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Commonwealth Proposals for Industrial Relations Changes December 2020

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Part 1 Union speaking points: For the workers

Fair Work Amendment (Supporting Australia’s Economic Recovery) Bill 2020

Top lines:

1. The union movement has defined three key tests for the IR changes:
 - a. We must not forget the debt owed to the essential workers, the heroes of the pandemic who rely on these workplace laws to protect them. The working people of our country have already sacrificed the most and have paid the highest price:
 - i. almost a million are unemployed and 1.4 million are underemployed;
 - ii. many have exhausted all their sick leave, annual leave and long service leave;
 - iii. 3.3 million people have raided their super account

- b. As we have said from the beginning, we will not accept workers being worse off - cuts to pay or the taking away of rights.
 - c. And finally, the changes have to make a start in tackling the biggest problem facing working people as exposed by the pandemic, the unacceptably high number of casual, insecure jobs:
 - iv. over half a million casuals lost their jobs in the first wave of the pandemic
 - v. the vulnerability of casual workers was the weakest link in our battle to stop the spread of the virus
2. The Bill fails the Government's own test: workers will be worse off. This was agreed up front in the IR discussions, changes shouldn't leave workers worse off.
 3. We're all in this together. Small business needs customers with secure jobs and money in their pocket. Any cuts to pay or loss of rights for working people will make recovery harder and longer. With international uncertainty over COVID we need a strong local economy where people have the confidence to spend, buying local goods and services.
 4. The Government's changes will make jobs less secure; they will make it easier for employers to casualise permanent jobs and allow employers to pay workers less than the award safety net. This is the opposite of what the country needs.
 5. It is also an attack on the tradies of Australia. By handing over power on projects to huge mining, resource and construction multinationals the Government wants to remove tradies' rights to have a say over their working and living conditions for up to 8 years. It's a big problem for FIFO workers where 13 workers took their own lives on one of these projects (Inpex) because of the working conditions. FIFO workers need a strong voice and deserve the same rights as other workers. This Bill takes both away.
 6. This Bill swings the pendulum too far in favour of big business. It will leave us with a completely unbalanced system that will make jobs more insecure and it will cut living standards for working people.

Part 2 Executive Summary of Government Proposals

Casuals

- Casuals definition – Does not reflect the *Workpac* decisions and gives primacy to the designation of 'casual' by the employer at point of engagement. The new definition and set-off provisions apply retrospectively (if found not to be a casual, offset entitlements against loading).
- All award provisions are to be reviewed by FWC for consistency with new provisions within 6 months.
- Casual conversion – Employer must make a written offer of conversion after 12 months if for the last six months there has been a regular pattern of work. Except that an employer does not

have to make the offer if there are reasonable grounds not to (similar to current provisions to refuse).

- Casual conversion – There is no arbitration of disputes, other than by agreement (including where an EA dispute clause applies).
- Casual Conversion - right to request if employer doesn't make an offer.
- There is a restriction on employers varying or reducing hours, or terminating employment, to avoid conversion obligations, although there is no civil penalty for a breach.
- Applications can be made to vary existing EAs where there is an 'uncertainty or difficulty' relating to the interaction between the terms of the agreement and the new definition of casual employee, or the conversion provisions. Variations can operate retrospectively

Awards

- The Government is writing to the FWC asking them to create optional loaded rates and/or exception rates and streamlined classification structure in five awards so long as no one is worse off. Opt in if both employer and employee agree. FWC to hear from parties and the Government by 31 March 2021.
- An independent review (i.e. not FWC) to identify what could be moved from awards to the NES.
- Part-time workers covered by 12 awards can be asked to enter into an agreement to work extra hours without overtime so long as they are working more than 16 hours a week. Impact is likely to vary from award to award. The list of awards can be added to by Regulation.

