Australian Chamber of Commerce and Industry

Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023

Senate Education and Employment Legislation Committee

ACCI Submission

18 April 2023

Australian Chamber of Commerce and Industry

Working for business.
Working for Australia

Telephone 02 6270 8000 | Email info@acci.com.au | Website www.acci.com.au

Media Enquiries
Telephone 02 6270 8020 | Email media@acci.com.au

Canberra Office
Commerce House
Level 3, 24 Brisbane Avenue
Barton ACT 2600
PO BOX 6005
Kingston ACT 2604

Melbourne Office
Level 2, 150 Collins Street
Melbourne VIC 3000

Sydney Office
Level 15, 140 Arthur Street
North Sydney NSW 2060
Locked Bag 938
North Sydney NSW 2059

Perth Office
Bishops See
Level 5, 235 St Georges Terrace
Perth WA 6000

ABN 85 008 391 795

Australian Chamber of Commerce and Industry

Table of Contents

Australian Chamber of Commerce and Industry

Introduction

1. ACCI thanks the Senate Education and Employment Legislation Committee (**Committee**) for the opportunity to express views on the Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023 (**Bill**) and accompanying Explanatory Memorandum (**EM**).

2. As the nation's largest and most representative business organisation, ACCI is committed to ensuring that Australia's workplace relations system is productive, flexible and meets the needs of both employers and employees.

3. The Bill under consideration proposes to make amendments which are largely uncontentious. ACCI does not oppose the passage of any of its schedules, although considers that some improvements could be made to minimise the adverse impact on businesses. Specifically, the changes in schedules 2 and 5 to the unpaid parental leave entitlement and process for making employee authorised deductions respectively would benefit from further revision, as will be outlined in this submission.

4. ACCI proposes that:

   a. the Committee should recommend that Schedule 2 (unpaid parental leave) be amended to:

      (i) require employees to give notice for a set or pattern of flexible UPL days;

      (ii) allow small business employers to refuse the use of a flexible UPL day on reasonable business grounds; or

      (iii) require employees and employers to discuss and engage in consultation regarding a forthcoming set of flexible UPL days; and

   b. the Committee should consider under Schedule 5 the issues relating to and risks associated with the ability for employees to make blanket authorisations for deductions of variable amounts.

5. This submission will address each schedule of the Bill consecutively. It will not discuss schedules 7 or 8 of the Bill (technical corrections and transitional provisions), as these do not contain items for which ACCI has views that it wishes to outline to the Committee.

6. ACCI looks forward to engaging with the Committee on any further questions on the Bill about our views or submissions.

Schedule 1 — Protection of Migrant Workers

7. The proposed section 40B in schedule 1 intends to clarify that where a contract of employment or a contract for services (i.e. an independent contracting arrangement) is held to be invalid under migration law, the provisions of the FW Act continue to apply.

8. The validity of a contract of employment or a contract for services can be affected by the doctrine of illegality: where the performance of a contract involves illegal conduct, it may be considered void and unenforceable. This principle has been variably applied to employment contracts of migrant workers.

9. In *Australia Meat Holdings Pty Ltd v Kazi* [2004] QCA 147, the Queensland Court of Appeal held that a breach of the *Migration Act 1958* (Cth) rendered a contract of employment unenforceable, thereby preventing the injured migrant worker from recovering workers' compensation.[1] This decision was then relied upon by Commissioner Bissett in *Smallwood v Ergo Asia Pty Ltd* [2014] FWC 964 (***Smallwood***) in which an unfair dismissal application brought by a worker against an employer who was not the worker's 457 visa sponsor was dismissed on the basis that the contract of employment, having been entered into contrary to the Migration Act, was "invalid and unenforceable".[2] *Smallwood* was cited with approval by the Supreme Court of Western Australia in *Kep Management Services Pty Ltd v Goldwest Enterprises Pty Ltd* [2015] WASC 132 and referenced by the Federal Circuit Court in *Lal v Biber* [2021] FCCA 959.

