Submission Number: 5
Date Received: 01/2/2013

FAIR WORK AMENDMENT (TACKLING JOB INSECURITY) BILL 2012

Submission to the House of Representatives Standing Committee on Education and Employment

February 2013

australian council of trade unions

CONTENTS

D No. 4/2013

Introduction

1. The ACTU welcomes the opportunity to make a submission to the House of Representatives Standing Committee on Education and Employment with respect to its inquiry into the *Fair Work Amendment (Tackling Job Insecurity) Bill 2012* (the Bill).

2. We welcome the attention the Bill and this inquiry focuses on what we believe to be one of the most pressing issues facing Australian workers today – the rise in insecure work. Despite our country's economic prosperity, increasing numbers of workers are trapped in poor quality work that provides with little economic security and little control over their working lives. Characteristics of insecure work include unpredictable and fluctuating pay; inferior rights and entitlements; limited or no access to paid leave; irregular and unpredictable working hours; a lack of security and/or uncertainty over the length of the job; and a lack of say at work over wages, conditions and work organisation. It is important to recognise that insecure work can be and is experienced by workers in all types of employment. However it is often experienced by those engaged in 'non-standard' work arrangements, such as casual and fixed-term employment, contracting (especially sham and dependant contracting) and labour hire arrangements.

3. Insecure work has profound implications for the quality of working life. Workers in these types of work have inferior rights, entitlements and job security to their counterparts in ongoing employment. Insecure work is often accompanied by negatives such as low pay, less access to opportunities for training and skill development, a lack of voice in the workplace and a higher risk of occupational illnesses and injury. People in insecure work are less likely to be aware of and to enforce their rights and entitlements. These types of work are often experienced by those most vulnerable in our workforce, including those with lower skills, young workers, women, Indigenous workers, migrant workers and workers with disabilities. Insecure work makes it difficult for workers and their families to plan for their future when they cannot rely on regular incomes. It also imposes high costs on communities, governments and on our economy.

4. The rise in insecure work in Australia also erodes Australia's system of employment standards. If an employer can evade their obligations under industrial legislation and instruments simply by labelling a permanent employment relationship as something else, then our system of social protection through minimum employment conditions is failing in one of the most basic tasks it is designed to fulfil.

5. The ACTU has identified insecure work as one of the most significant challenges facing Australian workers and their families. We recognise that Australia cannot nor should not return to an era of industrial protection based on a sole breadwinner and lifelong employment in the same organisation. However we do not accept that a modern and prosperous Australia must come at the expense of decent work. Australia can and should work towards having a safety net of minimum rights and conditions at work which provides all workers with fair and predictable pay and hours of work, access to basic conditions such as paid annual leave and sick leave, protection from unfair treatment at work, and quality skills and training opportunities.

6. To further understand the breadth, scope and complexity of the challenge that insecure work presents, as well as to subject our proposed policy responses to rigorous and independent assessment, the ACTU in October 2011 commissioned the Independent Inquiry into Insecure Work. Chaired by former Deputy Prime Minister Brian Howe, the Panel was tasked with investigating and reporting on the issue of insecure work in Australia, including its causes, effects and proposing recommendations to address problems identified.[1] Over the course of the Inquiry, the Panel received over 500 submissions from workers, academics, community organisations and unions, and heard from many witnesses during hearings around the country.

7. The Final Report of the Panel, *Lives on Hold: Unlocking the Potential of Australia's Workforce,* confirmed that insecure work is widespread and that, in many cases, fuelled by abuse of non-standard forms of employment as cheap substitutes for ongoing employment. The Panel made a number of recommendations to address the negative effects identified as being associated with insecure work. A number of these recommendations are already the subject of ACTU Congress policy, and others are currently the focus of ACTU research and policy work. The subject of this Bill – the 'secure employment order' – is one of the many recommendations proposed by the Panel in its Final Report.

8. While (subject to the amendments proposed below) the ACTU supports the *Fair Work Amendment (Tackling Job Insecurity) Bill 2012*, we believe it is insufficient on its own to effectively begin to address the issues associated with insecure work.

[1] The Final Report of the Panel, which includes its full terms of reference, is available at http://www.securejobs.org.au/getattachment/Home/Howe-Inquiry/lives_on_hold.pdf.aspx

9. Before proceeding to provide general and technical comments on the Bill, this submission briefly outlines the nature, scope and impacts of these two major forms of insecure work that the Bill seeks to address: casual and fixed-term employment.

