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Fair Work Amendment (Tackling Job Insecurity) Bill 2012

Referral and conduct of inquiry

1.1 On 29 November 2012, the House of Representatives Selection Committee referred the Fair Work Amendment (Tackling Job Insecurity) Bill 2012 (the Bill) for inquiry and report. The text of the Bill is provided in Appendix A.

1.2 The Bill was introduced by the Member for Melbourne who was subsequently appointed to the Committee for the purposes of this inquiry.

1.3 The reason for the referral was:

> To determine whether the Bill adequately addresses the nature and effects of insecure work in Australia.[1]

1.4 The inquiry was announced by media release on 6 December 2012 and received 20 submissions. A list of submissions is provided in Appendix B.

1.5 The Bill was discharged from the Notice Paper under Standing Order 116A on 18 March 2013 and restored to the Notice Paper on 20 March 2013.[2]

1.6 A public hearing was held in Melbourne on Friday 24 May 2013. A list of witnesses is available in Appendix C.

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1 House of Representatives Selection Committee, Report No. 73, *Consideration of Bills*, 29 November 2012, p. 3.

2 aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4926

Scope of inquiry

1.7 Many submissions received by the Committee provided evidence relating to the broad nature of insecure work in Australia, however this report limits its focus to insecure work in so far as it relates directly to the Fair Work Amendment (Tackling Job Insecurity) Bill 2012. Many of the submissions make recommendations to amend the *Fair Work Act 2009* which are beyond the scope of the Bill.

1.8 This report considers on the Bill's ability to achieve its intended outcomes. It does not provide comment or make recommendations regarding the *Fair Work Act 2009* outside of the scope of the amendments proposed by the Bill.

Fair Work Commission

1.9 It is important to note that Fair Work Australia, as referred to by the Bill, was renamed the Fair Work Commission by the *Fair Work Amendment Act 2012* on 4 December 2012.

Background

Australian workforce

1.10 In November 2012, there were approximately 11.5 million employed persons working in Australia. Of these, 7.3 million (63 per cent) had paid leave entitlements. Of the remaining employed persons:

- nearly 2.2 million (19 per cent) were employees without paid leave entitlements;
- 980,000 (9 per cent) were independent contractors; and
- just over 1 million (9 per cent) were other business operators.[3]

1.11 For both males and females, the occupation group with the highest proportion of employees with paid leave entitlements was managers (95 per cent and 91 per cent respectively), followed by professionals (92 per cent and 89 per cent respectively).[4]

1.12 The occupation group with the lowest proportion of male employees with paid leave entitlements was labourers (56 per cent). The occupation group

3 Australian Bureau of Statistics (ABS), *Forms of employment*, cat. no. 6359.0, ABS, Canberra, 19 April 2013, p. 5.

4 ABS, *Forms of employment*, cat. no. 6359.0, ABS, Canberra, 19 April 2013, p. 7.

with the lowest proportion of female employees with paid leave entitlements was sales workers, and labourers (both 46 per cent).[5]

Casual employment

1.13 The Australian Bureau of Statistics (ABS) defines a casual worker as an employee who is without either paid sick or paid holiday leave entitlements. The ABS reported that the rate of casual employment arrangements in the Australian workforce has remained steady over the last ten years:

> Australia's workforce is diverse. There is diversity in employment arrangements, flexible working time patters, and in the extent of part-time and casual employment. The rate of casual employment (those without either paid sick leave and paid holiday leave entitlements) has remained relatively steady over the last ten years.[6]

Casual loadings

1.14 Casual loadings are paid to employees in lieu of certain entitlements, such as paid sick leave or paid holiday leave. This loading is provided to casual employees through minimum wages in modern awards and enterprise agreements.[7] During the award modernisation process, the former Australian Industrial Relations Commission (now the Fair Work Commission) determined that the standard casual loading in modern awards would be 25 per cent.[8]

1.15 Casual loadings are not a recent concept; there are examples of the incorporation of casual loadings in awards dating back as far as 1914. At its inception, the provision of casual loadings focused on the irregular nature of casual work. Broadly, the original concept intended to ensure that a casual worker received a similar annual income to a worker engaged in ongoing, uninterrupted employment.[9]

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5 ABS, *Forms of employment*, cat. no. 6359.0, ABS, Canberra, 19 April 2013, p. 7.

6 ABS, *Forms of employment*, cat. no. 6359.0, ABS, Canberra, 19 April 2013, p. 3.

7 Enterprise Agreements may not include a casual loading, but must ensure the employees covered by the agreement are better off overall under the agreement than under the relevant award.

8 Department of Education, Employment and Workplace Relations (DEEWR), *Submission 17*, p. 5.

9 DEEWR, *Submission 17*, p. 5.

Casual conversions

1.16 Some casual employees have a right to request permanent work through casual conversion clauses in modern awards. During the awards modernisation process, the former Australian Industrial Relations Commission (now Fair Work Commission) indicated that casual conversion provisions would be maintained where they were already an industry standard. Currently, 26 of 122 modern awards contain some form of casual conversion clause.[10]

1.17 Enterprise agreements can also include casual conversion clauses. 17 per cent of agreements, covering 24.8 per cent of employees, currently provide for conversion of casual employees to other forms of employment.[11]As enterprise agreements are usually limited to an employer's enterprise, there is greater variation in the terms of casual conversion clauses in enterprise agreements than in modern awards.[12]

Protection from unfair dismissal under the *Fair Work Act 2009*

1.18 Contracted and casual employees are granted protection from unfair dismissal under Section 382 of the *Fair Work Act 2009*, provided that they have served the requisite minimum employment period.[13]

Casual employees

1.19 Casual employees are protected from unfair dismissal if they have:

- satisfied the minimum qualifying periods;
- worked on a regular and systematic basis; and
- have a reasonable expectation of continuing engagement on a regular and systematic basis.[14]

Rolling contract employees

1.20 Rolling contract employees are not considered to have been unfairly dismissed under the *Fair Work Act 2009* if they have been engaged under a contract of employment:

- for a specified period of time;
- for a specified task; or,

10 DEEWR, *Submission 17*, p. 5.

11 DEEWR, *Submission 17*, p. 6.

12 DEEWR, *Submission 17*, p. 6.

13 The requisite minimum employment period is 12 months for employees of businesses with fewer than 15 employees and 6 months in all other cases.

14 *Fair Work Act 2009*, s. 384(2).

- for the duration of a specified season.