10. Conversely, in *Nonferral (NSW) Pty Ltd v Taufia* (1998) 43 NSWLR 312, Cole JA of the NSW Court of Appeal held that a breach of the *Migration Act 1958* (Cth) did not render a contract of employment unenforceable for the purposes of the NSW workers compensation scheme because the refusal to enforce those rights was considered to be disproportionate to the seriousness of the unlawful conduct.[3]

11. Although the effect on the validity of a contract of employment of breaches of migration law has been disputed in the courts, the Fair Work Ombudsman (**FWO**), rather than the affected migrant worker, can nevertheless enforce rights and obligations under the FW Act. For example, the FWO investigated and enforced penalties against 7-Eleven franchises which had breached minimum conditions of employment in their contracting of workers in breach of visa conditions: see *Fair Work Ombudsman v Bosen Pty Ltd and Others (Industrial)* [2011] VMC 81. The jurisdictional barrier to employees pursuing their own compensation despite a potentially invalid contract of employment does not arise as an issue in these proceedings conducted by the FWO.[4]

12. This lack of clarity about the validity of a contract of employment (or a contract of services) should be rectified. This would not only benefit migrant workers by enabling them to pursue their own claims for compensation, but further, it would deter employers from breaching minimum employment standards when engaging migrant workers. Accordingly, the degree to which employers who are complying with the provisions of the FW Act will be forced to compete with other employers who are able to minimise their labour costs by breaching the FW Act will be reduced, thereby benefitting those compliant employers.

[1] *Australia Meat Holdings Pty Ltd v Kazi* [2004] QCA 147 [24] (Davies JA).
[2] *Smallwood v Ergo Asia Pty Ltd* [2014] FWC 964 [80] (Bissett C).
[3] *Nonferral (NSW) Pty Ltd v Taufia* (1998) 43 NSWLR 312, 315 (Cole JA).
[4] See, eg, *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd* [2012] FMCA 258.

13. Furthermore, the proposed provision would not impact the worker's position under migration law. The provision would only apply for "the purposes of" the FW Act. Workers who breach migration laws would continue to be held liable for that unlawful behaviour.

14. ACCI therefore supports schedule 1 of the Bill and considers this clarification a necessary amendment to the FW Act.

Schedule 2 — Unpaid Parental Leave

15. The items in schedule 2 propose to make extensive amendments to the unpaid parental leave (**UPL**) entitlement in the National Employment Standards (**NES**). Centrally, the amendments would convert the entitlement of national system employees to either 12 months of continuous UPL or 30 flexible days of UPL, to an entitlement of 12 months of continuous UPL, less any of the available 100 (or more if prescribed by regulation) flexible UPL days used within 24 months of the child's birth.

16. ACCI supports the intent of the amendments. In particular, improvements to flexibility in the workplace relations system are generally welcome. In addition, the attempt to achieve consistency between the paid parental leave scheme and the UPL entitlement is an important objective, as are the underlying policy bases of improving women's workforce participation and gender equity. However, the execution of these changes to the UPL entitlement are a cause for some concern for employers.

17. The quantum of flexible leave days available, given how a day is defined for this part of the FW Act, may generate workplace issues. In *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 271 CLR 495, Kiefel CJ, Nettle and Gordon JJ held that under the UPL entitlement:[5]

> … a "day" is not calculated according to an employee's ordinary hours of work. Rather, [the provisions] authorise an absence for the portion of the 24-hour period that would otherwise be allocated to working.

18. The consequence of this definition, in contradistinction to how a "day" is calculated for the purposes of paid entitlements such as annual leave and personal/carer's leave which is a "notional day" (meaning a portion of the employee's total ordinary hours in a year), is that the entitlement for part-time employees is significant. Under the existing entitlement to 12 months of continuous leave,[6] it does not matter how many days in a given week an employee works, all employees receive the same entitlement measured in weeks or months. For flexible leave days on the other hand, if an employee works part-time, their entitlement to UPL greatly exceeds that of full-time employees when measured in weeks or months.

19. While this is also the case under the existing system, with only 30 flexible UPL days available to employees, the impact on businesses is far more minor when compared with 100, and even more soon,[7] flexible UPL days.

