Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020

SUBMISSION TO THE SENATE EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE

FEBRUARY | 2021

ABOUT AMMA

AMMA is Australia's resources and energy industry group and has provided a unified voice for employers on workforce and other industry matters for more than 102 years.

AMMA's membership spans the entire resources and energy industry supply chain, including exploration, construction, commercial blasting, mining, hydrocarbons, maritime, smelting and refining, transport and energy, as well as suppliers to these sectors.

AMMA works to ensure Australia's resources and energy industry is an attractive and competitive place to invest and do business, employ people and contribute to our national well-being and living standards.

AMMA members across the resources and energy industry are responsible for a significant level of Australian employment, with an estimated 10% of our national workforce, or 1.1 million Australians, employed directly and indirectly as a result of the resources industry.

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1. SUMMARY

1. Australian Resources and Energy Group AMMA welcomes the opportunity to provide this submission to the Senate Education and Employment Legislation Committee ('**the Committee'**) inquiry into the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* (the '**IR Reform Bill'**).

2. AMMA represents the majority of employers across Australia's mining, oil and gas, and allied service sectors. The industry directly employs more than 264,000 people, supports over 1 million total jobs in Australia, accounts for over 10% of national GDP, and pays $40 billion in annual taxes and royalty revenues.

3. The industry has also displayed great resilience through the COVID-19 crisis:

   a) Direct resources employment is now at its highest level since November 2013. The ABS reported the number of people directly employed in resources jumped to 264,000 at the end of November 2020, up from 240,600 at the end of August 2020.

   b) Resources and energy export earnings reached a record high $291 billion in 2019-20 and will remain at historic record levels over the next two years.

4. The industry is well positioned to lead to Australia's post-pandemic recovery.

5. As noted in Chapter 2, there are $334 billion worth of major resources and energy projects in Australia's investment pipeline. If all this investment could be secured, the job creation would easily exceed 100,000. The Department of Industry has described this as a "new growth cycle".

6. The IR Reform Bill will significantly assist the industry in converting these opportunities into reality. It contains a package of measured, balanced amendments that will reduce compliance costs, risk, red tape, and administrative burden. This will significantly support economic growth and job creation in the post-pandemic environment.

7. AMMA has focused its submission on the three areas of the IR Reform Bill of most interest and relevance to its resources and energy industry members:

   a) **Schedule 1 – Casual Employees**

   - A clear definition of casual employment, providing certainty to employers and employees, further balanced with new casual conversion rights.
   - A mechanism to ensure employees deemed by relevant court determinations to have been misclassified will receive their fair back-paid entitlements, but would not force employers who have already paid a casual loading, to pay twice.

   b) **Schedule 3 – Enterprise Agreements**

   - A package of improvements that will reduce complexity, cost and uncertainty, and provide greater discretion and efficiencies to the Fair Work Commission ('**FWC'**).
   - Amendments addressing specific areas of trade union concerns.

   c) **Schedule 4 – Greenfields Agreements**

   - Allowing longer Greenfields Agreements terms for major resources and energy projects, up to eight years when agreed by trade unions. Providing industrial certainty and stability for significant nation-building projects.

8. AMMA was an active participant in the Attorney-General's Industrial Relations (**IR**) Working Groups of 2020. AMMA had a direct representative role on the working groups for Greenfields Agreements and Enterprise Agreements and was represented in the other working groups

(casuals, awards, compliance and enforcement) through its membership of the nation's largest business representative group – the Australian Chamber of Commerce and Industry (**ACCI**).

9. For those parts of the IR Reform Bill not addressed directly in this submission, AMMA refers and endorses the submissions and evidence of ACCI.

10. AMMA has noted, through both the IR Working Groups of 2020 and in more recent media commentary on the IR Reform Bill, that both the Australian Labor Party (ALP) and the trade union movement have signalled their opposition to the IR Reform Bill.

11. AMMA fails to see how this amendment legislation could not possibly be in the interests of the 13 million working people in Australia when it contains measures that would:

    a) Provide employees with pay rises faster by requiring the FWC to approve enterprise agreements within 21 days;

    b) Massively assist with securing $334 billion worth of new major resources and energy projects in Australia's investment pipeline, and the 100,000 jobs they would bring, through reforming greenfields agreements that must always be negotiated with unions;

    c) Provide new rights for casual employees to convert to permanent employment;

    d) Introduce criminal penalties and increased civil penalties for wage underpayments;

    e) Provide additional limitations around termination of agreements; and

    f) Abolish all remaining pre-Fair Work industrial instruments in July 2022.

12. AMMA also notes that a minor amendment regarding the FWC's existing powers to approve, in exceptional circumstances, agreements that may not meet the "better off overall test" (BOOT), have unjustifiably been the subject of controversy and misinformation campaigns.

13. On this issue AMMA makes the following observations:

    a) The Fair Work Act, since 2009, has always contained powers at section 189 for the FWC to approve enterprise agreements that do not pass the BOOT, if in the national interest to do so.

    b) This has been a seldom used and non-controversial discretionary power afforded to the FWC for well over a decade.

    c) The amendments within this IR Reform Bill simply add COVID-19 distressed circumstances as an additional consideration that the FWC can have in exercising its existing powers under s 189.

14. In summary, AMMA recommends the Australian Senate pass the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* in its entirety, with some minor text amendments as recommended in this submission.

15. This is a well-balanced package of improvements to Australia's IR framework, with some measures that may be seen as favourable to trade unions, and others to employers.

16. More importantly, as a whole these amendments are highly favourable to the national interest and will support employers and employees as we collectively seek to repair the damage to our economy.

2. TURBOCHARGING OUR RECOVERY WITH RESOURCES INVESTMENT

2.1. Economic and employment contribution

17. The resources and energy industry is unarguably one of Australia's most important in delivering economic prosperity, employment opportunities and ongoing government revenues. The sector's success has been critical to Australia's past and is even more critical to its present and future, as the nation looks to the strength of its longstanding primary industries to lead the post-COVID-19 recovery.

18. Across any measure of economic or employment contribution, the resources and energy industry sits among Australia's most consistent high performers:

    a) Directly employs more than 264,000 people in Australia[1], is estimated to support more than 1 million jobs through flow-on effects in allied sectors and regional communities[2].

    b) Delivers $40 billion annually to national and state/territory revenues through taxes and royalties[3].

    c) Accounted for a 10.4% share of Australian GDP in 2019-20, or $202 billion in dollar terms, making it the largest single industry contributor to the Australian economy[4].

    d) Accounted for 61% of all national export value, or in dollar terms, a record $291 billion in 2019-20, with forecasts of $279 billion for Australia in 2020–21, and $264 billion in 2021–22, despite the turmoil in the global marketplace[5].

19. The sources of income delivered by the resources and energy industry funds federal and state government programs to protect vulnerable people in the community; and helps build roads, schools, hospitals and other public infrastructure.

20. Further, the sustained contribution of resources and energy operators has provided Australia with the financial means to introduce some of the world's most generous support schemes and subsidies to its residents and businesses to help them get through the COVID-19 pandemic relatively unscathed. This includes funding for the JobKeeper, JobSeeker and JobMaker subsidy schemes credited for significantly softening the economic and social impact of the pandemic comparative to almost all other countries around the world.

2.2. A new growth cycle to repair the damage

21. All indicators point to growth in resources and energy major project investment as the most significant opportunity for Australia to turbocharge its post-pandemic recovery. According to the Federal Department of Industry's *Resources and Energy Major Projects* report, resources investment is on the brink of entering "a new growth cycle" [6].

22. The Chief Economist reported the number of resources and energy major projects in the investment pipeline increased in 2020 by 19% to 335 projects, and the value of those projects increased by 4% to $334 billion[7].

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[1] Labour Force, Australia, Detailed (December 2020) ABS
[2] Raynor, V. and Bishop, J. 2013 *Industry Dimensions of the Resource Boom: An Input-Output Analysis*, RBA Research
[3] Deloitte report, see *Miners pay $40 billion in tax and royalties* (11-05-20) AFR
[4] Australian System of National Accounts, 2019-2020 financial year, ABS
[5] International Trade in Goods and Services (04-02-21) ABS
[6] Department of Industry, Science, Energy and Resources, *Resources and energy major projects: 2020* (link)
[7] Department of Industry, Science, Energy and Resources, *Resources and energy major projects: 2020* (link)

23. In relation to those projects already committed and underway, the report found a 46% increase, indicating a return to investor confidence in the sector:

> *"Our outlook for resources and energy investment suggests that 2019 represented an inflection point in the mining investment cycle. The value of 'committed' resource and energy projects — those where a final investment decision (FID) has been taken — increased by 46 per cent over the past year to $44 billion."*[8]

24. In December 2020, AMMA released analysis of projects either 'committed' or considered 'likely' by the Department to proceed (i.e. advanced in planning and awaiting FID). The analysis found 98 mining and oil and gas projects, worth an estimated $83.8 billion, were either 'committed' or considered 'likely' to proceed between 2021 and 2026[9].

25. A range of employment modelling formulas were then applied, forecasting the operating phase employment demands for these projects would exceed **24,400 new jobs** over the next six years. Broken down into occupational categories, this forecast workforce demand includes a broad mix of trade and operator level roles, professional and management roles, and technical roles with a firm standing in Science, Technology, Engineering and Maths (STEM):

- 9,233 plant operators
- 4,842 management, supervisory and professional roles
- 4,639 engineering, geology and laboratory roles
- 3,014 heavy diesel fitters
- 2,084 other technical trades (electrical, maintenance etc)
- 621 oil and gas production technicians, control room operators

26. Notably, this was a highly conservative forecast factoring in only new operational-phase employees required for projects either already committed or very close to receiving final FID. When considering the large-scale construction phase workforces required to build these projects, as well as the significant flow-on effects throughout the servicing supply chains, the positive employment impacts of these new major projects would be at least 50,000 new jobs.

27. Further, these projections do not estimate the possible employment demands of the 237 additional major projects, worth around $250 billion, in Australia's investment pipeline, considered too early in development stages for inclusion in AMMA's detailed forecasts. Conservative analysis shows the job opportunities within this broader investment pipeline would easily exceed 100,000,

28. This demonstrates the huge opportunity for Australia's resources and energy industry to lead the country out of the COVID-19 recession, a role well acknowledge by various commentators:

> *"Whether it's recovery from the economic impact of COVID-19 or whether it's the long term continued economic development of Australia, mining and the resources industry will play an essentially pivotal role…. we have to play to our competitive strengths."*
> *- Owen Hegarty, EMR Capital Executive Chairman*[10]

> *"Recent national data and the success of the sector's business continuity plans together show that mining remains one of Australia's most resilient (and critical) industries through the COVID-19 crisis." – KPMG Australia*[11]

[8] Department of Industry, Science, Energy and Resources, *Resources and energy major projects: 2020* (link)
[9] AMMA (2020) *Resources and Energy Workforce Forecast 2021-2026* (link)
[10] Hegarty in *National Resources Review* (12-10-20) (link)
[11] Online article (17-04-20), *KPMG Australia frames mining sector 'way forward' in COVID-19 era (link)*

"The mining sector, which has formed the backbone of Australia's economic success over the past decade, continues almost unabated, as a resurgent China keeps buying iron ore and coal." – AFR article paraphrasing Deloitte Access Economics[12]

2.3. IR improvements will help secure investment

29. Despite the enormously positive growth indicators, Australia must not rest on its laurels. As countries around the world seek to recover from the pandemic, international competition for investment capital will be fiercer than ever.

30. To secure this new cycle of investment opportunity and place its economy in the best position to recover from the COVID-19 recession, Australia must present the most globally competitive regulatory framework possible.

31. In this regard there is no escaping the enormous body of evidence, compiled over the past several years, that points to Australia's IR framework as being long overdue for reform and simplification. Reducing IR red-tape and compliance costs, and achieving greater efficiencies and flexibilities, would significantly improve the nation's competitive standing in the global investment community and assist in securing these opportunities.

Global comparison

32. The World Economic Forum's (WEF) annual Global Competitiveness Report has consistently detailed how Australia's IR framework compares unfavourably to various first world and developing competitor nations[13].

33. Since 2014, Australia has ranked anywhere from 14th to 22nd in the world in terms of its overall competitiveness compared with the world's 141 established national economies. Year after year, Australia's industrial relations system has consistently been singled out as the most inflexible and uncompetitive aspect of Australia's regulatory framework, dragging the nation well outside the top 10.

34. In the 2019 report (the last one prior to the COVID-19 outbreak), Australian labour-employer relations rated just 53rd in the world and flexibility in wage determinations ranked 95th in the world. Australia's overall global competitiveness sat 16th overall below fellow western economies including the USA (2nd), Netherlands (4), Switzerland (5), Germany (7), the United Kingdom (9) and Canada (14).

35. For too long Australian policymakers have ignored the clear warning signs that the national industrial relations system must be improved to maximise the nation's global competitiveness.

Experiences of AMMA members

36. AMMA members have long contended that the inflexible and costly approach to industrial relations entrenched by the FW Act has been the most significant challenge to doing business and employing people in Australia.

37. Since the FW Act was introduced in 2009 AMMA has coordinated and published a range of credible research projects into the impact of the heavy-handed approach to workplace regulation on the resources and energy industry.

38. In the immediate years following the Act's inception, AMMA and RMIT University undertook a study tracking the experiences of resources and energy employers under the new framework.

[12] Ludlow, M (6-7-20) *How COVID-19 is remaking the economy, Australian Financial Review* (link)
[13] World Economic Forum, various editions of the annual *Global Competitiveness Report* (link)

39. Through six-monthly surveys across 2010-2012, the research found a rapid deterioration in the performance of the IR system, particularly the new enterprise bargaining framework[14]:

    a) In Report One (June 2010), RMIT researchers found the biggest issue with the FW Act was the new enterprise bargaining system, with employers trying to come to grips with the complexity of the system and extensive 'good faith bargaining' obligations.

    b) In Report Two (January 2011), the "satisfaction index" (employer satisfaction with the performance of the workplace relations system) had fallen from 76% to 65%.

    c) By Report Three (June 2011), the satisfaction index had fallen further to 61.7% and employers were reporting "serious concerns" about levels of labour productivity. Researchers noted their productivity measures were in "dangerously low terrain".

    d) Report Four (December 2011), showed just 28.2% of respondents had even attempted to negotiate productivity increases, and of those who had, just 11.5% were successful.

    e) By Report Five (June 2012) the number of employers engaging in the survey to lodge their concerns about agreement making and productivity under the FW Act doubled.

    f) In Report Six (August 2013), 87.5% of respondents had reported failure to negotiate any productivity offsets as part of agreements under the FW Act and three-quarters believed their productivity levels had fallen.