Agreements

- Requires FWC to publish the NERR on their website
- Extends time to issue the NERR to employees to 28 days after bargaining starts
- The '*assist in the revival of an enterprise*' test for flexible work directions will be easily met and allow many employers to give wide-ranging directions. There is no arbitration available in relation to these new directions.
- A new, wide exemption (for 2 years) allowing the FWC to approve agreements that do not pass the BOOT if 'appropriate in all the circumstances' and 'not contrary to the public interest'. Once approved these agreements remain in force until replaced or terminated.
- Permanent changes to the BOOT test requiring the FWC to give 'substantial weight' to the views of employers and employees, even in circumstances where the agreement leaves employees worse off compared with the relevant award, and employees are unrepresented.
- A new requirement for the FWC to perform its functions under Part 2-4 in a manner that 'recognises the outcome of bargaining at the enterprise level.'

- Removing mandatory pre-approval steps (to notify employees of the time and place of the vote, provide a copy of the agreement and explain its terms) and replacing them with a general (and unclear) requirement to give employees a ‘fair and reasonable’ opportunity to decide to approve an agreement.
- Employers don’t have to provide copies of things referenced in agreements if they are in the public domain.
- Only casuals who perform work during the access period will be able to vote.
- Limits what FWC can consider in terms of the BOOT to “reasonably foreseeable by the employer” at test time.
- Directs the FWC to consider the “overall benefits, including non-monetary benefits” in assessing BOOT compliance.
- Removing the power of the FWC to consider whether an agreement undercuts the safety net and replacing it with a requirement for all Agreements to include a ‘model NES interaction term’.
- Preventing the FWC from receiving submissions from unions which are not bargaining representatives for an agreement, unless there are exceptional circumstances.
- Approval of Agreements within 21 days unless reasons not to.
- Excludes transfer of instrument between related entities if the employee seeks employment with the new employer.

Greenfields Agreements

- Eight-year greenfield agreements are available for projects with a value as low as \$250m, inclusive of pre-construction expenditure. Must include pay rises and existing test regarding prevailing pay and conditions remain.
- No access to arbitration or any other changes.

Compliance

- Increased civil penalties for underpayments
- A new criminal offence is impossibly high to meet, and the provisions override state laws. The offence is, ‘dishonestly engaging in a systematic pattern of underpaying one or more employees’ with maximum penalties of 4 years or 5,000 penalty units for an individual and 25,000 penalty units for a body corporate. ‘Dishonest’ is defined as:
 - (a) dishonest according to the standards of ordinary people; **and**
 - (b) known by the defendant to be dishonest according to the standards of ordinary people.
- New small claims threshold of up to \$50 000

- Court can refer matter to FWC for conciliation on its own motion or by application by a party
- Costs can be ordered if party refuses to participate
- If not settled arbitration only by consent,
- Unlawful for jobs to be advertised below minimum wage
- Slightly increases penalties for sham contracting

Other

- New grounds for dismissal of FWC proceedings are unnecessary.
- FWC appeals can be determined without a hearing even if the parties do not consent to this.

Part 3 Detailed Analysis – Fair Work Amendment (Supporting Australia’s Economic Recovery) Bill 2020

Commencement

Most provisions commence the day after Royal Assent, other than as identified below.

SCHEDULE 1 CASUAL EMPLOYEES

Part 1 – Main Amendments

Definition of casual –

Inserts a new definition of ‘casual employee’ into the FW Act.¹ A person is a casual employee where ‘*an offer of employment made by the employer to the person is made **on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person.***’ To determine whether that test is met, the Act lists a set of factors that are the **only** factors that can be considered. These include whether the employment is *described* as casual employment. A regular pattern of hours is not of itself sufficient to indicate a ‘firm advance commitment’.

The assessment is made on the basis of the offer and acceptance of the employment as casual employment, not conduct after the employment is entered into. This is contrary to the *Workpac* decisions which held that someone could commence as a casual but later become permanent because, for example, the regularity of their work indicated a firm advance commitment.

These provisions effectively allow an employer to designate someone as a casual employee at the point of engagement.

The definition operates retrospectively – see Schedule 7 below.

Offers and Requests for Casual Conversion

¹ New section 15A.

Inserts a new Division into the NES to apply to 'casual employees'.²

A new section³ requires an employer to make a written **offer** (note, employees have a residual right to request where an employer decides not to make an offer - see below) to certain casual employees to convert to full-time or part-time employment. These are casual employees who have been employed for 12 months **and** *'during at least the last 6 months of that period, the employee has worked a regular pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to work as a full-time employee or a part-time employee.'* The offer has to be made within 21 days of the end of the 12-month period.

