conduct of either party.
>
> (5) A person who commences employment as a result of acceptance of an offer of employment in accordance with subsection (1) remains a casual employee of the employer until:
>
> (a) the employee's employment is converted to full-time or part-time employment under Division 4A of Part 2-2; or
> (b) the employee accepts an alternative offer of employment (other than as a casual employee) by the employer and commences work on that basis.

The definition is ostensibly justified as necessary to overcome what is described by the Minister as "ongoing confusion about the legal status of casual employees" (Workplace Express 2020). As we have seen from the research associated with precarious employment, the confusion arises out of employers choosing to engage workers as casuals despite there being an ongoing employment relationship that involves working a similar pattern of hours and being paid similar remuneration, week-in week-out and even year-in year-out. As we have seen from an analysis of the actual nature of casual employment very little is about flexibility in most cases (Peetz 2020). Rather, the decision to engage workers as casuals is about creating precarious employment for its own sake. Individual employers are making decision about casual employment thinking it to be in their best interests, or even perhaps believing that it is a necessity to be able to compete. However, at an aggregate level this has been counterproductive to the interconnected nature of consumer confidence, wage growth and the ability of workers to effectively bargain with their employers.

It is obvious that the sudden need on the part of the Morrison Government to define casual employment is the adverse outcome to some employers of case law in the Federal Court of Australia Full Court[3]. It is not surprising that the case law surrounding casual employment

[3] *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 (20 May 2020); *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 (16 August 2018)

emerged in the labour hire "industry". The engagement of the "permanent casual" appears to be endemic amongst labour hire providers despite the nature of the engagement. In these cases, the facts did not support a contention that simply because an employer describes a relationship as casual that will necessarily be so.

Writing about an expanding labour hire "industry" early in the twenty-first century, Hall (2002) uses data provided by the Australian Industry Group in a submission (AiG 2000).

> Amongst the ranks of labour hire employees (as distinct from contractors) casual rather than permanent employment is the overwhelming form of employment. For example, the AiG survey estimates that almost 97% of labour hire workers are engaged as 'casuals' (AiG 2000: 4).

We are unaware of any subsequent survey being undertaken by the AiG into the extent of casual employment within their labour hire membership. Literature concerning the expansion of the labour hire "industry" noted casual employment may have been appropriate, or even necessary, for the traditional uses of labour hire such as providing short-term temporary replacement employees to client employers on a needs basis. However, with the expansion of labour hire into functions such as a host employer outsourcing an entire workforce to a labour hire provider, the practice of casual employment remained even where there was an ongoing, full time employment relationship (Hall 2002; Toner and Coats 2006; Underhill 2005; Yu 2014). The QCU has continually used the reference above that purported casual employment makes up 97 per cent of the labour hire workforce and this figure has not been challenged.

Employers and the Morrison Government have used the objectionable terminology of "double-dipping" to describe circumstances where workers incorrectly designated as casual employees by their employers are in fact not casual. Employers, it is said, have paid a casual loading in lieu of other conditions for which the worker is ultimately entitled. This is despite most casual workers being financially worse off (Peetz 2020; Pennington 2020B). Rather than the double dipping projected by employer rhetoric, it is the employers in these cases that have been double-dipping by having a stable workforce.

The proposed Section 66B of the Bill, includes a casual conversion provision that requires an employer to make an offer, but that provision lacks any capacity for enforcement. Casual conversion provisions at the employee's request are contained in the proposed Section 66F of the Bill. There is nothing new about this type of casual conversion as evidenced, for example, by the long-standing provision contained in clause 11.5 of the *Manufacturing and Associated*

Industries and Occupations Award 2020. Such provisions predate the most recent decision of the Far Work Commission to make casual conversion a standard provision across modern awards (Workplace Express 2017). Casual conversion also predates the *Fair Work Act 2009* and the previous takeover of the regulation of industrial relations for incorporated employers by the Howard Government by the WorkChoices legislation in 2005 with many state tribunals including casual conversion clauses in state awards (Workplace Express 2002).