40. In a more recent research study, AMMA surveyed more than 100 resources and energy executives in 2018 to gauge the suitability of the FW Act within changing demographic, technologic and economic circumstances[15]. The survey results showed:

    a) 92% of resources and energy employers believed work regulation could be better utilised as a source of national competitive advantage.

    b) 95% of employers agreed Australia's current approach to work regulation doesn't provide the necessary flexibility to be competitive in the global marketplace.

    c) 97% said the 'one-size-fits-all' approach to workplace regulation is badly outdated.

    d) 94% said the system should allow for a wider range of agreement making options.

    e) 100% agreed flexibility, productivity and competitiveness should have much greater emphasis in the nation's approach to workplace regulation.

41. Over the past decade, the business community has constantly reported to successive ALP and Coalition governments the competitive challenges of some elements of the FW Act, brought about by its impacts on compliance cost, labour productivity and encouraging disputation.

42. There is a significant body of evidence demonstrating how the present-day regulatory burden, delays to projects and complex workplace relations processes are not supporting the competitiveness and sustainability of existing resources and industry operations let alone assist in attracting future investment.

43. This has real potential to impact the ability for Australia to convert the opportunities within the major project pipeline to reality, which will have flow-on effects to the broader economy.

44. Through the improvements contained within the IR Reform Bill, the Federal Parliament has the chance to address this damaging part of Australia's regulatory framework and position the nation competitively to secure the next wave of job-creating investment opportunities.

[14] Dr Stephen Kates (2013) *The AMMA Workplace Relations Research Project*, RMIT University (link)
[15] AMMA (2018) *A New Horizon: guiding principles for the future of work* (link)

3. SCHEDULE 1 – CASUAL EMPLOYEES

45. Schedule 1 of the IR Reform Bill seeks to provide clarity about casual employment and the relevant entitlements under the FW Act.

46. This includes introducing a new, clear statutory definition of 'casual employee'; a requirement on employers to offer casuals conversion to permanent employment after 12 months; and a mechanism which allows employers to offset previously paid casual loadings against a claim for leave and entitlements by a casual later determined by the employer or relevant court proceedings to have been a permanent employee for the purposes of the Act.

47. The understanding of casual employment arrangements across all industries has been consistent and non-contentious for many decades. That was until recent decisions of the Federal Court effectively overturned the longstanding interpretation of casual employment and the entitlements afforded to casuals.

48. The Federal Court rulings in *WorkPac v Skene*[16] and *WorkPac v Rossato*[17] created mass uncertainty and confusion about widespread practices involving casual employment. Both decisions found that an employee's patterns of work were the key determinative factor to their employment status, irrespective of hourly loadings paid or casual contracts signed.

49. This was contrary to the common understanding that a casual employee for the purposes of National Employment Standards (NES) is a person who is engaged and paid as such.

50. Not only have these decisions changed the interpretation of who is a casual employee, they have created significant uncertainty about the entitlements afforded to casual employees. The *Rossato* decision went so far as suggesting that casuals could receive both higher pay rates plus entitlements reserved for permanent employees.

51. The precedent established by these recent rulings has tarnished the legitimacy of casual employment across Australia, making businesses reluctant to hire casuals or provide existing casuals with any regularity in their working hours.

52. Casual employment, labour hire and independent contracting are all genuine forms of employment, which many Australians consider broadly satisfactory to their individual skills and needs. These types of arrangements play an important role in providing flexible employment options for both employers and employees.

53. These options have been a part of the industrial relations system for decades and have successfully kept pace with changes in work and in the community. Casual work has adapted to modern labour market challenges, such as supporting workforce engagement for mothers returning to the workforce, working parents and students.

54. It successfully facilitates employment for millions of Australians, particularly those prioritising flexibility, non-standard working hours, or additional income, and many of those who would not participate in the labour force if this option were removed and restricted.

55. AMMA supports the Australian Government seeking to restore clarity to casual employment and the relevant entitlements afforded to casuals through the provisions contained in Schedule 1 of the IR Reform Bill.

[16] [2018] FCAFC 131.
[17] [2020] FCAFC 84.

3.1. Casual Employment in the Resources and Energy Industry

56. The resources and energy industry is incredibly diverse and involves numerous and often complex contracting arrangements. Casual employment and labour hire represent small but important functions within these contracting arrangements.

Macro data analysis

57. According to the ABS, in November 2020 approximately 82.8% of the resources and energy workforce were permanent employees (defined as employees with paid leave entitlements), and 17.2% were casually employed (employees without paid leave entitlements). The industry therefore has a lower-than-average portion of casual employees, with the national all industries average being approximately 25%[18].

58. The ABS data further demonstrates how casual employment in the industry tends to increase as a proportion of the overall workforce during periods of more buoyant market conditions for the industry. For example, the downturn in the investment and commodity price cycle that began around mid-2012 and saw total employment at its lowest point in 2015/16, also saw a correlated drop in the overall percentage of casuals. When the industry began recovering in 2017, casual employment played a small but important role in meeting the paid and significant level of new employment demand.

Table 3.1: Casual employment in the resources and energy industry, 2014-2020

	Total Employees ('000)	Permanent Employees ('000)	Permanent Employees (% of total)	Casual Employees ('000)	Casual Employees (% of total)
2014	213.3	190.5	89.3	22.8	10.7
2015	207.9	186.9	89.9	21.0	10.1
2016	206.3	175.0	84.8	31.3	15.2
2017	211.1	175.0	82.9	36.1	17.1
2018	250.5	204.1	81.5	46.4	18.5
2019	245.6	216.7	88.3	28.8	11.7
2020	258.4	214.1	82.8	44.4	17.2

Note: in 2017-2018, 39,400 new jobs were created in the resources and energy industry, and 10,300 were casuals. Even during period of intense jobs growth, the industry's use of casual employment does not exceed the average use for all industries, at all times.

59. The above data also shows that in 2017-2018, 39,400 new jobs were created in the industry, and 10,300 were casuals. This demonstrates that even during periods of intense jobs growth, the industry's reliance on casual employment does not exceed the national average.

Use and purpose of casual employment

60. Casual arrangements are especially useful for engaging skilled workers for short-term work, particularly in the more cyclical, project-based areas of the resources and energy industry. On major resources and energy projects, a reliable source of contract labour contributes to the efficiency and success of projects, which ultimately deliver great benefits to the economy.

61. In the resources industry, where skills and prior experience comes at a premium, casual employment often provides a foot-in-the-door in entry level positions for people new to the industry. This includes casual 'labour hire' arrangements where contingent employees are relied upon to supplement permanent workforces at mine sites or gas and oil rigs during times of strong commodity prices and thus heightened demand. It is efficient and effective for a

[18] Australian Bureau of Statistics, Labour Force, Australia, Detailed - Table EQ05, published December 2020.

project operator to contract-out the provision of job-ready employees who can provide required capacity during the short-term.

62. In the contracting supply chain, highly skilled employees often take well-paid casual contracts where their capabilities are in greatest demand. This includes short-term shutdown and maintenance contracts, fixed-term engineering contracts and experienced specialist consultants who prefer to be on 'casual employment' basis with several leading high-paying employers, who engage their specialist skills when and as required.

63. At the peak of the previous resources boom it was not uncommon for employees to move to independent contracting arrangements and provide their services back to their former employer to take advantage of opportunities at the height of the market. This sometimes included taking multiple contracts at various operations within close proximity.

64. In some of the lower skilled areas of the resources sector supply chain (such as camp management), casual employment is used in similar ways to other sectors – to cater for fluctuating client demand. A good example is a hospitality provider to remote mine sites whereby the demand for chefs, cleaners and waitstaff is entirely dependent on how many people the client has on-site.

65. Casual employment is often criticised as perpetuating 'insecure work', but the experience of resources and energy employers is that many people employed as casuals desire the additional pay premium and flexibility it offers. One major, household-name labour hire firm confirmed to AMMA that employees regularly reject casual conversion and offers of permanent employment for this very reason.

66. Since the significant risk of liabilities arose from the *Rossato* and *Skene* decisions, many resources and energy employers have been trying to get as many staff as possible to convert to permanent roles.

67. Overall, most labour hire firms have far more permanently hired employees than they do casual employees. Ultimately, casual employment offers choices to both employers and employees. This is particularly relevant for the resources and energy industry where the workforce is highly mobile, moving between projects and operating sites at various stages throughout the life of the operation.

68. Having access to casual employment arrangements and independent contracting gives employees the freedom to accept jobs on particular projects or sites taking into account their personal needs including lifestyle, family, and financial factors.

69. There are numerous and varied reasons why employees prefer casual employment that is often suited to their own personal needs. What employers and employees need from the IR Reform Bill is clarity on those arrangements and an appropriate response when arrangements might naturally evolve into something more like permanent employment.

3.2. Part 1 – Main Amendments

70. Part 1 of Schedule 1 of the IR Reform Bill contains a number of amendments that address the issues raised by the Federal Court decisions in *Skene* and *Rossato* about casual employment arrangements and the relevant entitlements.

71. The main amendments of the IR Reform Bill, which this submission is focused, include legislating a new, clear definition of 'casual employee', rights to casual conversion under certain circumstances, and a mechanism to offset casual loading amounts against claims for entitlements.

72. AMMA notes there is an additional amendment in Part 1 of Schedule 1 of the IR Bill relating to the development and publication of the Casual Employment Information Statement which this submission briefly addresses.

Statutory definition of 'casual employee'

73. Prior to the Federal Court decisions in *Skene* and *Rossato,* employees who were engaged and paid as casuals pursuant to an industrial instrument were considered 'casual employees' for the purposes of the *Fair Work Act 2009* (Cth). These two significant decisions have tested the *Fair Work Act'*s treatment of casual employment by ruling an employee's patterns of work were the key determinative factor to their employment status.

74. Since these decisions were handed down there have been calls for binding authority about how to distinguish casual employment and provide certainty to employers utilising this legitimate model of employment as to the entitlements owed.

75. AMMA has been calling for a legislated solution to the casual employment uncertainty since the 2016 *Skene* decision first overturned the common understanding and longstanding practice of casual employment and associated entitlements. Further, AMMA's view is that legislating a clear definition of casual employment would reflect those which already exists in dozens of industrial awards.

76. The IR Reform Bill introduces a statutory definition of 'casual employee' that focuses on the offer and acceptance of employment and draws on the common law principles. The proposed new subsection 15A(1) of the *Fair Work Act 2009* would define a person as a casual employee if:

    a) 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; and

    b) the person accepts the offer on that basis; and

    c) the person is an employee as a result of that acceptance.

77. In determining whether an employer has made 'no firm advance commitment to continuing and indefinite work according to an agreed pattern of work', the IR Reform Bill provides a definitive list of factors that can be considered in proposed subsection 15A(2) which include:

    a) whether the employer can elect to offer work and whether the person can elect to accept or reject work;

    b) whether the person will work only as required;

    c) whether the employment is described as casual employment; and

    d) whether the person will be entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a Fair Work instrument.

78. This definitive list clarifies any uncertainty about what is a 'firm advance commitment' of employment and would certainly limit future disputes about whether arrangements are casual or not. The definition as drafted sets out the four requirements an employer would need to include in a casual employment contract which can easily be met.

79. In AMMA's view there is no issue with using the expression 'no firm advance commitment to continuing and indefinite work' as that assessment is limited to the four requirements listed in the draft provisions. Resources and energy employers support the more complete and exhaustive definition which better defines the parameters of casual employment than the status quo.

80. While employee representatives might argue that the definition as drafted ignores the fact that casual employment can naturally evolve into permanent arrangements and continue in this form for long periods of time, this issue is addressed clearly by the casual conversion provisions contained in the IR Reform Bill.

81. In regard to the transitional arrangements for the definition to take effect, AMMA does not take issue with transitioning current casuals onto new arrangements in order to meet the requirements of the definition. If people truly are casuals, an employer can give them a new (and different) employment contract every time they engage them. Employers would simply need to engage them under an updated contract after the new definition takes effect.

82. In AMMA's view, the proposed definition is a common-sense response to the confusing precedent set by common law. While the High Court is yet to hear the *Rossato* appeal, AMMA hopes a sensible approach will prevail. Certainty about employment arrangements, including the rights and obligations of both parties, is essential to ensuring businesses have the confidence to employ people and that employees receive their correct entitlements.

83. AMMA supports the inclusion of a new statutory definition of 'casual employee' as drafted in the IR Reform Bill. The concerns about whether an employee engaged and paid as a casual has any prospect of ongoing work are addressed by the complete and exhaustive list of factors to be assessed when determining whether there is a firm advance commitment.

Offers and requests for casual conversion

84. In July 2017, as part of its four yearly modern awards review process, the Fair Work Commission made a decision that provided employees covered by 85 awards (heavily focused on retail and hospitality) with new rights to seek conversion to permanent employment after 6- or 12-months of continuous employment with the same employer.

85. As a result of this decision it was anticipated an amendment to the National Employment Standards would shortly follow to provide similar rights to all casual employees.

86. In 2018, the Australian Government introduced the *Fair Work Amendment (Right to Request Casual Conversion) Bill 2019* into Federal Parliament. The provisions of the Casual Conversion Bill sought to amend the National Employment Standards to provide casual employees who had completed 12 months of regular service the right to request conversion to full-time or part-time employment.

87. Despite seemingly meeting the policy desires of trade unions and the federal opposition at the time, the Bill failed to secure support of the Parliament and lapsed at the dissolution of the 45th Parliament in April 2019.

88. While AMMA has been cautious about broad casual conversion rights in the past, largely due to the overtly political debate that surrounded it, AMMA supports the approach of the IR Reform Bill in seeking to legislate a broad casual conversion right in return for greater clarity and certainty on the definition of 'casual employee', and importantly the removal of the contingent liability that would face Australian businesses should *Rossato* be upheld in the High Court.

Employer offers – automatic right to conversion

89. The IR Reform Bill introduces an automatic right to casual conversion which creates a statutory obligation on employers to offer casual employees the ability to convert to permanent employment, provided certain conditions are met.

90. The new s 66B(1) of the FW Act would require an employer to offer a casual employee the opportunity to convert to permanent employment if:

    a) the employee has been employed for 12 months; and

b) during at least the last six 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 (as the case may be).

91. Section 66B(1) as drafted places conditions on the characteristics of the employment over a period of 12 months to determine whether the right to casual conversion exists. AMMA's view is that the conditions contained in the casual conversion provisions are appropriate in addressing the issues raised by the courts in *Skene* and *Rossato* where the nature of the work may evolve into more permanent arrangements.