20. The effect is best illustrated with examples. Consider one employee who is engaged to work only 2 days in a given week and another employee who is engaged on a full-time basis. For the first employee, the entitlement to 100 flexible UPL days means that, in effect, they have an entitlement to 50 weeks of UPL that can be taken continuously or intermittently.[8] The second, full-time employee is only entitled to an equivalent of 20 weeks of UPL that can be taken continuously or intermittently. The entitlement is even more significant for part-time employees who work on only a single day per week, which would be an equivalent of 100 weeks of UPL.

---

[5] *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 271 CLR 495, 508 [27] (Kiefel CJ, Nettle and Gordon JJ).
[6] FW Act s 71.
[7] EM [14].
[8] FW Act s 72A(3).

21. The result is that part-time and regular casual employees are able to take leave for prolonged lengths of time, creating vacancies which businesses may struggle to fill. When unpaid leave is taken continuously, it effectively operates as a right to return to a specific job after a specified period, noting that a leave entitlement in the NES is a workplace right,[9] meaning that employers are prohibited from altering the employee's position upon their return from leave to their detriment, including changing their roster,[10] reducing their level of responsibility,[11] or transferring them to a different worksite.[12] When unpaid leave is taken intermittently, its irregularity can generate uncertainty for employers.

22. In either situation, a vacancy is created which smaller businesses will face challenges in filling, given the potential inability to promise ongoing employment to the worker filling the vacancy following the return to work of the employee on leave. These challenges will be compounded by the Government's recent restrictions placed on fixed term contracting,[13] as well as forthcoming proposals to restrict the use of labour hire and impede the reliance on casual employment.

23. For example, a part-time employee working 2 days per week in a small business will be able to take UPL on a two-weeks-on, two-weeks-off basis, across a period of 100 weeks. The employee will only be required to give their employer notice of each individual flexible UPL day, four weeks prior (or later it is not practicable).[14] The employee can also decide at any moment to not take UPL during a two week period for which they would ordinarily do so, as long as they provide these four weeks of notice (or less it is not practicable), requiring the employer to provide them with the same work. Evidently, the large quantum of flexible UPL days provided in full to part-time employees will lead to challenging vacancies for employees.

24. These issues could be largely ameliorated by amending the notice requirements for flexible leave days. Although the extensive periods of absence which would be available to part-time employees relative to full-time employees will persist, by giving employers greater certainty over how flexible UPL days are intended to be taken, the vacancies would be easier to fill for employers.

25. The principal issue with the notice requirements lies in the obligation to only give written for "a flexible day",[15] rather than a set of flexible days. Although employees must give their employer 10 weeks' notice prior to using the first day of leave and must indicate the total number of flexible UPL days that are intended to be taken,[16] there is no requirement for employees to indicate either the pattern in or period over which UPL days will be used. Accordingly, employees can use the flexible UPL days irregularly and intermittently. For example, over a period of four weeks, an employee can choose to take across a four week period, 4 days, 2 days, 1 day and 3 days of leave each week respectively, and then reverse that pattern for the following four weeks, and/or change the days of the week on which the leave is taken, making the task of filling the vacancy considerably difficult for employers.

[9] See, eg, *Wilkie v National Storage Operations Pty Ltd* [2013] FCCA 1056.
[10] *Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd* [2013] FCCA 473.
[11] *Wilkie v National Storage Operations Pty Ltd* [2013] FCCA 1056.
[12] *Byrne v Australian Ophthalmic Supplies Pty Ltd* (2008) 169 IR 236.
[13] *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) sch 1 pt 10.
[14] FW Act s 74(4B).
[15] FW Act s 74(4B).
[16] Bill sch 2 items 45 and 49.

26. While this is already to some degree the case under the existing entitlement, it is indisputable that these effects will be heightened with the available flexible UPL days being increased from a mere 30 (at the cost of sacrificing the entire continuous 12 month period of UPL) to 100 days, which it has been flagged will increase through regulation following planned increases to the paid parental leave scheme which will be announced in the 2022-2023 Budget.[17] Additionally, it is anticipated that the usage of the entitlement will increase following greater publicity arising from these amendments.