Casual employment

10. While there is no universally applicable definition of casual employment,[2] it is widely understood to denote an employment arrangement whereby a worker is entitled to an hourly wage, typically with a casual loading in lieu of paid leave and other entitlements, and no right to employment beyond each separate engagement. The proportion of Australian employees engaged in casual employment has grown significantly over the past several decades: from 15.8% in 1984 to around 27.7% in 2004, before declining slightly and remaining relatively stable at around a quarter of all employees since then.[3] Casual employment now account for around a fifth of employed persons (which includes contractors and business operators).[4] Today, there are well over 2 million Australian workers engaged on a casual basis.

11. While casual employment has grown in all industries and over the past few decades, it is particularly heavily concentrated in certain areas of our economy. In the accommodation and food industry, 64% of all employees (429,700) workers) are casual; in agriculture, forestry and fishing, 48% of all employees (68,000) are casual; in retail, 40% of employees (415,100) are casual and in arts and recreation, 39% of employees (67,000) are casual.[5]

12. Australia has one of the highest rates of casualisation in the OECD. However, there is no evidence to suggest that there are any distinctive features of our economy that necessitate such high levels of job and income insecurity. Other developed countries have experienced similar structural changes and dynamics but without the accompanying dramatic increases in levels of insecure work, suggesting that such outcomes are far from inevitable or unavoidable. While industrial relations systems in other countries generally provide for temporary or casual employment, it is generally more strictly regulated

[2] There is no definition of a casual employee in the *Fair Work Act 2009* (Cth). Most awards (and many enterprise agreements) explicitly confer on employers a broad discretion as to whether someone is engaged and paid as a casual, without reference to the expected duration or regularity of their work.
[3] J Burgess, I Campbell and R May, 'Pathways from Casual Employment to Economic Security: the Australian Experience', *Social Indicators Research* (2008), 88, 161, 165, supplemented by ABS, Forms of Employment, Cat. 6359.0.
[4] ABS, *Forms of Employment, November 2011* (Released April 2012), Cat. 6359.0
[5] ABS, *Forms of Employment, November 2011* (Released April 2012), Cat. 6359.0

and, contrary to the Australian experience, is not permitted to be used for long term, ongoing engagements.[6]

13. While casual employment over the last two decades has grown much more rapidly for male employees, it continues to disproportionately affect women. Around a quarter (25.5%) of all female employees are casual, compared to around a fifth (20.5%) of all male employees.[7] This is explained in part by the lack of flexible working arrangements and social support for working parents, which compels many workers with caring responsibilities into casual and other types of insecure work. The overrepresentation of women in these types of work exacerbates gender inequalities in the workplace.[8] Young workers are also disproportionately represented in casual employment.[9]

14. The ACTU recognises that there is a role for casual employment in the Australian labour market in circumstances in which, because of the short-term or irregular nature of the work, it is not feasible to engage the worker on a permanent basis. This understanding of casual employment - as employment on a short-term, irregular or uncertain basis - reflects the original conception of casual employment in Australia and the concept as it continues to exist under the common law.[10] The ACTU believes that genuine casual employees should receive higher rates of pay (i.e. a casual loading) that fairly and adequately compensates for the lack of permanency and lack of access to paid leave entitlements.

15. The use of casual employment today, however, has gone far beyond this original purpose. It has become a widely used mechanism through which employers shift the costs and risks associated with employment from themselves to their employees. Today, many workers employed as casual employees are 'permanent casuals': casual employees with regular, stable and often long-term employment arrangements. The evidence of widespread misuse of casual employment is overwhelming. Australian Bureau of Statistics (ABS) data, for example, tells us that many casual employees are casual in name only: with over half of all casuals have been employed in their current

[6] I Campbell, 'Casual Work and Casualisation: How does Australia compare?' (2004) 15(2) *Labour and Industry* 85.
[7] ABS, *Forms of Employment, November 2011* (Released April 2012), Cat. 6359.0
[8] See further the submission of Elizabeth Broderick, Sex Discrimination Commissioner, to the Howe Inquiry, available at http://www.securejobs.org.au/getattachment/Home/Howe-Inquiry/Submissions/Australian-Human-Rights-Commission---Sex-Discrimination-Commissioner.pdf.aspx
[9] ABS, *Forms of Employment, November 2011* (Released April 2012), Cat. 6359.0.
[10] *Reed v Blue Line Cruises Ltd* (1996) 73 IR 420 at 425; *Williams v McMahon Mining Services Pty Ltd* (2010) 201 IR 123.