92. Rather than assuming that all recruits should be permanent employees from the outset of employment, it gives the parties an opportunity to review the work arrangements after 12 months to determine that the appropriate employment arrangements are in place.

93. These conditions allow employers to maintain their managerial prerogative to offer jobs on a full-time, part-time or casual basis based on their assessment of their business and labour requirements and their chosen commercial, operational and employment strategies.

94. In AMMA's view, the requirement to offer casual conversion after a period of 12 months must have consideration to whether there is a reasonable prospect of ongoing work of a similar nature to that worked in the relevant period. This is particularly relevant in the resources and energy industry where many technical and specialised projects requiring highly-skilled specialists engaged for their expertise take up to 12 months or more to complete.

When employer offers are not required

95. Despite the statutory obligation on employers to offer casual conversion under certain conditions, the IR Reform Bill provides an exception about when employers are not required to make offers of conversion. The exception proposed in new s 66C(1) of the FW Act states that employers are not required to make an offer of casual conversation if there are 'reasonable grounds' not to.

96. The IR Reform Bill also makes suggestions in new s 66C(2) about the circumstances in which 'reasonable grounds' might exist, including:

a) the employee's position will cease to exist in the period of 12 months after the time of deciding not to make the offer;

b) the hours of work which the employee is required to perform will be significantly reduced in that period; and

c) there will be a significant change in the days or times that the employee is required to perform their work which cannot be accommodated within the days or times the employee is available to work during that period.

97. AMMA notes the new ss 66(3) and (4), which set out the requirements on employers where there are 'reasonable grounds' not to offer casual conversion, are somewhat prescriptive. Despite the additional burden placed on employers when they are not provided to make an offer, weighed against the risk of future claims for unpaid entitlements from casual employees seeking permanent status, they are satisfactory.

98. AMMA supports the inclusion of the 'reasonable grounds' which allow employers to maintain the ability to manage their employment levels and skills mix within their workforces and take into account the levels of risk and uncertainty from clients and markets.

99. Some manage this risk by hiring non-ongoing employees and paying a premium in the casual loading to do so. AMMA would also note that where casual employment is not a viable option, employers and employees are not precluded from considering other options, such as fixed term contracts.

Residual right to request casual conversion

100. The IR Reform Bill provides casual employees who have not received or accepted an offer of casual conversion from their employer a residual right to request conversion in certain circumstances. AMMA's view is that this residual right is an appropriate balance to the exhaustive definition of casual employment contained in the IR Reform Bill, and should easily address any concerns of employee representatives.

101. AMMA notes the eligibility criteria and other requirements for requesting casual conversion are broadly reflected in the employers' obligation to offer conversion.

102. The new subsection 66F(1)(c) of the FW Act would provide the certain circumstances where a casual employee may make a request for conversion. The residual right only exists if all of the following conditions are met:

    a) the employee has not, at any time during the period referred to in paragraph (b), refused an offer made to the employee under section 66B;

    b) the employer has not, at any time during the period, given the employee a notice in accordance with paragraph 66C(3)(a) (which deals with notice of employer decisions not to make offers on reasonable grounds);

    c) the employer has not, at any time during the period, given a response to the employee under section 66G refusing a previous request made under this section;

    d) the request is not made during the period of 21 days after the period referred to in paragraph 66B(1)(a).

103. Most importantly, an employee's residual right to request casual conversion is not ongoing but intermittent. It requires that six months must have passed before a request can be made in circumstances where the employee has previously refused an offer to convert, or the employer gave a notice of a decision not to make an offer or refused a previous request of the employee.

104. AMMA views this as a sensible approach to ensure employees who may have had previous requests refused do not continue to repeatedly request permanency.

105. Since the *Skene* decision was handed down, resources and energy employers have experienced many enquiries from long-term casual employees who believe they may be owed back-paid entitlements. This is despite, in many cases, those employees actively choosing to be casually employed and even rejecting past offers of conversion.

106. The IR Reform Bill offers a sensible approach to the residual right to request casual conversion as it provides certainty to both employers and employees about workforce planning strategies. It also supports the intended use of casual employment arrangements and maintains employees' freedom to choose how they wish to engage with their employers.

Disputes about casual conversion

107. In the event of a dispute about offers and requests for casual conversion, the IR Reform Bill provides a disputes procedure unless another dispute resolution procedure applies.

108. While in principle AMMA's view is that interference by third parties in employers' decision making is inappropriate and unnecessary, it does support dispute procedures relating to casual conversion where arbitration is by consent of the parties only, and that dispute resolution procedures of the parties are respected where a dispute resolution procedure already applies.

109. AMMA supports the overarching intention of the casual conversion provisions contained in the IR Reform Bill. The provisions as drafted address concerns about the prospect of ongoing work for employees who are deemed to be casual and adequately respond to the rulings in the

Skene and *Rossato* that an employee's patterns of work are key determinative factors of their employment status.

Orders relating to casual loading amounts

110. The most concerning aspect of the casual employment issue for resources and energy employers is the risk of 'double dipping' claims being pursued by employees who have accepted offers of casual employment in the past and been paid higher rates as part of their employment arrangements, but are later found to have been misclassified as casuals.

111. Recent court decisions have spurred a number of opportunistic class actions launched against employers seeking multiple millions and in some cases billions in unpaid historic entitlements.

Offsetting provisions

112. The IR Reform Bill sets out a statutory rule for offsetting amounts an employer is liable to pay a person for relevant entitlements owed by the amount of a casual loading previously paid to compensate the person for not having those entitlements. The proposed new s 545A of the FW Act would apply in certain circumstances where:

    a) a person is employed by an employer in circumstances where the employment is described as casual employment; and

    b) the employer pays the person an identifiable amount (the loading amount) paid to compensate the person for not having one or more relevant entitlements during a period (the employment period); and

    c) during the employment period, the person was not a casual employee; and

    d) the person (or another person for the benefit of the person) makes a claim to be paid an amount for one or more of the relevant entitlements with respect to the employment period.

113. AMMA notes this is not the Australian Government's first attempt to clarify the issue of liabilities where an employee has been misclassified as casual. The *Fair Work Amendment (Casual Loading Offset) Regulation 2018* was introduced in December 2018 after the *Skene* decision first found a casual employee working on an ongoing basis was in effect a permanent employee and entitled to be back-paid annual leave and other full-time employee entitlements.

114. However, in May 2020, the Federal Court handed down its decision in *Rossato* which went a step further to not only reaffirm that employees are not necessarily 'casual' simply because their employment contract says so, but also to dismiss WorkPac's attempt to offset the casual loading already paid against its liabilities to pay the entitlements owed.

115. The precedent set by the Federal Court, as it stands, is that casuals can receive both higher hourly pay rates and entitlements reserved for permanent employees. While the Regulation partially addressed the concerns of employers, a more permanent legislative solution will protect businesses from potential claims from current and past employees.

116. AMMA supports the provisions in the IR Reform Bill which provide a statutory mechanism for employers to offset any entitlements owed to employees who are found to have been misclassified as casuals against the casual loading amount already paid. AMMA's view is that such a mechanism must provide protection against both retrospective and prospective claims.

Retrospective claims

117. To properly address the huge contingent liability hanging over the heads of Australian business, the IR Reform Bill must go further to clarify that orders relating to casual loading amounts also apply to past employees as much of an employers' cost risks are associated with 'double dipping' claims and subsequent class actions related to past employees.

118. AMMA recommends new s 545A(1)(a) make reference to "*a person who is or has been employed*" to ensure past employees are captured in its application.

119. Any decision not to retrospectively address the 'double dipping' issue stemming from *Rossato* will have ongoing financial implications for business whether they are subject to a legal claim or not. This is in part due to the ongoing financial reporting implications of the decision, as highlighted in guidance provided by the Australian Securities and Investments Commission regarding implications for financial reporting and audit.

120. Without the ability to offset casual loading already paid against claims for unpaid 'permanent' entitlements for periods prior to the new definition being legislated, the business community will continue to have a massive multi-billion liability hanging over its head. It is this liability, and the possibility to send businesses bankrupt, that first gave rise to the need for a true casual definition and this offset mechanism.

Offsetting claims for entitlements only

121. One area that the offsetting provisions of the IR Reform Bill fails to address is where an employee is pursuing a claim for an entitlement, such as accrued annual leave, opposed to pay in lieu of an entitlement. The Federal Court in *Rossato* found that the casual loading is not paid to employees towards or in satisfaction of those entitlements and that "the remuneration paid to Mr Rossato did not have a close correlation to the entitlements that he sought to claim".

122. In its decision the Court established that subregulation (d) of the *Fair Work Amendment (Casual Loading Offset) Regulation 2018* (Cth) can only apply if the underpayment claim relates to an amount in lieu of an NES entitlement rather than for payment of the entitlement itself. As Mr Rossato was seeking payment of the NES entitlements, not in lieu of, WorkPac could not rely on this regulation in this instance. The Court also determined that WorkPac was not entitled to either restitution or to offset against its liabilities to pay such entitlements.

123. To provide employers some protection against claims for back paid entitlements, the IR Reform Bill as drafted must be amended to ensure claims for unused entitlements are captured in its application. AMMA recommends new section 545A(1)(d) of the FW Act be amended to read:

> *"the person (or another person for the benefit of the person) makes a claim for, or to be paid an amount for, one or more of the 28 relevant entitlements with respect to the employment period."*

124. It is important that there is clarity about how the offsetting provisions apply to particular claims for 'permanent entitlements' and should apply to claims pursuing access to or recognition of particular entitlements such as accrued annual leave and long service leave where applicable. This would also prevent workplace disputes between different groups of the workforce and ensure equity across different classes of employees.

125. AMMA also holds the view that the courts should not be afforded discretion to determine what "*an appropriate proportion of the loading amount attributable to each of those entitlements in all of the circumstances*" is, as per new s 545(3) of the FW Act. The provisions contained in the IR Reform Bill must clarify that the proportion of casual loading already paid can be offset against permanent entitlements and not left open for interpretation by the courts.

126. Only where there is no modern award or enterprise agreement in place could there reasonably be a question as to what the casual loading should be proportionately offset against. Even in those cases, this should only be the case where the casual loading specified is less than 25%.

127. AMMA's view is that once the new statutory definition of 'casual employee' takes effect, the number of misclassified employees will significantly reduce and so too will the number of claims for entitlements. The provisions must however be included to deal with claims from both past and current employees and any who may inevitably fall between the cracks.

128. AMMA supports the provisions of the IR Reform Bill which allow employers to offset any potential liabilities for entitlements against the casual loading already paid to employees found to have been misclassified as casuals. Allowing casual employees to "double dip" and forcing businesses to pay twice fails the fairness test and any other measure of common sense.

129. Even without the devastating impacts of the COVID-19 pandemic, if left unresolved, the issue of 'double dipping' has left many employers assessing on a daily basis whether or not they can survive and further threatens to leave them with no option but to shut their doors. By resolving this contentious area of employment regulation Australian employers can get on with rebuilding the economy and reducing unemployment.

Casual Employment Information Statement

130. AMMA notes the IR Reform Bill introduces a requirement on employers to issue a Casual Employment Information Statement to new casual employees.

131. AMMA's view is this is an unnecessary burden placed on employers. However, weighed against potential claims for back-paid entitlements, is not significant. AMMA notes it is the Fair Work Ombudsman's role to provide education services and not the responsibility of employers.

3.3. Parts 2 and 10 - Other amendments / transitional arrangements

132. The IR Reform Bill includes a number of technical drafting changes in Part 2 of Schedule 1 to give effect to the amendments outlined in Part 1. AMMA sees no issue with any of them.

133. AMMA notes Part 10 contains provisions relating to transitional arrangements for casual employees. While AMMA has some concerns about the administrative burden that would be placed on the broader employer community by the requirement to assess every single casual employee against the new definition, given the potential risks and complexity of the issues surrounding casual employment, this is likely unavoidable.

134. To ease this administrative burden, employers could have the option of including casual employees in their transitional arrangements that may not meet the criteria at the time the new definition takes place but are expected to at some point within the proceeding six months.

3.4. How the Committee Should Proceed

135. AMMA is supportive of Schedule 1 of the IR Reform Bill. The amendments will provide necessary clarity and certainty on casual employment arrangements in Australia.

136. AMMA urges the Senate Committee to consider that the IR Reform Bill does not reverse or undermine the Federal Court's determinations in the *Skene* and *Rossato* cases, despite the possibility that the High Court may still overturn the rulings. The measures contained in the IR Reform Bill instead reflect well balanced amendments that would address employer concerns and uncertainty while providing new casual conversion rights to employees.

137. AMMA submits the Committee should recommend the passage of Schedule 1 of the IR Reform Bill with the following minor text amendments regarding the casual loading offset provisions:

    a) new section 545A(1)(a) should make reference to "*a person who is or has been employed*" to ensure past employees are captured in its application.

    b) new section 545A(1)(d) should be amended to read:

    "the person (or another person for the benefit of the person) makes a claim for, or to be paid an amount for, one or more of the relevant entitlements with respect to the employment period."

4. SCHEDULE 3 - ENTERPRISE AGREEMENTS ETC.

138. Schedule 3 of the IR Reform Bill deals with the making and approval of enterprise agreements under the FW Act.

139. This includes the legal steps and processes that parties to bargaining (employers, employees and their bargaining representatives) must satisfy when making an enterprise agreement, as well the tests and considerations that members of the FWC must apply when assessing applications for their approval.

140. Challenges with the FW Act's enterprise agreement making provisions have been a significant source of concern for employers since the legislation was enacted in 2009.

141. Both the Act's provisions and the FWC's application of them have seen the system become unacceptably time-consuming, complex and burdensome. Employers which either actively choose to participate in enterprise bargaining or are essentially locked into an ongoing cycle of bargaining, face technical roadblocks and complexities every step of the way.

142. The most common issues include overly pedantic assessments of whether employees who voted up an agreement "genuinely agreed" to the proposed agreement, the application of the 'better off overall test', the unreasonable number of undertakings required by the FWC before an agreement is approved (many of which may change the purpose of bargained outcomes), and the overall protracted timeframe it takes for the FWC to process approval applications.

143. These issues have greatly contributed to a rapid decline in the number of Australian workplaces utilising enterprise agreements. Despite enterprise-level collective bargaining supposedly being the cornerstone of Australia's industrial relations system since the early 1990s, today only 10.7% of Australia's total private sector workforce is covered by an enterprise agreement:

> *There has been a 52% decrease in the number of enterprise agreements current in the private sector since the Fair Work Act (FW Act) was enacted in 2009. Most of this decline has occurred in the past five years (44% decline).*[19]

144. To address this collapse in enterprise agreement making, the IR Reform Bill contains a number of improvements to agreement making and approvals processes, seeking to make the system a workable and attractive option once again.

