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Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022

Senate Education and Employment Committee

ACCI Submission

14 November 2022

Australian
Chamber of Commerce
and Industry

Australian Chamber of Commerce and Industry

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ABBREVIATIONS

ABCC	Australian Building and Construction Commission
AHRC	Australian Human Rights Commission
Bill	Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 – Other Bills named in full
BOOT	Better Off Overall Test
EM	Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 - Explanatory Memorandum – Other EMs named in full
FWC	Fair Work Commission
FWO	Fair Work Ombudsman
FW Act	*Fair Work Act 2009* (Cth), other legislation named in full
GM	General Manager of the FWC
ILO	International Labour Organisation
MWT	Migrant Worker Taskforce
NES	National Employment Standards (in the Fair Work Act 2009)
PABO	Protected Action Ballot Order
RO	Registered Organisation
ROC	Registered Organisations Commission

INTRODUCTION

1. The Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (the Bill) makes significant changes to the Fair Work Act 2009 (FW Act) on areas as diverse as gender and pay equity, job security and collective bargaining. It also abolishes the building and construction workplace regulator the Australian Building and Construction Commissioner (ABCC) and the Registered Organisations Commission (ROC), which regulates registered employer and employee representative organisations.

2. The Australian Chamber of Commerce and Industry (ACCI) shares many of the broad priorities and concerns that the Bill seeks to address. However the Bill, as it stands, will present major problems for businesses, employees, jobseekers and the wider economy. As presented, it should not pass.

3. Nevertheless, ACCI would not oppose the Bill's passage in the Senate, subject to:

   a. carving out Part 21 (single interest employer authorisation) from the rest of the Bill, so that the Government has time to consult further before bringing it back for Parliament to consider in 2023 (**Recommendation 1**); and

   b. the proposed amendments set out in this submission being made.

4. ACCI encourages the Committee to recommend the same approach.

Splitting the Bill

5. The Bill was introduced on 27 October 2022 and was referred to the Committee for inquiry with a report due by 17 November 2022.

6. ACCI is concerned about the prejudicially rushed timetable for examination of this Bill, noting that a three-week Senate inquiry is largely unprecedent in modern times when compared to reforms of workplace laws of similar significance[1].

7. That said, ACCI would not propose to delay the Government's workplace relations agenda and recommends carving out just one part of the Bill for further consideration. This part, being changes to the "single interest employer" bargaining stream, is easily the most complicated and contentious part of the Bill and requires further consideration and wider consultation by Government.

8. The proposed changes would see a departure from Australia's decades long consensus on the primary of enterprise-level bargaining, first introduced by the Keating Government, in favour of multi-sector or multi-employer bargaining. Such a dramatic change to our workplace relations system requires further scrutiny and broader consultation than the Government has provided.

9. ACCI rejects the Government's claim that this part of the Bill must be rushed through Parliament this year to deliver wage rises for Australian workers. For reasons set out in this submission, the shift to a system of compulsory multi-employer bargaining and its impact on wages is not yet clear. During their appearance before the Committee on 11 November 2022 the Department of

[1] The "IR Omnibus Bill" of 2020 was subject to a 3 month and 2-day inquiry, the Fair Work Amendment Bill 2014 was subject to a 2 month and 30 day inquiry and the Fair Work Bill 2008 was considered by the Senate for 3 months and 2 days.

Employment and Workplace Relations conceded that modelling had not yet been undertaken to determine the impact of the changes on wages.

10. International comparisons that attempt to link multi-employer bargaining with wage increases are inconclusive and, in Australia's case, misguided – Australia is the only country in the world that already has a system of compulsory industry specific terms and conditions of employment (modern awards).

11. Instead of providing an evidence-based explanation of how a shift to multi-employer bargaining will lift wages, Government relies on the argument that the existing system is not working. It could be said, therefore, that the changes being proposed are largely experimental.

12. Employers agree that the current system, which has seen declining rates of enterprise bargaining, is not working, but fundamentally opposes the idea that an abandonment of enterprise bargaining is the solution. The business community has been united in its opposition to the Government's bargaining changes and agree that a shift to multi-employer bargaining will see wages go backwards, add complexity to our already complex workplace relations system, increase disputation in our workplaces and lead to higher unemployment.

13. Employers, instead, have long advocated for measures that simplify and increase the reliability of the Fair Work Commission's (FWC) complex agreement approval process. ACCI welcomes many of the measures in this Bill which will address this issue but notes that any progress in this area risk being significantly outweighed by the shift to multi-employer bargaining.

14. Regardless of whether it is Government or business groups who are ultimately proven correct, it is the distance between the two positions and the risk of significant harm to our economy and to the livelihoods of millions of Australians which necessitate further consideration to be given to part 21 of the Bill.

Shared Priorities

15. ACCI members share several of the identified priorities in the Bill, including to see:

    a. wages growth to return to longer-term trend levels, and Australians to continue to enjoy world leading living standards;

    b. bargaining to work again, but this must occur at the enterprise level, where productivity gains are made and which will support long term, sustainable wages growth;

    c. more done to support diversity, anti-discrimination, pay equity, and doing more to ensure Australians can work free from sexual harassment;

    d. fewer Australians underpaid, more underpayments recovered, and less exploitation of migrant workers;

    e. Australians working in a high employment economy, in which they have options in how they work.

Proposed amendments

16. In light of these shared priorities, ACCI would not oppose passage of the Bill subject to the following amendments being made:

Australian Chamber of Commerce and Industry

RECOMMENDATIONS

PART	RECOMMENDATIONS	PAGE
Parts 1 and 2 — Abolition of the ROC	N/A	
Part 3 — Abolition of the ABCC	**Recommendation 20** — The ABCC should not be abolished. Alternatively, a specialist division of the Fair Work Ombudsman should be established to enforce compliance with workplace laws in the building and construction industry, and additional powers granted to the FWO to ensure no drop in enforcement powers.	36
	Recommendation 21 — Part 3 should be amended to require an independent review of the effectiveness of enforcement of workplace relations laws following the abolition of the ABCC, areas where additional powers or obligations are needed, and in particular, areas in which any of the powers and obligations under the BCIIP Act should be considered for reintroduction.	37
Part 4 — Objects of the FW Act	N/A	
Part 5 — Equal Remuneration	N/A	
Part 6 — Expert Panels	N/A	
Part 7 — Pay Secrecy	**Recommendation 22** — Proposed Section 333D and Item 384 should be removed as unnecessary or alternatively commence only after a 2-year period of education and promotion, during which s 333C would apply.	41
	Recommendation 23 — Subsection 333B(2) should be deleted. Alternatively, there should be a statutory note to s 333B(2) making clear that nothing compels any employee to provide any other employee with the information set out at para 333B(2)(a) or (b). Par 414 of the EM should become the statutory note / substantive provision to remove ambiguity or scope for misuse. There should also be clarification that this is a personal right to ask only, not able to be assigned or passed on to any other person or agent.	41
Part 8 — Sexual Harassment	N/A	
Part 9 — Anti-Discrimination	N/A	
Part 10 — Fixed Term Contracts	**Recommendation 24** — Amend s 333F(f)(iii) as follows: (iii) there is ~~are no reasonable prospects~~ no commitment that the funding will be renewed after the end of that period; or (iii) there is ~~are no reasonable prospects~~ no certainty that the funding will be renewed after the end of that period; or	45
	Recommendation 25 — There should be an explicit exemption where the employee is working in Australia on a temporary work visa.	46
	Recommendation 26 — There should be an explicit exemption for professional sporting contracts under s 333F(1).	46
	Recommendation 27 — There should be an explicit exception for Run of Play contracts under s 333F(1), as follows: (x) the contract is for employment as a live performance industry employee in a Run of Play or Run of Plays Contract.	46
Part 11 — Flexible Work	**Recommendation 28** — Rather than by arbitration, the Fair Work Commission should deal with disputes that arise in respect of requests for flexible working arrangements through conciliation, mediation, or another form of non-binding dispute resolution.	50
	Recommendation 29 — If there is to be arbitration, there also needs to be scope to reopen to or have reviewed any order under s 65C(f) granting a	51

	request, or making other changes in working arrangements, in circumstances where: the employer's stated reasons for refusing the request are borne out in practice; and there is a material change in circumstances which now make it inappropriate for such a request or change hours to be accommodated, or to continue to be accommodated as ordered.	
Part 12 — Terminating Expired Agreements	**Recommendation 17** — Amend proposed s 226(4)(c) as follows: (c) whether the termination of the existing agreement would adversely affect the bargaining position of the employees, employer or employers that will be covered by the proposed enterprise agreement.	30
	Recommendation 18 — Replace proposed par 226(1)(c)(i)(B) as follows: unduly restrict the capacity of the business to restructure to seek to avoid or minimise a significant threat to the viability of the business or to minimise terminations of employment covered by subsection (2)	30
Part 13 — Sunsetting Zombie Agreements	**Recommendation 19** — Amend proposed ss 20A(3) to require the FWO to issue a standard form notice (modelled on existing s 125A) which the employers would give to employees covered by transitional instruments which are set to terminate (the zombie agreements).	32
Part 14 — Agreement Approval	**Recommendation 11** — The veto power of unions over the terms which are put to employees before a vote for a multi-employer agreement should be removed.	20
Part 15 — Initiating Bargaining	**Recommendation 12** — This part should not be progressed.	21
Part 16 — Better Off Overall Test	**Recommendation 13** — Replace the existing mechanism in the Bill that allows the FWC to vary the enterprise agreement for all employees with a safeguard mechanism that would allow an employee (or their representative) to apply to the FWC to seek compensation in circumstances where the employee is left worse off than under the relevant modern award because the parties failed to contemplate their role/working patterns at the time the agreement was made.	23
Part 17 — Dealing with Errors	N/A	
Part 18 — Bargaining Disputes	**Recommendation 14** — Amend the Bill so that: (a) the minimum bargaining period starts from the latter of i) the commencement of bargaining; or ii) the nominal expiry date; and (b) the minimum bargaining period is nine (9) months for multi-employer agreements (including single interest employer agreements).	26
Part 19 — Industrial Action	**Recommendation 15** — Amend the Bill so that employee industrial action will be unprotected if employee representatives do not attend the compulsory conciliation conference, in the same way as the Bill currently operates for employer representatives.	27
	Recommendation 16 — The Protected Action Ballot Agents provisions be amended to: (a) better and more clearly and transparently protect integrity and against risk of, or perceptions of, inappropriate interest, control, enrichment, or corruption; and (b) prohibit unions controlling or having an interest in the ballot agents they commission to ensure (and be seen to ensure) the integrity and independence of the ballots unions cause to be run.	28
Part 20 — Supported Bargaining	**Recommendation 9** — Amend this Part so that the Minister has the power to declare particular industries as being "low paid" by regulation.	15
Parts 21 and 22 — Single Interest Employer Authorisations	**Recommendation 1** — ACCI supports splitting of the Bill such that consideration of Part 21 (the single interest employer authorisation) by the Senate is deferred until 2023, giving Government more time to consult.	12
	Recommendation 2 — The "single-interest employer authorisation" bargaining stream should remain voluntary. This requires an amendment to	12

	the Bill which removes the right of unions/ employees to make an application for a majority support determination. Only this ensures the primacy of the enterprise bargaining system, which drives productivity gains and ensures sustainable wages growth.	
	Recommendation 3 — A change to the small business exemption so that it captures businesses that employ at least 100 employees – businesses of all sizes can already be compelled to bargain for an enterprise level agreement, and businesses who are not large enough for in-house HR and/or legal teams are not well resourced enough to deal with the administrative complexity of bargaining across a large number of other businesses.	12
	Recommendation 4 — What constitutes a "common interest" must be clearly defined and should adopt the same scope which currently exists under the FW Act (that is to say that the FWC must consider the same list of factors that the Minister must consider before providing a declaration).	13
	Recommendation 5 — Employers covered by an expired enterprise agreement and who have re-commenced bargaining should have at least a 12-month grace period from the expiry date to re-negotiate a new enterprise level agreement before they can be subject to a single-interest employer authorisation and compelled to become party to a multi-employer agreement.	13
	Recommendation 6 — Section 216 EB, which effectively gives unions the ability to veto a majority employee vote in favour of an employer leaving a single-interest employer agreement, should be amended so that employees can vote to be covered by an enterprise-level agreement (which is a fundamental collective bargaining right).	13
	Recommendation 7 — The "public interest" test must be expressed in the positive – that is to say that the FWC must be satisfied that granting the "single-interest employer" declaration is in the "public interest", not simply "not contrary to the public interest".	13
	Recommendation 8 — The requirement that the employees covered by an agreement are "fairly chosen" must be reintroduced to the application stage for single interest authorisations.	13
Part 23 — Cooperative Workplaces	N/A	
Part 23A — Excluded Work	**Recommendation 10** — The definition of "general building and construction work" should be amended to include work in civil construction and work in metal and engineering construction.	17
Part 24 — Small Claims	**Recommendation 30** — Item 651 of the Bill should be amended to lower the threshold from $100,000 to $50,000	53
Part 25 — Job Advertisements	**Recommendation 31** — Amend Item 657 to allow only an inspector to bring proceedings under s 536AA, not an employee organisation.	54
	Recommendation 32 — Amend the commencement date to be six months rather than one month.	54

A – BARGAINING AND AGREEMENT MAKING

17. ACCI's concerns with the bargaining reforms set out in the Bill are not with those changes that the Government has identified as being necessary to lift wages in low-paid industries. ACCI supports the changes to the "supported bargaining" stream (other than to better clarify the scope of the stream). ACCI's key concerns relate to those changes which, together:

    a. see multi-employer bargaining become the default across all industries (not just the low-paid ones) – the changes to the "single interest employer" bargaining stream, (which will now be compulsory for a much broader range of employers) signals the Government's abandonment of enterprise level bargaining, the key driver of productivity;

    b. preference given to the views of unions over the employees they represent, particularly by allowing unions to initiate bargaining before they are able to demonstrate that a majority of employees want to bargain, by giving unions veto rights over agreement terms being put to an employee vote and also by giving unions veto rights over an employee vote in support of leaving a multi-employer agreement; and

    c. returns Australia to an arbitral bargaining system, which ultimately discourages agreement being sought at the workplace level by those who understand the business best (the employer and the employees), and hands over ultimate decision-making power to a third party with no skin in the game (the Fair Work Commission).