However the offer need not be made where *'there are reasonable grounds not to make the offer and the reasonable grounds are based on facts that are known, or reasonably foreseeable, at the time of deciding not to make the offer.'*⁴ These 'reasonable grounds' include such things as the employees position will cease to exist within 12 months or their hours will be significantly reduced. These grounds are similar to the standard award clause arising from the casual conversion test case.

Where the employer decides not to make an offer either because they believe they have reasonable grounds not to, or the employee is ineligible because they do not meet the 6 months/regular pattern of hours test, the employer has to provide a notice to the employee with reasons for the decision.⁵

Employees have 21 days to accept an offer.⁶ If it is accepted, the employer has to give the employee a notice within 21 days advising whether the conversion is to full-time or part-time, the hours of work and the date of commencement. These issues have to be discussed with the employee before the notice is given.

Where an employer has refused to make an offer based on reasonable grounds, an employee has a residual right to request conversion.⁷ The employer must respond in writing, including reasons, within 21 days and any refusal must be based on reasonable grounds.

There is a restriction on employers varying or reducing hours, or terminating employment, to avoid conversion obligations,⁸ although there is no civil penalty for a breach.

Conversion is voluntary. An employer cannot require conversion.⁹ The conversion provisions apply to pre-commencement periods of employment – see Schedule 7 below.

Disputes about the operation of these provisions are dealt with according to applicable DSPs in awards/agreements/contracts. However, there is a default DSP which allows the FWC to deal with disputes but arbitration is only available by agreement.¹⁰ A failure to attempt to resolve a dispute at the workplace level first is a contravention of the NES which may attract a civil penalty if a case is brought by a worker, a union or a FWO inspector.¹¹

The FWO is required to publish a casual employment information statement which employers must give to casual employees before, or as soon as practicable after, commencement (no civil penalty if they do not).

² Note there are a variety of current award provisions arising out of the Casual employment test case.

³ 66B

⁴ 66C

⁵ S66C(3) & (4).

⁶ S66D

⁷ S66F

⁸ S66L(1)

⁹ S66L(2)

¹⁰ S66M

¹¹ item 1 in s 539(2)

Set-Off

Where an employee is described as a casual and paid a loading, but is not a casual at law, and subsequently make a claim for certain entitlements (six in number), the court **must** reduce any amount payable for those entitlements by an amount equal to the loading amount.¹² Alternatively, the court may identify a proportion of the loading which is specifically or appropriately attributable to that particular entitlement and offset the claim by that amount (as opposed to by the whole amount of the loading).¹³

Part 2 – Other

The definition of ‘long term casual’ is repealed and replaced with a definition of ‘regular casual employee’ which requires employment on a regular and systematic basis but removes the sequence of periods of employment during at least 12 months. Where an employee converts their employment under the NES, their service as a casual employee prior to conversion will not count as service for the purposes of annual leave, personal leave, severance or redundancy.

SCHEDULE 2 MODERN AWARDS

Part 1 - Additional hours for part time employees

Introduces a new Division 9 – s 168M and following, allowing for *simplified additional hours agreements* (SAHA) for additional hours for certain award dependent part-time employees where:

- An identified modern award applies (12 listed awards that can be added to or subtracted by regulation)
- The employee is part-time; and
- The employee’s ordinary hours of work, averaged or otherwise, are at least 16 hours per week.

An employer cannot require an employee to enter into a SAHA, but there is no separate civil penalty if they do, just reliance on the existing General Protections provisions. Other award provisions may allow similar agreements, but agreements made under this new Division will prevail over the award to the extent of any inconsistency.

A SAHA must be entered into before the start of the additional agreed hours. The SAHA does not have to be in writing as long as the employer keeps ‘a record’ of it and provides a copy to the employee on request.¹⁴

Each period of additional agreed hours to be worked under a SAHA must:

- (a) be a continuous period of at least 3 hours; **or**
- (b) be **part of** a period of continuous work of at least 3 hours.

Note: For example, a period of 1 hour of additional agreed hours worked after the end of a 2-hour shift, so that the period of continuous work is 3 hours in total.