It is noted that the proposal in the Bill is for casual conversion to be contained in the National Employment Standards (NES) in the *Fair Work Act 2009* as opposed to being in awards as currently is the case. It is also noted that the proposal in the Bill is to be ostensibly employer-initiated as opposed to being at the request of the worker. The difficulty with the proposition contained in the Bill is twofold. First, there are no rights to enforce conversion and second the employer is able to escape any obligation based on undefined "reasonable business grounds" that are contained is the proposed Section 66C of the Bill. In other words, casual conversion would only take place where the employer (at the employer's sole discretion) is in favour of the conversion. As we have seen some employers, particularly labour hire providers, are heavily invested in maximising casual employment.

The proposal concerning casual conversion is a repackaging and the absurd definition of casual employment is a weakening of existing rights and conditions. It is disingenuous for government to say that these proposed provisions provide an improvement for workers when in fact it provides for a diminution. The definition renders any of the material circumstances around the engagement irrelevant, and merely relies upon nomenclature determined solely by the employer. The casual conversion provisions proposed reflect a diminution of entitlements dressed as some form of concession.

Casual employment has previously been recognised to be an issue within the Queensland jurisdiction with a growth of precarious employment under the Newman Government (McGowan 2015:48). The previous internal mechanism of public service directives have been enacted as amendments to the *Public Service Act 2008* in 2020[4]. The Queensland Industrial Relations Commission has been empowered to hear appeals from applications from casual conversion decisions of the employer. This process has provided fairness for both the employee and employer. The existence of an appeal mechanism also provides the employer

[4] Public Service and Other Legislation Amendment Bill 2020

with incentive to use casual employment for its proper purpose and not to replace secure employment.

The proposed Section 545A seeks to further perpetuate the myth of the permanent casual employee by compelling a court to reduce claims by the amount of any casual loading identified by an employer. Working in conjunction with the previously mentioned definition of casual employees that denies the actual nature of the employment relationship, the proposed section 545A is also about undoing the recent cases of the Federal Court of Australia Full Court. This provision is nothing more than statute designed to limit the entitlements to workers that have been determined by a court in accordance with the law and the relevant facts of those cases. It should be rejected accordingly.

Recommendation 1 If there is need to define casual employment, it should be done in accordance with recent jurisprudence having regard to the circumstances of the employment relationship not simply the title decided by the employer.

Recommendation 2 If casual conversion becomes a part of the NES, it requires some enforceability and right of appeal.

JobKeeper Flexibilities

By virtue of emergency amendments, employers were provided with ability to direct workers on JobKeeper to undertake duties and specify locations for where work is to be performed (including from home). The Bill seeks to continue these amendments.

It is reasonable to say that the economic recovery has exceeded everyone's expectations.

As early as June 2020, the Prime Minister has been foreshadowing the removal of JobKeeper on the basis of economic recovery (Coorey 2020). The Prime Minister reiterated this intention in January 2021 when he told businesses to prepare for life after JobKeeper wage subsidies ended in March (Coughlan 2021). Consistent with the position articulated by the Prime Minister, Treasurer Josh Frydenberg (2020) has also been readying the business community for an end to JobKeeper:

> "There will some businesses that don't make it and some jobs that cannot be saved. But it's our analysis the unemployment rate will come down next year and the year ahead even after JobKeeper comes off at the end of March."

And in relation to the economy Mr. Frydenberg said

> "The economic recovery is gaining momentum and these JobKeeper numbers are very encouraging,"
>
> "We saw 178,000 jobs being created last month. We have seen consumer confidence up across the country … and we have seen the effective unemployment rate, which is our focus, come down from 9.3 per cent down to 7.4 per cent."

In terms of employment, the Acting Prime Minister Michael McCormack said in January 2021 said:

> In fact, they're (business) telling me that JobKeeper and the other arrangements that we have in place need to be tapered off. They're telling me that they want Australians to get back to work" (Coulton 2021).

From a union perspective, the proposal to continue JobKeeper flexibilities is simply for employers to take advantage of their current position in the labour market. To allow the flexibilities to continue at this point in time represents the "thin edge of the wedge" for these flexibilities to last forever.