18. Enterprise bargaining, and widespread multi-employer bargaining and arbitration cannot co-exist; they are mutually exclusive settings in our workplace relations system. A workplace relations system is centralised, or it is not, and if it includes any substantive role for fundamentally centralising mechanisms such as arbitration and compelled multi-employer bargaining, it will rapidly become a centralised system.

19. A key concern for ACCI with this Bill is that proposes a re-centralization of workplace relations in Australia, and a reversion towards approaches to the regulation of work under which Australians were not as well off, under which we had less resilience in the face of economic crises, and for example under which we had high and sustained unemployment.

20. In its current form the Bill will ultimately see multi-employer bargaining significantly encroach on enterprise-level bargaining in Australia. This will see wages go backwards in Australia. The complexity of multi-employer bargaining and the increased risk of disputation arising from multiple employers, groups of employees and unions being forced to come to common positions will only serve to drive down wages to "low ball" outcomes, if agreement can be reached at all.

21. Where agreement can't be reached rates of industrial action will increase and Australia will see increasingly see reliance on arbitrated outcomes, which cannot produce the same productivity gains and wage outcomes as can be achieved by parties reaching agreement that suit their individual circumstances at the enterprise level.

22. If the Government is right and this shift to pattern bargaining sees a lift in wages, these increases, which will not be driven by productivity and will not be suited to the individual circumstances of an individual employer and its workforce, will be artificial and will ultimately lead to business closures and job losses. The only winners in such a system would be large businesses who could effectively lock out smaller competitors from the market by forcing them to adopt pay rates and conditions that they cannot afford.

PART 21 – SINGLE INTEREST EMPLOYER AUTHORISATIONS

23. The current single-interest employer authorisation bargaining stream is voluntary.[2] Employers with a "single-interest" can elect to apply to the Minister and the FWC to bargain together.[3]

24. The existing definition of "single-interest" is narrow. Single interest employers are employers that are in a joint venture or common enterprise or are related corporations.[4] Additionally, if employers have a close relationship, they can be authorised as "single interest employers" by the FWC, which may be either franchisees or other employers where the Minister for Employment has made a declaration (e.g. employers such as schools in a common education system, kindergartens or public entities providing health services).[5]

25. If employers choose to go down this route, they knowingly expose themselves to industrial action.[6]

26. The Bill substantially changes the operation of existing stream in the following ways.

    a. **The stream will become compulsory for employers** — unions/employees can seek a "majority support determination", which will compel the employer to bargain with other employers if the union can demonstrate that the majority of employees in each workplace want to bargain.[7] Additional employers can be added to the authorisation in this way.[8] MSDs do not require an employee vote.[9]

    b. **The types of employers who fall under this stream will be broadened** and who may now be compelled to bargain together (small business employers, those with 14 or less employees, are exempt);[10]

    c. The ability of employees to take **industrial action** will be retained. By broadening the types of employers who can be covered by this stream the Bill significantly increases the risk of sector-wide industrial action.

    d. The union will be given a veto over which terms are put by the employer to employees. Under the current system, the employee vote can sometimes act as a dispute resolution mechanism. For instance, where the employer and the union disagree over a term of the agreement, putting the agreement to a vote gives the employees the final decision over their own terms and conditions of employment. The veto in the current Bill hands an unreasonable amount of power to unions and disenfranchises the employees who will be covered by the agreement, in favour of union officials and their centralised decision making.

27. The Bill also removes the requirement for Ministerial approval for a single interest authorisation.

[2] FW Act s 249(1)(b).
[3] Ibid s 248(1).
[4] Ibid s 249(2).
[5] Ibid s 247.
[6] Ibid s 413(2), as it is treated as a single-enterprise agreement: see s 172(2).
[7] Bill item 634, s 249(3A).
[8] Ibid item 639, s 251(5).
[9] Ibid item 634, s 249(3B).
[10] Ibid item 634, s 249(3C).

The FWC will instead issue authorisations. Either a business or a union may apply and there is no limit to the number of businesses an application can cover. [11]

Scope of the stream

28. The definition of "common-interest" in the Bill is drafted so broadly there is a significant risk that an extensive range of businesses will now be compelled to bargain together.[12]

29. Under the new test, employers must have "clearly identifiable common interests" and factors that "may" be relevant are "geographic location" or "regulatory regime".[13] The Government cannot give any indication of which businesses may be covered by this test, as it leaves this to the discretion of the FWC[14].

30. It could be open to the FWC, for instance, to find that all businesses operating at the same shopping centre could be compelled to bargain together. This could allow, for example, a wealthier tenant like a major department store to set terms and conditions for smaller businesses simply because of their "common interest" of being tenants trading in the same shopping centre. These businesses would share a common "geographic location" and likely a common "regulatory regime".

31. There is no prohibition on competitors being "single-interest" employers, meaning that the wealthier tenant in the shopping centre could set pay rates at such a level that the smaller competitor cannot afford and eventually goes out of business. This is anti-competitive.

32. Another example may be employers of tradespersons on a building site who, despite providing a range of services from air-conditioning installation to plumbing to construction work, could be compelled to bargain together because they are working on the one building project.

33. The drafting is so broad there is a risk that employers spread out across the country could be compelled to bargain together because of, for example, the fact that they provide the same services and have similar customers but are operating in different areas. This could extend to pharmacies or grocers or butchers. The reference to "geographical location" in the Bill does not assist to clarify the scope of this steam.

34. The Bill also opens the door for competitors to be compelled to bargain together. This is of particular concern for small businesses who may not be able to afford wage increases pushed by larger competitor employers in the group. This can lead to monopolist outcomes, particularly in industries where major players already significantly outsize others. Under the existing single-interest employer stream, a factor that the Minister must consider when deciding whether to provide a single interest employer declaration is "the extent to which the relevant employers operate collaboratively rather than competitively"[15]. The Bill does not retain this limitation.

35. In the case of franchisees, the Bill only requires that franchisees have "similar business activities" rather than the existing higher threshold of "franchisees engaged in a common interest". This further expands the scope.

[11] Ibid item 633, s 248(1).
[12] Ibid item 634, s 249(3C).
[13] See ibid.
[14] This was confirmed during the appearance of the Department of Employment and Workplace Relations for this inquiry on 11 November 2022.
[15] FW Act s 247.

Impact on SMEs

36. Compelling such a broad range of employers to bargain together will have a particularly devastating effect on small and medium businesses, particularly because:

    a. it will require small business owners, who will almost always work in the business themselves, to spend a significant amount of time away from their work, negotiating a joint bargaining position with the other employers (including those with fundamentally different businesses) and then negotiating with employees and union reps, with significantly more time to dedicate to this process. Alternatively negotiating with employees / unions will likely fall to the larger employers in the group, because the smaller businesses will lack the time and resources to properly engage; and

    b. the outcome of the bargaining process will be a multi-employer agreement that will undoubtedly take on a "one-size fits all" approach, which will not be relevant to the particular requirements of the business and will cause operational difficulties in the future (e.g. because of working hours or rosters that do not suit all businesses).

37. The second point is particularly pertinent for small businesses because a lack of time and resources to properly engage with the bargaining process will see many small businesses allowing other better resourced businesses to negotiate terms and conditions on their behalf, increasing the risk that the final terms and conditions agreed will be ill-suited to the particular needs of that small business. This could include unaffordable rates of pay or workplace arrangements that do not maximise business operations.

38. This issue is compounded for those small businesses who may be compelled to join an existing single-interest employer agreement. In this case, the employer (and the employees) has not had an opportunity to provide input to the terms of the agreement.

39. Ill-suited collective agreements have the potential to significantly constrain how business owners can manage their businesses, which will eventually risk the viability of the business. This will lead to business closures and job losses.

40. The increased risk of industrial action across multiple employers will also have a devasting effect on small and medium businesses.

41. There is also little to no prospect that lowest common denominator bargaining will provide any foundation or encouragement to increase productivity, efficiency or enterprise resilience. There simply will be no positives for the employer in bargaining through such a process.

Limits on broad scope ("protections" for business)

42. ACCI is not satisfied that the purported "protections" for businesses in the Bill will sufficiently deal with the issues outlined above, despite Government assurances to the contrary. For instance, the requirement that granting the "single interest employer" authorisation is not "contrary to the public interest"[16] is notably expressed negatively (not positively as, "must be in the public interest")[17] and, accordingly, does not provide businesses with sufficient protection. It is not clear from a legal perspective how compelling two unrelated employers to bargain together would be contrary to the public interest, especially as the intent of the provisions is to compel more employers to

[16] Bill item 634, s 249(3B).
[17] Cf, eg, FW Act s 615A.

bargain together.

43. In *Re Esso Australia Pty Ltd* (2005) 139 IR 34, Giudice P, Ross VP and Commissioner Gay of the Australian Industrial Relations Commission (AIRC) considered the meaning of the "public interest", a decision which is regularly referred to by the FWC when considering applications to terminate enterprise agreements.[18] The AIRC held that:[19]

> The notion of public interest refers to matters that might affect the public as a whole such as the achievement or otherwise of the various objects of the Act, employment levels, inflation, and the maintenance of proper industrial standards … While the content of the notion of public interest cannot be precisely defined, it is distinct in nature from the interests of the parties. And although the public interest and the interests of the parties may be simultaneously affected, that fact does not lessen the distinction between them.

44. The AIRC proceeded to refer to the High Court decision of *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* (1987) 61 ALJR 393, in which Mason CJ, Wilson and Dawson JJ held that "[a]scertainment in any particular case of where the public interest lies will often depend on a balancing of interests, including competing public interests, and be very much a question of fact and degree".

45. Accordingly, the requirement that an application for a single interest authorisation be, in the negative sense, "not contrary to the public interest", is unlikely to offer any protection for businesses. This is because employers preferring not to be compelled into bargaining alongside other employers would likely need to provide evidence that demonstrates that the authorisation would somehow endanger the statutory objects of the FW Act or broader economic considerations to a not insignificant degree. These considerations are relatively unbounded, concerned with matters such as "productivity and economic growth for Australia's future economic prosperity" or "national economic prosperity and social inclusion for all Australians".[20] Placing an onus on a smaller employer to convince the FWC that such broad objectives may be prejudiced by the authorisation is a likely unsurmountable burden.

46. Similarly, the carve-out from multi-employer bargaining for businesses who have an "in term" enterprise agreement that has not expired will be gamed by unions who can easily drag out bargaining for a new agreement until after the nominal expiry date. This is because a business with an enterprise agreement can be subject to a single interest employer authorisation as soon as the enterprise agreement expires.

47. While the Government has introduced an amendment which would give the FWC discretion not to provide an authorisation within six months of the nominal expiry date, this is only a discretion and the FWC may still provide the authorisation at any time from the expiry date. Employers should be given at least twelve months from the nominal expiry date.

48. Businesses will only be removed from a "single interest employer" authorisation if the FWC approves an application to do so, having considered the views of the employer and the employees and "because of a change in circumstances it is no longer appropriate" for them to be covered.[21] The onus to prove a "change in circumstances" will be on the employer.