¹² S545A

¹³ S545A(3)

¹⁴ S168N

A SAHA has no effect to the extent that it is inconsistent with provisions in the award that limit the number of consecutive days of work or require work not be performed on particular days, unless those provisions themselves provide that an agreement or arrangement to the contrary is permissible.

Additional agreed hours are to be paid without overtime, but overtime can be paid where the additional agreed hours result in employees working outside the span of hours for which overtime is payable or because the employee works a number of hours beyond which overtime is payable. Other circumstances may be prescribed by regulation. The intention appears to be to do away with the class of overtime normally connected with late notice or part time workers extending beyond their regular hours on a particular day. For other purposes, annual leave, superannuation etc., the additional agreed hours are treated as ordinary hours of work.

A SAHA can be terminated by either party on 7 days' notice or by agreement at any time. They can be entered into in respect of "one or more days" and need only be entered into before the start of the first period of additional hours. For workers under 18, a parent may give standing consent for the employer to deal directly with the employee in make SAHAs.

The above provisions are taken to be a term of the identified modern awards and cannot be varied or revoked by the FWC but operate subject to the NES. Disputes about interaction between a SAHA and other terms of the award, or the operation of the SAHA provisions, are dealt with in accordance with the award DSP, i.e. no arbitration.

The FWC can vary the terms of an 'identified modern award' to resolve uncertainty or difficulty relating to the interaction of the award and the new Division 9 Agreements for additional hours for part-time employees. A variation can operate from any date specified in the variation, including retrospectively.

Part 2 – Flexible Work Directions (FWD)

A new Part 6-4D is inserted which allows employers to whom identified modern awards apply to give written directions to their award dependent employees about the duties to be performed or the location of the employee's work (including working from home). The power to give such directions prevails over the terms of the award, to the extent of any inconsistency.

Note, unlike the equivalent JobKeeper directions, these directions are able to be given by any employer to whom these awards apply, not just employers affected by COVID-19 and who suffered a reduction in turnover. The directions do have to meet an 'assist in the revival of an enterprise' test i.e.

'..the employer has information before the employer that leads the employer to reasonably believe that the direction is a necessary part of a reasonable strategy to assist in the revival of the employer's enterprise..'

otherwise the direction has no effect.

The directions must be reasonable. The employer has to give 3 days' written notice (or less if the employee genuinely agrees) and consult with the employee or their representative (and keep a written record). The consultation obligation only applies in respect of the first direction given to a particular employee, even if the subsequent direction is of an entirely different character. The minimum rate of pay guarantee applies.

These directions continue in place until withdrawn, revoked or replaced by the employer.

Disputes about interaction between a FWD and other terms of the award, or the operation of the FWD provisions, are dealt with in accordance with the award DSP i.e. no arbitration.

The above provisions are taken to be a term of the identified modern awards and cannot be varied or revoked by the FWC, but the FWC can vary an award to resolve an uncertainty/difficulty about the interaction between these provisions and the other terms of the modern award. These variations can operate **before** the date the determination is made.

Part 3 - Repeal Part 6-4D

These amendments to the FW Act are repealed after 2 years.

SCHEDULE 3 ENTERPRISE AGREEMENTS

Part 1 - Changes to the Objects

The current objects provision is to be repealed. A new criterion of 'enabling business and employment growth' has been added to the objectives at (b)(ii). Changes to (c)(iii) reflect the employers' agenda to change the FWC's approach to the application of the BOOT test. The change of emphasis should be read with the changes to FWC functions, Part 11 below.

This Part amends the objects of Part 2-4 at s 171 of the FW Act as follows:

- (a) *to provide a simple, flexible, fair and balanced framework for employers and employees to agree to terms and conditions of employment, particularly at the enterprise level; and*
- (b) *to enable collective bargaining in good faith for enterprise agreements that:*
 - (i) *deliver productivity benefits; and*
 - (ii) *enable business and employment growth; and*
 - (iii) *reflect the needs and priorities of employers and employees; and*
- (c) *to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements, including through:*
 - (i) *making bargaining orders; and*
 - (ii) *dealing with disputes where the bargaining representatives request assistance; and*
 - (iii) *ensuring that applications to the FWC for approval of enterprise agreements are dealt with in a timely, practical and transparent manner.*

Part 2 - Notice of employee representational rights

This Part:

- Extends the time for an employer to issue the NERR from 14 days to **28 days** after bargaining commences (amends s 173(3)); and
- Requires the FWC to publish on its website the NERR form prescribed by Schedule 2.1 of the Regulations (if the NERR itself is to change, the Regulations will be amended)

Part 3 - Pre-approval requirements

This Part substantially weakens the pre-approval obligations on employers.