Recommendation 3 That JobKeeper flexibilities be removed from the legislation.

Part-time Employment

The Bill proposes a new Division 9 of Part 2-3 of the *Fair Work Act 2009*. Such provisions would allow for agreements to be reached between employers and workers that enable "flexible" working of part-time employment. These agreements would allow for the working of hours above a minimum set number to be worked without overtime.

Similar provisions exist in a range of modern awards that enable working of additional hours by part-time employees without attracting overtime. Clause 10.4 of the *Children's Services*

Award 2010 operates in such a way as to provide for flexibility in part-time employment. Subclauses (d) (i) and (ii), and (f) of Clause 10.4 that enable such arrangements are set out below (emphasis added):

> (d) (i) **Changes in the agreed regular pattern of work may only be made by agreement in writing between the employer and employee. Changes in the days to be worked or in starting and/or finishing times (whether on-going or ad hoc) may also be made by agreement in writing**. An agreement in writing may be made by any electronic means of communication.
>
> (ii) **Where agreement cannot be reached, the employer may change the days the employee is to work by giving seven days' notice in advance of the change in accordance with clause** 21—Ordinary hours of work and rostering.
>
> (f) **A part-time employee who agrees to work in excess of their normal hours will be paid at ordinary time for up to eight hours provided that the additional time worked is during the ordinary hours of operation of the early childhood service.** No part-time employee may work in excess of eight hours in any day without the payment of overtime paid for at the rates prescribed in clause 23—Overtime and penalty rates.

The experience in the childcare industry has been an almost total expansion of part-time employment. Anecdotally, we are being told that workers seeking to enter (or re-enter) that industry are being faced with a labour market where part-time employment is the only available option. A considerable number of employers in that industry have adopted the policy of only engaging workers as part-time employees offering a minimum number of hours and working them more than that minimum on a regular basis. It is a practice that is not well liked by workers in the industry and is an example of "flexibility" only being flexible in favour of the employer and not the employee. The childcare industry already has turnover problems associated with low pay (Thorpe et al 2018) and the practice of only engaging part-time employees would be exacerbating an existing problem of recruitment and retention. The Bill would seek to extend the problems experienced in the childcare industry to a range of industries that are covered by the modern awards listed in the proposed Section 168M (3).

The arguments in favour of the type of flexible part-time provision contained in the Bill is that part-time employment is preferable to casual employment. In general sense this proposition would be hard to argue with, in that the part-time employee is not deprived of the various form

of leave and other entitlements, such as notice and severance pay, that are denied the casual worker.

However, as we have seen part-time employment is emerging as the latest growing group of workers in precarious employment (Carney and Stanford 2018). That is, that there is a range of part-time employees who are being treated as casual employees. Anecdotally, it suggested that some employers are engaging workers as part-time employees to avoid paying the 25 per cent loading associated with casual employment. In these cases, rather than part-time employment being used to create greater permanency for the worker, it is being used to reduce the hourly rate of pay. Where there is no certainty as to hours worked in a part-time arrangement, the benefits of part-time employment for the employee are removed. On the other hand, the employer is able to obtain numerical flexibility without paying for the loading associated with casual employment.

While there might be some potential benefits to such a provision, it is our submission that consideration of these issues should be undertaken either at an industry level through the Fair Work Commission processes for modern awards or at an enterprise level through bargaining. The concern is that the standardisation of a provision within the legislation to allow part-time employees to work additional hours without overtime will exacerbate the growing trend of part-time employees being treated as casuals. In that sense the expansion of such a practice would be counterproductive to creating a more stable workforce and would contribute to the ongoing problems associated with precarious employment. That is, such provision contained in the legislation and therefore having general application could further fuel further declines in consumer confidence, via continued low wage growth and precarious employment.

Recommendation 4 Flexible part-time employment should not be extended by this Bill.