[18] See, eg, *Tahmoor Coal Pty Ltd re Tahmoor Colliery Enterprise Agreement 2006; Tahmoor Washery Workplace Agreement 2006* [2010] FWA 6468.
[19] Re Esso Australia Pty Ltd (2005) 139 IR 34 [23].
[20] FW Act s 3.
[21] Bill item 637, s 251(2)(b).

49. In addition, once a single-interest agreement is made, a variation to remove an employer can only be given if each union representing employees agree to the variation.[22] This union veto will effectively lock employers into multi-employer bargaining and not provide them with a chance to bargain for an enterprise agreement. This will do nothing to increase the number of enterprise agreements in Australia, which is the Government's purported aim.

50. Finally, the initial version of the Bill as introduced to Parliament required an application for a single interest authorisation to be made in respect of a proposed enterprise agreement that would cover a group of employees who were "fairly chosen".[23] This was an important safeguard for business who would have the opportunity to argue before the FWC (before bargaining had commenced) that the employees proposed to be covered by the multi-employer agreement were not "fairly chosen". However, Government amendments removed this requirement from the application, instead reserving this consideration for the FWC's decision as to whether approve the enterprise agreement.[24] This change unfairly prejudices employers who do not wish to be compelled into multi-enterprise bargaining.

51. The requirement that employees are "fairly chosen" is critical in the bargaining process. In its absence, the scope of an enterprise agreement could be strategically restricted to only pertain to employees who parties are confident will support the agreement, excluding those employees who would object to its terms. The Explanatory Memorandum of the Fair Work Bill 2008 provided this useful illustrative example:[25]

> A single employer operates five organisationally distinct units within its enterprise. The employer makes an agreement with all of the employees in two organisationally distinct units, as well as ten employees who are the only non-union members within from another organisational unit that has a total of 30 employees. FWA is required to decide whether the group of employees covered by the agreement is fairly chosen.
>
> In this example, the group of employees covered by the agreement is likely to be unfair, particularly as the employees were unfairly chosen.

52. While the requirement that employees covered by the agreement are fairly chosen applies to all enterprise agreements by virtue of s 186(3) of the FW Act at the stage of agreement approval by the FWC, importantly, it is also a requirement imposed upon majority support determinations under s 237.

53. This is because majority support determinations of course involve, in theory, a vote or evidence of the democratic will of a group of employees. If the employees whose views are represented in the proof of majority support are not fairly chosen, then those applying for the determination are essentially able to gerrymander the group of employees who would be covered by the agreement to also be those who would support compelling the employer to bargain. For that reason, where an employer is required to bargain pursuant to a majority support determination, the FWC must be satisfied that the group of employees have been fairly chosen at two stages: (1) when evidence is provided that a majority of employees "want to bargain";[26] and (2) when evidence is provided that "the agreement has been genuinely agreed to by the employees covered by the agreement".[27]

[22] Bill item 641, s 216EB(d).
[23] Ibid item 634, s 249(3)(c).
[24] FW Act s 186.
[25] Explanatory Memorandum, Fair Work Bill 2008, [778].
[26] FW Act s 237(2)(c).
[27] Ibid s 186(2)(a).

54. This requirement will not be imposed upon parties seeking to prove that a majority of employees want to bargain under a single interest authorisation as provided in the Bill, despite the fact that the requirement for majority support under this stream essentially mirrors that of majority support determinations for single enterprise agreements.

55. In most cases, if the FWC is satisfied that the group of employees have been fairly chosen when evidence is provided that a majority of employees want to bargain, then they will also be satisfied of this requirement when approving the agreement. However, it is crucial that the requirement is first imposed at the point where the employer is first compelled to bargain — where evidence of majority support is first provided. This is because if the employer is forced to bargain under a single interest authorisation, by the time that the terms of the enterprise agreement have been fully determined and the FWC's final approval is sought, they are extremely unlikely to raise concerns about whether the group of employees were "fairly chosen". By then, significant time and costs has already been invested into the bargaining process and employers are unlikely to want to then abandon the process. This is despite the fact they may have been compelled to bargain alongside other employers against their wishes as a consequence of a vote or petition demonstrating majority support, only because the employees covered by the agreement were strategically chosen to ensure its success.

Recommendations

Recommendation 1:

ACCI supports splitting of the Bill such that consideration of Part 21 (the single interest employer authorisation) by the Senate is deferred until 2023, giving Government more time to consult.

56. If Part 21 is not split from the rest of the Bill and is to be voted on by the Senate, ACCI would encourage the Committee to recommend recommendations [2] to [8].

Recommendation 2:

The "single-interest employer authorisation" bargaining stream should remain voluntary. This requires an amendment to the Bill which removes the right of unions/ employees to make an application for a majority support determination. Only this ensures the primacy of the enterprise bargaining system, which drives productivity gains and ensures sustainable wages growth.

57. In the alternative, and if the Bill retains the majority support determination option, ACCI recommends the following:

Recommendation 3:

A change to the small business exemption so that it captures businesses that employ at least 100 employees – businesses of all sizes can already be compelled to bargain for an enterprise level agreement, and businesses who are not large enough for in-house HR and/or legal teams are not well resourced enough to deal with the administrative complexity of bargaining across a large number of other businesses.

Recommendation 4:

What constitutes a "common interest" must be clearly defined and should adopt the same scope which currently exists under the FW Act (that is to say that the FWC must consider the same list of factors that the Minister must consider before providing a declaration).

These factors are:[28]

- the history of bargaining of each of the relevant employers, including whether they previously bargained together;
- the interests that the relevant employers have in common, and the extent to which those interests are relevant to whether they should be permitted to bargain together;
- whether the relevant employers are governed by a common regulatory regime;
- whether it would be more appropriate for each of the relevant employers to make a separate enterprise agreement with its employees;
- the extent to which the relevant employers operate collaboratively rather than competitively;
- whether the relevant employers are substantially funded, directly or indirectly, by the Commonwealth, a State or Territory;
- any other matter;

58. Consideration might also be given to whether business size may be relevant, and included in the common interest criteria.

Recommendation 5:

Employers covered by an expired enterprise agreement and who have re-commenced bargaining should have at least a 12-month grace period from the expiry date to re-negotiate a new enterprise level agreement before they can be subject to a single-interest employer authorisation and compelled to become party to a multi-employer agreement.

Recommendation 6:

Section 216 EB, which effectively gives unions the ability to veto a majority employee vote in favour of an employer leaving a single-interest employer agreement, should be amended so that employees can vote to be covered by an enterprise-level agreement (which is a fundamental collective bargaining right).

Recommendation 7:

The "public interest" test must be expressed in the positive – that is to say that the FWC must be satisfied that granting the "single-interest employer" declaration is in the "public interest", not simply "not contrary to the public interest".

Recommendation 8:

The requirement that the employees covered by an agreement are "fairly chosen" must be reintroduced to the application stage for single interest authorisations.

[28] FW Act s 247.

PART 20 – SUPPORTED BARGAINING

59. The supported bargaining stream is a special stream of bargaining that renames and expands upon the existing "low paid bargaining authorisation" avenue under the Act.[29] The aim is to assist low-paid employees and their employers to make multi-employer agreements that meet their needs and address the constraints faced by low paid workers.

60. The stream will continue to allow employees in low-paid industries to compel (once a "supported bargaining authorisation" is granted by the FWC) employers to bargain but will broaden the stream's application, including by amending the definition of "low-paid" to consider prevailing wage levels in an industry.[30] Similarly, the "history of bargaining" consideration will be removed,[31] which aims to exclude classes of employees who have previously successfully bargained for a collective agreement on an enterprise basis from this multi-employer stream. Industrial action will be available for the first time in this bargaining stream.[32]

61. The changes to the existing "low-paid bargaining" stream (to become the "supported bargaining" stream) are said to be aimed at making the stream more accessible to low-paid workers, citing previous applications for aged care workers, nurses and security guards that failed to obtain low-paid bargaining declarations from the FWC for various reasons.[33]

62. While not specifically defining who a low-paid worker is in the Bill, the changes proposed will likely see an increase in the number of applications and successful authorisations.

63. The authorisations cannot cover any employees covered by an existing single-enterprise agreement that has not passed its nominal expiry date,[34] unless the employer entered into the enterprise agreement with the main intention of avoiding being specified in the supported employer authorisation.[35]

64. Once an employer is subject to a supported bargaining authorisation, the employer is compelled to comply with good faith bargaining obligations, which include (amongst other things) attending meetings at reasonable times, considering and responding to bargaining proposals in a timely manner and disclosing relevant information in a timely manner.[36]

65. Any supported bargaining agreement automatically prevails over any other enterprise agreement applicable to an employer, even if the other enterprise agreement was bargained and approved first. That is, supported bargaining agreements prevail over all other agreements applicable to the employer with respect to the same employees.

66. An existing supported bargaining agreement can also be varied (by consent and otherwise) to add a new employer.[37] Where agreement is unable to be reached on terms in the proposed supported bargaining agreement, the existing provisions (s260 and s269-s279, which apply to "low paid bargaining authorisations") allow a bargaining representative to apply to the FWC to make a Supported Bargaining Workplace Determination, which would compel an arbitrated

[29] FW Act part 2-4 div 9.
[30] Bill item 611, s 243(1)(b)(i).
[31] FW Act s 243(2)(b).
[32] Bill item 625.
[33] EM [890]-[896].
[34] Bill item 611, s 243A(1).
[35] Ibid item 611, s 243A(3).
[36] FW Act s 228.
[37] Bill item 597, s 216.

outcome on the parties regarding outstanding matters in dispute.

Scope of the stream:

67. Under the Bill employees or their representatives can apply to the FWC for an authorisation compelling their employer to bargain in conjunction with other employers if:

    a. the FWC is satisfied that it is appropriate for the employers and employees that will be covered by the agreement to bargain together, having regard to:[38]

    b. the prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector); and

    c. whether the employers have clearly identifiable common interests; and

    d. whether the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process; and

    e. any other matters the FWC considers appropriate; and

    f. the FWC is satisfied that at least some of the employees covered by the proposed agreement are represented by a union.

68. In relation to whether employers have "clearly identifiable common interests", the FWC is required to consider: [39]

    a. geographical location of employers;

    b. the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises; and

    c. being substantially funded (directly or indirectly) by Commonwealth or State/Territory Governments.

69. The tests identified above do not give employers or employees any clarity over who a low paid worker is or which industries they will work in. For instance, while the Government refers to funded sectors such as aged care and child-care,[40] it is not clear, on the face of the Bill, whether the test would apply to them or whether the stream could be extended to other non-funded sectors such as retail, hospitality etc.

70. While broadly supporting the policy intent behind these changes, ACCI cannot support this part of the Bill until greater clarity is given to the scope of the stream. The most straight forward way of doing this would be to allow the Minister to declare particular industries by regulation. This would provide Government with the flexibility it needs to continuously assess which industries need the additional support the supported bargaining stream provides.

Recommendation 9:

Amend this Part so that the Minister has the power to declare particular industries as being "low paid" by regulation. This would leave the scope of this stream beyond doubt. The Committee should recommend that draft regulations be developed identifying the relevant industries prior to passage of the Bill.

[38] Ibid item 611, s 243(1).
[39] Ibid item 611, s 243(2).
[40] EM [890].

PART 23 – COOPERATIVE WORKPLACES

71. Co-operative workplace agreements are multi-employer agreements that were not made through a supported bargaining or single interest bargaining process (albeit the latter is technically defined as a type of enterprise agreement).

72. It will be voluntary for employers who may opt in to bargaining but also opt-in to an agreement once it is in place, subject to an employee vote. Businesses will not be restricted in opting out of bargaining at any time during the process if they wish. This is nominally intended to target smaller businesses but will be open to all, and time will tell if it is misused for the convenience of unions or is subject to coercion.

73. This stream reflects the existing voluntary multi-employer bargaining option available to all employers. The FWC will play a more proactive role in bargaining, and industrial action is not available in this stream.

74. Having examined Part 23, ACCI does not oppose the broad intent and supports opt in multi-employer bargaining as an option for workplaces.

PART 23A - EXCLUDED WORK

75. The Bill passed the House of Representatives with a Government amendment which inserts a new Part 23A into the Bill which defines "general building and construction work" and other amendments which exclude such work from the permitted scope of single interest authorisations, the supported bargaining stream, and multi-enterprise bargaining generally.

76. Broadly, these changes are positive and welcome. The ramifications for these industries arising from compulsory multi-enterprise bargaining, arbitration and more widespread industrial action could be debilitating. This is particularly so in light of the lawlessness and union militancy that pervades these industries, which will be exacerbated by the abolition of the ABCC pursuant to Part 3 of the Bill.