The Part fundamentally changes the operation of these provisions by replacing the mandatory procedural steps set out in ss 180(2),(3) and (5) of the FW Act, which require an employer to *'take **all reasonable steps**'* to ensure that relevant employees have access to the agreement, an appropriate explanation of its terms, and details of the voting process; and replaces it with a general requirement to *'take **reasonable steps** to ensure that the relevant employees are given a fair and reasonable opportunity to decide whether or not to approve the agreement'* (the general requirement).

A new section 180(3) then says that 'without limiting' the general requirement, the employer is 'taken to have complied' with the general requirement if the employer 'takes reasonable steps' to ensure the relevant employees have access to the agreement and an appropriate explanation of its terms and details of the voting process.

Section 188 of the FW Act is amended to remove the obligation on FWC to ensure compliance with the procedural requirements, and simply requires the FWC to be satisfied that the relevant employees have been given 'a fair and reasonable opportunity to decide whether or not to approve an enterprise agreement'.

Note the removal of the word 'all' from the 'reasonable steps' formulation. Note also the narrowed definition of 'relevant employees', discussed in the section below.

The content of the general obligation is very unclear. Under this new section, while an employer will be taken to have met the obligation if the procedural requirements are met, an employer does not necessarily *have* to undertake the procedural steps in order to comply with the general requirement. In theory, an employer could fail to provide proper access to the terms of an agreement and/or fail to properly explain its terms and/or fail to give proper notice of the vote, and yet still meet the pre-approval requirements if the FWC was satisfied that employees had overall been given 'a fair and reasonable opportunity' to decide whether or not to approve the agreement. In addition, there is no longer any obligation to provide material incorporated in an agreement by reference if it is 'publicly available'. While awards, agreements and laws will be technically be 'publicly available', in reality it may be very difficult for employees to locate them readily, particularly those who are unrepresented. Material that is no longer in force can be particularly difficult to locate.

The 'fair and reasonable steps' test also applies to variations.

The Part also makes some less substantive changes:

- Section 180(6) (which provides examples of the types of employees who may need an appropriate explanation, i.e. culturally and linguistically diverse employees, young employees, and unrepresented employees) changes from a section to a note.
- Reflecting the fundamental shift from mandatory procedural steps to a general requirement, the heading of s 180 is changed from *'Employees must be given a copy of a proposed enterprise agreement etc.'* to *'Pre-approval requirements'*; and pre-approval 'steps' is changed to pre-approval 'requirements' in s 211(3)(a), which deals with when the FWC must approve a variation.

Part 4 - Voting requirements

This Part provides that the group of employees that can vote on an agreement to employees employed 'at the time the request is made'; excluding all casuals, except those casuals who actually performed work during the access period (replaces s 181(1)).¹⁵ This new definition informs the meaning of 'relevant employees' for the purposes of the pre-approval obligations.

Amendments to s 207 extend this new definition to the process for making joint applications for variations of agreements.

Part 5 - Better off overall test

New public interest exemption

These amendments operate for a period of 2 years.

They add a new limb to the public interest exemption in s 189 of the FW Act, which allows the FWC to approve agreements that do not meet the BOOT as long as it is 'appropriate to do so taking into account all the circumstances' (including the views and circumstances of the employers, employees and bargaining representatives, the impact of COVID-19, and the result of the vote) and 'because of those circumstances' approval is 'not contrary to the public interest'. There is no requirement under this new limb of the test for 'exceptional circumstances' to exist. The FWC can approve an agreement under the section if it fails to meet other approval requirements in ss 186 and 187, if undertakings are given. The existing exceptional circumstances process in s 189 is retained as an alternative.