Approval of Agreements

The Bill at the proposed Section 254AA provides that the only parties allowed to make submissions about the appropriateness of agreements will be the parties to those agreements. s.590(1) of the *Fair Work Act 2009* provides that the Commission may "inform itself in relation to any matter before it in such manner as it considers appropriate." The Bill seeks to remove the Fair Work Commission discretion to inform itself as it sees fit. The only possible objective

for this proposed amendment is to reduce scrutiny of agreements in particular, agreements made without the knowledge or involvement of a union. It is noted that this proposal is closely linked to another proposal about employers' obligations to advise workers of their rights to be represented.

Currently, employers are supposed to provide workers with a notice of their right to be represented in negotiations. The Bill at Part 2 of Schedule 3 seeks to change this to the employer posting a notice on the Fair Work Commission's web site within 28 days of bargaining commencing. Most agreement making, where there is no union involvement does not constitute bargaining in any real sense as employers will provide their workforce with a ready prepared agreement about which there is little or no room for negotiation. In such cases the agreement is presented to workers as a *fait accompli* that the workers vote upon the terms of the agreement unilaterally created by their employer.

The manifold objectives contained in this Bill are to delay and effectively hide advice to workers about their rights to be represented; and to operate in conjunction with the process whereby a union is unable to appear to make contrary submissions to the Fair Work Commission about the agreement's compliance with the *Fair Work Act 2009*. In essence this combination of proposals is intended to reduce the process of agreement certification to *ex parte* proceedings in which the Fair Work Commission is only informed by the party seeking certification of the agreement and no other organisation. Unions will have an expert knowledge of the industry in which the agreement is to operate and will be able to assist the Fair Work Commission with determining whether the agreement is compliant with all statutory obligations.

The objectives of the Bill concerning agreement making and approval are presumably in response to the collapse of bargaining in the private sector that has occurred in the second half of the past decade. While the objective of resurrecting bargaining might appear to be honourable, in the form proposed in the Bill it is completely misguided and, if successful, will further entrench earnings inequality by continued low wage growth. By the very nature of the amendments proposed, presumably it will be those agreements about which no scrutiny is considered prudent by the employer that will flourish. That is, if the agreements have to be rushed through the Fair Work Commission and workers are denied representation and/or advice in relation to the agreement, it is questionable as to whether any new agreements made under such circumstances will add value.

Rather than diminishing worker entitlements to representation and union power to intervene in bargaining as is proposed by the Bill, if the Government was serious about promoting bargaining it would be improving worker and union power in the bargaining process. There is little doubt that the collapse of bargaining in Australia has been employer led.

There are a number of possibilities as to why employers might have walked away from enterprise bargaining, such as not seeing any further benefit in terms of productivity improvements. However, the most notable decline in bargaining, particularly in the private sector, appears to coincide with the period immediately following the *Aurizon* decision[5] (McCrystal 2018; Peetz 2018; Pennington 2018). The *Aurizon* decision drastically changed the industrial landscape to provide employers with what amounts to "take it or leave" ultimatums to the workforce. *Aurizon* overturned the previous presumption in favour of retention of conditions contained in agreements. The huge gap between negotiated conditions and the safety net with the associated financial hardship was not considered to be relevant to the public interest. Notably this precedent has been used by employers in a range of industries (McCrystal 2018:149):

> All the cases have in common the fact that the employer has been unable to get agreement from employees to their proposed changes, the changes generally involve a reduction in existing terms and conditions of engagement or removal of perceived restrictions on managerial prerogative, the parties are at impasse and there appears little prospect of reaching agreement.

Moreover, most of the recent changes (whether legislative or through case law) involving bargaining, have been aimed at reducing the capacity of workers to pursue an agenda as part of bargaining.

The *Fair Work Act 2009* does represent an improvement from the excesses of the WorkChoices legislation, however it is apparent that with that one exception of the repeal of WorkChoices, all legislative changes since the inception of protected industrial action in pursuit of bargaining claims, have been aimed at reducing the power of workers to be able to influence the outcome of bargaining. The proposed changes in the Bill would represent a continuation of that trajectory of disempowering workers and allowing for employers to unilaterally determine

[5] *Aurizon Operations Limited and Others* [2015] FWCFB 540

employment conditions. As such the proposal regarding agreement making and approval will ensue a continuation of low wage growth and further exacerbate income inequality.