job for over a year and over 15% of casuals have been employed in their job for more than 5 years.[11] Academic research conducted over the past decade has also consistently found that many casual employees have been engaged by the same employer on a regular basis for a significant period of time.[12]

16. There is also strong evidence to indicate that many if not most casual employees would prefer ongoing employment. ABS data, for example, indicates that half of all casual employees would prefer ongoing employment.[13] This is also supported by quantitative and qualitative academic research in Australia. [14]

Fixed term employment

17. Fixed-term employment in Australia accounts for just over 4% of all employees, but it is heavily concentrated in specific sectors of our economy.[15] Just under a third (31% or 120,600) of all workers on fixed-term contracts are employed in the education sector, followed by 17% (66,400 workers) in health care and social assistance, 14% (54,300 workers) in public administration and safety.[16]

18. While fixed-term employees generally have similar wages and conditions to ongoing employees, they lack job security. There are also other negatives associated with fixed-term employment, including difficulties accessing training and career opportunities commensurate with those enjoyed by permanent employees. Like casual employment, there is considerable evidence to suggest that

[11] ABS, *Employment Arrangements, Retirement and Superannuation,* Cat 6361.0, 2007. See also the figures as to job tenure in B van Wanrooy et al, *Working Lives: Statistics and Stories*, Workplace Research Centre, University of Sydney, 2008, p 72; B Pocock, J Buchanan and I Campbell, 'Meeting the Challenge of Casual Work in Australia: Evidence, Past Treatment and Future Policy' (2004) 30 *Australian Bulletin of Labour* 16.

[12] See various reports produced as part of the Australia at Work Series, Workplace Research Centre, University of Sydney. See also B Pocock, J Buchanan and I Campbell, *Securing Quality Employment: Policy Options for Casual and Part-time Workers in Australia,* 2004. For further qualitative evidence of the abuse of casual employment, see *Lives on Hold: Unlocking the Potential of Australia's Workforce,* the Report of the Independent Inquiry into Insecure Work in Australia, 2012 and submissions to the Inquiry, available at http://www.securejobs.org.au/getattachment/Home/Howe-Inquiry/lives_on_hold.pdf.aspx

[13] ABS, *Measures of Australia's Progress 2010: Casual Employees,* 2010.

[14] See, e.g., B Pocock, R Prosser, K Bridge, 'Only a Casual: How Casual Employment Affects Employees, Households and Communities in Australia', University of Adelaide, July 2004. See also the powerful stories and submissions by unions, academics and community groups to the How Inquiry into Insecure Work, available at http://www.securejobs.org.au/Home/Howe-Inquiry/Submissions.aspx

[15] ABS, *Forms of Employment, November 2011* (Released April 2012), Cat. 6359.0

[16] ABS, *Forms of Employment, November 2011* (Released April 2012), Cat. 6359.0

employers are misusing fixed-term employment to evade obligations typically associated with ongoing employment.[17]

The impact of insecure work

19. The negative effects of insecure work on workers and beyond the workplace are well-documented. Casual employees enjoy fewer rights and entitlements at work. They are explicitly excluded from a number of the National Employment Standards in the FW Act, including annual leave,[18] paid personal/carer's leave,[19] and notice of termination and redundancy pay.[20] Casual workers have no job security, and are more likely to rely on the award safety net and to earn lower rates of pay relative to permanent employees.[21] In addition, casual workers are less likely than their permanent counterparts to be aware of their rights at work or to be willing to enforce them.[22]

20. Many casual employees would prefer ongoing employment.[23] For many casuals, casual employment means unpredictable and fluctuating pay which makes it difficult to make ends meet, predict earnings and borrow money. Casual employment also means little or no control over working arrangements and hours, which is particularly difficult for workers with caring responsibilities.