Permanent new BOOT considerations

The Part adds an extensive new section to s 193, which:

- Limits the FWC's consideration of patterns of work for employees and prospective employees which are 'reasonably foreseeable by the employer' at the test time.
- Directs the FWC to consider the 'overall benefits' (including non-monetary benefits) that the employee would receive under the agreement compared with the award
- Directs the FWC to give "substantial weight" to the views of agreement-covered employers, award-covered employees, and any bargaining representatives (not objecting unions who are not bargaining reps); with a note providing that an example of the views of employees is the outcome of the vote (consistent with the employers push to give primacy to the views of the parties).Relocates the IFA exclusion in s 193(2) to this section (of no substantive effect).

The amended process also applies to agreement variations.

Note that because 'identified awards' are taken to incorporate the capacity for employers to give *flexible work directions* and enter into *simplified additional hours agreements*, the standard against which particular agreements are judged against may shift in any event.

Part 6 - New model NES interaction term

¹⁵ See *Swinburne University* [2015] FCAFC 98.

This Part removes the role of the Commission in ensuring that agreements do not exclude or undermine the safety net, and replaces it with a requirement for all enterprise agreements and workplace determinations to include a new model NES interaction term, to be set out in the Fair Work Regulations. The Part removes the requirement in section 186(2)(c) for the FWC to be satisfied that the terms of an agreement to be approved do not contravene s 55 (which prevents agreements from excluding the NES). The note at 186(2) that clarifies that an agreement may supplement the NES, is removed.

The Part repeals the note in s 55(7), which clarifies that terms of modern awards and agreements which exclude the NES are of no effect. The Part changes the heading of s 186(2) from 'Requirements relating to the safety net etc.' to 'Requirements relating to genuine agreement and passing the better off overall test'. The likely effect is to do away with arguments at the approval stage as to whether the terms of the agreement are inconsistent with the NES.

Part 7 - Variation of single enterprise agreements to cover new franchisee employers and their employees

This section provides for a new process for new franchisees to be roped into EBAs covering similar businesses.

This provision is intended to allow new franchisee employees to vote to be covered by an agreement which covers other businesses in the franchise who are single interest employers within the meaning s 172(5), and carry on similar business activities as the new franchisee. Eligible employers are employers who 'carry on similar business activities under the same franchise as the other employers'; and who are (i) franchisees of the same franchisor; or (ii) related bodies corporate of the same franchisor; or (iii) any combination of the above. The employer is required to tell the employees about the voting process and who will be covered by the agreement, but not explain the effect of the terms. The new 'fair and reasonable opportunity to decide' test applies.

Part 8 - Terminating agreements after nominal expiry date

This Part prevents an application for termination of an agreement being made until **3 months** after the NED has passed.

Part 9 - How the FWC may inform itself

This Part would significantly confine the discretion of the FWC to consider any information it sees fit to do so (s 590) in approval applications for new agreements and variations.

It will exclude unions who were not bargaining representatives for an agreement but have an interest in the outcome of an approval application or are objecting to the approval of a substandard agreement. The Part limits the FWC to consider, other than in exceptional circumstances:

- information that is publicly available
- submissions made by a volunteer body under section 254A
- submissions/evidence/info from the employer or employers covered by the agreement; an employee covered by the agreement; a bargaining representative for the agreement; an employee organisation covered by the agreement; and/or state or federal workplace relations Ministers.

By erecting quasi-standing rules at the approval stage, it is likely that the existing (small) window for unions who are not heard at an approval stage to argue that they “persons aggrieved” by an approval decision (and therefore entitled to appeal it), will be diminished.

Part 10 - Time limits for determining certain applications

This Part requires the FWC to determine an application for approval of a new agreement or a variation within 21 working days, or otherwise give written notice as soon as practicable to relevant employers and employee organisations (and place a copy on the website) explaining why the application has not been determined, including any exceptional circumstances.

Part 11 - FWC functions

This Part dictates a special approach to bargaining decisions over and above the general requirements in s 578. The Part will require the FWC to perform its functions and exercise its powers under Part 2-4 ‘in a manner that recognises the outcome of bargaining at the enterprise level.’ This is likely to be heavily relied upon by employers in submissions and may fundamentally change the approach of the FWC to bargaining decisions. It is very unclear how this requirement will interact with provisions of the FW Act, in particular the BOOT but is likely to require the FWC to elevate the approval of an agreement above other considerations.