Recommendation 5 that there be no dilution of the approval process by the Fair Work Commission and no limitations placed on how the Commission informs itself as to the appropriateness of an agreement for certification.

Better Off Overall Test (BOOT)

The Bill provides that in applying the BOOT the FWC is only required to consider existing rosters, when in fact a change in conditions brought about by a new agreement may give rise to new rosters.

The Bill also allows for "non-monetary benefits" to be taken into consideration for assessing if an agreement passes the BOOT. The proposed Section 193(8)(b) reads as follows:

> 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

There is no definition of non-monetary benefits in the Bill. The explanatory memorandum provides the following examples at clause 241:

> 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.

The explanatory note might be of some assistance as an extraneous aid to interpretation in the case of any ambiguity. However, as the Bill stands, there is no ambiguity in the proposed Section 193(8)(b). Accordingly, the distinct possibility exists for an arrangement for payment to be made other than in cash and an agreement to codify such an arrangement. Any such an

arrangement is potentially disastrous for workers and reintroduces a concept of "truck"[6] that has been missing from the industrial landscape since the Nineteenth Century (Yerbury and Karlsson 1992:354)

Recommendation 6 that there be no dilution of the BOOT test.

The New Zombies

The Bill does seek to abolish "Zombie" agreements still in place from WorkChoices. "Zombies" refers to the agreements that were made under the WorkChoices legislation that did not meet the no disadvantage test (NDT), being the relevant test for the certification of an agreement that provided fairness to workers.

It will, however, bring into being new "zombies" that need not pass the BOOT if the employer can demonstrate a downturn from COVID-19 and FWC determines approving the agreement would not be against the public interest.

There is a broad consensus that WorkChoices was an absolute disaster for workers and ultimately for the Howard Government that introduced the legislation when it eventually won control of the Senate (Hall 2005; Muir 2008; Van Gramberg 2013). Existing agreements continued with the creation of the *Fair Work Act 2009* by way of transitional arrangements that were intended to enable those agreements to be replaced by new agreements that were compliant with the new legislation that had restored fairness to bargaining. Obviously, some employers have sought to hold on to the competitive advantage they gain by reducing their labour costs by engaging staff on substandard conditions by not replacing the "Zombie" agreement. The following case study was provided by the United Workers Union (known as United Voice at the relevant time) and demonstrates the impact of "Zombie" agreements in a price sensitive industry such as contract cleaning.

[6] Payment other than by cash

Case Study: Fiona and Brian – Peninsula Fair Shopping Centre cleaners

Two cleaners, Fiona Quemuel and her partner, Brian Toleman, both work side by side performing identical work, however, Brian was paid the award rate and Fiona was paid below the award due to the continuing operation of an expired 'WorkChoices' agreement.

Both work at Peninsula Fair Shopping centre at Kippa-Ring on the north side of Brisbane.

Both wear the same uniform that of the principal contractor, have the same supervisor, have the same tasks to perform but both did not have the same employer.

Brian is directly employed by Trident Cleaning who has the contract to clean and provide security services for Peninsula Fair shopping centre, but Fiona was indirectly employed by Trident through a labour hire arrangement with a labour hire company trading as Workplace Central.

Fiona was on a flat rate of pay and paid the same flat hourly rate regardless of the day of the week, or the time of the day or night which she works. Fiona's hourly rate was simply the award minimum base rate.

Brian is paid under the terms and conditions of the Cleaning Services Award 2010, so he receives penalty rates at night, on the weekend and on Public Holidays.

Fiona was not paid any penalties or allowances.

Fiona stated to UVQ:

> *"I expressed an interest in cleaning work at the Peninsula Fair Shopping Centre, as my partner Brian already worked there for Trident. I gave my CV to the shopping centre management and to Trident.*
>
> *Trident management called me to a meeting at their offices and offered me a casual position. I filled out paperwork and provided my bank and superannuation details.*
>
> *About two weeks after my meeting with Trident, I received an email welcoming me to 'Workplace Central' and stating that I would be paid $23.08 per hour and that Trident Cleaning was my host employer.*
>
> *I rang Trident as no one had mentioned anything to me about working for a different company and I hadn't heard of 'Workplace Central'.*

The Trident supervisor told me that all new starters are engaged through Workplace Central as casuals on a flat pay rate regardless of the day or time you work.