Provided that the employment is terminated:

- at the end of the period;
- on completion of the task; or,
- at the end of the season.[15]

Context of the inquiry

1.21 The Bill was introduced by the Member for Melbourne, Mr Adam Bandt MP. In his first reading speech, Mr Bandt stated that insecure work practices impact millions of Australians' capacity to plan for the future:

> We are now in a position in which one in four employees in this country does not enjoy paid leave. That is a national shame. It is something that we need to tackle, because it is having an effect on the ability of millions of people around this country to plan their lives and to take the kind of steps necessary that the rest of us take for granted to live a secure and planned life.[16]

1.22 In his speech, Mr Bandt referred to the reports *Lives on Hold: Unlocking the potential of Australia's workforce*, released by the Australian Council of Trade Unions (ACTU) in May 2012; and *Shifting Risk: Work and working life in Australia*, released by the ACTU in 2010.[17] He stated that these reports highlight the increasing stress placed upon workers:

> They observed that people are now required to absorb more financial, social and economic risks and therefore experience much more financial and social stress.[18]

1.23 Subsequent to the release of these reports (October 2010 and May 2012 respectively) by the ACTU and the introduction of the Bill (November 2012), the Commonwealth Government has:

- published the findings of the Fair Work Act Review;
- passed the *Fair Work Amendment Act 2012*; and
- introduced the Fair Work Act Amendment Bill 2013.

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15 *Fair Work Act 2009*, s. 386(2).

16 Adam Bandt MP, Member for Melbourne, *House of Representatives Hansard*, 26 November 2012, p. 13090.

17 Adam Bandt MP, Member for Melbourne, *House of Representatives Hansard*, 26 November 2012, p. 13090.

18 Adam Bandt MP, Member for Melbourne, *House of Representatives Hansard*, 26 November 2012, p. 13090.

1.24 It is worth noting that the *Fair Work Amendment Act 2012* and the proposed amendments of the Fair Work Amendment Bill 2013 mean that the Fair Work legislation environment is now different to the one into which the Fair Work Amendment (Tackling Job Insecurity) Bill 2012 was introduced.

Review of Fair Work Legislation

1.25 In June 2012, the Department of Education, Employment and Workplace Relations (DEEWR) published the findings of the Fair Work Act Review in a report titled *Towards more productive and equitable workplaces: an evaluation of the Fair Work legislation*.[19]

1.26 The review was conducted by a panel of three independent experts, the Fair Work Act Review Panel (the Panel), as part of the Commonwealth Government's commitment to commence a post-implementation review of the *Fair Work Act 2009* within 2 years of its full implementation. The Panel made 53 recommendations.[20]

1.27 The Panel found that the Act was broadly meeting its objectives and did not require wholesale change. The Panel made a range of, mainly technical, recommendations to improve the operation of the legislation without compromising productivity and fairness in the workplace.[21]

1.28 The *Fair Work Amendment Act 2012* was passed by the Parliament in December 2012. The Act implemented approximately one third of the Panel's recommendations. This included amendments to unfair dismissal provisions, the functions of the Fair Work Commission (FWC) and a range of technical and clarifying amendments.[22]

1.29 On 21 March 2013, the Commonwealth Government introduced the Fair Work Amendment Bill 2013. This Bill would implement further Panel recommendations.[23]

Outline of the Fair Work Amendment (Tackling Job Insecurity) Bill 2012

1.30 The Fair Work Amendment (Tackling Job Insecurity) Bill 2012 (the Bill) seeks to grant casual and rolling contract employees, and their unions, the

19 Australian Government, *Towards more productive and equitable workplaces: an evaluation of the Fair Work legislation*, DEEWR, Canberra, 15 June 2012.

20 DEEWR, *Fair Work Amendment Bill 2013: Explanatory Memorandum*, p. 1.

21 DEEWR, *Fair Work Amendment Bill 2013: Explanatory Memorandum*, p. 1.

22 DEEWR, *Fair Work Amendment Bill 2013: Explanatory Memorandum*, p. 1.

23 DEEWR, *Fair Work Amendment Bill 2013: Explanatory Memorandum*, p. 1.

right to request a 'secure employment arrangement' from their employer at any time before or after they have commenced employment.

1.31 The Bill has one Schedule of 18 amendments to the *Fair Work Act 2009*.

1.32 Item 11 inserts new Part 2-7B, setting out secure employment arrangements. Division 2 provides for requests for secure employment arrangements. Division 3 provides for the making of secure employment orders by the Fair Work Commission (FWC).

1.33 Items 12 and 13 provide penalties for contravening a secure employment order (as determined in Part 2-7B).

1.34 Item 14 places secure employment arrangements under the function of the FWC with items 15 and 16 requiring the Fair Work Commission to research the operation of Part 2-7B in relation to requests for secure employment arrangements. Item 18 provides Fair Work inspectors powers to issue compliance notices in relation to secure employment orders.

1.35 The other proposed amendments are consequential amendments.

Part 2-7B, Division 2 – Requests for secure employment arrangements

1.36 The new Part 2-7B provides for requests to change from casual or rolling contract employment to secure employment arrangements and the making of secure employment orders.

1.37 Division 2 of part 2-7B comprises two clauses. Clause 306L enables written requests from employees or by employee organisations, if requested by the employee, to change from casual employment to secure employment arrangements. The employer must provide a response to the request within 21 days, and if the request is refused, then reasons for the refusal must be provided. This clause also specifically excludes 'small business exempt casual[s]'[24].

1.38 Clause 306M is the same as Clause 306L except for replacing 'casual employees' with 'rolling contract employees'. There is no exclusion relating to small business exempt casual[s] in this clause.

Part 2-7B, Division 3 – Secure employment orders

1.39 Division 3 of Part 2-7B consists of seven clauses relating to the introduction of secure employment orders.

1.40 Clause 306N proposes that the FWC may, on receiving an application under section 306P, make any secure employment order it considers appropriate to provide, or to maintain, secure employment arrangements

24 Fair Work Amendment (Tackling Job Insecurity) Bill 2012, c. 306L(5).

for the person(s) to whom the order will apply.[25] The secure employment order must specify the employer(s) who are required to comply with the order, being the employer(s) of the relevant person(s).[26]

1.41 A secure employment order may apply to:

- any one of the following persons (a ***relevant person***):
  - a casual employee;
  - a rolling contract employee;
  - a prospective employee who, if employed at the time the application for the order was made, would be a casual employee or rolling contract employee;
  - an employee who already has a secure employment arrangement;
  - a prospective employee who, if employed at the time the application for the order was made, would have a secure employment arrangement; or
- two or more relevant persons; or
- a class of relevant persons.[27]

1.42 The class of relevant person may be described by reference to one or more of a particular:

- industry or part of an industry;
- kind of work;
- type of employment;
- employer.[28]

1.43 A secure employment order cannot apply to small business exempt casual[s].[29]

1.44 Clause 306P(1) sets out who can make an application for a secure employment order in relation to a request refused under section 306L or 306M. In the case of the employee making the request, either the employee or their representative organisation can make an application. There is also provision for the Age, Disability or Sex Discrimination Commissioners to make an application on behalf of an employee. In the case of an employee representative organisation making the request, only that organisation can make an application.[30]

25 Fair Work Amendment (Tackling Job Insecurity) Bill 2012, c. 306N(1).
26 Fair Work Amendment (Tackling Job Insecurity) Bill 2012, c. 306N(4).
27 Fair Work Amendment (Tackling Job Insecurity) Bill 2012, c. 306N(2).
28 Fair Work Amendment (Tackling Job Insecurity) Bill 2012, c. 306N(3).
29 Fair Work Amendment (Tackling Job Insecurity) Bill 2012, c. 306N(5).
30 Fair Work Amendment (Tackling Job Insecurity) Bill 2012, c. 306P(1).