27. These issues could be rectified by requiring employees to give notice for a set or pattern of flexible UPL days. For example, employees could be required to give notice for the dates of flexible UPL days to be taken over a four week period, four weeks prior to the first leave day. Alternatively, small business employers could be provided with the ability to refuse the use of a flexible UPL day on reasonable business grounds. Least favourably, the amendments could simply require employees and employers to discuss and engage in consultation regarding a forthcoming set of flexible UPL days.

28. Ultimately, ACCI does not oppose the proposed amendments to the UPL entitlement but considers that improvements could be made to minimise the adverse impact on businesses.

[17] EM [14].

Schedule 3 — Superannuation

29. The amendments in schedule 3 propose to impose an obligation on employers to make superannuation contributions for the benefit of employees so as to avoid liability to pay the superannuation guarantee charge (**SGC**) and insert associated provisions necessary for the enforcement of this obligation.

30. The wording of this obligation mirrors the requirement under the FW Act for modern awards, which must, pursuant to section 149B, "include a term that requires an employer covered by the award to make contributions to a superannuation fund for the benefit of an employee covered by the award so as to avoid liability to pay superannuation guarantee charge under the S*uperannuation Guarantee Charge Act 1992* in relation to the employee."

31. The consequence of section 149B is that the vast majority of modern awards already contain a term that reflects the obligation proposed in the Bill. Further, this term in modern awards will usually be replicated into an enterprise agreement in bargaining. Resultingly, a significant proportion of the Australian workforce is already covered by industrial instruments which impose the same obligation as that which is proposed in the Bill.

32. This obligation will therefore primarily affect employees who are both award-free and agreement-free. Additionally, it will affect employees covered by the following awards, which presently lack an obligation to make superannuation contributions for the benefit of an employee so as to avoid liability to pay SGC:

- *Black Coal Mining Industry Award 2020*;
- *Mining Industry Award 2020*;
- *Rail Industry Award 2020*;
- *Asphalt Industry Award 2020*;
- *Hydrocarbons Industry (Upstream) Award 2020*;
- *Dredging Industry Award 2020*;
- *Maritime Offshore Oil and Gas Award 2020*;
- *Seagoing Industry Award 2020*;
- *Miscellaneous Award 2020*;
- *Australian Public Service Enterprise Award 2015*;
- *Australian Bureau of Statistics (Interviewers) Enterprise Award 2016*;
- *Parliamentary Departments Staff Enterprise Award 2016*; and
- *Australian Federal Police Enterprise Award 2016.*

33. Hence, the impact on employers of introducing this obligation is fairly limited, given that, in most cases, it will simply result in the overlapping of an already existent obligation.

34. It should be noted that the vast majority of employers are meeting their superannuation obligations, or, where the applicable industrial instrument does not impose such an obligation, are already making sufficient superannuation contributions so as to avoid liability to pay the SGC. The deterrent effect of the obligation is therefore likely to be insignificant.

35. According to the Australian Tax Office (**ATO**), for the 2019-20 period, the net superannuation guarantee gap between contributions that should have been made by employers (were they to avoid liability for the SGC) and contributions that were made, was approximately $3.4 billion.[18] This is equal to a net gap as a percentage of total contributions that were made of 4.9 per cent.[19] In that period, the ATO completed over 17,000 cases relating to unpaid superannuation, with 12,000 arising directly from complaints, 1,700 on the ATO's own initiative and 3,000 from the Superannuation Guarantee Taskforce. In approximately 25 per cent of investigated complaints, the employer was found to be compliant.[20]

36. Perhaps more significantly for many employers, the amendments in schedule 3 will potentially increase the enforcement of superannuation obligations (or shortfalls).