145. The Attorney-General and Minister for Industrial Relations, Christian Porter, has said the following about the included amendments:

> *"The Bill contains measures that will speed up the approvals process, reduce complexity, focus on cooperation between the parties, give weight to the bargained outcome, and reduce the risks of failure and delays on narrow technical grounds."*[20]

146. AMMA supports the Attorney-General's above characterisation of the proposed amendments to the enterprise agreements provisions. The changes represent a package of technical fixes to common areas of frustration and red tape for both employer and employee participants in enterprise bargaining, as well as members of the FWC.

147. The practical effects of each Part would, in summary, be:

    a) Refocusing the Objects of the legislation and the approach of the FWC towards prioritising and giving effect to legitimately bargained outcomes between employers and their employees at the workplace level (Part 1 and Part 11);

[19] *Historical Trends data – current by quarter*, December 2018 (Updated 29 March 2019), Australian Government Department of Employment, Skills, Small and Family Business. Retrieved from employment.gov.au.
[20] Christian Porter Press Release 9/12/20

b) Simplifying the administrative processes required to notify employees of their rights when bargaining commences (Part 2);

c) A more reasonable / common-sense approach to ensuring employees "genuinely agreed" to the agreement's terms and conditions (Part 3);

d) A more reasonable / common-sense approach to determining which casual employees should have access to voting on an agreement (Part 4);

e) A more workable 'better off overall test' that only considers employment arrangements already in-place or otherwise 'reasonably foreseeable', not a wide range of unlikely hypothetical scenarios contemplated by the parties (Part 5);

f) Clearer and simpler interaction between enterprise agreements and the National Employment Standards (the minimum employment safety net) leading to administrative efficiencies (Part 6);

g) New ability for employees of a franchisee employer to vote in favour of being covered by an existing agreement applying elsewhere in the franchise (Part 7).

h) Limiting applications to terminate an enterprise agreement to at least three months after its nominal expiry date, thus promoting genuine attempts at renegotiation (Part 8).

i) Providing a clearer set of facts, evidence and submissions from which members of the FWC may inform themselves when looking to approve enterprise agreements (Part 9).

j) Legislating that approval of enterprise agreements should be determined by the FWC within 21 days of lodgement unless exceptional circumstances exist (Part 10).

k) Facilitating the voluntary / elective transfer of employees to either as associated entity of their existing employer, or a new employer in some circumstances (Part 12).

l) Automatically expiring at 1 July 2022 all industrial instruments made before the FW Act's inception in 2009 (Part 13).

148. AMMA's views on each of these Parts of Schedule 3 are provided below, including greater detail on their effects, and supporting evidence from the resources and energy industry.

4.1. Part 1 – Objects

149. Part 1 of Schedule 3 would insert new text for the 'Objects' of the FW Act's enterprise agreements provisions (s 171). This is a short section at the beginning of the enterprise agreements division which effectively sets the tone for the purpose of the enterprise agreements provisions.

150. While the differences between the existing text and the proposed new text may appear subtle, it is extremely important to ensure the Objects at the outset of the enterprise agreements section reflect the intended practical application of the legislation.

151. Even small, nuanced changes can make a big difference to how courts and administrative tribunals view the purpose of the legislation and exercise their discretion in how it should be interpreted and applied in the matters and cases that come before them.

The new provisions

152. For the convenience of the Committee, both the existing s 171 of the FW Act and the new text for s 171 as proposed by the IR Reform Bill is provided below.

a) Existing s 171 Objects:

The objects of this Part are:

(a) 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; and

(b) 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 without delay.

b) Proposed new text for s 171 (AMMA has highlighted key areas of difference):

The objects of this Part are:

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.

Effects of the revised Objects

153. In AMMA's view the revised Objects at s 171 would have the following effects on enterprise agreement making under the FW Act:

a) Placing of greater emphasis on what employers and employees agree, and their needs and priorities; and

b) Placing of greater emphasis on considerations of productivity, business and employment growth.

154. While revising the Objects in this way would send an important message to employer and employee parties about the purpose of entering negotiations for a new enterprise agreement, clearly the primary intention of these amendments is to change the manner in which the FWC assesses new agreements in the approval stages.

155. The collapse in the number of workplaces utilising enterprise agreements is not because employer and employee representatives are incapable or unwilling to reach agreement on matter that meet their needs and priorities, or that consider productivity and business growth.

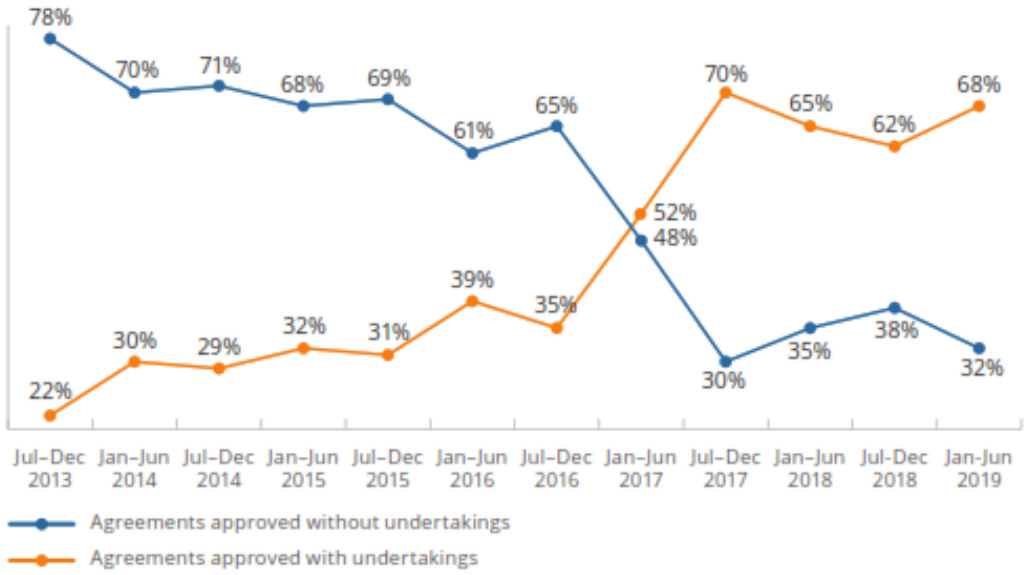
156. Rather, the unattractiveness is in the prospect of navigating a time-consuming and costly system, with many complex procedures requiring nothing short of full compliance, only to have genuinely agreed bargaining outcomes unwound or undermined by the overly technical and legalistic approach taken by the FWC when assessing the agreement for approval.

157. While the frustrations with the FWC's approach to approving enterprise agreements is now pervasive amongst the employer community, this has not always been the case. The FW Act has now been in effect for more than 11 years however it has only been the past three-to-four years in which employers have expressed significant concerns about their experiences with the FWC's enterprise agreement approval practices.

158. The change in how the FWC is approaching its function of assessing agreement approval applications is demonstrated by the vast increase in the proportion of agreements requiring undertakings to be approved.

159. The following has been extracted from the FWC's most recent annual report:

Figure 5: Enterprise agreements – agreements approved with and without undertakings



At December 2018, the FWC approved 65% of enterprise agreements with undertakings compared to December 2016 where the same percent of enterprise agreements were approved without undertakings.[21]

160. Specific examples of the ludicrous types of undertakings being sought by the FWC, employer experiences with delays due to an overly pedantic assessment of agreement terms, and general frustrations with the FWC's approach to approvals, follow in subsequent sections of this chapter of AMMA's submission (see Parts 3, 5 and 10).

161. There is also a significant issue with applications being withdrawn after the applicant has been advised by the FWC that their agreement is likely to be rejected. The FWC's 2019 annual report states that 576 agreement approval applications – or 11% of all applications – were withdrawn in 2018-19.

162. If the significantly increased number of undertakings required over the past four years was reflective of the FWC taking a more facilitative approach to approving enterprise agreements, such as correcting genuine errors in those applications, the number of applications being withdrawn in fear of rejection should be far lower than in excess of 1-in-10.

163. It should be noted that the assessing of enterprise agreement approval applications through a highly technical, legalistic lens was never the intention of then-Labor Federal Government

[21] *Annual Report 2017-18,* June 2018 (released 18 September 2018), Fair Work Commission. Retrieved from fwc.gov.au.

when drafting the legislation in 2008. The Explanatory Memorandum for the *Fair Work Bill 2008* states in relation to the functions of the then-named Fair Work Australia (FWA):

> *"It is intended that FWA will usually act speedily and informally to approve agreements with most agreements being approved on the papers within 7 days".*

164. In the early years of the legislation this intended "informal" and practical approach was largely followed by members of the tribunal. An important Full Bench decision relating to enterprise agreement approval in 2010 included the following observations (emphasis added):

> *[13] The appellants emphasised the facilitative aspects of these objectives. We agree that these objectives place the primary role for making enterprise agreements on the parties to those agreements and their representatives and that the role of Fair Work Australia (FWA) includes facilitating the making of enterprise agreements. In general we believe that the requirements for approval should be considered in a practical, non-technical manner and that reasonable efforts should be made to clarify matters with the parties and consider undertakings to clarify or remedy concerns to the extent that these may be available under s 190 of the Act.*[22]

165. AMMA advises the Committee to view Part 1 of Schedule 3 of the IR Reform Bill as an important precursor to the changes that follow to the enterprise agreements provisions. As a package of amendments to those provisions, the effect will be to course-correct the FWC's approach to agreement approvals, being to facilitate and certify the outcomes reached by parties bargaining at the workplace level.

166. Achieving this outcome starts with having the Objects at s 171 effectively setting the tone for the purpose and application enterprise agreement making under the FW Act.

4.2. Part 2 – Notice of employee representational rights

167. Part 2 of Schedule 3 would amend the Notice of Employee Representational Rights (NERR) to simplify this process for all parties and provide additional time for employers to ensure compliance.

The NERR has no practical value

168. The NERR is a legislative form found at Schedule 2.1 of the *Fair Work Regulations 2009* that, as per s 173 of the FW Act, must be provided to employees no later than 14 days after the notification time (in practice, the time at which the FW Act recognises the start of the bargaining process).

169. The NERR notifies employees of the following information:

a) That bargaining has commenced in relation to an enterprise agreement proposed to cover certain employees;

b) What an enterprise agreement is and how they become approved;

c) Rights for employees to represent themselves or appoint a bargaining representative including a trade union; and

d) Where employees can go for further information.

170. Controversially, the issuing of this form to employees was a new obligation placed on employers by the FW Act that did not feature in Australian workplace law from 1993-2009, a time in which the numbers of enterprise agreements grew significantly.

[22] [2010] FWA 1347

171. To understand why the NERR is considered a pointless administrative requirement, consider that to commence bargaining for an enterprise agreement, in practice, either:

    a) An employer would notify its employees of its intention to pursue an enterprise agreement and seek nominations of bargaining representatives; or

    b) After achieving a Majority Support Determination, employees or an employee representative (such as a trade union), would notify the employer of the employees' intention to bargain for an enterprise agreement.

172. Further, to successfully achieve an enterprise agreement, an employer requires majority support of the workforce as determined through an employee vote (a minimum of 50% plus one). The outtake is that in practice employers, unions and / or other employee bargaining representatives communicate regularly to employees throughout the process in order to effectively represent their views and influence their understanding and voting in relation to a proposed agreement.

173. The NERR adds no value to this process. Aside from some details the employer is required to fill-in, the form provides basic information readily available on the FWC and FWO's websites. The limited amount of unique information that is required to be on the form – such as the name of the employer, the proposed agreement and its coverage – is always duplicated and superseded time and time again by the significant communication and engagement undertaken by employers and employee representatives throughout the bargaining process.

174. For these reasons, the employer community has long held the position that the NERR should either be abolished entirely or become an information function of the FWC. However, in the interests of achieving uncontroversial changes that can be supported by all industrial stakeholders – even the minority who still see a place for the NERR - employer groups have instead persisted with various minor proposals to make the process more practical and less of a compliance burden.

Problems with the NERR

175. The key problem with the NERR is that despite being an administrative process deemed unnecessary and pointless by most industrial stakeholders, seemingly minor and accidental errors have seen otherwise compliant enterprise agreements rejected at the approval stage.

176. The most notorious examples of agreement rejection caused by minor NERR defects include the substituting of a single word for clarity purposes (*Aldi*[23]*),* providing additional materials with the NERR via a staple (*Peabody*[24]*),* and including the telephone number for the FWO rather than the number for the FWC Infoline (*MMA Offshore*[25]). Other examples have seen agreements rejected due to the form being printed on company letterhead or with a company logo present, and issued as little as one-day late.

177. It has been highly concerning to see minor deviations from the precise content of the NERR form being interpreted by some Courts and FWC members to amount to a fatal defect in the enterprise agreement making process. This in turn has been relied on as a basis for refusing the formal approval of a growing number of enterprise agreements otherwise validly made by an employer, its employees and their representatives.

178. The Productivity Commission (PC), in its 2015 *Inquiry Into Australia's Workplace Relations Framework*, found the rejection of agreements based on technical NERR defects had significant adverse consequences:

[23] [2019] FCAFC35
[24] [2014] FWCFB 2042
[25] [2017] FWCFB 660.

While there are often good reasons for having procedural requirements (for example, to prevent a party engaging in potentially misleading conduct during the approval process), substance rather than form should prevail, which is a recurring theme in this report. Where the FWC rejects an EA on procedural grounds, it can trigger a fresh round of complex negotiations. This is not only a costly and tedious process, but can also compromise the relationship between employers and employees. This was noted by a member of the Launceston Chamber of Commerce, whose EA was rejected by the FWC due to a technical defect in their NERR[26].

179. The PC further recommended (Recommendation 20.1) the government amend the FW Act to:

    a) *Allow the Fair Work Commission wider discretion to overlook minor procedural or technical errors when approving an agreement, as long as it is satisfied that the employees were not likely to have been placed at a disadvantage because of an unmet procedural requirement.*

    b) *Extend the scope of this discretion to include minor errors or defects relating to the issuing or content of a notice of employee representational rights.*

180. In December 2018, the Australian Parliament passed the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2017*, which partially gave effect to this recommendation of the Productivity Commission. Schedule 2 of that legislation provided additional discretionary powers to members of the FWC to approve agreements despite minor procedural or technical errors made in relation to the NERR, as long as the errors would not disadvantage employees.