1.45 Clause 306P(2) relates to applications for secure employment orders other than in relation to requests refused under sections 306L or 306M. In these circumstances, a secure employment order application can be made by the organisation that is entitled to represent the interests of the relevant person(s); or the employer organisation that is entitled to represent the industrial interests of the employer of the relevant person(s).[31]

1.46 Clause 306Q sets out matters the FWC must take into account when deciding to make a secure employment order:

- the needs of employees to have secure jobs and stable employment;
- the employer's capacity to use arrangements that are not secure employment arrangements in cases where this is genuinely appropriate, having regards to the needs of the business;
- the size of the employer(s) to whom the order will apply;
- if the application was made under section 306P(2), whether the order would apply to the same employees and prospective employees, and require the same employers to comply with it, as are covered by a relevant modern award; or,
- any other matter FWC considers relevant.[32]

1.47 Clause 306R sets out provisions regarding the content of secure employment orders. Nonetheless, the FWC, in making a secure employment order, is not limited to the seven options provided by 306R.[33]

1.48 Clause 306S allows secure employment orders to be implemented in stages as FWC thinks appropriate.

1.49 Clause 306T specifies that an employer must not contravene a secure employment order. This section links to the civil remedy provisions of the *Fair Work Act 2009* (Part 4-1) via amendment item 13. However, amendment item 17 provides that a contravention of a secure employment order is not a criminal offence.

1.50 Clause 306U deals with any inconsistency between modern awards, enterprise agreements and the secure employment orders. The term(s) of a modern award or agreement have no effect if they are less beneficial to an employee than the term(s) of the secure employment order.

31 Fair Work Amendment (Tackling Job Insecurity) Bill 2012, c. 306P(2).

32 Fair Work Amendment (Tackling Job Insecurity) Bill 2012, c. 306Q.

33 Fair Work Amendment (Tackling Job Insecurity) Bill 2012, c. 306R(2)

Stakeholders' response

1.51 The Bill attracted qualified support from unions, strong opposition from employer organisations, and support from organisations such as the Federation of Ethnic Communities' Councils of Australia (FECCA), the Australian Institute of Employment Rights (AIER) and St Vincent de Paul Society.[34]

1.52 Employer organisations all expressed concern at the Bill and rejected the proposal, for example:

> HIA strongly opposes the Bill.[35]
>
> CCI [WA] strongly opposes the passage of the Bill in its entirety.[36]
>
> I am writing on behalf of Australian Business Industrial to advise its opposition to the Fair Work Amendment (Tackling Job Insecurity) Bill 2012.[37]
>
> Ai Group strongly opposes the Bill and urges the Committee to recommend that the Bill not be passed.[38]
>
> ACCI strongly opposes these proposed new measures.[39]

1.53 By contrast, unions supported the Bill's intentions to address insecure work but expressed reservation that the Bill, as drafted, addresses the issue, for example:

> The AEU supports the Bill while recognising it as but an initial legislative response and more will be required to effectively address the unacceptable incidence and increasing rise of insecure work in Australia.[40]
>
> [The ACTU] believe that [the Bill] is insufficient on its own to effectively begin to address the issues associated with insecure work.[41]

1.54 Unions provided commentary on the broader issues of insecure work in Australia and provided advice and recommendations to amend the *Fair*

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34 Federation of Ethnic Communities' Councils of Australia (FECCA), *Submission 15*, p. 4; Australian Institute of Employment Rights (AIER), *Submission 6*, p. 2; St Vincent de Paul Society, *Submission 10*, p. 1.

35 HIA, *Submission 1*, p. 1.

36 Chamber of Commerce and Industry of Western Australia (CCI WA), *Submission 11*, p. 1.

37 Australian Business Industrial NSW Business Chamber (ABI), *Submission 12*, p. 1.

38 Australian Industry Group (Ai Group), *Submission 14*, p. 2.

39 Australian Chamber of Commerce and Industry (ACCI), *Submission 18*, p. 2.

40 Australian Education Union (AEU), *Submission 2*, p. 1.

41 Australian Council of Trade Unions (ACTU), *Submission 5*, p. 3.

Work Act 2009 beyond the scope of the Bill, which are beyond the scope of the inquiry.[42]

Broad issue of insecure work

1.55 The broad issue of insecure work was raised repeatedly by unions in submissions[43] and at the public hearing in Melbourne.[44] The ACTU alluded to the range of effects of insecure work:

> The effects of insecure work are felt far beyond that individual worker in the workplace; they are felt by families, communities and ultimately by our economy more generally. It is experienced at an individual level but its effect is much more profound.[45]

1.56 The Committee received individual evidence from Ms Sharni Chan, an academic working in the university sector. The sector is distinctive in its working arrangements, which are often directly tied to the patterns of teaching or research projects.

> Teaching contracts are for 13 weeks and research jobs are not contracted; you are a casual – so you are hired hour to hour.[46]

1.57 Ms Chan, who has been engaged on a casual basis in the university sector over the previous decade, detailed her experience of long-term casual work and her inability to obtain secure work in her field:

> Being a casual is not something that gives me flexibility to balance work and family. Rather, I have had to make my whole life flexible in order to meet the demands of casual work, which can mean intermittent demand for your work. You have to be there. You cannot turn down any work, because you never know when the work might run out.[47]

1.58 Employer organisations disagreed about the prevalence of insecure work in Australia. Mr Stephen Smith, the Director of National Workplace Relations for the Australian Industry Group (Ai Group), claimed that the issue of insecure work was exaggerated by unions:

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42 For examples see: ACTU, *Submission 5*, pp. 3-6; AEU, *Submission 2*, pp. 2-3; NTEU, *Submission 3*, p. 4; Queensland Nurses' Union (QNU), *Submission 4*, p. 7; National Union of Workers (NUW), *Submission 7*, pp. 6-7.

43 AUE, *Submissions 2*, p. 1; NTEU, *Submission 3*, p. 13; QNU, *Submission 4*, p. 4; ACTU, *Submission 5*, p. 3; NUW, *Submission 7*, p. 5; Australian Manufacturing Workers' Union (AMWU), *Submission 9*, p. 2.