37. Currently, the ATO has primary responsibility for pursuing unpaid superannuation. The ATO is able to investigate and seek recovery of the SGC which employers may be liable for when an insufficient proportion of an employee's quarterly ordinary earnings are contributed to their superannuation fund. The ATO also has unique enforcement measures, such as requiring noncompliant employers to undertake an education course.[21]

38. While the FWO already has the power to bring proceedings against employers who contravene the superannuation terms in modern awards (see, for example, *Fair Work Ombudsman v HSCC Pty Ltd* [2020] FCA 655), it rarely (if ever) appears to commence proceedings where the employer has solely contravened those terms without an accompanying broader underpayment of wages or other entitlements. Accordingly, the amendments in schedule 3 may result in the FWO pursuing more underpayments of superannuation that are not accompanied by other breaches of workplace relations law, given that the obligation in the proposed 116B will be a standalone provision in the National Employment Standards (**NES**), which are a central focus of the FWO's enforcement.

39. Additionally, the proposed 116B would enable employees to pursue unpaid superannuation in a personal capacity given that it would constitute a breach of the NES.[22] However, employees covered by modern awards which impose an obligation to make superannuation contributions for the benefit of an employee so as to avoid liability to pay SGC are already able to do so, with the same penalties and jurisdictions available for breaches of modern awards and the NES.[23] Nevertheless, it is foreseeable that more claims would be pursued by employees personally given the potentially greater awareness of the terms of the NES than terms of modern awards.

40. The effect of the proposed section 116D would be that, where a proceeding brought by the Commissioner of Taxation in respect of unpaid superannuation remains afoot, the employee may not make an application for an order for a breach of the NES. This is a welcome provision and will ensure that employers do not face the prospect of multiple actions for brought for the same dispute.

---

[18] Australian Tax Office, *Superannuation guarantee gap*, <https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-gap/Superannuation-guarantee-gap/>.
[19] See ibid.
[20] John Ford, Acting Deputy Commissioner, Superannuation and Employer Obligations, Australian Taxation Office, Hansard, 18 September 2020.
[21] *Tax Administration Act 1953* (Cth) sch 1 div 384.
[22] FW Act ss 44 and 539.
[23] See FW Act s 539(2) items 1 and 2.

41. Overall, ACCI does not oppose the amendments contained in schedule 3 of the Bill because of the widespread obligation on employers that already exists under modern awards and enterprise agreements to make sufficient contributions to employees' superannuation funds so as to avoid liability to pay the superannuation guarantee charge. The amendments may lead to a greater enforcement of superannuation entitlements; however, the statistics demonstrate that the majority of employers are already compliant with these obligations.

Schedule 4 — Workplace Determinations

42. The amendments in schedule 4 intend to clarify that when a workplace determination comes into effect, the enterprise agreement that applies at that time ceases to be in operation.

43. A workplace determination is, in essence, an arbitral decision of the FWC during a bargaining dispute about the terms of a proposed enterprise agreement. In other words, when parties are unable to reach agreement about certain terms to be included in an enterprise agreement and are therefore unable to successfully "bargain" for an "agreement", bargaining representatives can seek a decision from the FWC to make a determination about what those terms should be.[24] A workplace determination can therefore be best understood as a quasi-agreement, with most of its terms usually having been decided by the parties during bargaining,[25] and the remainder—those which were in dispute—decided by the FWC.[26]

44. Accordingly, when a workplace determination comes into effect, as a quasi-agreement, it should naturally replace the enterprise agreement which applied to the parties at that time. ACCI therefore supports the amendments in schedule 4 of the Bill, which will provide greater clarity for employers.

[24] See FW Act ss 260, 266, 269.
[25] FW Act s 274.
[26] FW Act ss 264(3), 269(3), 270(3).

Schedule 5 — Employee Authorised Deductions

45. The amendments in schedule 5 propose to change the process for the authorisation of deductions by employers from the pay of employees. These deductions can be made for the payment of trade union membership fees, health insurance fees, salary sacrifice arrangements,[27] and other payments.