181. While this was welcome, the rapid decline in enterprise agreement making and the COVID-19 pandemic has meant the practical application of these discretionary powers have yet to be properly tested. Further, addressing the issue in this reactionary way does not deal with the fundamental issue at hand – being that the obligation on employers to provide the NERR in the form prescribed by the FW Act remains an unnecessary administrative burden and point of compliance risk to no discernible benefit or purpose.

How this Bill improves the NERR

182. The IR Reform Bill proposes a far more effective solution for addressing longstanding concerns with the NERR and removes any uncertainty or risk to the agreement making process that the form presents. The changes would still ensure employees are notified with a consistent, legislative notice ensuring they fully understand their representational rights in bargaining.

183. The amendments put forward in Part 2 of Schedule 3 would have the following effects:

    a) The FWC would publish the NERR in a prescribed form on its website, with employers required to provide a link to employees in order to discharge their statutory obligations.

    b) The timeframe in which an employer must provide the NERR to employees following the notification time would be extended from the current 14 days to 28 days.

184. AMMA submits to the Committee that both these areas of change are well justified and would have real material impact on streamlining and reducing risk in the agreement making process.

185. In relation to publishing a standardised NERR on the FWC's website, this solution has a number of practical benefits including:

    a) Taking advantage of the efficiencies offered by modern information technology;

[26] Productivity Commission (2015), Final Report, Inquiry into Australia's workplace relations framework

b) Removing any variability in the NERR that may have seen employees issued with incorrect information and/or a defective form;

c) Vastly limiting the likelihood that enterprise agreements (including those otherwise genuinely agreed and compliant) could be rejected on that basis; and

d) Ensuring all employees involved in bargaining continue to receive a standard, consistent NERR informing them of their representational rights.

186. In relation to the extension of the timeframe for employers to provide the link to the NERR, it is important to note that agreement making is highly complex and involves a significant amount of resources, deadlines, processes and consultation. Given the long lead times involved in enterprise agreement making strategy, amongst AMMA's members it would be very unusual for significant bargaining meetings to take place within 28 days of the notification time.

187. Further, in the resources and energy sector, many roster patterns see some employees working swings well in excess of 14 days and thus getting information effectively to those employees can often take in excess of the 14-day current timeframe for providing the NERR.

188. The proposed 28 days would be the new maximum period in which an employer has to issue the NERR to all its employees. This simply provides an additional buffer for an employer to ensure it is fully compliant with its NERR responsibilities and all employees are aware of their representational rights. It would be rare for an employer to require the full 28 days to issue the NERR – in most cases compliance would occur well within the new statutory deadline, especially with the proposed change to a standardised online form and the efficiencies that would deliver.

189. Importantly, nothing in the IR Reform Bill seeks to alter the most important timeframe intended to ensure employees have appropriate notice to access, understand and seek more information on a proposed agreement – the minimum 21 days in which an employer must wait between issuing the NERR and instigating a vote.

4.3. Part 3 – Pre-approval requirements

190. Part 3 of Schedule 3 of the IR Reform Bill deals with the requirements that an employer must undertake before it can request that employees vote (and thus potentially approve) a proposed enterprise agreement. This primarily relates to providing the agreement and other relevant documents to employees and ensuring the agreement's terms and their effects have been properly explained.

191. This requirement – found at ss 180, 186 and 188 of the FW Act - is commonly referred to as the "genuinely agreed" requirement applied by the FWC. In recent years this has been the source of significant contentiousness, with tribunal members increasingly overturning otherwise compliant enterprise agreements due to concerns the employees were not properly informed enough to have "genuinely agreed" to it.

192. The amendments included in this part do not remove or water down these pre-approval requirements, but rather seek to re-establish a degree of reasonableness and common sense to this test that has gone by the wayside in recent times.

193. In doing so, the IR Reform Bill would address one of the primary areas driving the complexities, costs and uncertainty associated with enterprise agreement making in the present day, and go a long way to encouraging employers and employees back to the bargaining table.

The "genuinely agreed" requirement

194. The key amendments in this Part are to s 180 of the FW Act, which relate to an employer's obligation to provide copies of the agreement to employees and explain its terms and effects

prior to the vote; and s 188 which requires that the FWC be satisfied that an agreement has been *genuinely agreed* taking into consideration the matters listed at s 180 and anything else the FWC finds relevant.

195. Like many of the challenges and frustrations relating to enterprise agreement making, the problem has emerged not necessarily from the legislation itself but the evolution of how it is being applied by members of the FWC and the Courts.

196. Widespread employer experiences show the FWC is taking an extraordinarily forensic approach to assessing whether an employer took all reasonable steps to ensure that the terms of an agreement, and the effect of those terms, were explained to relevant employees.

197. AMMA members have provided numerous reports of some members of the FWC going on 'fishing exercises' determined to uncover something that may not have been explained to employees with the level of detail they might deem adequate. This has seen employers required to explain, line-by-line, every single item within a proposed enterprise agreement in comparison to a related (or semi-related) provision in the relevant Award or National Employment Standards.

198. To demonstrate the impracticality of this extremely analytical approach, the Building and Construction Award has 146 pages and more than 80 allowances. Even if an employer were to explain to employees how an enterprise agreement may vary or align to each provision in that award, such a practice is not required by the legislation and would only result in those employees being more confused about the practical benefits of the agreement than before.

199. Examples of AMMA members' frustrations with the "genuinely agreed" requirement include:

    a) One AMMA member provided a 10-page summary of each individual agreement clause and its effect. This was rejected by the FWC which found the employer should have explained exactly which provisions of the agreement were better than the award and which were not.

    b) Another AMMA member had an agreement rejected by the FWC, despite being endorsed by over 70% of the workforce, after a union representative raised a highly technical issue that they argued was not properly explained in the pre-approval stage.

200. The nanoscopic level to which employers are expected to have complied with ss 180, 186 and 188 is driving some disconcerting strategy and tactics of some bargaining parties.

201. For example, in the second example above, the union was a party to bargaining but had not endorsed the agreement. Upon failing to convince the employees to vote 'no', it waited until the agreement was in the FWC for approval before raising the objection (which was not raised during countless bargaining meetings) with the intention to "kill off" the non-union agreement.

202. Another profoundly negative impact is the chasm of opportunity this provides to industrial organisations which were not party to an agreement or even involved in the bargaining process, to intervene and appeal an agreement's approval by the FWC.

203. With s 188 requiring the FWC to be satisfied that *"there are no other reasonable grounds for believing that the agreement has not been genuinely agreed"*, this opens the door and encourages non-bargaining parties to put forward any possible "reasonable grounds" that may see an agreement's approval overturned, or at least delay its application to the workplace.

204. The publishing of recently approved enterprise agreements on the FWC's public website opens the door for this practice. Well-resourced unions, most notably the CFMMEU, have made a business model out of relentlessly scouring all new non-union enterprise agreements during their appealable period, searching for any possible minor procedural shortcoming that might lead to their revocation.

205. This is turn opens the door for the union to involve itself when bargaining re-commences.

Matters of note

206. As described in Part 1 (pages 21-24), the challenges in this area have emerged from the FWC's application of the "genuinely agreed" requirement in recent years. While frustrations with this technical requirement existed prior, much of the business community consider the Federal Court's 2017 and 2018 decision in *One Key Workforce v CFMEU*[27] as a turning point for how the tribunal interprets and applies its responsibilities in relation to sections 180 and 188.

207. In *One Key,* the CFMEU had taken the FWC's approval of the agreement to the Federal Court on appeal arguing, amongst other matters, that the agreement had not been properly explained to the employees. The Federal Court therefore considered the requirement of s.180(5) that:

    a) the terms of the agreement, and the effect of those terms, are explained to the relevant employees; and

    b) the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of the relevant employees.

208. In the 2017 single Judge ruling, the Court found the employer failed to meet its obligations as it *"did little more than read to the employees parts of the Agreement and certainly did not explain the effect of its terms"*.

209. This was later backed by the Full Federal Court when dismissing the employer's appeal. It found:

    > *"without knowing the content of the explanation, it was not open to the Commission to be satisfied that all reasonable steps had been taken to ensure that the terms and their effect had been explained to the employees who voted on the Agreement or that they had genuinely agreed to the Agreement."*

210. There were other appeal grounds in the *One Key* matter, however it was this interpretation of the requirements at s.180(5) which saw the FWC begin taking a far more rigorous approach to ensuring agreements and their terms were explained in great detail to employees. Just a few examples of the slew of decisions highlighting the pedantic application of the "genuinely agreed" requirement include:

    a) In *Celotti* a Full Bench of the FWC overturned the agreement upon appeal by multiple unions, after finding there was no employee at the time performing work under three of the 12 awards the agreement covered, and therefore the workforce as a whole could not have genuinely agreed to it[28].

    b) In *DDP Electrical* a Full Bench of the FWC overturned the agreement after finding the single member could not have been satisfied with s.188 because the exact content of the employer's explanation of each term of the agreement was not provided to the FWC[29].

    c) In *Georgiou Group* the FWC rejected application for approval of an agreement due to deficiencies in its explanation, including that awards were not referred to by name and copies not provided to employees (note: these documents are publicly available)[30].

[27] [2018] FCAFC77
[28] [2020] FWCFB 5011
[29] [2020] FWCFB 18
[30] [2019] FWC 210

d) In *Shamrock Civil* a Full Bench of the FWC overturned the agreement on appeal by the CFMEU after finding deficiencies in how some terms were explained in relation to corresponding terms in the Award[31].

211. While the merits of each individual case could be argued and debated, it is the trend which has created the problem. It is clear that the "genuinely agreed" requirements at ss.180, 186 and 188 have created a minefield of complexity and compliance risk for employers. It has made the approval of agreements believed by the parties to have been reached genuinely and in good faith extraordinarily difficult to predict.

212. Almost all industrial relations commentators would agree that this extreme level of legalistic technical analysis in enterprise agreement approvals was not the intention of legislators when drafting the FW Act, nor has it been present in previous eras of Australian workplace law.

213. This trend arises particularly for agreements reached without a union. While there is no distinction between union and non-union agreements under the FW Act, some members of the FWC appear to have taken the view that where a union has been involved in bargaining and supports the agreement, the employees must have been properly informed of its terms and their effects.

214. This is both a wrong assumption and creates a practical application of the law that infringes on freedom of association principles. Union-backed agreements should not be sailing through the FWC with less technical scrutiny than non-union agreements – but they are.

215. It is well known that agreements reached without unions are subject to a more excessively thorough test to which any possible shortcoming is deemed fatal. Even those which pass such tests are then served up via publication on the FWC's website to be appealed, delayed, and often overturned on technicalities by unions perturbed at their exclusion.

216. When only 14% of all employees (public and private sectors) are union members, and only 12% in the resources and energy industry[32], this outcome is often as frustrating for employees as it is employers.

Effects of the Part 3 amendments

217. The amendments to ss.180 and 188 within the IR Reform Bill are not based on any notion that employees should not be properly informed about an agreement, nor would they dilute an employer's responsibilities to adequately explain the agreement's terms and their effects.

218. Rather, they reflect the objective of reducing the level of technical analysis the FWC feels is necessary to ensure an agreement's compliance with the "genuinely agreed" concept. The amendments would effectively achieve this by:

a) Repealing s.180(5) which is presently being interpreted as a stand-alone strict requirement that all terms of the agreement, and the effect of those terms, are explained to relevant employees;

b) Incorporating the requirement to have explained the agreement and its terms into new ss.180(2) and (3) which would place more weighting on the reasonableness of the employer's steps in ensuring employees understand the agreement and have an opportunity to consider its offer; and

c) Encouraging the FWC to use its discretion for subjective considerations including the "appropriate manner" in which the terms of the agreement should be (or have been) explained, and any "particular circumstances and needs" of relevant employees.

[31] [2018] FWCFB 1772
[32] ABS (2020) *Trade union membership* (accessed via abs.gov.au)

219. Overall, the amendments seek to restore a level of reasonableness and common sense to the pre-approval requirements that largely existed in the earlier application of the FW Act and disappeared entirely following the *One Key* decision.

220. While not explicit in the amendments, the practical effect of the changes may encourage positive common sense outcomes, such as not requiring an employer to explain the provisions of the National Employment Standards or awards unless they had direct relevance on the agreement terms; not deeming it automatically fatal if some materials were not provided to employees as long as they are publicly available and easily accessible; and potentially allowing the FWC to overlook minor omissions in the explanation of an agreement if those omissions are deemed to have no material impact on the outcome.

221. This is turn would provide members of the FWC with more confidence to use their skills and experience to make subjective, discretionary findings when assessing the steps an employer has taken to ensure employees "genuinely agreed".

222. It would further discourage mischievous 'appeal and delay' tactics by parties with a commercial interest in seeing otherwise genuinely agreed agreements fail late in the approval stage.

223. For these reasons, AMMA commends the IR Reform Bill's amendments to Part 3 of Schedule 3 of the enterprise agreements provisions.

4.4. Part 4 – Voting requirements

224. Part 4 of Schedule 3 seeks to provide clarity around which casual employees are entitled to vote on a proposed enterprise agreement.

225. This has been an area of contention and ambiguity arising primarily in the retail, hospitality, fast food and education sectors, and is therefore of most relevance to those industries that employ higher than typical proportions of casual employees.

226. It is not a matter of high relevance to AMMA's members in the resources and energy industry, where casual employment is lower than average, notwithstanding that the *McDermott* matter (cited below) providing some guidance on this issue arose in the offshore oil and gas industry.

227. For this reason, AMMA refers the Committee to the submissions of peak employer groups in the abovementioned sectors and ACCI and Ai Group as the overarching business representative bodies.

228. In considering the issues this Part seek to rectify, the Committee should note the FWC's *Enterprise Agreements Benchbook*[33] highlights the complexity in this area:

> ***Should casual employees vote?***
>
> *Casual employees are able to be covered by enterprise agreements and so must be included in votes to approve agreements. The question is how to determine which casual employees are properly included.*
>
> *The general contractual characteristics of casual employment is that a person who works over an extended period of time as a casual employee will be engaged under a series of separate contracts of employment on each occasion a person undertakes work, however, they will not be engaged under a single continuous contract of employment.*[34]
>
> *The majority of the Full Court of the Federal Court in National Tertiary Education Industry Union v Swinburne University of Technology*[35] *(Swinburne) found that only employees who are employed at the time the employer requests that employees vote upon a proposed enterprise*

[33] FWC (2019) Enterprise Agreements Benchbook (URL), page 94
[34] [2018] FWCFB 7224
[35] [2015] FCAFC 98

agreement are eligible to vote. Therefore, in order to be able to vote, a casual must be employed at that time.