[17] For a discussion of the misuse of fixed-term contracts in the education sector, see the submissions of our affiliates the Australian Education Union and the National Tertiary Education Union to the Independent Inquiry into Insecure Work in Australia, available at http://www.securejobs.org.au/Home/Howe-Inquiry/Submissions.aspx
[18] FW Act, s.86.
[19] FW Act, s.95.
[20] FW Act, s.123(c).
[21] ABS, Employee Earnings, Benefits and Trade Union Membership, Cat 6310.0 and ABS unpublished data.
[22] See the submission by the Centre for Employment and Labour Relations Law, University of Melbourne to the Independent Inquiry into Insecure Work in Australia, and G Maconachie and M Goodwin 'Victimisation, Inspection and Workers' Entitlements: Lessons Not Learnt?' (Paper presented at the *Proceedings Asia-Pacific Economic and Business History Conference 2008*, 13-15 February 2008, Melbourne, Australia).
[23] See footnotes 13 and 14 above.

21. The impact of fixed-term employment on workers can also be damaging. Many workers on fixed-term contracts experience significant job insecurity. [24] In addition, workers engaged on fixed term contracts of short duration, who receive no loading with no redundancy entitlements may experience insecurity and disadvantage commensurate or exceeding that experienced by long term casual employees.[25]

22. For many casual and fixed-term workers, the costs associated with these types of work extend beyond the workplace. There is a growing body of Australian and international research documenting the impact of insecure work arrangements on the psychological and physical well-being of workers.[26] Low and unpredictable incomes can place significant pressure on families and contribute to a more stressful home environment as families struggle to meet household expenses. Insufficient hours of work can mean that workers must hold down two or more jobs at the same time. Lack of control over working hours can also prevent workers from fully engaging with other aspects of their lives that depend on their work schedules being relatively predictable, and undermine periods traditionally reserved for leisure, family and other obligations.

23. High levels of casual and other insecure work arrangements also undermine the longer term productivity of Australian workplaces, through reduced investment in training and skill development, lower levels of employee commitment, higher labour turnover, and lower OHS standards.[27] It also undermines employers who do the right thing and provide decent quality, secure jobs by creating competition based incentives to reduce the quality and security of work.

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[24] Research conducted by the University of Sydney's Workplace Research Centre found that the largest proportional increase in employees either agreeing or strongly agreeing with the statement 'There is a good chance I will lose my job or be retrenched within the next 12 months' between 2007 and 2009 was among private sector employees on fixed term contracts (up from 20 to 31 per cent). See the submission by Dr J Buchanan of the Workplace Research Centre, University of Sydney, to the Independent Inquiry into Insecure Work in Australia, p.2

[25] Ibid.

[26] See J Moss and M McGann, 'Health, Freedom and Work in Rural Victoria', Social Justice Initiative, University of Melbourne, 2011; Rocha et al, "The Effects of Prolonged Job Insecurity on the Psychological Well-Being of Workers", (2006) 3 *Journal of Sociology and Social Welfare* 33, p 11; JJ Evans & E Gibb*, Moving from Precarious Employment to Decent Work*. Chapter 5, Discussion paper 13, Global Union Research Network, ILO Geneva 2009.

[27] J Buchanan, 'Paradoxes of Significance: Australian Casualisation and Labour Productivity', ACIRRT Working Paper 93, Sydney, 2004, and R Hall, T Bretherton and J Buchanan, 'It's Not My Problem: the Growth in Non-Standard Work and Its Impact on Vocational Education and Training in Australia', NCVER Research Report, June 2000.

24. High levels of casual and other types of insecure work impose costs on governments. There are significant cost implications for governments where workers are not able to accrue significant levels of superannuation and must rely on pension arrangements. Job insecurity and underemployment may also effectively shift costs from employers to the state through increasing the number of people reliant on social security arrangements. There are also potentially significant indirect costs to governments arising from the negative effects of insecure work on people's health and well-being.[28]

Responding to the growth in insecure work

25. As noted above, the ACTU commissioned the Independent Inquiry into Insecure Work in late 2011. In its Final Report, the Panel made a number of recommendations to address the negative effects identified as being associated with insecure work. These recommendations include:

- Pursuing universality in labour law, so as to afford protection to all workers;
- Implementing measures to prevent and address abuses of non-standard types of employment;
- Implementing and expanding portable leave entitlement schemes
- Committing to lifelong learning, and investing in the capability of workers over the lifetime;
- Reforming Australia's tax and transfers system to provide a stronger safety net;
- Restructuring government funding and procurement practices which, at present, contribute to the growth in insecure work rather than support secure forms of employment;
- Further research so as to better understand the nature and impact of insecure work.