Part 12 - Transfer of business

This Part excludes employees who seek, on their own initiative, to become employed by a new employer from the transfer of business provisions.

The proposed amendment aligns closely with a recommendation of the Productivity Commission Inquiry. On previous occasions we have opposed such amendments, on the basis of its impact on employees who are offered a “choice” between no job or a transfer to a new entity for lesser wages and conditions.

Part 13 – Cessation of instruments (‘Zombie Agreements’)

This part automatically sunsets all ‘agreement-based transitional instruments’ and all ‘Division 2B State employment agreements’ on 1 July 2022. The Part also sunsets any enterprise agreement made during the bridging period on the same date, with rights and liabilities preserved.

No provision is made for employees who may be worse off as a result. We will need to consider whether this captures some agreements that we do not want to terminate.

SCHEDULE 4 GREENFIELD AGREEMENTS

Inserts a new definition of ‘major project’¹⁶ which is a project where capital expenditure that has been or is reasonably likely to have been incurred is at least \$500m or where the Minister declares a project to be a ‘major project’ (between \$250 - \$500m). In deciding whether to make a ‘major project’ declaration, the Minister must take into account the national/regional significance, contribution to job creation and any other relevant matter. These declarations cannot be disallowed.

¹⁶ S23B

Where the FWC is satisfied that the work to be performed under the agreement relates only to the construction of a 'major project', the maximum term of such an agreement is 8 years after the date the agreement will come into operation (which is 7 days after approval or any later day specified in the agreement).¹⁷ This means the agreement itself can nominate a future date from which the 8 year period runs.

Where the nominal expiry date of a major project greenfield agreement exceeds 4 years, the FWC must be satisfied that the agreement provides for annual increases on the 'base rate of pay' in each year of its operation until its nominal expiry date.¹⁸

SCHEDULE 5 COMPLIANCE/ENFORCEMENT

Part 1

Inserts a new definition of 'remuneration-related contravention' (RRC).¹⁹

Allows the Court to make 'adverse publicity' orders.²⁰

Inserts new maximum penalties:

- RRC by an individual (non-serious) – 1.5 times the usual penalty for an individual
- RRC by small business body corp (non-serious) – 7.5 times [the usual penalty for an individual](#)
- RRC by body corp (non-serious) – greater of 7.5 times [the usual penalty for an individual](#) or twice the value of the benefit
- RRC by body corp (serious) – greater of 5 times the usual serious contravention penalty [for an individual](#) or 3 times value of the benefit
- Other non RRC for bodies corporate – 5 times [the usual penalty for an individual](#).

If a Court awards penalty against a body corporate on the basis of the value of the benefit, the Court can only order that the penalty be paid to the Commonwealth (irrespective of who brings the claim).

Part 2 – Small Claims

Raises the small claims threshold to \$50,000. Allows orders for filing fee costs to be made in favour of a successful claimant.

The Court must consider whether it is appropriate to refer a matter to the FWC for conciliation as soon as practicable after a small claims proceeding commences.²¹ An order to refer can be made at Court's own initiative or on application by a party.²² Costs can be ordered if a party refuses to participate in FWC

¹⁷ S186(5)(b). Eight year limit also applies to variations s211(1)(b).

¹⁸ New s 187(7)

¹⁹ S12

²⁰ S545(2).

²¹ S548A

²² S548B(2)

conciliation. Conciliations are conducted in private. Conciliation ends if parties jointly apply, the matter is resolved, the FWC is satisfied conciliation is unsuccessful or the Court orders it to end.

If the FWC is satisfied conciliation is unsuccessful and considers a party has no reasonable prospects of success, it must advise the parties accordingly. Once conciliation ends, the parties can agree to have the FWC arbitrate the matter²³ and can make orders for the disputed amount, interest and filing fees paid by the applicant. These are the only orders the FWC can make. Non-compliance with these orders is not an offence. Permission to appeal to a Full Bench can be sought in the ordinary way.