The effect of the Full Court's reading of s.181(1) in Swinburne is that an employer should only make a request under s.181(1) to employees who are employed 'at the time', as opposed to those who are not employed at the time but who might otherwise be regarded as 'usually employed'.

A person who is a casual employee but who is not working on a particular day or during a particular period, is unlikely to be 'employed' on that day or during that period.

In Swinburne the relevant casual employees were engaged by the University as sessional employees during the 2013 academic year and were likely to be engaged as sessional employees during the 2014 academic year. Because the casual employees were not employed at the time the University requested employees to vote, they were not eligible to vote.

In McDermott Australia Pty Ltd v AWU & AMWU,[36] a Full Bench of the Commission held that casual employees who had accepted ongoing employment with McDermott to work on the construction of an offshore gas facility were employed by McDermott at the time they were requested to vote on the enterprise agreement, notwithstanding the fact that no work was completed at the time of the vote.

229. The issues identified in the FWC's Benchbook were further exposed in the *Kmart* enterprise agreement application matter, which saw the FWC take the initial view that casuals who were employed after the access period commenced should have been given opportunity to vote on the agreement[37]. Whilst this determination was later corrected in the successful Full Bench appeal of the single member decision[38], the matter further highlights the ongoing ambiguity the Part 4 amendments seek to address.

230. In principle AMMA would support any amendments that provide certainty and clarity for employers and employees in the bargaining process and remove points of dispute and confusion.

4.5. Part 5 – Better off overall test

231. Part 5 of Schedule 3 deals with improving the "better off overall test" (BOOT). Provisions regarding the BOOT and how it must be applied are found at ss.186, 189 and 193 of the Act.

232. Alongside the "genuinely agreed" requirement (see Part 3 above), the impractical application of the BOOT is one of the most significant drivers of uncertainty, risk and frustrations with enterprise agreement making under the FW Act. In its current form the BOOT is a key reason many employers have abandoned agreement making as their preferred industrial strategy and reverted to award-based arrangements.

233. Given the overblown public reaction of some stakeholders to the IR Reform Bill's proposed BOOT amendments, it is crucial to make the distinction between the Bill's two very separate areas of changes in relation to the BOOT:

    a) Amendments to ss.193 and 211 - which contain minor, practical changes to how the BOOT is applied by the FWC for standard agreement approval applications; and

    b) Amendments to ss.186 and 189 - Temporary powers provided to the FWC to approve enterprise agreements that would otherwise not pass the BOOT for limited COVID-19 related circumstances.

[36] [2016] FWCFB 2222
[37] [2019] FWC 6105
[38] [2019] FWCFB 7599

234. The interest of AMMA's members in amending the BOOT overwhelmingly relates to the first area of proposed changes, which would have permanent and longstanding benefits for all users of the industrial relations system.

235. As detailed in Chapter 2 of this submission, the resources and energy industry has weathered the COVID-19 storm much better than most other sectors and has strong growth opportunities on the horizon. There are no present circumstances that AMMA is aware of within its membership whereby an employer may have the need to apply to the FWC for approval of a temporary enterprise agreement that otherwise would not pass the BOOT.

236. For this reason, AMMA's submission in relation to the BOOT focuses primarily on the practical improvements in contained within the IR Reform Bill's amendments to ss.193 and 211.

Employer experiences with the BOOT

237. Like the "genuinely agreed" requirement, the challenges and frustrations with the BOOT stem from the FWC applying it in an overly technical, forensic manner.

238. Far from a general assessment of an agreement's overall benefits, the BOOT now involves a narrowly focused line-by-line analysis of each provision of the proposed agreement to a corresponding (or loosely related) provision in the Award.

239. Such an approach has stripped any practical, qualitative assessment from the BOOT. It provides no perspective about whether the agreement as a whole leaves employees better off than the award conditions. There is a further lack of consideration about the views and wishes of the employees as expressed through the negotiating and voting processes at the workplace level.

240. An equally significant problem is that this flawed technical approach is not only applied to existing and reasonably foreseeable working arrangements, but a seemingly endless range of hypothetical, often highly unlikely scenarios not foreseen by any parties to the agreement at the time it is reached.

241. These problems have led to significant enterprise agreements, often covering thousands of employees in some of Australia's largest employers, being rejected or significantly delayed due to BOOT issues.

242. The most widely cited case is that of *Coles Supermarkets*[39] which, in 2016, had its new enterprise agreement rejected by a Full Bench of the FWC after it found a small number of part-time and casual employees working night-fill shifts would be disadvantaged compared to the award pay rates.

243. The agreement sought to cover 77,000 employees and had achieved 90% approval of those which voted on it. The Full Bench accepted evidence from both Coles and an SDA official that the majority of employees would be better off financially, there were significant non-monetary benefits, and that the views of the employees who voted on the agreement were relevant.

244. In its reasons, however, the Full Bench noted compliance with the BOOT required each award covered employee and each prospective award covered employee must be better off. The decision is considered by many in the business community as a landmark matter which further entrenched the FWC's application of the BOOT that it must not leave any individual employee or prospective employee worse-off than the award under any circumstances.

245. In a more recent public event, in March 2020 Bunnings sensationally withdrew its application for approval of a new agreement covering 37,000 employees, after waiting almost 12 months

[39] [2016]FWCFB 2887

for the FWC to make an approval determination. Bunnings managing director Mike Schneider made the following comments in relation to the withdrawal:

> *"At the end of day [the BOOT test] that every single employee has to be better off is a really difficult one to balance when you're employing 37,000. We're talking about a few hundred out of thousands and for that few hundred there is absolutely a path to them being no worse off with a series of adjustments and the feedback from the team we spoke to about that was fine.*
>
> *"We've gone into this in a really good faith approach with the bargaining parties and Fair Work and just found the process to be over the top in terms of process and the time it's taken."*[40]

246. Gerard Dwyer of the SDA, which endorsed and was a party to the agreement, made the following comments:

> *"Quite clearly, the overwhelming majority of Bunnings' staff would have been better off under the agreement now withdrawn. This yet again demonstrates frustration with the bargaining process…"*[41]

247. Bunnings' withdrawal from the enterprise agreement making system followed McDonalds making the same decision in late 2019. With its new agreement having been significantly delayed and frustrated over issues including BOOT compliance, the fast food giant reverted its 109,000 employees back to the award. A McDonald's spokesperson made the following comments about the BOOT to the *Australian Financial Review:*

> *"The increasing lack of certainty for business in achieving a practical and viable EA may ultimately result in fewer EAs being put forward across industry. Industry and government need to be working together if we are to achieve a functional solution to IR reform, and specifically, amendments to the better off overall test."*[42]

248. AMMA members in the resources and energy industry (those which engage in enterprise agreement making) have similar longstanding complaints in relation to the BOOT and how it impacts on the employer experience in trying to get a new enterprise agreement approved.

249. Examples of common experiences include:

a) Employers having to provide numerous undertakings to the FWC, often dubious in relevance to the agreement's practical application, in order to pass the BOOT. One example involved an AMMA member which didn't employ casuals or part-time staff and had no intention of doing so, being required to include casual and part-time clauses in its draft agreement, and then being asked to provide undertakings about casual employment in order to pass the BOOT.

b) Employers having to provide undertakings about basic matters they are otherwise required to comply with under the law. For example, one AMMA member reported having to provide undertakings that it would comply with its obligations under the National Employment Standards, in order to pass the BOOT.

c) Reports from employers as well as AMMA's workplace consultants (who are involved in regular EBA matters) that agreements which are near identical are receiving differing degrees of scrutiny and/or inconsistent treatment by members of the FWC.

250. These experiences are seriously detracting from the commercial advantages that having an in-term enterprise agreement applying to the workforce would otherwise provide.

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[40] Schneider in Marin-Guzman (19-03-2020) *'Waste of time': Bunnings boss slams EBA system* (AFR)
[41] Dwyer in in Marin-Guzman (19-03-2020) *'Waste of time': Bunnings boss slams EBA system* (AFR
[42] Marin-Guzman (21-12-2019) *McDonald's exit from enterprise bargaining marks system in decline* (AFR)

The prior 'no disadvantage test'

251. Recent discussions about addressing issues with the BOOT have seen repeated comparisons to the former 'no disadvantage test' (NDT) that existed under the 1993 and 1996 iterations of Australia's workplace relations laws.

252. In essence the NDT served the same function as the present-day BOOT in providing a criteria for the national workplace tribunal to ensure employees to be covered by a proposed enterprise agreement would be left no worse off than if they were working under the relevant award pay and conditions.

253. The key difference is that the NDT did not require that every individual employee be better off under the agreement, but rather that the workforce, considered as a whole with some focused analysis on distinct employee groups (e.g. by classification, by employment status etc), be at an advantage under the agreement as opposed to the award.

254. This did not mean agreements were routinely approved where employees were clearly at a disadvantage, but rather than the agreement could be assessed at a more general level and not requiring a line-by-line micro-analysis that would hold up the agreement's approval for weeks, if not months. Further, a range of remedies were available for employees who found themselves at a disadvantage to seek corrections in their take home pay. Addressing these types of individual anomalies were seen as a routine part of the human resources process.

255. The NDT was abolished by the 2005 WR Act amendments but restored with the "Fairness Test" shortly after in 2007 that operated in a near identical way.

256. The employer community has long argued for a return to this approach, whereby the BOOT would be assessed at a more holistic level, involve appropriate analysis of different employee groups and occupational classifications, but not require that each individual employee be better off in every conceivable arrangement of their working hours.

257. The merits of reverting to a NDT were closely examined by the Productivity Commission in its 2015 review of the workplace relations system (emphasis added):

> *…while the difference between these two tests should be marginal in theory, a NDT is likely to be more workable in practice. This is because in order to approve an agreement, the BOOT requires the FWC to be positively satisfied that an agreement will make all employees better off than the relevant award. This provides a wider scope for agreements to be rejected at the approval stage when compared with a NDT, which would require the FWC to identify how an agreement makes a class of employees worse off overall in order to reject an agreement. Some participants noted that there is a lack of hard evidence that a BOOT is harder to meet than a NDT, but did concede that there could be a symbolic difference that may incline FWC members to treat the BOOT as setting a slightly higher bar.* [43]

258. Ultimately the Productivity Commission endorsed the globalised NDT approach particularly practiced between 1996-2005 over the line-by-line BOOT analysis of today, making this final recommendation:

> *Recommendation 20.5*
>
> *The Australian Government should amend the Fair Work Act 2009 (Cth) to replace the better off overall test for approval of enterprise agreements with a new no-disadvantage test.*
>
> *The no-disadvantage test would be conducted by the Fair Work Commission. It would assess that, at the test time, each class of employee, and each prospective class of*

[43] Productivity Commission (2015), page 695

employee, would not be placed at a net disadvantage overall by the agreement, compared with the relevant modern award(s).[44]

259. At various points within the Attorney-General's Enterprise Agreement Making Working Group in 2020, the employer parties raised this recommendation of the Productivity Commission and made the case for a return to a NDT-style test.

260. This proposal had very limited support from the employee representative groups and ultimately, as demonstrated in the IR Reform Bill, the Attorney-General chose not to pursue changes to the BOOT that would leave any individual employee at a disadvantage, irrespective of how large the majority that may be better-off.

The new BOOT would leave no worker worse off

261. It is crucial the Senate understands that the proposed amendments to the "standard BOOT" at s.193 would not provide the ability for an enterprise agreement to leave any existing employee, or prospective employee under foreseeable employment arrangements, worse off.

262. Much to the disappointment of the employer community, the amendments do not change the fundamental requirement that the pay and conditions of any individual employee must be considered on their own merits and cannot be diluted or offset by the overall benefit to the majority of employees.

263. Rather, the amendments seek to address a smaller subset of BOOT issues through the following effects:

    a) Dealing with the issue of hypothetical scenarios by directing the FWC to only consider patterns of work and types of employment that are "reasonably foreseeable" at the test time to be engaged in by award-covered employees or prospective employees.

    b) Placing greater emphasis on the role of non-monetary benefits to the overall benefits delivered by the agreement.

    c) Directing the FWC to give "significant weight" to any views of the parties (i.e. employers, employee representatives and employees themselves) relating to whether or not the agreement passes the BOOT.

264. AMMA agrees with these amendments and believes they are well justified by the significant body of evidence in relation to issues with the BOOT.

265. Regarding hypothetical scenarios, the change will inspire confidence in employers that they will not be required to waste valuable time and resources answering questions about, or providing multiple undertakings for, highly unlikely workplace arrangements which they had no intention of pursuing or covering with the agreement.

266. Having members of the FWC dream-up hypothetical employment scenarios not contemplated by the bargaining parties at the workplace level, and to then require various undertakings or even reject an agreement on the basis on those scenarios, is a ludicrous scenario for Australia's workplace relations system to facilitate.

267. Emphasising the role of non-monetary benefits to the overall assessment of the agreement is an important acknowledgement that the employer value proposition of modern-day businesses extends far deeper than financial benefits alone. Many employees, particularly those with family responsibilities, often value and prioritise non-remunerative parts of their work arrangements as highly as the remunerative.

268. The significance of placing greater emphasis on the views of the parties in relation to the BOOT will remain to be seen, given this amendment does not circumvent the core requirement that

[44] Productivity Commission (2015) recommendation 20.5, page 700

individuals must be better off than award terms. Nonetheless, this amendment may very well assist in changing the culture of the FWC when it comes to some members seemingly searching for deficiencies that the parties to the agreement either considered so minor they overlooked them or consider them offset by the overall benefits of the agreement.

269. Overall, AMMA submits that the amendments to the BOOT at s.193 do not change the test substantially enough to warrant any concern about employees being disadvantaged. By rejecting the longstanding argument of the employer community and the Productivity Commission's recommendation that a global test applied to groups of employees is appropriate, the Morrison Government has effectively accepted the position of employee representatives in relation to the most contested question about the BOOT's application.

270. The changes reflect an incremental improvement in a flawed test that will likely produce some administrative efficiencies, and some increased confidence from employers in the system. They are uncontroversial and should be supported in full.

COVID-19 relief measures

271. For the reasons outlined at paragraphs 97-99 above, AMMA makes only a brief submission on the proposed amendments to ss.186 and 189.

272. While AMMA members are unlikely to utilise these measures, there is nothing untoward in providing the independent workplace tribunal with the power to consider extraordinary applications when businesses and jobs are on the line. The FWC comprises members from a range of backgrounds, including a large number of members from employee representative backgrounds, and there are multiple avenues for review and appeal of its decisions.