26. The subject of this Bill – the 'secure employment order' – is one of the many recommendations put forward by the Panel in its Final Report.

[28] J Moss and M McGann, 'Health, Freedom and Work in Rural Victoria', Social Justice Initiative, University of Melbourne, 2011.

27. The ACTU shares the Panel's conclusions that insecure work is increasingly prevalent in Australia and is an issue of deep concern to Australian workers and their families. We also share the Panel's conviction that there is no one simple solution to the challenge that insecure work presents. Responding to insecure work requires a comprehensive suite of policies, including in the range of areas outlined above.

28. While not capable on its own of addressing the rise in insecure work, labour law reform is a key part of an effective response to the issue. Simply put, our labour laws have failed to prevent the abuse of casual and other types of non-standard employment, leaving employers free to exploit loopholes in our laws so as to shift the risks associated with employment from themselves to workers. Our labour law framework has also failed to keep pace with changes in workplace practices and changes in the structure and dynamics of our labour market. As a consequence, basic rights and entitlements – originally intended to form a safety net for all those engaged in paid employment - are applying to an ever diminishing number of permanent employees.

General comments on the Bill

29. The ACTU supports a number of the principles that underpin the Bill. These include:

(i) There is a pressing need to act to address the increasing prevalence of insecure work.

(ii) Mechanisms must be in place to ensure that non-standard forms of work - such as casual and fixed-term employment, independent contracting and labour-hire - cannot be used by employers as a means of diminishing workers' entitlements and avoiding the obligations that are associated with ongoing employment.

(iii) The Fair Work Commission (FWC)[29] should have greater capacity to monitor and prevent the abuse of insecure work arrangements. At present a casual employee who believes he or she has been misclassified as a casual employee may seek to recover entitlements under the NES and/or award or agreement through the courts. The duration and cost of such an exercise makes this an

[29] The Bill refers to Fair Work Australia (FWA). FWA has since been renamed the Fair Work Commission (FWC), and the ACTU uses the current terminology in this submission.

unrealistic option for most workers. As an accessible, low cost jurisdiction with expertise in employment and industrial relations, the FWC is best placed to play a role in these matters.

(iv) Workers trapped on insecure work arrangements should have accessible pathways to secure employment.

(v) Existing approaches to conversion of casual employees (and employees on other types of arrangements in some cases) from insecure to secure forms of employment, while effective in some circumstances, have proven ineffective in addressing the widespread abuse of casual employment. Since the early 2000s, casual conversion clauses have been included in a number of state and federal awards,[30] and they continue to be found in some modern awards[31] and agreements. The precise formulation of these clauses differs, however they generally provide workers who have been employed with a particular employer for a significant period of time with the individual right to request conversion to permanent employment, subject to the right of employers to refuse such requests where they have reasonable grounds for doing so. Limitations on the effectiveness of these clauses include a reluctance of some casual employees to shift to ongoing work because of the prospect of a drop in take home pay due to the loss of the casual loading; the ability of the employer to refuse permanency without the reasonableness of their refusal able of being effectively tested within FWC; and the unenforceability of the casual conversion provision except through expensive and time exorbitant Federal Court proceedings. In many cases, however, it appears that the most significant hurdle to the effectiveness of these clauses is the requirement that casual employees be aware of their right to convert, and be willing and able to be in a position to assert that right. The very nature of casual employment means that these workers are often reluctant to risk their employment by enforcing rights they may have under a casual conversion clause.

[30] The conversion clause originated in *Metal Industry Award 1984,* through the *Metals Casuals Award Case* (2000) 110 IR 247. Casual conversion clauses were rendered in federal awards in 2005 by virtue of s.515(1)(b) of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). They were rendered operable again by the passage of the *Fair Work Act 2009*.

[31] Through the award modernisation, casual conversion clauses in awards were carried through to modern awards where it had previously constituted an industry standard: [2008] AIRCFB 1000, 51

30. However the ACTU has a number of concerns with the Bill as currently drafted. First, the ACTU believes the abuse of non-standard types of employment must be addressed at its source. This can be done through ensuring that the definitions of various employment arrangements (whether in legislation, awards or agreements) more appropriately correspond with their original and intended meanings. We believe conversion mechanisms (whether on individual or collective basis) are best viewed as supplementary means of addressing insecure work.

31. Second, 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. This is discussed further in our technical comments below on an employee's eligibility to make an application for a secure employment order.