77. However, the limited definition of "general building and construction work" in the new Part 23A is concerning. The proposed section 23B defines "general building and construction work" as work undertaken by an employee within the meaning of paragraph 4.3(a) of the Building and Construction General On-site Award 2020. The provision then exempts from the definition, and thereby extends the scope of single interest authorisations and the supported bargaining stream to work in civil construction and work in metal and engineering construction.

78. Other work is also specifically exempted from the definition, including the joinery and building trades industry; electrical services; plumbing or fire sprinkler fitting; black coal mining; mining generally; quarrying; the concrete products industry; the premixed concrete industry; and work connected with lifts and escalators or air-conditioning or ventilation. That said, generally such work would ordinarily be excluded from the scope of the Building and Construction General On-site Award 2020 under clause 4.4.

79. Conversely, work in civil construction and work in metal and engineering construction is covered by the Building and Construction General On-site Award 2020. There is no justification for including these sectors within the scope of single interest authorisations and the supported bargaining stream while other parts of the general building and construction industry are excluded.

80. The civil, metal and engineering construction industries are to a large extent comprised of smaller employers who lack relative bargaining power compared with their powerful union counterparts. The significant powers conferred on unions under the Bill, particularly the power to veto enterprise agreement terms and compel employers to participate in multi-enterprise bargaining, will mean that businesses in these industries will be put at risk. Further, the cost to the public could be substantial given the potential disruption to large infrastructure projects.

Recommendation 10:

The definition of "general building and construction work" should be amended to include work in civil construction and work in metal and engineering construction.

PART 14 – AGREEMENT APPROVAL

81. The Bill seeks to remove many of the existing requirements in s 188 that must be met to have an enterprise agreement approved, and replace them with three (3) requirements:[41]

    a. Compliance with a Statement of Principles

    b. Notice of Employee Representational Rights (NERR)

    c. Sufficient Employee Interest

Statement of Principles

82. The FWC will now have broad discretion to determine whether an enterprise agreement has been "genuinely agreed", which it must be satisfied of before approving an enterprise agreement.[42]

83. The FWC will be required to issue a Statement of Principles that will outline the types of measures that the FWC considers will demonstrate genuine agreement.[43] The Statement of Principles will address the following matters:[44]

    a. informing employees of bargaining for a proposed enterprise agreement;

    b. informing employees of their right to be represented by a bargaining representative;

    c. providing employees with a reasonable opportunity to consider a proposed enterprise agreement;

    d. explaining to employees the terms of a proposed enterprise agreement and their effect;

    e. providing employees with a reasonable opportunity to vote on a proposed agreement in a free and informed manner, including by informing employees of the time, place and method for the vote;

    f. any matter prescribed by the regulations for the purposes of this paragraph; and

    g. any other matters the FWC considers relevant.

84. These new notification requirements will only apply to enterprise agreements where bargaining has started after the commencement of the Bill. This appears to address various points in the current system which are seeing agreements delayed or not approved, even where supported by employers and employees.

Notice of Employee Representational Rights

85. The requirement to issue a Notice of Employee Representational Rights (NERR) will remain as it presently operates under the FW Act, but only in the case of a proposed single enterprise

[41] Bill item 509, s 188.
[42] FW Act s 186(2)(b)(i).
[43] Bill item 511, s 188B.
[44] Ibid item 511, s 188B(3).

agreement.

86. This includes the requirement to wait until at least 21 days after the last notice is given before requesting employees vote for the agreement.

87. This no longer applies for a proposed single-interest employer agreement, supported bargaining agreement or cooperative workplaces agreement. As is presently the case, minor technical or procedural errors in relation to the issuing of the NERR that do not disadvantage employees will not prevent an enterprise agreement from being approved.[45]

Need for employees to have sufficient interest in the agreement

88. To approve an enterprise agreement, the FWC must also be satisfied that the employees who vote on the proposed enterprise agreement:[46]

    a. have a sufficient interest in its terms; and

    b. are sufficiently representative, having regard to the employees the agreement is expressed to cover.

89. There have been particular problems with knowing which casuals need to be invited to vote on an agreement.[47] We hope this can be addressed and practical assistance provided through the proposed FWC statement of principles. If not, this will remain an issue for future legislative clarification.

Other matters

90. While not strictly approval requirements, additional changes in the Bill include expanding the list of "permitted matters", which are matters that the bargaining parties are able to negotiate and include in the collective agreement, to "special measures to achieve equality", if "the term has the purpose of achieving substantive equality for employees or prospective employees who have a particular attribute or a particular kind of attribute".[48] If such changes are genuinely agreed and constructive and reflect the priorities of the employees who will work under the agreement this change will likely be positive for both employers and employees.

Assessment

91. The purpose of the changes to approval requirements is to simplify detailed and complex pre-approval requirements to better encourage enterprise bargaining. It also ensures that the FWC is not required to refuse to approve agreements due to minor or technical procedural deficiencies that did not affect how employees voted on the agreement.

92. ACCI has long advocated for measures that simplify and increase the reliability of the FWC's complex agreement approval process. ACCI supports these changes.

[45] Bill item 509, s 188(5).
[46] Ibid item 509, s 188(2).
[47] See, eg, *Re Kmart Australia Ltd* [2019] FWC 6105; *Appeal by Shop, Distributive and Allied Employees Association* [2019] FWCFB 7599; *Appeal by the Australian Workers' Union (AWU)* [2019] FWCFB 7599.
[48] Bill item 428, s 172A.

Union Veto on Multi-Employer Agreement Voting

93. The Governments package of amendments to its Bill includes proposed s 180A, which provides that before a multi-employer agreement can be put to a vote, *"the employer must obtain written agreement to the making of the request from each bargaining representative for the enterprise agreement that is an employee organisation".* The new s 207A would not allow votes to vary multi- employer agreements without every union giving permission.

94. Not one union, every union. Not just the unions with members at the employer's workplace, but all the unions that may have members will be representatives in any workplace that may be covered by the agreement, which may number in the hundreds.

95. It is not clear whether there is any exclusion of unions that seek to be covered by such agreements using s 183. This allows a union that may not have finally negotiated an agreement, which may have little or no employee support, to seek to be bound by the agreement after it commences operation.

96. ACCI does not support this change. It hands too much power to unions and is not in the best interests of the employees they represent. It is paternalistic and disenfranchises the employees who will be covered by the agreement.

97. Under the current system, the employee vote can sometimes act as a dispute resolution mechanism. That is to say that where the employer and the union disagree over a term of the agreement, putting the agreement to a vote gives the employees the final decision over their own terms and conditions of employment.

98. Enough time is given between the notice to vote and the vote for union representatives to campaign and inform those voting of the unions concerns. If the agreement is voted up, union representatives still have a right to raise their concern directly with the FWC who ultimately decides to approve the agreement.

Recommendation 11:

The veto power of unions over the terms which are put to employees before a vote for a multi-employer agreement should be removed.

PART 15 – INTIATING BARGAINING

99. Currently, unions cannot initiate bargaining without the agreement of the employer or after obtaining a majority support determination,[49] which demonstrates that a majority of employees wish to commence bargaining.

100. Item 522 of the Bill would allow a union, representing just one employee, to initiate bargaining automatically once a request to bargain has been sent to the employer, provided that:

a. the employer has been covered by an enterprise agreement that expired within the past five years and the proposed agreement will replace the expired agreement;

b. the making of the earlier agreement did not cause a single-interest employer authorisation to cease to operate; and

c. the proposed agreement will cover the same, or substantially the same, group of employees as the earlier agreement.

101. This applies only to single enterprise agreements, not multi-employer or greenfields agreements. Once a request has been made by the union, three important consequences flow:

a. The employer is compelled to comply with good faith bargaining obligations, which include (amongst other things) attending meetings at reasonable times, considering and responding to bargaining proposals in a timely manner and disclosing relevant information in a timely manner.

b. Compulsory arbitration is possible where an "intractable bargaining dispute" arises, under the Bill.

c. Employees can take protected industrial action, subject to a PABO.

102. This change gives more power to unions, including power to initiate bargaining without demonstrating that the majority of employees wish to bargain (i.e. through a majority support determination) or where the employer has agreed.

103. There are legitimate reasons why employees may not wish to bargain for a new agreement, including that they are happy to remain on the most recent, expired agreement (noting that agreements have pay rises worked into their terms). For instance, an expired agreement may include positive rostering arrangements, around which employees have structured their lives. If bargaining reopens the agreement, then employees would be risking the existing, more favourable terms. If the employer does not consent, bargaining should only commence if the majority of employees are in favour of doing so, not because one union representing one employee wants to.

104. For the reasons listed above, ACCI does not support this change.

Recommendation 12:

The amendments in Part 15 – Initiating Bargaining, should not be progressed.

[49] FW Act s 236.

PART 16 – BETTER OFF OVERALL TEST

105. The BOOT is the test that the FWC must apply before approving a collective agreement to ensure that employees are better off overall than they would be under the applicable modern award.

106. Employers have been clear that the application of the BOOT has been one of the key problems causing a decline in enterprise-level bargaining since 2009. The increasingly rigid approach the FWC has taken in determining whether the BOOT has been met has seen many enterprise agreements fail to be approved. This, in turn, has meant that many employers lack confidence in using the enterprise bargaining system.

107. In this Bill, the BOOT will be revised so that the FWC is required to approve an agreement as being better off overall provided that employees are better off overall "globally", as opposed by comparing each entitlement in an enterprise agreement against the underlying modern award.[50]

108. When assessing whether employees are better off overall, the FWC will:[51]

a. Not be required to consider the circumstances of prospective employees;

b. Only be required to consider patterns of work that are reasonably foreseeable at the test time;

c. Will be able to assess the BOOT by references to classes of employees (as opposed to each individual employee) unless there is evidence that identifies individual employees are worse off under the enterprise agreement;

d. Will give primary consideration to a common view (if any) relating to the BOOT expressed by specified bargaining representatives of the employer and employees; and

e. Will be able to directly amend or excise a term in an agreement that does not otherwise meet the BOOT.

109. These changes, that allow the BOOT to be applied globally, are welcome and will give employers more confidence to engage with the enterprise bargaining system. This, in turn, should see more employees benefit from the higher wages that enterprise agreements provide.

Reconsideration and Reopening Agreements

110. Part 16 includes a provision empowering employees or unions to trigger a reconsideration of the BOOT (proposed s 227A) at any time after the agreement is approved, provided:

a. prior to approval of the enterprise agreement, the FWC gave consideration to a common view regarding whether the agreement passes the BOOT;

b. as part of this consideration, the FWC had regard to patterns or kinds of work, or types of employment engaged in, or to be engaged in, by award covered employees; and

[50] Bill item 528, s 193A.
[51] See ibid.

c. at the test time, or a later time, the modern award covered employees engaged in other patterns or kinds of work, or types of employment to which the FWC did not have regard.

111. If the FWC is satisfied that the circumstances of any employee does then not meet the BOOT (at the time of reconsideration) then either:

a. the employer must give undertakings to rectify the concerns; or

b. the FWC will of its own initiative vary the enterprise agreement to rectify the concerns.

112. Any undertaking or variation will apply to all employees from seven days after the date of the variation moving forward (unless a different date is specified by the FWC).

113. A Government amendment to the Bill provides that the BOOT reconsideration process will be available to 'new employees' (engaged after the original test time) in circumstances where an enterprise agreement provides different terms and conditions for those employees than it does for the 'original employees' when they engage in the same patterns or kinds of work, or types of employment.

114. While the changes that allow the BOOT to be applied globally, rather than line-by-line, are welcome, the ability of the FWC to vary the agreement at any time during the term is a concern because it effectively means that collective agreements will no longer "lock in" terms and conditions for the life of an agreement (which is one of the primary benefits of enterprise bargaining for most employers). Instead, agreement terms can be capable of continuous challenge or scrutiny if there is any prospect of employees being worse off under the agreement when compared to the modern award.

115. In some ways this change will mean that the Bill will likely create more uncertainty and confusion than presently exist. This will likely disincentivise bargaining.

116. ACCI supports a safeguard mechanism that would allow a new employee (or their representative) to apply to the FWC to seek compensation in circumstances where they are left worse off than under the relevant modern award because the parties failed to contemplate their role/working patterns at the time the agreement was made. This proposed model fundamentally differs to the 'safeguard' included in the Bill which would allow the FWC to vary the terms of the agreement at any time during its term.

117. The mechanism to allow the FWC to compensate a particular employee, or new class of employee, is preferred to allowing the FWC to vary the actual terms of the agreement.

Recommendation 13:

Replace the existing mechanism in the Bill that allows the FWC to vary the enterprise agreement for all employees with a safeguard mechanism that would allow an employee (or their representative) to apply to the FWC to seek compensation in circumstances where the employee is left worse off than under the relevant modern award because the parties failed to contemplate their role/working patterns at the time the agreement was made.