44 ACTU and NTEU, *Transcript of Evidence*, Melbourne, 24 May 2013, pp. 2-9.

45 Mr Timothy Lyons, Assistant Secretary, ACTU, *Transcript of Evidence*, Melbourne, 24 May 2013, p. 2.

46 Ms Sharni Chan, Member, NTEU, *Transcript of Evidence*, Melbourne, 24 May 2013, p. 5.

47 Ms Sharni Chan, Member, NTEU, *Transcript of Evidence*, Melbourne, 24 May 2013, p. 3.

> There is no casualisation or fixed-term employment problem in Australia. The problem as we see it is the ongoing attempts by unions to convince the public that there is a problem…[48]

Committee comment

1.59 The complexities of balancing employer and employee requirements for flexibility with the problem of insecure work in Australia warrant further investigation; however this is beyond the scope of this inquiry and therefore outside of the scope of this report.

Technical concerns with the Bill

1.60 All stakeholders raised concerns regarding the technical aspects of the Bill. They either rejected the Bill, drew attention to perceived inadequacies in the Bill, or suggested improvements to the Bill.

1.61 Employee and employer organisations were concerned with the lack of clarity in relation to new terms introduced by the Bill.[49] DEEWR highlighted these concerns:

> The Bill does not define a number of key terms which could lead to confusion and potentially increases the scope of the Bill beyond its intention.[50]

1.62 Employer organisations expressed concerns regarding the increased powers provided to unions and the Fair Work Commission.[51]

1.63 Furthermore, stakeholders asserted that the operation of the Bill would create conflict with modern awards and enterprise agreements.[52]

Uncertainty of terminology in the Bill

1.64 A key concern raised by stakeholders related to the lack of clear definitions throughout the Bill, including:

48 Mr Stephen Smith, Director, National Workplace Relations, Ai Group, *Transcript of Evidence*, Melbourne, 24 May 2013, p. 9.

49 ABI, *Submission 12*, p. 2; DEEWR, *Submission 17*, pp. 2, 9, 11; St Vincent de Paul Society, *Submission* 10, p. 3; ACTU, *Submission 5*, pp. 13-17; AEU, *Submission 2*, p. 3; QNU, *Submission 4*, p. 6; DEEWR, *Submission 17*, p. 10; HIA, *Submission 1*, p. 1; Ai Group, *Submission 14*, p. 6; FECCA, *Submission 15*, p. 8.

50 DEEWR, *Submission 17*, p. 11.

51 Ai Group, *Submission 14*, pp. 2-5; HIA, *Submission 1,* pp. 2-3; Australian Mines and Metals Association (AMMA), *Submission 19,* pp. 5-7; ABI, *Submission 12,* pp. 1-3; Australian Public Service Commission (APSC), *Submission 20*, pp. 2-3.

52 DEEWR, *Submission 17*, pp. 9-10; Ai Group, *Submission 14*, p. 7; AMMA, *Submission 19*, p. 6; HIA, *Submission 1*, p. 3; CCI WA, *Submission 11*, pp. 2-3; ABI, *Submission 12*, p. 2.

- the lack of clear definition of 'rolling contract employee' and 'rolling contract basis';[53]
- the lack of any definition for 'prospective employee';[54]
- the expansion of the definition of 'secure employment arrangements' to include 'secure hours' to ensure no loss of employment hours upon conversion to secure employment arrangements;[55]
- the unclear definition of an 'industry' in relation to secure employment orders;[56]
- the lack of definition for 'working arrangement orders';[57] and,
- the lack of provisions dealing with the concept of employee 'length of service' in relation to secure employment arrangements.[58]

1.65 A number of points of definitional conflict and omission were also identified, including:

- the duplication of unions' ability to represent casual and fixed term employees in clauses 306L(2) and 306M(2);[59]
- the duplication of small business exemption in clause 306L when they are covered by clause 306Q and the *Fair Work Act 2009* itself;[60]
- the discrepancy between clauses 306N and 306R in relation to orders covering a single employee;[61] and,
- the omission of the Race Discrimination Commissioner from the listing of discrimination commissioners in clause 306P(1)(a)(iii).[62]

1.66 Furthermore, DEEWR noted the need for additional provisions to outline the interaction between the Bill's amendments and current transitional instruments:

> Further rules would need to be provided to govern the interaction between 'secure employment order' and transitional instruments made under the former *Workplace Relations Act 1996*.[63]

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53 ABI, *Submission 12*, p. 2; DEEWR, *Submission 17*, p. 9.

54 DEEWR, *Submission* 17, p. 11; St Vincent de Paul Society, *Submission* 10, p. 3.

55 ACTU, *Submission 5*, p. 17; AEU, *Submission 2*, p. 3; QNU, *Submission 4*, p. 6.

56 DEEWR, *Submission 17*, p. 11.

57 ACTU, *Submission 5*, p. 17.

58 DEEWR, *Submission 17*, p. 10; HIA, *Submission 1*, p. 1; St Vincent de Paul Society, *Submission* 10, p. 3; AEU, *Submission* 2, p. 3; ACTU, *Submission 5*, pp. 13-14; Ai Group, *Submission 14*, p. 6.

59 ACTU, *Submission 5*, p. 15.

60 ACTU, *Submission 5*, p. 14; AEU, *Submission 2*, p. 2.

61 AEU, *Submission 2*, p. 3; ACTU, *Submission* 5, p. 16.

62 FECCA, *Submission 15*, p. 8.

63 DEEWR, *Submission 17*, p. 11.

Committee comment

1.67 Concerns regarding the lack of clear definitions and clear limitations are exacerbated by the considerable powers granted by the Bill.

Powers granted by the Bill

1.68 Employer organisations and DEEWR expressed concern regarding the scope of the powers that the Bill would grant the Fair Work Commission and unions.[64] DEEWR noted that the scope of the secure employment orders set out in Part 2-7B, Division 3 of the Bill is 'potentially very broad'.[65]

1.69 HIA asserted opposition to proposed FWC powers to make secure employment orders, stating that these proposed powers are without precedent:

> To empower the FWC to dictate the way work is arranged within a business and to enable those terms to be applicable to all current and potentially future employees goes well beyond the powers of any court or tribunal.[66]

1.70 In addition, employer organisations expressed concern regarding powers granted to unions which would allow them to apply for a secure employment order without employees making an application. [67] The Australian Mines and Metals Association (AMMA) stated that:

> Of particular concern is that the bill enables unions to apply to the FWC for 'secure employment orders' for a class of relevant persons, including a particular industry, part of an industry, kind of work, type of employment, or employer, without the relevant employees making a request for such an application. In essence the bill enables unions to impose union policy positions, opposing workplace flexibility and productivity, on the entire workplace or even industry.[68]

1.71 By contrast, unions were supportive of the additional powers granted by the Bill.[69] The NTEU supported union involvement, particularly in relation to a dispute between employees and employers:

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64 DEEWR, *Submission 17*, p. 9; HIA, *Submission 1*, p. 2; Ai Group, *Submission 14*, pp. 5-6; AMMA, *Submission 19*, p. 7.