273. It would therefore be extremely unlikely, if not impossible, for an employer to gain approval of an agreement that does not pass the BOOT, and for that approval to stand-up to FWC and Court appeal processes, without a compelling case. Moreover, if employers and employees agree to temporary terms and conditions in the mutual interest of saving the business and its associated jobs from potential closure, why should the FWC have no discretion to consider such an application?

274. Should the Senate take particular interest in the amendments to ss.186 and 189 regarding the approval of non-BOOT compliant agreements, AMMA strongly urges they are considered independently to the s.193 amendments relating to the vast majority of cases.

275. AMMA refers the Committee to ACCI's submission on this part of the IR Reform Bill for further context and guidance.

4.6. Part 6 – NES Interaction Terms

276. Part 6 of Schedule 3 seeks to introduce clarity and administrative efficiencies regarding how enterprise agreements interact with the terms of the National Employment Standards (NES), which contain the minimum conditions and terms of employment for all employees.

277. The Explanatory Memorandum to the Bill explains the change as follows:

> *Item 36 repeals paragraph 186(2)(c). When deciding whether to approve an enterprise agreement, the FWC no longer needs to be satisfied that the terms of the agreement do not contravene section 55 (which governs the interaction between the NES and enterprise agreements)*
>
> *Instead of this process, new section 205A requires enterprise agreements to include the model NES interaction term.*

278. AMMA's interpretation of this change is that members of the FWC will no longer need to undertake time-consuming and onerous investigative work, such as cross-checking various

parts of an agreement with the NES, to ensure enterprise agreements do not exclude the NES terms. This is because the new requirement is that all enterprise agreements contain the new model term which includes those NES terms.

279. As a result, AMMA expects this will ease the administrative burden on members of the FWC and speed up the approvals process. The Explanatory Memorandum appears to confirm this interpretation of the change:

> *This amendment simplifies the enterprise agreement approval process by avoiding the need for the FWC to examine each term of an agreement to determine whether it contravenes section 55. Instead the FWC will only need to consider whether the agreement includes the model NES interaction term.*

280. In achieving this, the IR Reform Bill would address a significant frustration for AMMA's members – that the FWC consistently requires undertakings that employers will comply with the minimum conditions listed within the NES.

281. Employers should not have to provide undertakings that they will comply with their non-optional legal requirements, and the FWC should not have to ask for them, to get enterprise agreements approved. It should be an unspoken assumption by all parties that the law will be complied with.

282. For these reasons, AMMA supports the amendments in Part 6 of Schedule 3.

4.7. Part 7 – Franchise employers and their employees

283. Part 7 of Schedule 3 is named in full "Variation of single enterprise agreements to cover eligible franchisee employers and their employees"

284. This Part of the Bill is not particularly relevant to AMMA's members in the resources and energy industry. However, in principle AMMA sees no issue with providing efficiencies for franchise employers and employees to agree to be covered by lawful terms and conditions utilised elsewhere in the franchise.

4.8. Part 8 – Terminating agreements after nominal expiry date

285. Part 8 of Schedule 3 deals with the termination of enterprise agreements after their nominal expiry date. The amendments to this section – s.225 of the FW Act - would have the straightforward effect of preventing any party to an expired agreement to apply for its termination until at least three months after its nominal expiry date.

286. While this change appears to be in response to unfounded union concerns, and AMMA does not agree they are necessary, it does appear to be put forward in the interests of encouraging good faith re-negotiation attempts, prior to any party threatening to apply for termination.

287. For this reason, AMMA does not oppose Part 8 of Schedule 3.

288. In relation to this area of workplace law, AMMA notes that calls for broader reforms to provisions for terminating enterprise agreements are not supported by logic or evidence. Evidence and reasons for this position are provided below.

Terminating agreements is not controversial

289. Unlike most other countries, once a workplace agreement in Australia passes its nominal expiry date that agreement remains in place until a new one is struck. If a new agreement cannot be reached, it is not uncommon for one of the parties (the employer or the employees) to be unsatisfied with the business continuing to operate under the old, expired terms and conditions.

290. For this reason, the ability for employers or employees to apply for termination of a workplace agreement has been a feature of enterprise bargaining since the mid-1990s. However, employers and employees cannot simply terminate an agreement because they are unhappy with the expired one. They must apply to the independent workplace tribunal (the FWC) to review and rule on their reasons for wanting to terminate the old agreement, which usually means reverting to award wages and conditions unless a new agreement is reached.

291. Importantly, the public interest is taken into consideration when the tribunal is ruling on an application. This is especially the case when applications are made by just one party to an expired agreement (i.e. a unilateral bid to terminate). Such applications are considered very carefully by the FWC, and only approved where there is a compelling case to do so – for example, if the agreement's ongoing application in the workplace threatens the ongoing viability of the business and the jobs it supports.

Union claims are baseless

292. In recent years the ACTU has been campaigning for employers to lose the ability to apply for termination of an enterprise agreement. The purported justification is the baseless claim that employers are somehow misusing this decades-long function of the IR system to "threaten employees" and/or unions in bargaining meetings.

293. For example, the *Change the Rules* campaign kit states the following:

> *At the same time employers can use the "nuclear option" and have the Fair Work Commission terminate existing agreements to blackmail workers into accepting lower pay and inferior conditions… Terminating existing agreements must not be a weapon available to employers seeking to get an advantage in negotiations.*

294. This characterisation is not backed-up by the empirical evidence. FWC records show around 400 applications to terminate agreements are made each year, with less than 3% opposed by employers or employee groups.

295. The campaign against the right to apply for agreement termination appears to be driven by a handful of cases in recent years where an enterprise agreement has been terminated by the FWC, on application by the employer, whilst vigorously opposed by the union/s involved.

296. Cases such as these are very rare and typically involved circumstances where the expired agreement contained terms and conditions that:

    a) are well above Award Rates (sometimes multiple times over),

    b) were agreed under better economic circumstances and unsustainable within the current environment, and

    c) if left unaddressed would lead to the business closing and people losing their jobs.

297. Further, recent examples of this occurring (e.g. Aurizon, Peabody) typically involved circumstances where the employers had long attempted to bargain for a new agreement but were repeatedly stifled by the relevant unions.

298. It should also be noted that the ACTU's policy, which was adopted by the ALP prior to the 2019 federal election, is to remove an employer's right to apply to terminate an expired enterprise agreement, but not the right of a union or employees to apply for termination.

299. Given the important function it plays, the minority of cases in which termination applications are contested, and the independent checks and balances involved, in AMMA's view the ACTU / ALP policy to remove rights for employers but retain them for employees has no merit.

EA termination in the resources and energy industry

300. The resources and energy industry is not a big user of the ability to apply for termination of workplace agreements. However, where this function is required, it is very important.

301. The highly cyclical and globally exposed nature of resources and energy markets mean the competitive pressures facing an employer can be vastly different from one bargaining period to the next. For instance, there have been some examples in recent years where a resources and energy employer was being held to the wages and conditions under an expired agreement struck within the "mining boom period", and were contributing to declining sustainability within a much more challenging economic environment.

302. In those types of circumstances, the option to have expired, unsustainable agreements reviewed and potentially terminated by the independent umpire keeps projects open and saves jobs.

4.9. Part 9 – How the FWC may inform itself

303. Part 9 of Schedule 3 places stricter guidelines on FWC members in relation to what information and/or parties or stakeholders they should consider evidence from when seeking to approve a new enterprise agreement.

304. At present, agreement approvals are playing out as a very public, open process in which any organisation or individual can seek to provide arguments and evidence as an "aggrieved person" to inform the FWC as it considers approval or an appeal of an approval.

305. Enterprise agreement approvals were never intended to be a "free for all" whereby individuals or organisations who were not parties to the agreement, involved in bargaining or even eligible to be covered by it, can lodge legitimate bids to have the agreement's approval declined or overturned.

306. This in turn has created a significant disadvantage for employers and employees to engage in enterprise bargaining – why bother going through a process of several months when unrelated third parties can undo their genuinely bargained outcomes?

307. The proposed new s.254AA seeks to fix this problem by exhaustively listing all the sources which the FWC may inform itself in agreement approvals:

a) information that is publicly available;

b) submissions made by a body under section 254A (entitlement for volunteer bodies to make submissions);

c) submissions, evidence or other information provided by or requested from:

(i) the applicant; or

(ii) the employer or employers covered by the agreement; or

(iii) an employee covered by the agreement; or

(iv) if paragraph (1)(a) applies—a bargaining representative for the agreement; or

(v) if paragraph (1)(b) applies—an employee who will be covered by the agreement if the FWC approves the variation; or

(vi) if paragraph (1)(b) applies—an employee organisation covered by the agreement; or

(vii) in any case—the Minister or a Minister of a State or Territory who has responsibility for workplace relations matters.

308. For the reasons that follow, AMMA's strong view is that these limitations are both appropriate and necessary to restore confidence in the enterprise agreement making process.

Third party interference in agreement approvals

309. It is a fundamental and appropriate principle of any balanced industrial relations system that employees have access to workplace representation as a measure to promote and protect their employment rights and interests. However, the FW Act has gone well beyond facilitating this principle and instead seeks to enshrine a role for unions in enterprise bargaining wherever possible.

310. The Act allows unions to make an application to be covered by an agreement they were otherwise not party to; to make submissions to the FWC as to whether agreements should be approved; and to appeal to stop or overturn the approval of an agreement on any number of public interest grounds.

311. This can occur despite employers and employees having already participated in a bargaining process and where employees have voted in favour of the proposed set of terms and conditions. The fact that the FW Act allows third parties to involve themselves in agreement making at any stage in the bargaining process undermines the willingness and effort of employers and employees to engage cooperatively to reach genuine agreement.

312. This is particularly evident when unions seek to oppose the approval of an agreement to which they were not a party, even after employees have endorsed the proposed terms of the agreement and the FWC is satisfied it otherwise meets the statutory criteria.

313. In recent times even the Fair Work Commission has expressed frustrations with this strategy. A tribunal member recently criticised the CFMMEU's intervention in the agreement approval process, questioning whether it was pursuing its own agenda or assisting the tribunal under the FW Act, stating:

> "…*what I'm trying to understand is, how is it that when you sought permission to be involved in this approval process when you weren't a bargaining representative for the agreement, how this is assisting the Commission when it appears to me that the objections made have been merely made for the sake of making objections and delaying the approval process, which isn't something that assists the Commission."*[45]

314. Unions employing this strategy often assert their rights to intervene in workplaces under the guise of freedom of association and assisting the administrator with its functions.

315. The principle of freedom of association is that employees have a genuine choice on whether or not they wish to have their interests represented and by whom. Contrary to this principle, the law contains no preventative stopping unions from inserting themselves into bargaining, even where they were not nominated by employees as their representatives and are clearly just seeking to delay and frustrate the process.

316. AMMA's strong view is that Australia's workplace laws should prevent or greatly limit third parties' intervention in agreement making where employers and employees have demonstrated they can work genuinely and lawfully in agreeing to workplace outcomes.

317. AMMA therefore strongly supports the amendments listed within Part 9 of Schedule 3.

318. Further, AMMA encourages the Committee to consider the importance of the "exceptional circumstances" carve-out in this proposed new section. By allowing members of the FWC to

[45] Downer EDI Mining–Blasting Services Pty Ltd [2019] FWC 5615 (16 August 2019), p [85].

effectively work outside of the limitations this amendment would apply if it believes there are genuine and exceptional circumstances at hand, these proposed amendments do not water down or remove any employee protections. Rather, they provide the FWC with greater discretion as to when the involvement of organisations and individuals with an otherwise tenuous case to be heard, should be legitimately considered.

4.10. Part 10 – Time limits for determining certain applications

319. Part 10 of Schedule 3 would impose a firm expectation on the FWC to approve enterprise agreements within 21 days of their lodgement. Given the length of time from agreement lodgement to approval has often exceeded several months, the inclusion of this expected timeframe in the FW Act would significantly benefit all users of the system.

320. Importantly, this amendment is more about setting clear expected standards of efficiency on the tribunal and not in any way interfering with or diluting its discretion to take longer to approve an agreement, or not approve an agreement, as it deems necessary.

321. This is clear by the inclusion of the text "as far as practical". Where the FWC finds itself unable to approve an agreement within the 21-day statutory benchmark, the member must provide written notice as to why it was not able to do, including any "exceptional circumstances" that may exist. This requirement would address a related frustration for employers – a lack of communication about the cause behind long approval delays in the past.

Delays in agreement approvals

322. The most common area of grievance for resources and energy employers are the unjustifiable delays in enterprise agreement approvals at the FWC.

323. Despite the collapse in the number of new agreements (see page 20) being submitted to the FWC over recent years, the median time for enterprise agreement approval in 2017-18 was 76 days. In 2019, the FWC stated in its annual report this median approval time had been reduced to 35 days.

324. It is AMMA's understanding this "improvement" was in-part impacted by a large number of very similar construction industry EAs being approved immediately prior to the 2019 Federal Election, along with some changes to the FWC's administration processes.

325. Evidence from several AMMA members also indicates approvals have not improved:

    a) One AMMA member waited 125 days to receive agreement approval, delaying pay rises and other benefits for employees, primarily due to the "unheard" number of undertakings required.

    b) Another AMMA member fought for over 12 months from lodgement to have its enterprise agreement approved by the FWC.

326. This is not just a resources and energy sector problem. In the retail industry, for example, an agreement lodged on 12 December 2018 was ultimately approved on 11 November 2019, following a FWC appeal process. The effect was 32,000 employees waiting 11 months for a pay increase[46].

327. As revisited throughout this chapter of AMMA's submission, a key underlying cause for these delays has been the overly-technical and highly inefficient application of the approvals processes by some members of the FWC. This approach has resulted in a great degree of inconsistency from the FWC as to whether agreements meet statutory criteria such as the

[46] FWC Appeal Decision [2019] FWCFB 7599

BOOT and the 'genuinely agreed' requirement, or require undertakings in order to be approved.

328. It is further ludicrous that the FWC has now taken the approach of categorising agreement applications into 'simple' and 'complex' applications with different timeliness benchmarks. The setting of a deadline of up to four months to process and approve 'complex' enterprise agreement applications is simply unacceptable for AMMA members, many whom are contractors in the highly competitive resources and energy sector and require quick turnaround of in-term agreements to successfully tender for work and keep people in employment.

329. With consideration of supporting workplace cooperation as the economy reboots from the pandemic, it is important to note that employers and employees are facing these roadblocks at the FWC after already having bargained and successfully reached agreement on their terms and conditions of employment.