32. Finally, to be effective, the ACTU believes that the regulatory response to insecure work must be comprehensive, well-considered and multi-faceted. First, regulatory responses must be multi-faceted in that they must include, but extend beyond, labour law. Second, with respect to labour law, regulatory responses must address insecure work in all its forms. This Bill proposes a mechanism which seeks to address the abuse of casual and fixed-term employment only. Experience tells us that there is a real risk that measures to limit some types of 'non-standard' employment arrangements, if effective, may lead to the increase in alternative forms of 'non-standard' work, such as sham and dependent contracting and the use by companies of labour hire. In effect, employers will identify and exploit other available avenues through which to shift the costs and risks associated with employment onto workers. Addressing casual and fixed-term employment only also fails to recognise that insecure work manifests itself in different ways in different industries. Labour law reform must also be comprehensive in that it must involve both measures to prevent the abuse of different types of employment, and measures that are directed at improving rights and protections for workers, irrespective of the type of employment arrangement through which they are engaged.

Technical comments on the Bill

Secure employment and enterprise agreements

33. Clause 10 of the Bill proposes to amend s.172 of the Act so as to clarify that 'permitted matters' for the purpose of making an enterprise agreement includes matters pertaining to secure employment arrangements.

34. The ACTU understands that conversions from casual and fixed-term employment to permanent employment are already considered to fall within the scope of permitted matters for the purposes of s.172 of the Act and so this amendment would appear unnecessary.

35. In any case, it is the ACTU's strong view that there is no justification for the retention of the 'matters pertaining' requirement within the FW Act and it should be removed entirely. Consistent with international standards, parties should be free to agree on what matters to include in agreements.[32] The 'permitted matters' restriction should be replaced by a general requirement the enterprise agreements contain 'terms regulating relations between employers, workers and their representatives and their social, economic or employment interests', and agreements should be subject to a genuine no disadvantage test.

Eligible employees

36. In our view, any conversion mechanism (whether individual or collective in nature) should be targeted at preventing the abuse of non-standard types of employment, and assisting those workers engaged in arrangements that more appropriately resemble permanent employment to be classified accordingly.

37. 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

[32] The restrictions placed on agreement content under the Fair Work Act have been the subject of criticism by the International Labour Organisation's Committee on Freedom of Association and Committee of Experts on the Application of Conventions and Recommendations: CEACR, Right to Organise and Collective Bargaining Convention, 1949 (No. 98): Australia, ILC, 98th Session, 2009; Case No. 2698, Complaint against the Government of Australia presented by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU), GB 308/3, June 2010, [226]-[227] and [229(g)].

been refused). As currently drafted, this would enable a casual employee who has been employed for three weeks to apply to the FWC for an order and oblige the FWC to consider such a request. The ACTU recognises that it can be difficult to identify the precise threshold beyond which a casual employee should more appropriately be classified as an ongoing employee (i.e. whether it is best to determine this by reference to a certain time threshold or by the regular and systematic nature of a worker's engagement or both). In any case, some formulation must be adopted that takes into account the ongoing nature of the engagement.

Small business exemption

38. The Bill proposes to exempt small businesses if (a) the employer is a small business employer; and (b) the employee is not a long term casual employee.[33] The ACTU does not believe such an exemption is warranted for two reasons. First, the ACTU does not believe that workers should have a different safety net of rights and entitlements simply because of the size of the employer for which they work. If an employee is described by their employer as a casual but is in reality engaged in an arrangement which is regular and ongoing, then he or she should be entitled to permanent employment irrespective of the size of the business.

39. Second, the needs of small businesses are already adequately taken into account. Under s.306Q of the Bill FWC is already required, when considering an application for a secure employment order, to consider the size of the employer to whom the order will apply (s.306Q(c)), an employer's capacity to use insecure work arrangements where genuinely appropriate having regards to the needs of the business (s.306Q(b)) and any other matter FWA considers relevant (s.306Q(e)). In addition, the Act already requires FWC, in performing functions or exercising powers under the Act, to take into account the objects of the Act.[34] These objects include 'acknowledging the special circumstances of small and medium-sized businesses'. [35]

[33] Clause 6; clause 306L(5); clause 306N(5).
[34] FW Act, s.578 (a);
[35] FW Act, s.3(g).