I worked out over a four-week period, working just 33 hours, that I was paid $100.00 less than the award.

I spoke with a United Voice organiser who visited the site. The organiser explained to me that I was actually employed by another company related to Workplace Central, which had an expired 'WorkChoices' era certified agreement still operating. The agreement did not provide for any penalty rates or allowances.

Workplace Central had a labour hire arrangement with Trident that allowed them to provide cleaners at below award conditions.

I think it is unfair that some of us at the shopping centre who wear Trident uniforms and work alongside cleaners directly employed by Trident are not paid penalty rates or allowances, when we perform the exact same tasks every day."

United Voice Queensland officials have negotiated for Fiona to be directly employed by Trident, and she will now be paid under the award, and receive penalties and allowances, like her husband Brian.

UVQ subsequently negotiated directly with Workplace Central who have agreed to terminate their "WorkChoices" agreement by 1 January 2018.

The first questions arising from the Bill is why it has taken so long to "kill off" the old "zombies" and why the Bill allows for such a long continuation of the existing zombies. As can be seen from the above case study, unions like United Voice (now United Workers Unions) have diligently sought to assist workers remove "zombie" agreements where they are made aware of their existence. The continued existence of "zombie" agreements beyond ten years after the Australian people voted conclusively to remove WorkChoices is unacceptable to anyone concerned about fairness for workers.

So aside from continuing WorkChoices "zombies" well beyond their use by date, the Bill seeks to introduce a new form of COVID-19 "zombie". Not content to consign WorkChoices to being part of the Howard Government's nefarious history, the current Government seeks to emulate the more heinous aspects of WorkChoices.

Recommendation 7 that agreements made under legislation pre-dating the *Fair Work Act 2009* be terminated forthwith.

Recommendation 8 that no agreements be allowed that do not pass the BOOT test.

Greenfield Agreements

The Bill would allow for a Greenfield Agreement to be made for up to eight years in duration. The Queensland Council of Unions undertook research in conjunction with the Electrical Trades Union (ETU) into a roster being worked by FIFO workers in the Northern Territory (Martin 2021). This research involved a qualitative study among electrical trades workers working a challenging FIFO roster while employed during the construction phase of the INPEX LNG Project in Darwin. Results from 18 semi-structured interviews were used to examine these rosters from the perspective of workplace health and safety.

This research demonstrated that the combination of greenfield agreements and the Australian Building and Construction Commission place very severe restrictions on workers' ability to have any say in their own conditions of employment on "major" construction projects. In this case, workers were required to wait until the expiry of existing agreements before they were able to meaningfully negotiate with their respective employers about the rosters in place on site. Those rosters required the working of 60 to 70 hours per week for a four-week block in the oppressive Darwin climate. Workers also found the time 6 days off work in every five-week cycle (or swing) to be insufficient for the maintenance of their health and well-being (mental or otherwise).

In this context, the proposal to extend the period for which a greenfield agreement may operate to eight years is absurdly long. As evidenced by the research around the FIFO work undertaken by ETU members in Darwin, this proposition would further deprive workers of any realistic say in their hard-won working conditions. This proposal, along with several other proposals in the Bill, perpetuates managerial discretion and employers unilaterally dictating employment conditions regardless of the unfavourability of those conditions.

Recommendation 9 reject any extension of the operation of greenfield agreements.

Recommendation 10 clarify that workers covered by greenfield agreements are not required to continue work that endangers their safety.