PART 17 - DEALING WITH AGREEMENT ERRORS

118. The Bill gives the FWC expanded powers to vary agreements to correct or amend "errors, defects or irregularities" in agreements. It currently only has the power to deal with "ambiguity or uncertainty" in agreements.[52]

119. Currently, errors, defects and irregularities can frustrate the proper application of agreement terms. This is another measure that will give employers greater confidence to participate in the enterprise bargaining system.

120. ACCI supports these amendments.

[52] Bill item 535, s 218A.

PART 18 – BARGAINING DISPUTES / ARBITRATION

121. Under the current FW Act, parties cannot typically apply to the FWC to seek a binding decision on what terms should or should not be included in a collective agreement. The terms of an agreement are for the parties to agree to or for the employer to put to a vote of employees.

122. This approach fundamentally changes under the Bill.

123. Where there is "no reasonable prospect of agreement being reached" and it is "reasonable in all the circumstances to make the declaration, taking into account the views of the bargaining representatives for the agreement", a bargaining representative will be able to apply for, and the FWC can make, an "intractable bargaining declaration".[53]

124. Before making an application, a bargaining representative is still required to participate in the existing bargaining dispute processes under the FW Act (s 240 disputes), which includes attending conciliation (an informal process).

125. Once an intractable bargaining declaration is made, the FWC must either:

    a. arbitrate the outstanding matter(s) between the parties, imposing an intractable bargaining workplace determination on them (which operates like an enterprise agreement); or

    b. provide the parties with a post-declaration negotiating period to agree on terms, after which the FWC must arbitrate the outstanding matters between the parties, imposing a workplace determination on them to resolve any matters on which agreement had not been reached by the parties.

126. The timing of the post-declaration negotiating period, like all aspects of this process, is left to the discretion of the FWC.

127. Parties subject to an intractable bargaining declaration will be unable to take legally protected industrial action.

128. This introduces 'unilateral arbitration' into enterprise bargaining for the first time under the FW Act. This means that one party can disagree to the claims made in bargaining and seek to have terms imposed on all parties by way of arbitration. Arbitral based bargaining discourages agreement being reached between the parties who know the business best (the employer and the employees) in favour of a third-party with no skin in the game. It effectively signals a return to an arbitral-based bargaining regime more commonly experienced in the 1970s and 1980s.

129. It is available in both single enterprise agreements and all multi-employer bargaining streams.

130. Arbitration is a time consuming and costly exercise, particularly for small businesses that may now be compelled to bargain for multi-employer agreements, and unproductive in that they take the final decision-making away from those who understand the business best. This is especially true for arbitration seeking to resolve disputes during multi-employer bargaining. The more parties involved, the more costly the arbitration.

[53] Bill item 543, s 234.

131. A system where agreements are made in the workplace between people who know the business best, will deliver the best results for employer and employees, and will deliver sustainable gains for both based on their priorities. This is how people work together cooperatively and sustainably, not by resource to compulsory arbitration.

Intractability

132. While maintaining fundamental opposition to an expanded role for compulsory arbitration, ACCI has raised more specific concerns with Government that greater clarity was needed in the definition of "intractable bargaining dispute" to ensure that the FWC does not have discretion to move parties to compulsory arbitration too quickly, cutting off scope for enterprise bargaining.

133. In response, the Government has made an amendment so that the FWC is not able to make an intractable bargaining declaration in relation to a proposed agreement unless it is after the "end of the minimum bargaining period". This period is generally 6 months after the nominal expiry of the previous agreement.

134. ACCI welcomes this as an improvement but is of the view that the minimum bargaining period should commence at the time the parties actually start bargaining, and not at the nominal expiry date of the previous agreement, which may not be a period of active bargaining.

135. In cases where bargaining has commenced prior to the nominal expiry date, the "minimum bargaining period" should commence at the time of the nominal expiry date.

136. Additionally, due to the increased complexity of multiple parties (both employers and employees/ unions) bargaining for the one agreement during multi-employer bargaining, it is important that parties are given sufficient time to resolve disputes without intervention by the FWC.

137. A period of nine (9) months from the time bargaining is initiated, or the nominal expiry date (whichever is later), would be more appropriate for multi-employer bargaining (including for single-interest employer agreements).

Recommendation 14:

Amend the Bill so that:

(a) the minimum bargaining period starts from the latter of i) the commencement of bargaining; or ii) the nominal expiry date; and

(b) the minimum bargaining period is nine (9) months for multi-employer agreements (including single interest employer agreements).

PART 19 – INDUSTRIAL ACTION

Notice periods and conciliation/ mediation

138. Protected industrial action will be available for single-interest and supported bargaining multi-employer agreement, but not the cooperative workplace agreement. Notice periods will be 3 working days for enterprise agreements and 120 hours for multi-employer agreements.[54]

139. The Bill also requires the FWC to convene either a conciliation conference or mediation between bargaining representatives every time a PABO is filed. While this does not prevent protected industrial action being taken, it involves a third party in a dispute resolution process in response to each time employees seek to commence the process of taking industrial action.

140. Conciliation must be held between when the PABO is applied for and when the date for the PABO voting closes - ensuring the conciliation has been held before industrial action is taken. This is a positive step, although will not be a significant deterrent to taking industrial action. Conciliation is a very easy process that would require attending (even via telephone) for an hour or two – it is not a time-consuming or costly exercise that will in practice delay or discourage strikes, pickets or bans. That said, encouraging parties back to the bargaining table before industrial action is taken is broadly welcome.

141. A Government amendment has the effect that employer response action is not protected if a bargaining representative for an employer does not attend the conference. It is unclear why this will apply to employer representatives but not employee representatives.

142. It appears employer response action (s 411) would be unprotected for not attending a conference as ordered, but employee response action (s 410) would not be subject to such a risk even if the union and employees completely or deliberately ignored the FWC.

143. Such inconsistency is incompatible with the fundamental principle of reciprocity and equivalence of application of the law to industrial action between employers and unions where possible / appropriate. It is also unmerited and its quite unclear why this approach has been taken.

Recommendation 15:

Amend the Bill so that employee industrial action will be unprotected if employee representatives do not attend the compulsory conciliation conference, in the same way as the Bill currently operates for employer representatives.

Ballot Agents

144. The Bill also establishes a process for a list of 'fit and proper persons' who may conduct PABOs. Currently, the AEC is the default PAB agent but the FWC may approve another person to be an eligible agent on application.

145. The Bill facilitates a pre-approval process to create a standing panel of agents. Regulations will prescribe conditions to satisfy the FWC that a person is "fit and proper" to be eligible to be a PAB

[54] Bill item 579, s 414(2)(a).

agent.

146. We live in a time of considerable focus on integrity and transparency, and it is important to be seen to scrupulously avoid any risks of perceptions of conflict of interest, corruption, and self-enrichment.

147. It would be preferable to ensure that any measures to support the integrity of the process is set out in the Bill, rather than allowing the Minister to determine such factors by way of regulation.

148. In addition to setting out the relevant factors for determining who a "fit and proper person" is, the Bill should clarify that associated entities or entities controlled by those commissioning the ballot (unions) cannot conduct PABO ballots. That is, only genuinely disinterested entities should be able to be ballot agents.

149. It should only consider how to treat persons who have previously been denied a permit and any consequences for non-compliance with ongoing permit obligations. Processes will also need to be confirmed regarding ongoing reporting obligations and auditing, noting that the permit lasts for a period of up to three years.

150. Further advice will be required to determine whether additional integrity and assurance protections are necessary.

Recommendation 16:

The Protected Action Ballot Agents provisions be amended to:

- Better and more clearly and transparently protect integrity and against risk of, or perceptions of, inappropriate interest, control, enrichment, or corruption.
- Prohibit unions controlling or having an interest in the ballot agents they commission to ensure (and be seen to ensure) the integrity and independence of the ballots unions cause to be run.

PART 12 – TERMINATING EXPIRED AGREEMENTS

151. The ability to terminate expired (beyond nominal expiry date) enterprise agreements will be substantially curtailed under the proposed changes. Such agreements will only be able to be terminated without employee agreement where they have passed their nominal expiry date and fall into one of the following categories: [55]

    a. The FWC is satisfied that the continued operation of the enterprise agreement would be unfair for the employees covered by the enterprise agreement.

    b. The FWC is satisfied that the enterprise agreement does not, and is not likely to, cover any employees.

    c. Alternatively, all of the following apply:

        i. the FWC is satisfied that the continuing operation of the enterprise agreement would pose a significant threat to the viability of a business carried on by the employer or employers covered by the enterprise agreement; and

        ii. the FWC is satisfied that the termination of the enterprise agreement would be likely to reduce the potential of termination of employment by reason of redundancy or insolvency for employees covered by the enterprise agreement; and

        iii. if the agreement contains terms providing for entitlements relating to termination of employment by reason of redundancy or insolvency, the employer has given a guarantee to the FWC that it will continue to honour those provisions contained in the enterprise agreement (unless the underlying modern award provisions on the subject matter are more beneficial). This guarantee must be given for the earlier of the following periods:

            1. four years;

            2. a shorter period the FWC may determine if appropriate; or

            3. until the employees become covered by another enterprise agreement that covers the same or substantially the same group of employees.

152. This will apply to all new and existing termination applications, provided that in relation to existing termination applications the FWC has not yet terminated (or refused to terminate) a particular enterprise agreement. If an application to terminate an agreement is made unilaterally by an employer or union then it must be heard by a Full Bench of the FWC.[56]

Reciprocity

153. Both employers and unions or employees may seek to terminate an expired enterprise agreement.

[55] Bill item 471, s 226(1).
[56] Ibid item 383, s 333B.

154. Under proposed s 226(4) and the new test for the termination of expired agreements, the FWC is to have regard to bargaining for new agreements and the impact of terminating the expired, previous agreement on re-negotiations for new agreements. This is not opposed.

155. However proposed s 226(4)(c) is unbalanced. It would have the FWC consider only the bargaining position of employees in renegotiations in determining whether or not to terminate an expired agreement, and have no regard to the bargaining position of the employer.

156. This needs to be genuinely reciprocal, directing the FWC to consider the bargaining position of both employees and the employer / employers. Collective bargaining is inherently about two parties; barring the most exceptional circumstances prescriptions of this type should apply to both parties, in a balanced manner.

Recommendation 17:

Amend proposed s 226(4)(c) as follows:

(c) whether the termination of the existing agreement would adversely affect the bargaining position of the employees, employer or employers that will be covered by the proposed enterprise agreement.

Restructuring

157. Proposed s 226 allows the FWC to terminate an agreement where its continued operation would "pose a significant threat to the viability of a business carried on by the employer". While welcomed, this does not provide enough clarity that employers may need to restructure their business in order to save the business and that the agreement may be acting as a restriction on doing so.

158. The Act should provide an avenue to take strategic action before threats are realised, or become pressing, to minimise risks to a business or to jobs.

Recommendation 18:

Amend proposed par 226(1)(c):

(i) the FWC is satisfied that the continued operation of the enterprise agreement would either

(A) pose a significant threat to the viability of a business carried on by the employer, or employers, covered by the agreement; or

B) unduly restrict the capacity of the business to restructure to seek to avoid or minimise a significant threat to the viability of the business or to minimise terminations of employment covered by subsection (2)

PART 13 – SUNSETTING ZOMBIE AGREEMENTS

159. Zombie agreements are pre-Fair Work Act agreements which are still in effect despite providing terms and conditions that do not meet the current minimum rate set out in the relevant modern awards. They are a remainder or carry over from the previous workplace relations system and there has been bipartisan support for their eventual sunsetting.

160. Under the Bill a mandatary "drop dead date" will apply for all "zombie agreements" made prior to the commencement of the FW Act. This date will be twelve months after commencement of the Bill. Employers must notify employees of the drop-dead date within six months of commencement of the Bill.[57] The FWC will be able to extend the operation of such agreements by up to four years in certain circumstances[58].

161. ACCI does not oppose the sunsetting of the so-called Zombie Agreements.

162. The Government's provision of a 12-month grace period to transition away from the previous transitional instruments (proposed par 20A(2)(a)) is welcomed. This is a practical and sensible approach, realistic to the payroll adjustments to be made in transitioning away from the previous generation agreements, which have been in place for some time.

163. The scope to extend the default grace period where merited (ss20A(4)-(8)) is also welcomed. This is practical and sensible.

Notices to Employees

164. Employers remain far from convinced that requiring employers to give employees notices and statements under the Fair Work Act achieves much.

165. There is high quality information online from the Fair Work Ombudsman and Commission which goes as far as possible in providing straightforward explanations of a very complicated system, and employees can access that information easily. The Gillard Government enshrined an old-fashioned and somewhat patronising approach to distributing information to employees which the system has increasingly become saddled with and kept replicating.