Requests for secure employment arrangements

40. The Bill provides that an eligible employee (or their union) may make a request for a secure employment arrangement with their employer in writing. The employer must give the employee or their union a written response to the request within 21 days and, if the employer refuses the request, the written response must include the reasons for the refusal.[36] The Bill provides no guidance to employers as on what basis, if any, they may legitimately refuse a request from an eligible employee for a secure employment order.

41. The ACTU recommends that the Bill be amended to clarify that an employer may not unreasonably refuse a request from an eligible employee for a secure employment arrangement. In determining whether a refusal is unreasonable, the employer should take into account the length of employment of the employee(s) and the probable length of their future employment and whether there is anything inherent in the nature of the work which requires the employee to work on a casual or fixed-term basis.

Employee organisations

42. Clause 306L(2) and clause 306M(2) of the Bill state that 'an employee organisation that is entitled to represent casual employees may, if asked to do so by one or more of the employees, request the employer in writing for a secure employment arrangement for that employee or those employees.'

43. The ACTU supports the proposition that a union should be entitled to apply for an order on behalf of employees. However we question whether these subclauses have been drafted appropriately. All unions are entitled to represent casual and fixed-term employees. We presume the intent of the subclauses is to clarify that unions are only capable of making such a request if they are entitled to represent the industrial interests of the relevant employees to be covered by the order.

[36] Clause 306L and 306M.

The role of the Fair Work Commission

44. Clause 306Q of the Bill enumerates a number of matters to which FWC is required to have regard to determining whether and on what terms to make a secure employment order. If the Bill is progressed, the ACTU suggests the following additional matters:

- The length of employment of the employees, and the probable length of their future employment;
- Whether granting the order would assist in eliminating discrimination or providing equal remuneration for work of equal or comparable value;
- The wishes of the employees concerned; and
- The objects of the Fair Work Act.

Process

45. The Bill does not appear to state the process to be adopted by 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).

Content of orders

46. Clause 306R of the Bill addresses the content of secure employment orders for more than one person. As currently drafted, the Bill does not appear to specify or address the content of secure employment orders where the order will apply to one person only.

A secure employment object

47. The ACTU suggests the inclusion within the Bill of a new item which would have the effect of amending s.3 of the Act so as to include a new subsection 'promoting secure employment and secure working arrangements'. This proposed amendment would facilitate the operation of the new Part of the Act (through, for example, providing further guidance to FWC in the discharge of its functions). We also believe such an amendment is consistent with, and reflects, the centrality of secure employment to the attainment of 'national economic prosperity and social inclusion for all Australia's (s.3), to a number of the other objects of the Act (such as 'ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders' and 'assisting employees to balance their work and family responsibilities by providing for flexible working arrangements'), and to the capacity of many workers to access the rights and protections in the Act.

Hours of work

48. The ACTU notes that there does not appear to be any provision in the Bill through which an employer is obliged to provide a secure employment arrangement (either in response to an employee's request or through a Secure Employment Order) which has the same or similar hours of work as the employee requesting the secure employment currently works. In practice, this would appear to mean that a casual employee working full time hours could request a permanent position in accordance with the Bill and the employer could offer him or her a permanent part-time position (with significantly fewer hours of work). The employee may be compelled to decline the offer to maintain hours of work and income, but the employer would nonetheless have satisfied their obligations under the Bill. The ACTU proposes that the Bill be amended to clarify that, in considering and granting a request for secure employment, an Employer is required to provide the employee with a secure employment arrangement that corresponds, both in quantum of hours and pattern of hours, with that previously worked by the employee.

Penalties

49. 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 work arrangements).

50. Proposed section 557(2)(fa) refers to 'working arrangement orders'. It is unclear what this term denotes, given that it is not included or defined anywhere else in the Bill or in the FW Act.

Awareness-raising

51. Finally, the ACTU notes that there is nothing in the Bill related to measures to ensure employees are aware of their rights under this new Part of the Act. Such measures would seem particularly important given that workers in insecure work are significantly less likely than their permanent counterparts to be aware of their rights and how to enforce them. Were the Bill to be progressed, measures would need to be adopted to ensure that the new rights for employees are widely disseminated. This could include amending s.124 of the FW Act so as to ensure the Fair Work Information Statement, which all employers are obliged to provide to new employees, includes information on secure employment orders. We would also recommend that adequate funding be made available for unions, employer

organisations and the Fair Work Ombudsman to educate employees and employers on their rights and obligations under this new Part of the Act.