46. Currently, employers can deduct from the amounts payable to employees for the performance of work any amounts that are authorised by the employee that are principally for their own benefit (putting aside the ability to deduct other amounts authorised by an industrial instrument or law).[28]

47. The authorisation by the employee must be in writing,[29] specify the amount of the deduction,[30] and be able to be withdrawn in writing by the employee at any time.[31] Any variation of the amount of the authorised deduction must be authorised again in writing by the employee.[32] This means that, as held by Judge Burnett in *Fair Work Ombudsman v Glasshouse Mountains Tavern Pty Ltd* [2014] FCCA 111, "there can be no blanket authorisation" by the employee.[33] Instead the authorisation must specify the precise amount that the employer can deduct from their pay.[34]

48. The Bill proposes to enable blanket authorisations. The effect of item 2 in schedule 5 would be that the authorisation given by employees can specify that the deduction is for "amounts as varied from time to time". This means that employees will be able to authorise deductions without specifying the amounts which are permitted to be deducted from their salary.

49. This could have serious repercussions for an employee who proceeds to make an authorisation for variable amounts and whose circumstances then change, which could result in deductions from their salary that greatly exceed their expectations. An employee may be in a position to authorise variable deductions at one point in time, but when the fees for which the deductions are being made, they may no longer be in the same position. Although the obligation on employees to provide a new authorisation each time the amount varies leads to some additional administrative burden, it is a bulwark against unforeseen large deductions and disincentivises organisations that rely on payroll deductions from regularly increasing their fees, to the detriment of employees.

50. For example, an employee may authorise deductions from their salary for union fees. The union may then decide to significantly increase the fees owed by that employee. The affected employee may only become aware of this significant increase following the deduction being made. It appears that this proposal would primarily benefit—perhaps as is the underlying justification for the measure—organisations such as trade unions which more frequently collect fees through salary deductions.

[27] *Australian Education Union v Victoria* [2015] FCA 1196 [373].
[28] FW Act s 324(1)(a).
[29] FW Act s 324(1)(a).
[30] FW Act s 324(2)(a).
[31] FW Act s 324(1)(b).
[32] FW Act s 324(3).
[33] *Fair Work Ombudsman v Glasshouse Mountains Tavern Pty Ltd* [2014] FCCA 1115 [121].
[34] See ibid.

51. It may be the case that, in the majority of circumstances, organisations are nevertheless required to notify individuals of increases to fees, prior to their occurrence. For example, the United Workers Union appears to issue fee increase notices when their union membership fees increase.[35] However, it is not clear whether this is a legal requirement and if it is, whether it applies to all organisations for which payroll deductions may be being made. ACCI encourages the Committee to examine this issue closely.

[35] See <https://unitedworkers.org.au/fee-increase-notice/>.

Schedule 6 — Coal Mining LSL Scheme

52. The amendments in schedule 6 propose to improve the treatment of casual employees under the coal mining long service leave (**coal LSL**) scheme. ACCI does not oppose the proposed amendments.

53. ACCI does have some reservations about the decision to include a casual employee's casual loading in their 'eligible wages' for the purposes of calculating the payroll levy. The notional objective of this proposal is to "ensure that casual employees are treated no less favourably than permanent employees";[36] however, it is not clear that the exclusion of casual loading is necessarily an unfavourable treatment of casual employees.

54. Leave payments are not included in the 'eligible wages' of full-time and part-time employees. Casual loadings are provided to casual employees in lieu of leave payments. Hence, including casual loadings in casual employees' 'eligible wages' in fact places casual employees in a *more favourable* position than full-time and part-time employees under the coal LSL scheme.

55. Furthermore, in amending the coal LSL scheme, the Government should have used the opportunity to address other, more pressing issues that persist. In particular, the Government could have sought changes to the scheme which would have clarified that certain service providers and contractors who may work on coal mine sites should be excluded from its coverage.

[36] EM [125].

About ACCI

The Australian Chamber of Commerce and Industry represents hundreds of thousands of businesses in every state and territory and across all industries. Ranging from small and medium enterprises to the largest companies, our network employs millions of people.

ACCI 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.

ACCI Members

State and Territory Chambers

Industry Associations

Australian
Chamber of Commerce
and Industry