166. Adding notice obligations to employers has become a bit of a go-to approach when making changes to the Fair Work Act, but providing statements and notices costs employers money and time, and can be very logistically difficult, particularly where there is repeated engagement or mass engagement, such as in labour hire.

167. A better approach would be to move to standard online information, which an employer would direct employees to through links via pay slips, email, or intranet, such as (for example):

www.fairwork.gov.au/casualinformationstatement

www.fairwork.gov.au/zombienotice

[57] Bill item 481, s 20A(3).
[58] Ibid item 481, s 20A(4).

168. Employees can then follow the government administered links, confident the information is up to date, accurate and reliable.

169. If that is not going to be implemented, we are concerned that proposed ss 20A(3) is imprecise and unclear. Consideration should be given to replacing the amendments as introduced with a regulation making power, and a standard / prescribed form notice that employers would download and give to employees.

170. This could be modelled on existing s 125A under which the Fair Work Ombudsman issues a standard form information statement, which employers are then required to issue to employees If this approach is taken, less can go wrong. Additionally, there can be more confidence the employees have the intended information, without omission, error, or ambiguity.

Recommendation 19:

Amend proposed ss 20A(3) to require the FWO to issue a standard form notice (modelled on existing s 125A) which the employers would give to employees covered by transitional instruments which are set to terminate (the zombie agreements).

Publication of Decisions

171. A series of Government amendments would require publication of decisions to extend the operation of so-called zombie agreements on application.

172. It is not clear why this is needed in addition to the ordinary publication process for FWC decisions (under s 601) of the FWC. We note in particular that the FWC will have made an assessment of employees being likely to be better off overall in each instance.

B – NON-BARGAINING AMENDMENTS

PARTS 1 AND 2 – ABOLITION OF THE ROC

173. The Government was elected with a commitment to abolish the ROC.

174. However, the majority of the day-to-day work of the ROC has been very positive. The ROC is well regard regarded as a positive and supportive regulator, and its work has improved reporting transparency and governance in both registered employer and employee organisations.

175. The strong message from ACCI's registered members is that if the functions of the ROC are to be returned to the FWC, it is vitally important that the culture of service and support for accountability and transparency is maintained

176. The amendments in Part 1 appear to broadly provide the right foundation for that to occur. ACCI particularly welcomes proposed s 329A(2),[59] which will help maintain a positive, assistance-based culture in transfer of the ROC functions to the FWC.

[59] Bill item 6, s 329A.

PART 3 – ABOLITION OF THE ABCC

177. ACCI does not support the abolition of the ABCC nor the deliberate watering down of specialist enforcement in the building and construction industry. Multiple Royal Commissions have found uniquely unacceptable, illegal, threatening, and damaging conduct in the workplace relations domain of this industry and have recommended specially designed regulation.[60]

178. The Commonwealth should not ignore the recommendations of Royal Commissions lightly.[61] Further, there has been no observable change in the cultures of the workplaces in parts of the building and construction industries since the introduction of the ABCC. Irrespective of the attempts to trivialise and misrepresent its work, the reality is that the ABCC dealt with a steady stream of genuine and serious threats to freedom of association, coercion and other important issues.

179. The Commonwealth should also not ignore the clear concerns and frustrations of judges in awarding substantial penalties against the CFMMEU on a near continuous basis. As recently as July 2022, O'Sullivan J held in *ABCC v CFMMEU (The 250 East Terrace Case)* [2022] FCA 760:[62]

> This offending is both another example and a continuation of the Union's appalling behaviour (whether in this form or in its pre-2018 amalgamation with The Maritime Union of Australia). I consider the Union's record of prior contraventions is a matter going to both the objective seriousness of its contravening conduct and is a factor indicating an ongoing need for specific deterrence.

180. Evidently, there has been absolutely no change in the industry since 2009 when the Rudd Government chose to retain a specialist regulator to address problems in building and construction that would justify its abolition.

Ensure the FWO is equipped to enforce compliance

181. The *Building and Construction Industry (Improving Productivity) Act 2016* includes industry-specific obligations and regulatory powers that are not set out in the FW Act and will therefore not be available to the FWO.

182. The Bill will lead to substantial enforcement gaps that were previously filled by the ABCC but will not be able to be performed by the FWO.

183. The ABCC has statutory functions such as "investigating suspected contraventions, by building industry participants, of this Act, designated building laws or the Building Code" and "instituting, or intervening in, proceedings in accordance with this Act".[63] While the FWO also has investigative functions,[64] the ABCC uniquely understands its regulatory role to require prosecution of all breaches of the law. On the other hand, given that the FWO has an economy-wide regulatory responsibility, its enforcement approach is inevitability more discretionary.

[60] See especially *Royal Commission into Trade Union Governance and Corruption* (Final Report, December 2015) vol 5 ch 8 [1].
[61] Ibid recommendation 61.
[62] (emphasis added).
[63] *Building and Construction Industry (Improving Productivity) Act 2016* s 16(1).
[64] FW Act s 682(1)(c).

184. This may not be adequate for addressing the illegality pervading the building and construction industry which is systemic and recurring.

185. The ABCC intervenes in matters heard by the FWC and provides important evidence that assists with the determination of disputes, such as those relating to right of entry laws.[65] The ABCC performs a similar role in court proceedings.[66] The FWO does not do so.

186. In the performance of its statutory functions, the ABCC takes a distinctive enforcement approach of ensuring that its policies, procedures and resource-allocation corresponds to "industry conditions based on complaints received by the ABC Commissioner".[67] The FWO does not adopt this approach and consequently, areas in the building and construction industry about which complaints are more common may not be a focal point of the FWO's enforcement of workplace laws.

187. The FWO lacks other powers currently possessed by the ABCC. Accordingly, the Government is misleading the Parliament when contending that the FWO will be able to straightforwardly subsume the actions, activities and approaches of the ABCC, without ramifications for the prosecution against longstanding lawlessness in the building and construction industry.

188. While there was an election commitment to abolish the ABCC, the Government has made clear its position that the FWO will step in and enforce compliance in the building and construction industry. To do so, the FWO must be afforded additional powers. ACCI maintains that this should be done through the establishment of a properly resourced, specialist division of the FWO with additional powers.

189. A failure to do so would be a departure from the approach taken by previous Governments, including when the Rudd and Gillard Governments set up and maintained the specialist Office of the Fair Work Building Industry Inspectorate.

190. A specialist division within the FWO is also consistent with states and territories that have their own building commissioners.

Recommendation 20:

The ABCC should not be abolished.

Alternatively, a specialist division of the Fair Work Ombudsman should be established to enforce compliance with workplace laws in the building and construction industry, and additional powers granted to the FWO to ensure no drop in enforcement powers.

National Construction Industry Forum

191. The Government announced on 7 November that it would amend the Bill to establish a new National Construction Industry Forum as a statutory advisory body, including a new definition of general building and construction work. This does not appear any more than an advisory forum.

[65] *Building and Construction Industry (Improving Productivity) Act 2016* s 110.
[66] Ibid s 109.
[67] Ibid s 16(2).

192. New Government amendments to the Bill address the introduction and operation of the forum. These amendments must be further examined and considered by the industry, as well as the Committee.

Statutory Review

193. If the ABCC is to be abolished, and some of its functions reallocated, this should be subject to a statutory review after 2 years to examine the performance of the industry with respect to workplace relations. Specifically, the review should consider the extent to which the industry continues to be plagued by unlawful behaviour and how effective the post-ABCC arrangements have been in addressing these issues.

194. We recall in support of this:

a. In 2018, a review was undertaken as a consequence of s 119A of the *Building and Construction Industry (Improving Productivity) Act 2016*.

b. A condition of the passage of the amendments relating to casual employment in the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* was a review after 12 months.[68]

c. Section 24 of the *Modern Slavery Act 2018* provides for a review after 3 years of operation and identifies a number of matters that the Minister must cause to be reviewed.

Recommendation 21:

Part 3 should be amended to require an independent review of the effectiveness of enforcement of workplace relations laws following the abolition of the ABCC, areas where additional powers or obligations are needed, and in particular, areas in which any of the powers and obligations under the BCIIP Act should be considered for reintroduction.

[68] *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* s 3.

PART 4 – OBJECTS OF THE FAIR WORK ACT

195. The objects of the Fair Work Act primarily serve two purposes.

a. First, the Fair Work Commission must take into account the objects of the Act in performing its functions and exercising its powers.[69]

b. Second, the objects govern the interpretation of the provisions of the Fair Work Act by the courts to the extent that interpretations that best achieve those objects will be preferred over alternatives.[70]

196. Some ACCI members have expressed concern about these two new objects, primarily that pertaining to job security, 'colouring' the decisions of the FWC and courts in a manner that could significantly change how the FWC interprets, and therefore applies, seemingly unrelated (to job security and gender equality) provisions and powers.

197. Members have also raised concerns about the lack of a definition for "job security". With no guidance provided by Government it's unclear how the FWC/ Courts will interpret this term.

198. While ACCI does not oppose Part 4 of the Bill, it would encourage the Government to monitor legal developments in this area to ensure that any unintended consequences arising can be identified and fixed by further legislative amendments, if necessary.

[69] FW Act s 578.
[70] *Acts Interpretation Act 1901* (Cth) s 15AA.

PART 5 – EQUAL REMUNERATION

199. ACCI supports the commitment across the Australian community to increasing pay equity and closing pay gaps between women and men. Pay inequity is long standing, deep-seated, persistent and multicausal, and is a challenge across OECD and non-OECD countries.

200. The International Labour Organisation (ILO) estimates that on average women globally are paid about 20% less than men.[71] In Australia, the gap is 14.1%.[72]

201. Key changes in this Part include that the powers of the FWC will be expanded to enable it to make equal remuneration orders on its own initiative, remove the need to undertake any comparison against a traditionally male-dominated group (recognising that an appropriate comparison may exist), make it clear that sex discrimination does not need to be found to make an order, and require the FWC to consider any historical gender-based undervaluation of the work.[73]

202. The changes will bring the FW Act in line with Queensland's Pay Equity Principles and the original intent of the FW Act provisions, which has arguably been departed from by the FWC.

203. ACCI does not oppose Part 5 of the Bill.

204. In supporting these changes, and broadly the changes to the "supported bargaining" stream, ACCI is supporting the Government's changes that it itself says will most effectively lift wages in industries such as childcare, aged care and health. It's unclear why further changes are needed to the "single interest employer" bargaining stream is necessary to support low paid workers.

[71] International Labour Organisation, 'Closing gender pay gaps is more important than ever' (webpage, 18 September 2022) <https://news.un.org/en/story/2022/09/1126901>.
[72] Workplace Gender Equality Agency, 'Hard choices on necessities for Australian women as gender pay gap persists' (webpage, 18 August 2022) <https://www.wgea.gov.au/newsroom/new-national-gender-pay-gap>.
[73] ss 157(2B) and 302(3) of the Bill

PART 6 – EXPERT PANELS

205. Part 6 would amend the Act to prescribe new Expert Panels within the FWC to hear pay equity and care and community sector matters.

206. Matters of bench allocation are generally dealt with by the FWC itself. While ACCI supports greater expertise and specialisation of important matters, ACCI has a slight concern about the precedent of Government more actively interfering in matters such as bench allocation, which are arguably matters best left to the FWC itself. . In ACCI's view the FWC has been effective at fulfilling its statutory functions. While reasonable minds may differ as to the merits of its decisions, the FWC has been successful in navigating the complex issues that arise in pay equity and care and community sector matters, and individual members at all levels, and parties, have lent their best endeavours to what are difficult and complex matters.

207. Regardless, ACCI does not oppose Part 6 of the Bill.

PART 7 – PAY SECRECY

208. The Government considers that greater scope for employees to reveal their pay and compare pay to others will assist in improving gender pay equity. This follows similar prohibitions on pay secrecy in the UK and Canada.

209. Proposed s 333B would enable employees to disclose or not disclose their remuneration and any other terms or conditions of their employment that are reasonably necessary to determine remuneration outcomes. Proposed s 333C would render any pay secrecy terms void.

210. These provisions are sufficient for achieving the policy objective. It is not necessary to then seek to penalise employers that enter into employment contracts which contain pay secrecy terms. Given such terms would be rendered void by section 333C, there does not appear to be an adequate justification for the availability of a civil remedy in response to their inclusion in a contract.

a. Mistakes are made, and old contracts are used and reused for new staff.

b. There is a particular risk of penalising smaller employers who are not made aware of these changes the Fair Work Act and utilise the old contract templates for new employees.

c. It is not clear whether contracts with broad confidentiality requirements (i.e. for the whole contract) may be held to contain terms inconsistent with section 333B and therefore expose the employer to liability for a statutory offence.

Recommendation 22:

Proposed Section 333D and Item 384 should be removed as unnecessary or alternatively commence only after a 2-year period of education and promotion, during which s 333C would apply.