Wage Theft

It is noted that the small claims jurisdiction is increased from $20,000 to $50,000. It is also noted that the Fair Work Commission is to be charged with conciliation and consent arbitration of recovery of wages claims. These are improvements to the recovery process but are fatally flawed due to the absence of compulsion to the conciliation and arbitration process. By insisting that conciliation and arbitration be voluntary, the Bill renders an otherwise good proposition useless. We have seen from other research and inquiries that underpayment has become a business model for some employers (Healy 2016:319; Queensland Parliament 2018:79; Thornthwaite 2017:262/3). The experience with employers that are defending recovery of wages claims is that they will often use any legal barrier available to avoid making payments that are owed. The Bill is perhaps drafted with the naive notion that underpayments result from errors made by employers (which certainly account for some underpayments) rather than deliberate actions to avoid legal obligations. Alternatively, the ideological bias of the current federal Government against any form of compulsory conciliation and arbitration makes it unable to introduce the policy position necessary to effect proper and inexpensive resolution to underpayments.

The Bill also seeks to introduce penalties for wage theft that are presumably intended to override recent amendments to the Criminal Code in Queensland.

The following table sets out the differences between the Queensland Criminal Code and the Omnibus Bill in relation to the criminalisation of wage theft from employees.

Comparison of Queensland Criminal Code and Omnibus Bill

Element	**Queensland Criminal Code**	**Omnibus Bill**
Test for Offence	Intention to steal from an employee is deemed fraudulent (an objective test with no need to prove intention separately to the offence)	Requirement to establish a person has dishonestly engaged in stealing in a systematic pattern (a subjective test requiring separate proof of intention to the act of underpayment)
Scope of Offence	Underpayment of any amount payable under a State or Commonwealth Act or industrial instrument (will include superannuation and long service leave)	Limited to monetary payments (does not include superannuation from SGA, long service leave from state act, & potentially other forms of leave)
Penalties	10 years max imprisonment. Note: stealing from an employer by an employee also attracts a 10-year sentence of imprisonment (max penalty)	4 years max imprisonment. 25,000 penalty units for body corporate
Accessorial Liability	Includes enablers, aiders, counsellors, or procurers of a wage theft/stealing offence	No extension to 'other persons' who are knowingly involved in an offence c/f s 550 Fair Work Act for accessorial liability for a civil contravention

Under the Queensland Criminal Code, a number of stealing offences are deemed to be fraudulent such as stealing from an employer by an employee and more recently stealing by an employer from an employee. In such cases, there is no need to prove intention of the person separately to the underpayment. If the offence is found, a court may impose a penalty in accordance with sentencing principles which will take into account factors (among others) such

as the nature of the offence, maximum and minimum penalties, and other mitigating factors[7]. In contrast, the Bill introduces a common law definition of stealing by dishonesty according to the ordinary meaning of dishonesty, requiring the prosecution to prove a separate element and higher standard of intention[8].

In terms of scope of the offence, the Queensland Criminal Code is broader than the nature of a stealing offence contained in the Bill. Section 391(6A) of the Criminal Code includes the non-payment of an amount due for the performance of work under any Act or industrial instrument (award or agreement) of the State or Commonwealth, which includes superannuation contributions under the *Superannuation Guarantee (Administration) Act 1992* (Cth) and long service leave entitlements under the *Industrial Relations Act 2016 (Qld)*.

Failure to provide superannuation contributions or long service leave would therefore not fall within the scope of the offence proposed by the Bill. Failure to pay superannuation has also proven to be a very common form of wage theft (QCU 2020:30). The 2018 Queensland Parliamentary Inquiry estimated that Queensland workers lost around $1.22 billion in wages to wage theft annually, and a further $1.12 billion in superannuation (Queensland Parliament 2018). Failure to pay superannuation contributions is of considerable concern because of its continued impact upon wage theft victims as it will adversely affect retirement incomes and continues to contribute to income inequality, pay inequity and poverty.

There is also concern that the definition of a wage offence contained in the Bill would limit wage theft to "wages" or "other monetary entitlements" which might be interpreted to exclude various other forms of leave such as annual leave entitlements.