65 DEEWR, *Submission 17*, p. 9.

66 HIA, *Submission 1*, p. 2.

67 Ai Group, *Submission 14*, pp. 5-6; HIA, *Submission 1*, p. 2; AMMA, *Submission 19*, p. 7.

68 AMMA, *Submission 19*, p. 7.

69 ACTU, *Submission 5*, pp. 10-11; NTEU, *Submission 3*, p. 10; QNU, *Submission 4*, p. 6; AMWU, *Submission 9*, p. 3.

> The NTEU supports the option for a class of employees to be provided with secure employment orders and for the role of unions in applying for secure employment orders on behalf of their members. This will provide certainty to employees who may be in dispute with their employer and may not be able to negotiate a secure employment order.[70]

1.72 FECCA also supported the role of unions as representative bodies for employees from culturally and linguistically diverse backgrounds, who may require assistance lodging requests in writing due to literacy barriers and unfamiliarity with the fair work legislative framework:

> Concerns which may be identified in relation to the practical efficacy of this primary approach include potential lack of system's knowledge by employees, particularly new migrants, a fear of approaching an employer in relation to these provisions for fear of losing casual employment and literacy barriers that may hamper the ability to put the request in writing as mandated by the Bill.[71]

1.73 Although supportive of the additional powers granted by the Bill, the ACTU expressed concerns that the Bill does not outline the process that the FWC would adopt when considering a secure employment order:

> The Bill does not appear to state the process to be adopted by the FWC in considering an application for a secure employment order or orders. Were FWC given the capacity to make secure employment orders, the ACTU believes it would be useful to clarify that FWC would have broad discretion in terms of the process adopted to determine an order (e.g. written submissions from the parties, private conferences, hearings).[72]

1.74 In addition to a lack of clarity regarding the processes by which secure employment orders are to be considered, stakeholders expressed confusion regarding the interaction between enterprise agreements, awards and secure employment arrangements.[73]

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70 NTEU, *Submission 3*, p. 10.

71 FECCA, *Submission 15*, p. 7.

72 ACTU, *Submission 5*, p. 16.

73 DEEWR, *Submission 17*, pp. 9-10; HIA, *Submission 1*, p. 3; CCI WA, *Submission 11*, pp. 2-3; ABI, *Submission 12*, p. 2.

Interaction between enterprise agreements and secure employment arrangements

1.75 DEEWR noted that the Bill has the potential to undermine the terms of negotiated enterprise agreements by amending section 172(1) of the *Fair Work Act 2009*.[74]

1.76 Section 172(1) of the Bill states that secure employment arrangements are a permitted matter for enterprise agreement content. However, under the Bill, the terms of a modern award or enterprise agreement would have no effect in relation to an employee to the extent that it is less beneficial to the employee than a term of a secure work order.[75]

1.77 DEEWR outlined the detrimental impact that this would have on businesses as they try to reconcile the requirement of existing terms of an enterprise agreement with the additional requirements imposed by a secure work order:

> This has the potential to undermine the terms of an enterprise agreement that was collectively negotiated within the enterprise and has passed the better off overall test. Particularly, this could significantly increase business costs, with an employer being required to adhere to existing terms of an enterprise agreement, and also having to meet the additional requirements imposed by a 'secure employment order.'[76]

1.78 Both AMMA and the Australian Industry Group (Ai Group) expressed concerns that the Bill's amendment of Section 172(1) to include secure employment arrangements as a permitted matter would grant employees and unions the right to take industrial action during enterprise bargaining.

1.79 Ai Group states that this amendment conflicts with longstanding principles in industrial law, recognised by the High Court.[77]

1.80 The AMMA asserted that this would create a worrying trend of agreement clauses seeking to undermine managerial decision making and freedom of contract.[78]

Casual conversion provisions

1.81 HIA asserted that the Bill's disregard for the terms of modern awards and enterprise agreements would undermine certainty for employers and employees alike:

74 DEEWR, *Submission 17*, pp. 9-10.
75 DEEWR, *Submission 17*, pp. 9-10.
76 DEEWR, *Submission 17*, pp. 9-10.
77 Ai Group, *Submission 14*, p. 7.
78 AMMA, *Submission 19*, p. 6.

> The Bill does not provide an exemption for businesses already covered by casual conversion clauses within modern awards and expressly states that terms of a modern award or enterprise agreement will have no effect to the extent that it is less beneficial than what is provided for within the Bill. Such a provision, if enacted, would undermine certainty under all negotiated Enterprise Bargaining Agreements and all casuals currently engaged in the building industry.[79]

1.82 The Chamber of Commerce and Industry of Western Australia (CCI WA) compared the casual conversion provisions articulated in the Manufacturing and Associated Industries and Occupations Award 2010 with those outlined in the Bill. CCI WA stated that there are discrepancies between the two, concluding that there are fundamental discrepancies between the casual conversion provisions of the Bill and those outlined in most modern awards.[80]

1.83 CCI WA also expressed concerns about the lack of guidance on how to address the inconsistencies between casual conversion clauses in modern awards and the Bill:

> It would be impossible for an employer to comply with the different procedural requirements and time frames in both the Bill and the modern award[81].

1.84 Australian Business Industrial (ABI), an affiliate of the New South Wales Business Chamber, said that the Bill duplicates provisions regarding the right for employees to request conversion from casual arrangements, which is already covered by the *Fair Work Act 2009*:

> Proposed Part 2-7B would operate to create something akin to the Act's current right to request which is provided in Part 2-2, "the National Employment Standards".[82]

1.85 ABI raised concerns that the Bill erroneously accords secure employment orders the same status as equal remuneration orders:

> Proposed Part 2-7A shares structural characteristics with Part 2-7 of the Act. Part 2-7 of the Act provides for the making of equal remuneration orders (EROs) to redress instances of gender based unequal remuneration…Part 2-7B proposes that SEOs have the same status of EROs. It could not be said that determining the

79 HIA, *Submission 1*, p. 3.

80 CCI WA, *Submission 11*, pp. 2-3.

81 CCI WA, *Submission 11*, p. 3.

82 ABI, *Submission 12*, p. 2.

> nature of an engagement is subject to the same cultural assumptions as is setting equal remuneration.[83]

1.86 Employer organisations expressed also concerns regarding the implications of the Bill's provisions to phase out casual loadings after a conversion of employment.[84]

Phasing out of casual loadings after a conversion of employment

1.87 The HIA and Ai Group highlighted concerns about the provision that allows for a phasing out of casual loadings after a conversion, as outlined in the new section 306R of the Bill, which allows secure employment orders to contain:

> An order specifying the terms of secure employment arrangements under which casual loadings would be phased out over a period of time so as to avoid a sharp drop in employee remuneration.[85]

1.88 Ai Group describes the provision as unfair to employers:

> The Bill proposes that a 'secure employment order' may provide for the 'phasing out' of the casual loading so as to avoid a sharp drop in employee remuneration. Such an order would be unfair on employers and would amount to 'double dipping.'[86]

1.89 The HIA indicated that this provision was absurd and would force employers to compensate employees for a disadvantage that no longer exists.[87]

Refusing a request for secure employment arrangements

1.90 The Bill requires an employer to provide reasons for any refusal to agree to a secure employment arrangement but does not specify on what grounds, if any, the employer may validly refuse a request. DEEWR illustrates these concerns, stating that this provision:

> Potentially allows requests for secure work arrangements to be refused for any reason by the employer. Further, they allow an application to the Commission simply because an employer refused the request – regardless of the validity of any reasons for refusal. This is not consistent with the general approach of the Fair

83 ABI, *Submission 12*, p. 2.

84 Ai Group, *Submission 14*, p. 6; HIA, *Submission 1*, p. 2.

85 *Explanatory Memorandum*, p. 6.