211. Further, it should be expressly clarified in the legislation (such as in the form of a statutory note) that employers are not *required* to disclose their pay or contractual terms to those who ask for it. A legislative amendment seeking to prohibit pay secrecy should not become an amendment that mandates pay transparency. On the face of the Bill, these provisions do not have that effect; however, there is a risk that a layperson may interpret them in that manner. This has the potential to cause workplace disharmony. The Committee should examine whether this requires further clarification, as follows:

Recommendation 23:

(a) Subsection 333B(2) should be deleted.

(b) Alternatively, there should be a statutory note to s 333B(2)[74] making clear that nothing compels any employee to provide any other employee with the information set out at para 333B(2)(a) or (b). Par 414 of the EM[75] should become the statutory note / substantive provision to remove ambiguity or scope for misuse.

(c) There should also be clarification that this is a personal right to ask only, not able to be assigned or passed on to any other person or agent.

[74] Item 383
[75] EM, p.78

PART 8 – SEXUAL HARASSMENT

212. Part 8 continues the Government's implementation of the remaining recommendations of the Respect@Work report. ACCI strongly supports stronger measures to combat sexual harassment and does not seek changes to Part 8 of the Bill.

PART 9 – ANTI DISCRIMINATION

213. Part 9 of the Bill amends various aspects of the Act to include "breastfeeding", "gender identity" and "intersex status" as prohibited attributes for discrimination in modern award and enterprise agreement terms.

214. Additionally, it prohibits employers from taking adverse action against persons on the basis of such attributes and includes them as matters which the FWC is required to consider when performing its functions. These changes are uncontroversial and reflect existing prohibitions on discrimination in both federal and state jurisdictions.

215. Further, Part 9 provides that terms of enterprise agreements that are special measures to achieve equality are deemed not to be discriminatory terms, which are ordinarily prohibited under s 194. Understood another way, item 431 of the Bill provides that enterprise agreements may include terms that are discriminatory, so long as the discrimination positively benefits persons with a particular attribute in the pursuit of substantive equality. This is reasonable and reflects existing approaches to affirmative action.

216. ACCI's only concern with Part 8 is to caution against unnecessary incorporation of academic language without adequate elaboration. The notion of "substantive equality" is not well understood outside of academia. Employers operating small and medium sized enterprises are unlikely to be familiar with this term or what it may require of them. The principal object of Part 2-3 of the Act, in which these amendments will be situated, is (under s 171(a), emphasis added):

> to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits …

217. Incorporating phrases such as "substantive equality" into the enterprise bargaining system which require familiarity which anti-discrimination or human rights law is not conducive to promoting simplicity.

218. Nevertheless, ACCI does not seek changes to Part 9 of the Bill.

PART 10 – FIXED TERM CONTRACTS

219. The Government is seeking to impose limits on fixed term contracting. ACCI welcomes the Government's willingness to engage with concerns and to try to avoid unintended consequences for employers and employees. We particularly welcome proposed s 333F, including:

    a. Proposed para 333F(1)(f) which recognises particular issues for funded work.

    b. Proposed par 333F(1)(i) which allows the Minister to make additional exemptions by regulation. However, ACCI maintains that clear exemptions in the Act will be more effective and avoid better problems, and that the regulation making power should be viewed as a failsafe to address unforeseen circumstances.

220. ACCI advances two issues needing clearer exemption or amendment.

Funded Work

221. Proposed par 333F(1)(f) addresses the funded sector and inherent limitations on the capacity of social and community services that rely on state and territory government funding contracts to engage employees on ongoing or open-ended basis.

222. We thank the Government for engaging with concerns raised by ACCI and others, as well as for considering the employers, employees, and those who rely on the not-for-profit sector who risk being harmed by any unintended uncertainty in this area.

223. The not-for-profit sector cannot hire people on an ongoing basis where not funded to do so, and where funding is not guaranteed.

224. Unfortunately, despite the sound intentions, the drafting needs to be improved. Sub-paragraph 333F(1)(f)(iii) has been expressed too 'tightly':[76]

    (iii) there are no reasonable prospects that the funding will be renewed after the end of that period; or

225. Examining the wording, this is too tight a test and will unduly expose the charitable and not for profit sector to restrictions on the capacity to used fixed term contracting to employ when the reality is that their funding is only for a fixed term from state and territory governments.

226. This demands an untenable approach to increasing the size of the workforce, and it is only in the narrowest circumstances that the sub-paragraph can be relied upon.

227. There is only one possible alternative – casual employment. Not for profit employers simply cannot hire somebody on an open-ended basis where not funded to do so, particularly not in the not-for-profit sector which does not generate revenue.

228. A minor change to this provision could avoid this, under either of two options:

[76] (emphasis added).

Recommendation 24:

Amend s 333F(f)(iii) as follows:

(iii) there is ~~are no reasonable prospects~~ no commitment that the funding will be renewed after the end of that period; or

(iii) there is ~~are no reasonable prospects~~ no certainty that the funding will be renewed after the end of that period; or

229. The Government has accepted the need for such an exemption, which is welcome. However, this will mean nothing if it does not work in practice, and it gravely concerns ACCI that the exemption may have been drawn too narrowly to be useful.

Seasonal Work

230. Section 333F(1)(c) of the Bill exempts 'employees engaged under contracts to undertake essential work during a peak demand period' from the Bill's new prohibitions on fixed term employment.

231. The Explanatory Memorandum identifies that this exception is designed to address where an employer needs additional workers to do essential work during a peak period, such as for fruit picking or other seasonal work.

232. Seasonal work is an important and necessary exception to the Bill's proposed prohibition on fixed term employment, and it is critical that s 333F(1)(c) is sufficiently broad and clear such that it covers all seasonal workers. Seasonal work is broader than simply fruit picking, for example it includes retail and hospitality peaks and as well as transport operations which need to service these peaks.

233. The reference to 'essential work' in s 333F(1)(c) is likely to confuse. It is unclear whether such work is essential to the employer, to the industry or to the economy or society generally (i.e. 'essential services').

234. Section 333F(1)(c) should be amended to reflect its intent as outlined in the Explanatory Memorandum such that it reads 'the employee is engaged under the contract to undertake work during a peak demand or seasonal period'.

Temporary Labour Migration

235. Various visa series allow temporary migration to Australia for the purposes of employment for periods of greater than two years, such as medium stay visas which allow work for up to 4 years with a sponsoring employer. How is this to be reconciled with the proposed two year restrictions on fixed term employment? Would an employer that sponsors someone for four years to come to Australia breach the Fair Work Act in offering the temporary employment upon which the visa was predicated? This seems easily avoidable, and the following would address situations in which someone may change visa series to seek to remain in Australia, perhaps in pursuit of permanent residency status.

Recommendation 25:

There should be an explicit exemption where the employee is working in Australia on a temporary work visa.

Professional Sport

236. Extended or consecutive fixed term contracting in professional sport is not exploitation, it is what allows sportspeople to maintain careers. What may be concerning in employment generally, is in the context of sport often a career positive (consecutive fixed term contracts).

Recommendation 26:

There should be an explicit exemption for professional sporting contracts under s 333F(1).

The following should be added as an additional paragraph (pending more input from professional sporting organisations):

(x) the contract is for employment as a professional sportsperson or coach with, or within, a professional sporting organisation or competition.[77]

Live Performances

237. 'Run of Play Contracts' are critical to the operation of the live performance industry. They allow the engagement of performers, dancers and musicians for the "run of play" in live productions. These contracts are regularly subject to change due to variation in ticket sales or venue availability for touring productions. This can result in new contracts being issued at the end of a tour, season or run. The industry is concerned that the proposed restrictions on consecutive contracts may unintentionally restrict extending tours or seasons of theatrical productions. Current industry practice should continue, as it is a unique requirement of the live performance industry and prohibiting Run of Play Contracts would present a significant challenge to the economic sustainability of touring shows, and potentially prematurely end work opportunities.

238. 'Run of Play Contracts' should be included in the list of exceptions contained in Section 333F.

Recommendation 27:

There should be an explicit exception for Run of Play contracts under s 333F(1), as follows:

(x) the contract is for employment as a live performance industry employee in a Run of Play or Run of Plays Contract.

Commencement

239. We understand the commencement table at Clause 2 is to be varied to allow commencement of the fixed term restrictions up to 12 months after Royal Assent, to allow an opportunity for more consultations.

[77] The Government may argue that s 333F(1)(a) covers sport, but that does not seem sufficiently clear.

240. This is welcome but the need for the aforementioned recommendations still persists. ACCI looks forward to the opportunity to further engage with Government during this period to ensure any unintended negative consequences are avoided, but maintains that substantive exemptions are preferable over remedial regulations, where possible.

PART 11 – FLEXIBLE WORK

241. The NES provide employees with a right to request changes in their working arrangements for certain purposes under s 65 of the Act. The permissible circumstances in which an employee can make a request include if the employee is a parent, a carer, disabled, over 55, or experiencing family violence.[78]

242. Employers are required to respond in writing to any request for flexible working arrangements.[79] Employers are required to provide reasons for any refusal in their written response,[80] and employers may only refuse a request on reasonable business grounds.[81]

243. Part 11 of the Bill proposes to increase the procedural requirements for employer responses to requests for flexible working arrangements. These procedural requirements largely mirror those that already exist in the flexibility terms of modern awards.[82]

244. ACCI therefore does not oppose this element of Part 11. Employers, including SMEs, are to a large extent already bound by these procedural requirements.

245. However, Part 11 also introduces an avenue for compulsory arbitration of any refusals or partial agreements to requests for flexible working arrangements. As stated by the Full Bench of the FWC in *Re 4 yearly review of modern awards* [2018] FWCFB 1692:

> The Commission is unable to deal with a dispute to the extent it is about whether an employer had reasonable business grounds under s 65(5), unless the parties have agreed in a contract of employment, enterprise agreement or other written agreement to the Commission dealing with the matter.

246. ACCI is not opposed in principle to the involvement of the FWC in disputes; however, this should take the form of conciliation, conference, or mediation where this may assist in facilitating negotiation between the parties and helping them to reach agreement, rather than making binding decisions that may be impractical, unbalanced, or uninformed by an understanding of how the business operates. Non-binding, facilitative approaches to dispute resolution are more conducive to harmonious workplaces and better working relationships in the future than centrally-imposed arbitration. They also lack the formality and legalism of arbitration, which can be particularly daunting and demanding for SMEs, not to mention being quicker and less costly.

247. As stated, requests for flexible working arrangements can be only refused on the basis of 'reasonable business grounds'.[83] Consequently, any arbitral role performed in respect of these requests requires the FWC to making binding decisions about whether business grounds for a refusal of a request are in fact reasonable.

248. This requires an arbitrator with incomplete information substituting its subjective assessment for the informed assessment of those who know the operations of the business best.

[78] FW Act s 65(1A).
[79] Ibid s 65(4).
[80] Ibid s 65(6).
[81] Ibid s 65(5).
[82] See, eg, *Restaurant Industry Award 2020* cl 6.
[83] FW Act s 65(5).

249. This can create issues where an employer is unable to provide conclusive evidence to support the existence of the business ground for refusal, which may often only be able to be discerned by the employer who has a unique understanding of the operation of their enterprise.

250. In *The Police Federation of Australia (Victoria Police Branch) T/A The Police Association of Victoria v Victoria Police* [2018] FWC 5695, Commissioner Wilson held that an employer did not have reasonable business grounds for refusing a request because they failed to prove that the change would objectively result in the imposition of an unreasonable financial burden, damage to morale and effectiveness, or a loss of resources. The Commissioner held that an employer could not rely on 'unresearched opinion and supposition' to refuse a request. This decision was upheld by a Full Bench of the FWC in *Police (Vic) v Police Federation of Australia (Vic)* [2019] FWCFB 305.

251. Similarly, in *Australian Municipal, Administrative, Clerical and Services Union v Brimbank City Council* [2013] FWC 5, Deputy President Lawler held that for a refusal of a request to be permissible, it was "necessary for the [employer] to point to some cost or adverse impact over and above the inevitable small adverse impacts associated with any material request".

252. Any process that enables the FWC to make binding determinations on parties entails a higher degree of formality and rigor in proving any arguments raised.

253. However, this is incongruent with the nature of s 65 requests, which, as is reflected by the prescribed list of 'reasonable business grounds for refusing requests' under the proposed s 65A(5) in the Bill, often concern matters such as impracticability, inefficiency, or the impact on customer service. These matters are often more difficult for smaller employers to conclusively prove. It is also obvious that reasonable business grounds will differ from business to business, circumstance to circumstance, request to request.

254. On the other hand, facilitative and advisory processes conducted by the FWC through mediation or conciliation provide employers with an opportunity to offer their perspectives less formally to work through concerns, understand other views and have the assistance of an independent intermediary to try to reach an agreement.