With respect to penalties, the maximum penalty for wage theft contained in the proposed Section 324B(1) of the Bill is four years. This compares with 10 years that was introduced into similar provisions in the Queensland Criminal Code. The 10 years maximum penalty also coincides with the offence of stealing as a servant that would apply to a worker that steals from their employer. We note that the Bill considers the penalty for stealing by a worker to be two-and one-half times worse than stealing by an employer. This is consistent with the ongoing trivialisation of wage theft by the federal Government and employers.

[7] *Penalties and Sentences Act* 1992 (Qld)
[8] *Peters V R* (1998) 162 CLR 493

Finally, the Bill does not extend accessorial liability provisions to other persons for a wage theft offence. Only an organisation or individual may be prosecuted. This is in contrast to the accessorial liability provisions which were introduced in Section 550 of the *Fair Work Act 2009* for civil contraventions to specifically recognise that wage theft occurs in a number of circumstances such as where another person is 'knowingly involved' in the contravention, for example an accountant, human resources advisor, lawyer, or a franchisor for contraventions committed by a franchisee.

This is also in contrast to the wage theft offence under the Qld Criminal Code which extends criminal liability under Sections 7 and 9 of the Criminal Code to an enabler, aider, abetter, procurer or counsellor.

There are also concerns about the resourcing of the Fair Work Ombudsman (FWO) for wage theft offences. It is noted that the FWO does not have the resources to effectively enforce existing obligations on employers (Clibborn 2020:334). The QCU has previously made submission that the FWO would benefit from an external review to provide greater focus on an enforcement regime (QCU 2020:27). Aside from resourcing, which is clearly an issue, one of the major problems is that FWO operates in such a way as that it assumes underpayments to be an error (Hardy and Howe 2015:565; Parliament of Australia 2017:63). The way the FWO operates would be completely inconsistent with effectively enforcing wage theft laws.

Recommendation 11 if Wage Theft is to be introduced into the *Fair Work Act 2009* as a federal offence that the offence has penalties at least equivalent to those in the jurisdiction that already has an offence of wage theft.

Recommendation 12 provide resourcing and an effective enforcement framework for the prosecution of wage theft.

Conclusion

This submission makes several recommendations regarding the content of the Bill. There is very little, if anything, in this Bill that would advantage workers. It is disappointing that even those aspects of the Bill that are ostensibly intended to benefit workers have been drafted in such a way as to penalise workers, particularly those seeking to act collectively.

Those drafting the Bill recognise that there is a problem with the way in which some employers, most notably those who provide labour hire to guest organisations that would otherwise be the employer, engage workers as purported casual employees regardless of the on-going circumstances of the engagement of the worker in question. Rather than address the abhorrent conduct of these employers it seeks to penalise the workers by codifying a legal fiction of casual employment. The way in which the Bill defines casual employment rests all of the power unilaterally with the employer in how they describe the employment relationship. Likewise, the part-time "flexibilities" contained in the Bill run the risk of engendering that part-time employment continues to be the latest form of precarious employment.

Those drafting the Bill also recognise that bargaining has collapsed in the private sector. Rather than address the causes of this collapse the Bill seeks to further bend the rules in favour of the employer having sole discretion as to the implementation of employment conditions. The Bill seeks a return to the "take it or leave it" approach to "bargaining" advanced by the ill-fated *WorkChoices* legislation of the Howard Government. We speculate that this is intended to allow employers and prospective employers to take full advantage of labour market conditions caused by the recent recession.

Finally, the Bill recognises that wage theft is a systemic problem across Australia by criminalising some conduct. However, the Bill seeks to reduce the criminalisation aspects that exist in Queensland to tackle wage theft. On past and current practices, this leaves little hope that there will be an effective enforcement regime by the FWO.

All of this done in the context of a crisis low wage growth; growing income and wealth inequality; and interrelated on-going precarious employment. These features of the Australian labour market were palpable before the most recent recession. Such features have been exacerbated by the recent economic climate and rather than attempt to address these concerns, the Bill actually provides policy solutions that will make income inequality and precarious employment worse, not better.

Given the problems associated with the Bill we implore the Senate to reject the Bill in its entirety. Rather than ram through legislation that will adversely impact upon workers, we would ask the Senate to send the message to government to seek community and stakeholder support for policy direction and implementation.

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