86 Ai Group, *Submission 14*, p. 6.

87 HIA, *Submission 1*, p. 2.

> Work Act, which is to foster open and genuine cooperation and discussion between employers and employees in relation to flexibility matters.[88]

1.91 These concerns are shared by the ACTU:

> The Bill provides no guidance to employers on what basis, if any, they may legitimately refuse a request from an eligible employee for a secure employment order.[89]

1.92 DEEWR further stated that the Bill's provisions were not consistent with the general approach of the *Fair Work Act 2009* as they allow employers to refuse any secure employment arrangement request for any reason, and then allow an application to the Commission because the request had been refused, regardless of the validity of the reasons for the refusal:

> The proposed provisions potentially allow requests for secure work arrangements to be refused for any reason by the employer. Further, they allow an application to the Commission simply because an employer refused the request – regardless of the validity of any reasons for refusal. This is not consistent with the general approach of the Fair Work Act, which is to foster open and genuine cooperation and discussion between employers and employees in relation to flexibility matters.[90]

1.93 Such an approach also contradicts existing *Fair Work Act 2009* provisions in respect to flexible working arrangements and unpaid leave, which state that requests may only be refused on 'reasonable business grounds':

> The [Fair Work] Act provisions dealing with requests for flexible working arrangements (s 65) and requests to extend unpaid leave (s 76) provide that an employer may only refuse a request on 'reasonable business grounds'.[91]

1.94 In addition to the lack of clarity surrounding the refusal of requests for secure employment arrangements, concerns were also raised regarding the enforcement of the process.[92]

Enforcement of the secure work requests and orders

1.95 DEEWR noted that the Bill does not allow Fair Work Inspectors to seek orders from the courts in relation to breaches of the secure employment

88 DEEWR, *Submission 17*, pp. 10-11.

89 ACTU, *Submission 5*, p. 16.

90 DEEWR, S*ubmission 17*, p. 11.

91 DEEWR, *Submission 17*, p. 10.

92 DEEWR, *Submission 17*, p. 11; ACTU, *Submission 5*, p. 17.

arrangements. For example, if the employer refused to provide a written refusal response to a secure employment request.[93]

1.96 This contrasts with comparable provisions of the National Employment Standards which are civil remedy provisions, enforceable in the Federal and eligible State or Territory Magistrates court upon application by a Fair Work Inspector:

> While the reason for an employer's refusal of an employee's request under the NES is not subject to review by the courts, applications for court orders in relation to failure to supply a written response along with applications in relations contraventions of most other provisions of the NES can be brought by Fair Work Inspectors as well as employees and employee organisations.[94]

1.97 The ACTU noted that the Bill does not provide guidance in relation to enforcement of time limits on employer responses to secure employment arrangement requests:

> While clause 306T of the Bill provides that an employer must not contravene a secure employment order, there does not appear to be any clause within the Bill that has the effect of obliging an employer to respond to an employee's request for conversion within the 21 days (in contrast, for example, to s.44(1) of the Act with respect to requests for flexible working arrangements).[95]

Committee comment

1.98 In addition to the technical concerns raised by stakeholders, there are significant broader policy implications that would ensue with the Bill's passing.

Policy concerns

1.99 A range of stakeholders raised concerns regarding the wider implications of the Bill and its impact on the Australian workforce.

1.100 Ai Group asserted that the Bill would limit flexibility for both employers and employees:

> The Bill, in its attempts to restrict casual and fixed term employment, not only restricts important flexibility relied on by

93 DEEWR, *submission 17*, p. 11.

94 DEEWR, *Submission 17*, p. 11.

95 ACTU, *Submission 5*, p. 17.

> employers to maintain productivity and competitiveness, but also restricts important flexibility enjoyed by employees to meet family responsibility and lifestyle choices.[96]

1.101 The Australian Chamber of Commerce and Industry (ACCI) declared the Bill unworkable, impractical and detrimental to economic growth:

> The proposals in this Bill, if passed, would have significant implications for employers and business flexibility. The measures are unworkable, would be impractical and would create legal uncertainty for employers. The Bill would undermine the promotion of productivity and economic growth and would not lead to an increase of employment opportunities.[97]

1.102 ACCI compared the impossibility of legislating 'secure' work arrangements to the Parliament attempting to legislate 'secure and viable businesses':

> Just as Parliament cannot create secure and viable businesses, it is difficult to understand that the Parliament can create "secure" employment arrangements.[98]

1.103 AMMA asserted that job security for workers can only be attained by ensuring that businesses remain strong and competitive. The Bill weakens the flexibility and feasibility of business and as a result would decrease job security:

> The only concept of 'job security' for workers comes from ensuring that businesses remain competitive and labour markets generate jobs. Legislating access to "secure employment arrangements" is likely to undermine genuine job security by reducing the propensity of employers to engage or re-engage individuals because of the threat that their contract could be unilaterally or exogenously altered during its duration.[99]

1.104 These concerns were not limited to employer organisations. Unions, although welcoming the attention that the Bill draws to the issue of insecure work, expressed concerns regarding the Bill's ability to effectively address the abuse of non-standard types of employment.[100] The Assistant Secretary of the ACTU, Mr Timothy Lyons stated:

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96 Ai Group, *Submission 14*, p. 4.