255. These less adversarial mechanisms provide a mechanism to explain to employees these complex impacts on their business. Less formal processes also broaden the available options for resolving the dispute which the FWC may be unable to offer in arbitration. For example, in mediation or conciliation, while the employer may be unable to assent to the request for alternative working arrangements, they may be able to offer better pay, a change in role, flexibility in another aspect of the employment relationship, or partial granting of the request (on some days, for some hours for example). These creative solutions are unavailable to the FWC in arbitration, which is effectively forced into a binary determination of whether the request must be granted or denied, inevitably to the detriment of one party.

256. Overall, the additional procedural requirements imposed upon employers in relation to requests for flexible working arrangements are not opposed by ACCI due to employers' existing familiarity with them under the modern award terms. However, empowering the FWC to arbitrate disputes should be rejected in favour of alternative dispute resolution mechanisms also already undertaken by the FWC, such as mediation, conciliation and conferences.

257. This is especially true, considering that most flexible work requests are successfully accommodated.

258. Under s 653(1) of the Act, every 3 years the GM of the FWC researches and reports on:

a. The operation of the right to request under ss.65(1) of the Act.

b. The circumstances in which employees make requests; the outcome of requests; and the circumstances in which requests are refused.

259. The most recent report indicates that, based on University of Sydney research:

a. "Requests were generally agreed by employers or agreed following negotiations, while refusals were rare", and "Most respondents reported that requests were granted, while refusing such requests was not reported as widespread".[84]

b. "Most interviewees that responded commented that requests were agreed by employers or agreed following negotiations. Refusals were rare, particularly among employers who provide greater access to flexibility than the statutory provisions."

c. "Requests were refused when there were rostering difficulties, the need for staff availability at opening hours or when the business welcomed clients, as finding staff to cover particular hours or days could be difficult, with some employers preferring not to have too many individual alterations to rosters."

d. "…the quantitative survey found that requests were refused when there was either no capacity of, or it was impractical to, change to working arrangements of other employees to accommodate the request. Other reasons included impact on customer service, significant loss of efficiency/productivity if the changes were implemented and that the requested arrangements could not be accommodated within an existing shift."

260. The University of Sydney research concluded that "*Most respondents reported that requests were granted much more often than they were refused*".[85]

261. Judgements about staffing need to rest with employers who know their businesses better than anyone else can and are accountable for the consequences of those decisions. On this basis:

Recommendation 28:

Rather than by arbitration, the Fair Work Commission should deal with disputes that arise in respect of requests for flexible working arrangements through conciliation, mediation, or another form of non-binding dispute resolution.

Amendments

262. **Reasonable Business Grounds:** Government amendments to the Bill as introduced will add a statutory note to ss 65A(5) clarifying that the nature and size of the business are relevant to the reasonable business grounds upon which requests may be refused. This seems useful on a non-exhaustive basis, as indicative of the type of factors which may validly lead to a refusal, but not a comprehensive or exhaustive list of those factors.

[84] General Manager's report into developments in making enterprise agreements under the Fair Work Act 2009 (Cth): 2018–21 (Link)
[85] General Manager's report into developments in making enterprise agreements under the Fair Work Act 2009 (Cth): 2018–21 (Link), p.21

Review and Re-Opening

263. If the Committee does not recommend that the Bill be amendment such that there is recourse to mediation/ conciliation but arbitration, then employers should have an avenue for revisiting a binding decision of the FWC made in arbitration over a dispute about a request for flexible working arrangements. The ability to appeal such a decision will not suffice because 21 days is a short period. Further, evidence justifying the reasonable business grounds upon which the request was originally objected to may not materialise until a longer period of time.

264. This review mechanism should be limited to circumstances where the employer can demonstrate after the 21-day period that the employer's stated reasons for refusing the request are borne out in practice and are, therefore, clearly unworkable. It cannot operate as a general appeal right for both parties. This would simply result in greater uncertainty and cost for both parties.

Recommendation 29:

If there is to be arbitration, there also needs to be scope to reopen to or have reviewed any order under s 65C(f) granting a request, or making other changes in working arrangements, in circumstances where:

- The employer's stated reasons for refusing the request are borne out in practice.
- There is a material change in circumstances which now make it inappropriate for such a request or change hours to be accommodated, or to continue to be accommodated as ordered.

Other Proposed Changes

265. Part 11 does various other things, which ACCI does not oppose or seek amendment to , including broadly:

    a. Consequential definitional changes regarding family and domestic violence.[86]

    b. Codifying additional meeting and communication obligations from the standard award provision on 'Requests for flexible working arrangements' into the Act. Employers would want to see the corresponding prescription come out of modern awards.

[86] Bill items 446-457.

PART 24 – SMALL UNDERPAYMENT CLAIMS

266. There is an existing small claims procedure for the recovery of smaller underpayment claims (s 548). Under this specialised procedure:

a. The court is not bound by any rules of evidence and procedure.

b. The court may act in an informal manner.

c. The court may act without regard to legal forms and technicalities.

d. The court may amend the papers after commencing the proceedings.

e. The ex-employee claimant or employer respondent may be represented by a lawyer only with the leave of the court.

f. The court may make legal representation subject to conditions 'designed to ensure that no other party is unfairly disadvantaged'.

267. The EM to the original FW Act indicated that "this is intended to ensure that claims for a relatively small amount of money are dealt with efficiently and expeditiously by the courts.".[87]

268. ACCI supports:

a. A less formal option for the recovery of small underpayments.

b. An appropriate increase in the threshold for a small claim, given the existing $20,000 threshold has not been increased since 2009.

Increasing the Small Claims Threshold

269. Item 651 of the now Bill seeks to increase the current threshold fivefold to $100,000.

270. The changes in 2009 doubled the previous small claims threshold from $10,000 to $20,000. Scope was also provided to increase this by regulation; however, this was never done.

a. Were inflation applied to the $20,000 it would be approximately $26,000 in 2021

b. Were safety net / minimum wage increases between 2009 and 2022 applied, it would be higher again, over $30,000.

c. There was an unsuccessful attempt to increase the small claims threshold from $20,000 to $50,000 in the Coalition's Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill[88], which would have exceeded increases in both inflation and minimum wage rises between 2009 and 2021. This was not passed.

[87] Fair Work Bill 2008, Explanatory Memorandum, [2167].
[88] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, Schedule 5, Part 2, Item 8, p.73

271. ACCI supports a sensible, reasonable increase in the small claims threshold after 12 years.

272. However, $100,000 is not a small claim. For any business it is a very substantial financial claim and potentially damaging commercial litigation.

273. For small to medium sized enterprise (SMEs) such amounts will often be existential threats, particularly when multiple like circumstances occur in parallel (such as simultaneous claims of underpayment from those employed doing similar work on similar rosters).

274. For families whose personal assets are tied up in their businesses, such as the family home, $100,000 liabilities are significant. They should be entitled to the protections of proper evidentiary processes and legal representation, if they seek such protections. In 2018 a significant proportion of small business people took home incomes around $50-60,000.[89]

275. ACCI submits that a more modest increase of $50,000 would be more appropriate, and for claims between $50,000 and $100,000 to be treated as "small claims" only if both parties consent. A review should then be undertaken two years after commencement to consider whether a further increase would be appropriate.

Recommendation 30:

(1) Item 651 of the Bill should be amended as follows:

651 Paragraph 548(2)(a)

Omit "$20,000", substitute ~~"$100,000"~~ "$50,000".

(2) Also allow underpayment claims between $50,000 and $100,000 to be heard as small claims with the agreement of the (a) Court, and (b) the plaintiff (employee or ex-employee) and (c) the respondent (employer).

(3) There be an independent review of the operation of small claims procedure after 2 years to examine the operation of the amended scheme, including consideration of whether the $50,000 figure should be further increased.

(4) Alternatively, simply amend s 548(2)(a) as follows:

651 Paragraph 548(2)(a)

Omit "$20,000", substitute ~~"$100,000"~~ "182 penalty units".[90] [The threshold will then be automatically indexed and not 'fall behind' again]

Other Changes in Part 24

276. ACCI does not object to:

a. Interest not counting towards any cap on the amount that may be awarded (Item 652).

b. Scope to order the payment of filing fees in awarding costs (Item 653).

[89] https://theconversation.com/factcheck-qanda-are-almost-60-of-small-business-owners-paid-50-000-or-less-91328.

[90] Penalty units are to rise to $275 from 1 January 2023. This is equivalent to $50,000 today, but would index this amount along with penalty changes in future. See: <https://www.theaustralian.com.au/breaking-news/aussies-to-be-slugged-with-fine-hikes-in-federal-budget/news-story/343e1c110f26dd742dcd6271cd722cc0#:~:text=From%20January%201%2C%20the%20cost,due%20on%20July%201%2C%202023>.

PART 25 – JOB ADVERTISEMENTS

277. These changes follow a recommendation of the Migrant Worker Taskforce, based on conduct which we understand occurred largely outside Australia and in advertising in Languages Other Than English (LOTE) Specifically, recommendation 4 of the MWT is for legislation to be amended to prohibit persons from advertising jobs with pay rates that would breach the FW Act.

278. While ACCI is concerned about the opportunity for employers to unintentionally contravene this provision, especially considering how complex interpreting industrial instruments can be, ACCI is pleased that the Bill specifically says that employers would be excused if they had a reasonable excuse for not complying.

279. ACCI does object to unions being able to enforce compliance with these provisions, in addition to the FWO. This is particularly the case as there is no actual employee involved, there is merely an intention to potentially offer employment, short of an offer being made and contractual relations being entered into. There is no agency or representative role for union yet in that scenario, and it is not clear that the registered rules of unions necessarily allow them to represent perspective employees. The Bill should be amended so that compliance is left to the FWO by itself. There is no evidence that supports that the FWO is not equipped to deal with enforcement of these provisions by itself.

280. While ACCI does not fully oppose this part of the Bill, the practical consequence of this change will be that less employers will advertise pay rates. This consequence is contrary to the policy objectives of the Government, including in other parts of this Bill (pay secrecy), to create a culture of pay transparency in Australian workplaces.

281. Finally, ACCI is of the view that employers should be given additional time to ensure that job advertisements comply with these new laws.

Recommendation 31:

Amend Item 657 to allow only an inspector to bring proceedings under s 536AA, not an employee organisation.

Recommendation 32:

Amend Item 84 in Part 26 on the commencement of Division 19 as follows:

Division 19—Amendments made by Part 25 of Schedule 1 to the amending Act

84 Employment advertisements

Division 4 of Part 3-6 of this Act, as inserted by Part 25 of Schedule 1 to the amending Act, applies in relation to employment advertised on or after the day that is six months ~~one month~~ after the commencement of Part 25 of Schedule 1 to the amending Act (whether the employment was first advertised before on or after that day).

ABOUT ACCI

The Australian Chamber of Commerce and Industry (ACCI) is the largest and most representative business advocacy network in Australia. We speak on behalf of Australian business at home and abroad.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses are also able to be members of our Business Leaders Council.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, employing over 4 million Australian workers.

The Australian Chamber strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

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INDUSTRY ASSOCIATION

accord

AMCA

Animal Medicines Australia

afa Great advice for more Australians

ais nsw

Australia Arab Chamber of Commerce & Industry

AADA

Australian Beverages

ADA Australian Dental Association

ADIA Australian Dental Industry Association

AFEI Australian Federation of Employers & Industries

Australian Gift & Homewares Association

AHA

aicm Australian Institute of Credit Management

Australian Made

AMPC

AMMA Australian Resources & Energy Group

AMTA Australian Mobile Telecommunications Association

apmf

ARIA Australian Recording Industry Association

ARITA

Australian Retailers Association

ARTA

ASMI Australian Self Medication Industry

Australian Steel Institute

ATEC

ATIC Australian Tourism Industry Council

ATA Australian Trucking Association

AVA Australian Veterinary Association

BIC Bus Industry Confederation moving people

Business Council of Co-operatives and Mutuals

Caravan Industry Association of Australia

Cement Concrete & Aggregates Australia

Chemistry Australia

CAA

CMAA

Consult Australia

COPHE Council Of Private Higher Education

CPA Australia

CLIK Australasia

Customer Owned Banking Association

Direct Selling Australia

Exhibition & Event Association of Australasia

Fitness Australia

Franchisee Federation

HIA

LFRA Large Format Retail Association

Live Performance Australia

Master Builders Australia

master plumbers Expert. Committed. Professional.

MTAA Medical Technology Association of Australia

Medicines Australia

NALSPA

NDS National Disability Services

neca national electrical and communications association

nesa national employment services association

National Fire Industry Association

NRA National Retail Association

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NSW HCA The voice of the Hire Car Industry

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