The Court can make an order on application in terms of the award made by the FWC to allow the award to be enforced for up to 6 years after the order was made.

Part 3 – Prohibited Advertising

Inserts a prohibition on employers advertising employment specifying a rate of pay less than the national minimum wage/special national minimum wage. A civil penalty applies. The contravention is enforceable by an inspector only (not unions).

Part 4 – Compliance Notices, Infringement Notices and Enforceable Undertakings

Inserts RRCs into the *Building Industry (Improving Productivity) Act* and prevents an inspector from instituting proceedings where an undertaking exists in relation to a RRC. The amendment also applies to contraventions occurring before commencement.

Increases penalties (slightly) for non-compliance with FWO compliance notices and infringement notices. Inserts a list of things the FWO may take into account in deciding whether to issue an EU.

Part 5 – Sham Arrangements

Increases (slightly - from 60 to 90) penalty units for breaches of sham contracting provisions.

Part 6 – Functions of FWO/ABCC

Includes the publishing of information about the circumstances in which FWO/ABCC will commence, defer etc., proceedings to their list of functions.

Part 7 – Criminalising wage etc., non-payments

Inserts a new criminal offence of ‘dishonestly engaging in a systematic pattern of underpaying one or more employees’²⁴ with maximum penalties of 4 years or 5,000 penalty units for an individual and 25,000 penalty units for a body corporate. ‘Dishonest’ is defined as:

- (a) dishonest according to the standards of ordinary people; **and**
- (b) known by the defendant to be dishonest according to the standards of ordinary people

Note: the Victorian wage theft laws define ‘dishonest’ as dishonest according to the standards of ordinary people only. The second element in (b) above is not required. The second subjective element in the bill will make the offence almost impossible to prove and unlikely to be prosecuted.

²³ S548D

²⁴ S324B

Overrides State or Territory wage theft laws.²⁵

Inserts a list of matters that the Court may have regard to in determining whether an employer has engaged in a systematic pattern of underpaying one or more employees.

Limits standing to bring a prosecution to the FWO, ABCC and DPP. There is a limitation period of 7 years subject to ministerial extension on a case by case basis.

SCHEDULE 6 FAIR WORK COMMISSION

Repeals and replaces s 587 (When the FWC can dismiss an application) to include additional grounds of applications being *'misconceived, lacking in substance or otherwise an abuse of process.'*

Creates a new power for the FWC (Full Bench) to make orders where an application is dismissed, that a further application cannot be made without the permission of the President, a VP or DP. There is no right to appeal a decision regarding permission. Replaces the requirement for parties to *consent* to an appeal being determined without hearing with a requirement for their views about holding a hearing to be taken into account.²⁶

SCHEDULE 7 APPLICATION SAVINGS & TRANSITIONAL

Allows applications to be made to vary an existing EA where there is an 'uncertainty or difficulty' relating to the interaction between the terms of the agreement and the new definition of casual employee, or the conversion provisions. Variations can operate retrospectively.

The new definition of 'casual employee' applies in relation to offers of employment made before or after commencement (this may render the *Rossato* proceedings obsolete).²⁷ Any existing claims that might exist but for the new definition of casual employment are extinguished. The set-off provisions apply to any entitlements that accrued or loadings paid before and after commencement.

The casual conversion provisions apply in relation to periods of employment starting before or after commencement. There is a requirement for employers to assess whether the conversion provisions apply to existing casual employees during a transition period of 6 months. There is no residual employee right to request during this transition period.

The FWC must review all modern awards within 6 months of commencement to ensure the casual provisions are consistent with the amended Act.

Flexible work directions given under the JobKeeper amendments cease to have effect.

The franchisee provisions apply to employers who become franchisees, or agreements made, before or after commencement.

The amendments in relation to greenfield agreements apply to agreements made on or after commencement.

The restriction on advertisements below the minimum wage apply to those published after commencement.

²⁵ S26(2)

²⁶ s. 607(1)(b)

²⁷ S46. Note: the exception to this is where a court has already made a binding determination that a worker is not a casual employee, or where casual conversion has occurred.

The wage theft offence applies to conduct post-commencement.

The increase to the small claims threshold applies to claims made but not determined before commencement.