97 ACCI, *Submission 18* p. 4.

98 ACCI, *Submission 18*, p. 4.

99 Australian Mines and Metals Association (AMMA), *Submission 19*, p. 5.

100 ACTU, *Submission 5*, p. 13; AMWU, *Submission 9*, p. 4; AEU, *Submission 2*, p. 3; NUW, *Submission 7*, p. 4.

> We have concerns that, through its limited focus on casual and fixed-term employment, the Bill risks inadvertently fuelling the growth of other types of insecure work such as sham contracting or the use of labour hire.[101]

1.105 Unions also expressed concerns that the Bill does not acknowledge the legitimate use of casual or contracted employment arrangements. This could infringe upon an employee's ability to access flexible working arrangements or to choose to be engaged under casual or contracted arrangements.[102]

Inconsistent with principles of the *Fair Work Act 2009*

1.106 Employer organisations asserted that the Bill and its intended outcomes are in fundamental opposition to the principles of the *Fair Work Act 2009.*[103] The New South Wales Business Chamber declared that:

> The proposed amendments are inconsistent with the policy objectives of the Fair Work Act and its mechanisms.[104]

1.107 The Housing Industry Association (HIA) claimed that the Bill undermines the stated intentions of the *Fair Work Act 2009*:

> If enacted, the Bill would…reduce firm productivity and competitiveness and undermine one of the stated intentions of the FWA, namely the creation of 'a national workplace relations system that is fair to working people, flexible for business and promotes productivity and economic growth'.[105]

1.108 The AMMA agreed with these claims, stating that the Bill was against the objectives of the Act and the interests of all Australians:

> These outcomes are all clearly against the objectives of the Fair Work Act legislation and against the interests of employers, employees and the Australian community.[106]

1.109 Concerns were also raised regarding the Bill's incompatibility with the principles of the *Public Service Act 1999*.[107]

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101 Mr Timothy Lyons, Assistant Secretary, ACTU, *Transcript of Evidence*, Melbourne, 24 May 2013, p. 2.

102 QNU, *Submission 4*, p. 5; ACTU, *Submission 5*, p. 12; AEU, *Submission 2*, p. 2.

103 HIA, *Submission 1*, p. 1; ABI, *Submission 12*, pp. 2-3; AMMA, *Submission 19*, p. 7.

104 ABI, *Submission 12*, p. 2.

105 Housing Industry Association (HIA), *Submission 1*, p. 1.

106 AMMA, *Submission 19*, p. 7.

107 APSC, *Submission 20*, pp. 2-3.

Contradicts merit-based employment principles

1.110 The Bill would allow the Fair Work Commission to issue a secure employment order giving an employee ongoing status without satisfying a full merit selection process. This is in direct conflict with the requirements outlined in the *Public Service Act 1999*.[108]

1.111 The Australian Public Service Commissioner expressed concerns that the Bill was incompatible with merit-based employment decisions:

> I am concerned that the provisions of the Fair Work Amendment (Tackling Job Insecurity) Bill 2012 (the Bill) would be onerous and unnecessary for the APS and that the proposal, whereby an agency could be compelled to offer ongoing employment to an individual, would interfere with a cornerstone of APS employment; that all employment decisions are based on merit.[109]

1.112 The Commissioner asserted that the Bill contradicts the *Public Service Act 1999*, which requires all employment decisions to be based on merit:

> The Act requires all employment decisions to be based on the principle of merit, and for all eligible members of the community be given reasonable opportunity to apply. A competitive merit selection process must be held to fill all vacancies with the exception of those that involve the movement of an existing APS employee at level.[110]

Does not acknowledge legitimacy of casual and contract arrangements

1.113 Casual and contracted working arrangements are a legitimate form of employment. This was acknowledged by Mr Bandt when he introduced the Bill:

> I do acknowledge that there is a place for casual labour in the workforce. It can be used to address genuine business needs, and it can be beneficial for people who only want short-term employment with higher rates to compensate for the lack of tenure. It can be a win-win arrangement.[111]

1.114 The legitimacy of casual and contract working arrangements were supported by unions and employer organisations alike. The HIA confirmed that casual employment has a long and legitimate history:

108 APSC, *Submission 20*, pp. 2-3.

109 APSC, *Submission 20*, p. 1.

110 APSC, *Submission 20*, pp. 2-3.

111 Adam Bandt MP, Member for Melbourne, *House of Representatives Hansard*, 26 November 2012, p. 13090.

> Casual employment has long been recognised as a legitimate form of engagement. Such a position is evidenced from the Secure Employment Tests Case, various iterations of industrial relations legislations, and awards generally.[112]

1.115 The AMMA warned that casual and contracted arrangements should not be demonised, stating that:

> Casual and contract based forms of employment are legitimate and essential work practices that have long played a role in Australian workplaces and they should not be demonised.[113]

1.116 Mr Daniel Mammone, Director of Workplace Policy and Legal Affairs for the ACCI, also pointed to the legitimate business need for different employment arrangements, including casual forms, and that this can suit employees as well as employers. He emphasised the need for business certainty:

> We have a situation whereby employers have arrangements in place that employees understand and agree to, whether that is a mixture of permanent employment, on permanent arrangements, fixed-term arrangements or casual arrangements. All sorts of permutations in terms of legitimate workplace arrangements, and lawful ones, if these proposals are enacted are now going to be somehow put in doubt where what was considered to be arrangements suitable to both the employer and the employee, or the particular worker, would be subject to great uncertainty. So that impacts on certainty for business, and we would say that certainty is key.[114]

Committee comment

1.117 The Bill limits both employers' and employees' ability to utilise casual and contracted working arrangements.

Reduces flexible working options for casual and contract employees

1.118 The Bill does not clearly outline the circumstances under which casual or contracted working arrangements could or should be used. This concern was noted by the Australian Education Union (AEU).

> The Bill as it presently stands fails to adequately recognise circumstances where casual or fixed-term employment is

112 HIA, *Submission 1*, p. 1.

113 AMMA, *Submission 19*, p. 7.

114 Mr Daniel Mammone, Director of Workplace Policy and Legal Affairs, ACI, *Transcript of Evidence*, Melbourne, 24 May 2013, p. 11.

> legitimate or, conversely, where it is – or should be – illegitimate.[115]

1.119 The ACTU shared these concerns.

> Any response to insecure work must recognise and take account of the genuine use of these types of arrangements. As drafted, the Bill does not clearly or effectively distinguish between the legitimate use of these types of employment and their misuse.[116]

1.120 In addition, the Bill does not acknowledge that workers may choose to work under casual arrangements. The Queensland Nurses' Union claimed that many of their members prefer to work under causal arrangements and have been resistant to attempts by employers to convert them to permanent work.

> We acknowledge that some nurses prefer to be engaged as casuals. Correspondingly, when attempts have been made by employers to convert casuals to permanent part-time status, some casuals have been quite resistant. In nursing, the employee is more often casual by choice than by compulsion.[117]

1.121 DEEWR indicated that individuals could potentially be forced to enter part-time by a secure employment order under clause 306N(2) of the Bill.[118] Mr John Kovacic, Deputy Secretary of Workplace Relations and Economic Strategy, DEEWR elaborated:

> I think the bill has the potential to reduce flexible work options for casuals in a number of respects. For instance, the bill would allow orders to be made that convert casual and/or rolling contract employees to permanent employment without their agreement—absent a requirement to consider their views, interest outside converting to permanent employment and even if they wish to remain a casual or contract worker.[119]

1.122 The AMMA also discusses this potential, declaring that the Bill undermines employees wishing to be employed under casual or contracted arrangements:

> The Bill would enable the majority of the employees in a workplace and their unions to pursue a 'secure employment order' to prevent casuals being employed, or to force casuals to convert

115 AEU, *Submission 2*, p. 2.

116 ACTU, *Submission 5*, p. 12.

117 QNU, *Submission 4*, p. 5.

118 DEEWR, *Submission 17*, p. 7.

119 Mr John Kovacic, Deputy Secretary of Workplace Relations and Economic Strategy, DEEWR, *Transcript of Evidence*, Melbourne, 24 May 2013, p. 14.

> to full-time employment. This might occur despite casuals not wanting or being able to accept a permanent job because of their unique circumstances. The Bill therefore undermines the desires of a number of employees and puts the decision on their employment into the hands of a third party.[120]

Committee comment

1.123 The Bill not only limits flexibility, it also discourages employers from utilising casual and contracted working arrangements.

Discourages employers from engaging casual employees

1.124 Employer organisations expressed their concern that the Bill would discourage employers from engaging casual employees.[121] They state that the Bill would increase the financial risk of engaging casual employees, leading employers to take pre-emptive self-protection action. According to the HIA the Bill would:

> Significantly reduce the availability of casual employment as a viable mode of engagement… [and] ultimately threatens ongoing engagements for all current casuals with employers preferring to downsize than bear risk of having all staff engaged on a permanent basis.[122]

1.125 ABI claimed that if employees believed that they had a right to convert to secure employment arrangements, this would mean that an employers may be less inclined to engage or re-engage casual employees:

> Legislating access to SEOs is likely to reduce the propensity of employers to engage new non-essential employees, or to re-engage such individuals, because of the threat that a contract could be altered during its term.[123]

Committee comment

1.126 This is compounded by the potential breadth of secure work orders under Subsection 306N(2) of the Bill, which could apply to an entire class of employees, both current and prospective.

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120 AMMA, *Submission 19*, pp. 6-7.

121 HIA, *Submission 1*, p. 1; ABI, *Submission 12*, p. 3.

122 HIA, *Submission 1*, p. 1.

123 ABI, *Submission 12*, p. 3.

Prospective employees

1.127 DEEWR expressed concerns regarding Subsection 306N(2) of the Bill, which allows a secure work order to apply to a prospective casual or rolling contract employee. DEEWR cautioned that employers could be barred from employing workers on a casual or contract basis, even when the available work calls for employment of this nature.[124]

1.128 DEEWR warned that under the proposed sections 306N(2) and (3), 306Q(d), and 306R of the Bill secure employment orders could operate in relation to all employees and employers covered by a modern award – with the potential effect that no casuals could be employed in a relevant industry or occupation. DEEWR outlined the potential ramifications:

> An order of this nature may result in an employer or whole industry being effectively barred from engaging employees on a casual basis.[125]

1.129 However, DEEWR also notes that under section 306Q(b) the Bill requires the Fair Work Commission to have regard to an employer's capacity to use arrangements that are not secure employment arranges in cases where this is genuinely appropriate to the needs of the business.[126]

Length of service requirements

1.130 DEEWR raised concerns regarding the Bill's proposed provisions allowing all casual employees to request a secure employment arrangement from their employer or to seek a secure employment order from the Fair Work Commission regardless of their length of service.

> Under the Bill, an individual could apply for a casual position only to request a 'secure employment arrangement' on the first day of work, or prior to commencing work. If this request is refused, this same employee could apply to the Commission for a 'secure employment order' to achieve part-time or full-time permanent employment for a position that was advertised, offered and accepted by the employee on the basis that it was a casual position or for a fixed term.[127]

1.131 In addition, DEEWR comments on the burden that this places on employers.

> Even where no 'secure employment order' is granted, there will be a burden on the employer associated with engaging with the

124 DEEWR, *Submission 17*, p. 7.
125 DEEWR, *Submission 17*, p. 8.
126 DEEWR, *Submission 17*, p. 8.
127 DEEWR, *Submission 17*, p. 8.

> above processes immediately following the conclusion of a recruitment process.[128]

1.132 The HIA also expressed concern regarding the provision, affirming that the period of time that an individual is engaged is essential to the understanding of how an individual's access to entitlements arises.

> Simply being employed as a casual is not sufficient justification of the triggering of an entitlement to another form of employment.[129]

1.133 These concerns were not limited to employer organisations. The ACTU did not understand the rationale behind the provisions.

> It is difficult to understand the rationale behind the proposed eligibility rules in the Bill, whereby any casual employee (with the exception of a 'small business exempt casual'), regardless of their length of service with an employer, would be eligible to lodge an application for a secure employment order (providing the employee has requested a secure employment arrangement from their employer and been refused).[130]

1.134 The ACTU recognised the challenges in identifying the precise threshold beyond which an employee should best be classified as an ongoing employee, but stated that:

> In any case, some formulation must be adopted that takes into account the ongoing nature of the engagement.[131]

Committee comment

1.135 Both unions and employer organisations expressed concerns that the Bill would discourage employers from engaging casual or contracted employees. This highlights the nature of the opposition from stakeholders to the passing of this Bill.

Concluding comments

1.136 Stakeholders raised concerns regarding technical aspects of the Bill. Responses ranged from unconditional rejection to expressions of support for the Bill's principles, however, all expressed concerns regarding the Bill's ability to address the issue of insecure work.

128 DEEWR, *Submission 17*, p. 8.

129 HIA, *Submission 1*, p. 1.

130 ACTU, *Submission 5*, p. 15.

131 ACTU, *Submission 5*, p. 15.

1.137 Unions acknowledged that the scale and complexity of insecure work requires detailed and comprehensive analysis in order to properly address the issue.

1.138 Employer organisations asserted that the Bill does not consider the ramifications of inhibiting the ability of business to remain competitive.

1.139 Measures to address insecure work should not be legislated without comprehensive analysis of the issue and the impacts any such legislation would have on employers and employees. The issue of insecure work warrants further investigation.

1.140 The Bill's unclear terminology and inconsistencies with current Fair Work legislation, Enterprise Agreements and Modern Awards would create confusion and damage employers' and employees' confidence in Australia's industrial relations framework.

1.141 By proposing that the Fair Work Commission be able to impose secure employment orders, both for individuals and classes of employees, the Bill would alter the objectives of the workplace relations system as provided by the *Fair Work Act 2009*. It would be inappropriate to recommend a change altering the fundamentals of Australia's industrial relations framework without extensive and transparent consultation.

1.142 The Committee does not support the Bill.

Recommendation 1

The Committee recommends that the House of Representatives not pass the Fair Work Amendment (Tackling Job Insecurity) Bill 2012.

Mike Symon MP
Chair
June 2013