330. The willingness of employers and employees to work cooperatively and genuinely bargain to reach agreement on issues of mutual value is undermined when the FWC takes so long to approve an agreement its effects are often diminished by the time it takes effect.

Public institutions must be efficient

331. It is important to remember the FWC is a public administrative tribunal, not a court. There are no separation of powers issues with the government of the day expecting efficient use of public funding in its public institutions.

332. The FWC already notes the importance of timeliness to users of the IR system. Its website states the following in relation to application timeframes:

> *How long will it take for my agreement to be approved?*
>
> *The Commission's timeliness benchmarks are intended to set tight performance goals; to an extent they are aspirational. We expect that there will be circumstances where the Commission cannot meet these goals for a variety of reasons, for example, dependent on the complexity of the application. The timeliness benchmarks are as follows.*
>
> *Applications that are compliant at lodgement and can be approved without undertakings:*
>
> - *50% to be finalised within 3 weeks*
> - *100% to be finalised within 8 weeks*
>
> *Applications that require undertakings or cannot be approved, including contested applications and applications requiring a hearing*
>
> - *50% to be finalised within 10 weeks*
> - *100% to be finalised within 16 weeks*

333. Further, the President of the FWC has taken a personal interest in improving the average agreement approval times at the tribunal, stating the following in August 2019:

> *Compared to 2017–18 the median time from lodgement to approval has more than halved, from a median of 76 days to a median of 35 days.*
>
> *There has also been a significant improvement in the number of applications yet to be determined, down from a peak of 2063 in January 2019 to 660 on 9 August.*

The Commission expects performance will continue to improve throughout the 2019–20 financial year, after which the system will stabilise at a point where the following benchmarks will be sustainable. [47]

334. Given the President has publicly spruiked the ability of the FWC to effectively cut its average approval timeframes in half in a 12-month period; and has indicated performance will continue to improve; and there are significantly less agreements being lodged for approval today than only a few years ago – AMMA expects the FWC should have little trouble meeting the new 21-day timeframe for agreement approvals if legislated.

Changing the culture of the FWC

335. In AMMA's view the 21-day timeframe for agreement approval, when considered alongside the revised Objects and amendments to the various approvals processes contained within the IR Reform Bill, are all intended to change the culture of the FWC toward one of "facilitating" enterprise agreements rather than searching for reasons they could be rejected.

336. A common experience of AMMA's members is that agreements seem to be in the hands of the tribunal's public servants for far too long before they eventually end up before a statutorily appointed FWC member. This approach began with the "Enterprise Agreements Triage Pilot" conducted between 2014-2015. The FWC reported at the end of the pilot that:

Using the triage approach yields a situation where agreements are assessed and finalised in a comparable if not faster manner, with further potential for improvement. The approach is certainly more cost efficient, with a potential cost benefit to the FWC of upwards of $1million per year and freeing up Commission Members to concentrate on more substantive work.[48]

337. AMMA and its member disagree with the findings and recommendations of the Triage Process Pilot Review, which was the precursor to what is today commonly referred to as "Member Assist" – a process whereby enterprise agreements are assessed against the statutory criteria by public servant administrators prior to handing over to FWC members for final determination.

338. Firstly, the experience of employers is that outsourcing the important work of FWC members to public servants has not resulted in any improvements to the agreement approvals processes. Rather, it has further exacerbated delays and frustrations with the approvals process and led to a significant increase in the number of undertakings (often with no real practical relevance to the workplace) being required.

339. Secondly, in AMMA's view there is no more substantive work members of the FWC could be doing than giving effect to the genuinely bargained outcomes of employers and employees in the workplace, and at the same time bringing enterprise bargaining in Australia back from near-death, especially in the pandemic recovery environment where cooperation between employers and employees at the workplace level will be more important than ever.

340. It is clear the FWC has undervalued the importance of fast enterprise agreement approvals processes, evidenced by how quick its leadership was to outsource the work of its statutorily appointed tribunal members to virtually anonymous public servants.

341. The FWC should prioritise administrative efficiencies above all else and focus on effectively processing the FW Act's fundamental employment instrument. For these reasons AMMA urges the Committee to support the 21-day timeframe for agreement approvals contained in Part 10.

[47] https://www.fwc.gov.au/about-us/news-and-events/enterprise-agreement-update
[48] INCA Consulting (2015) *Enterprise Agreements Triage: A review of the pilot (link)*

4.11. Part 11 - FWC Functions

342. Part 11 involves inserting a new section 254B into the FW Act that further encourages the FWC to "perform its functions and exercise its powers… in a manner that recognises the outcome of bargaining at the enterprise level".

343. This small insertion is consistent with AMMA's evidence put forward throughout Chapter 4 of this submission. AMMA supports its passage to further entrench culture change and improved performance at the FWC.

4.12. Part 12 – Transfer of Business

344. Part 12 of Schedule 3 amends the 'transfer of business' provisions at s.311 of the FW Act to ensure employment instruments do not transfer for voluntary transfers of staff between associated entities.

345. This is a common sense and long-overdue amendment that would effectively make it much easier for an employee to transfer between associated employment entities. This flexibility is especially important in the context of the COVID-19 economic challenges, where the ability of an employee to transfer to an associated entity, without imposing a penalty on the new employing entity, will likely save people from being made redundant.

What are the 'transfer of business' provisions

346. The FW Act's transfer of business provisions originally dealt with situations where a business was transferred from one national system employer to another. Subsequent changes have meant the provisions now also cover the transfer of all state public sector workers to a national system employer.

347. The key requirement of the transfer of business provisions (which were known as "transmission of business" under the previous legislation) is that in certain circumstances a new owner of a business must, if taking on employees from the old business following a sale or transfer, also take their industrial arrangements into the new business which will continue to cover their employment.

348. Generally, where a transfer of business occurs, transferring employees' industrial instruments transfer to the new enterprise if they are hired within three months of the sale. Additionally, service with the old employer counts as service with the new employer. If that is not the case, the new employer may be obliged to pay the affected employees their accrued entitlements such as annual leave or redundancy.

Problems with the system

349. The original intention of such provisions was to ensure that employment terms and conditions were protected in the event that essentially the same business was transferred to a new owner.

350. However, the current rules are so broad as to extend to situations where it is not readily apparent that a new business is of the same character as the old, rendering this area of regulation an unwarranted one affecting the continued viability of many businesses and the continued employment of private and public sector workers.

351. While there are many issues with the transfer of business provisions, the inability for employees to voluntarily transfer between "associated entities" without effectively taking with them their existing employment conditions and entitlements, was amongst the most obvious flaw.

352. This was first picked up by the 2012 FW Act Review Panel, appointed by the former Labor government, which recommended amending s.311 of the FW Act to:

"To make it clear that when employees, on their own initiative, seek to transfer to a related entity of their current employer, they will be subject to the terms and conditions of employment provided by the new employer."[49]

353. The Productivity Commission, in its 2015 *Inquiry into Australia's workplace relations framework*, focused quite heavily on the various commercial and employment challenges with the FW Act's transfer of business provisions. Included in the Productivity Commission's various observations was that:

> *Protecting employee entitlements may also reduce employment opportunities, not least because the new employer may be reluctant to take on employees under the same conditions that contributed to poor business performance for the old employer…*
>
> *Transfer of business provisions need to balance competing goals. They should not frustrate structural adjustment or limit employment opportunities; but nor should they allow an employer to restructure their business specifically to avoid the application of an industrial instrument (typically an unwanted enterprise agreement).*[50]

354. The Productivity Commission went on to make four proposals for change to the transfer of business laws. The first three are not relevant to this Committee Inquiry, however the last of the recommendations - and by far the least contentious given it revolves around employee choice – relates directly to the amendment within the IR Reform Bill:

> *Recommendation 26.4*
>
> *The Australian Government should amend the* Fair Work Act 2009 (Cth) *so that when employees, on their own initiative, seek to transfer to a related entity of their current employer, they will be subject to the terms and conditions of employment provided by the new employer.*[51]

The proposed change is sensible

355. AMMA notes this is not the first time the Coalition Government has attempted to fix this well-known problem. The original *Fair Work Amendment Bill 2014* included an amendment to:

> *Provide that a transferring employee's old industrial instrument ceases to apply to them in their new employment with a "related entity" of the old employer if the transfer was at employees' own initiative. This would apply whether the old employer was a private sector company or a state public sector organisation considered a "related entity" of the new employer as defined by the Corporations Act 2001.*[52]

356. This provision was removed by the Senate from the final version of the legislation that passed both Houses of Parliament on 11 November 2015.

357. The change proposed in Part 12 of Schedule 3 therefore:

a) Is consistent with a recommendation of Labor's own FW Act review panel in 2012;

b) Is consistent with a recommendation of the Productivity Commission in 2015; and

c) Would give effect to a sensible amendment that was removed from the 2014 FW Amendment Act.

358. Most importantly, the amendment will provide much-needed flexibility for employees and employers in the pandemic recovery environment. It will facilitate employees' transfer between associated employment entities, on their own initiative, without providing a significant

[49] 2012 *Towards more productive and equitable workplaces (An evaluation of the Fair Work Legislation)* - link
[50] Productivity Commission, final report, 2015 Inquiry into Australia's workplace relations framework
[51] Productivity Commission, final report, 2015 Inquiry into Australia's workplace relations framework
[52] AMMA member update on the FW Amendment Bill 2014 (link)

disincentive for the new employer by burdening them with legacy employment terms and entitlements.

359. AMMA recommends the Committee support the amendment at Part 12.

4.13. Part 13 – Cessation of Instruments

360. Part 13 of Schedule 3 will deliver on a longstanding campaign priority for trade unions and the Australian Labor Party by abolishing all pre-FW Act industrial instruments in July 2022.

361. The Government estimates between 300,000 and 450,000 employees in Australia are currently employed under pre-FW Act legacy agreements, such as Australian Workplace Agreements (AWAs) made under the 1996–2009 WR Act, and 'enterprise flexibility agreements' which were first available under the 1988 laws.

362. Such agreements have continued in operation by virtue of not having been replaced or terminated. In some cases employers may have increased pay but not sought to terminate the previous agreement covering their enterprise(s) or employees. This includes agreements from previous workplace relations legislation, made under the various iterations of the No Disadvantage Test in place at that time.

The end of "Zombie Agreements"

363. It appears the key driver for sunsetting all pre-FW Act instruments in July 2022 is the longstanding union campaign against them. While the term "zombie agreements" was prominent in the ACTU's 2019 *Change the Rules* campaign, examples exist of union campaigns in this area from prior.

364. The below is an extract from the Australian Services Union's (ASU) submission to the 2017 Inquiry into Corporate Avoidance of the Fair Work Act:

> *In the course of our organising and campaigning activities the ASU has come across many examples of nominally expired pre-reform collective agreements (commonly referred to within the industry as 'Zombie Agreements') still covering workers.*
>
> *For example in the private sector the contract call centre sector is an industry where pre-reform agreements prevail. These Pre-reform agreements have the effect of denying workers important employment conditions such as penalty rates, overtime and public holiday rates in the relevant Modern Award. By never renewing these pre-reform agreements, employers are denying their workforce the higher safety net available under the Fair Work Act and unfairly undercutting their competitors.*[53]

AMMA's position

365. In principle, AMMA does not agree there is a problem with pre-FW Act agreements that needs addressing – at least in the resources and energy industry where such arrangements are almost always at multiple times the award rates. For example, some legacy AWA's will involve long-serving employees enjoying wages and conditions far exceeding the award safety net, and who would otherwise be perfectly happy to continue those terms and conditions.

366. The union and Labor campaigns against "zombie agreements" also seems to ignore s225 of the FW Act, which already allows an employee or union covered by any agreement to apply to terminate it after its nominal expiry date. In AMMA's view, it is likely the ACTU/ALP policy is motivated by cases where unions lack sufficient employee support to agitate for a new agreement.

[53] ASU (2017) Submission to Senate Committee: Corporate Avoidance of the Fair Work Act

367. On balance, however, AMMA does not oppose the amendment contained in Part 13 of the IR Reform Bill. A small number of resources and energy employers may be affected, however in AMMA's view any with pre-FW instruments have prepared well for an eventual transition away from these legacy arrangements.

4.14. How the Committee Should Proceed

368. None of these changes represent a "silver bullet" fix to the longstanding issues employers and employees have experienced with enterprise bargaining under the FW Act. Rather, it is the cumulative effect of this package of amendments that would significantly reduce the cost and complexities of engaging in enterprise bargaining.

369. For this reason, AMMA strongly encourages the Committee to view the amendments within Schedule 3 as an interconnected package of improvements, the effects of which must be considered as a whole.

370. For example, amendments allowing the FWC to apply the better off overall test (Part 5) more reasonably would be far less effective in achieving faster and more practical approvals of enterprise agreements, if the amendments inserting reasonableness into the pre-approval requirements were not made at the same time (Part 3).

371. Similarly, the amendments designed to change the culture of the FWC to one being more facilitative to the timely approval of enterprise agreements, and putting into effect the views of the parties to bargaining (Parts 1, 10 and 11) are all closely related.

372. Further, it would be disingenuous to claim or suggest that the package of amendments within Schedule 3 overtly favour employers, employees, or their respective representatives. Parts 8 and 13 would give effect to longstanding policy requests of unions (and featured in the ACTU's *Change the Rules* campaign), and Part 9 may disadvantage only those unions which have made a business model out of disrupting and delaying approvals of enterprise agreement to which they were not a party.

373. However, as a whole the package of amendments in Schedule 3 is well balanced and would overwhelmingly benefit employers and employees equally.

374. The amendments within Schedule 3 of the IR Reform Bill are clearly directed at having the FW Act and the functions of the FWC refocused on giving timely effect to bargaining outcomes between employers and employees at the workplace level, where all statutory requirements have been met, and there are no other reasons to do so.

375. AMMA submits that the Committee should recommend they pass in full without any further amendments.

5. SCHEDULE 4 - GREENFIELDS AGREEMENTS

376. Schedule 4 of the IR Reform Bill seeks to amend the greenfields agreements provisions at ss.186-187 of the FW Act to facilitate agreements that can cover the full length of the construction phase for new 'major projects'.

377. Rather than being restricted to the four-year maximum duration that currently applies to both enterprise agreements and all greenfields agreements, the amendments would allow greenfields agreement terms of up to eight years for 'major projects' that meet the following eligibility:

    a) A total capital expenditure of at least $500 million; or

    b) For projects of between $250 million and $500 million, if the responsible Minister makes a declaration of eligibility based on a range of factors including the project's national significance and expected job creation.

378. The purpose of these amendments is to provide additional industrial relations certainty to major projects in the infrastructure, and resources and energy industries, where due to their massive scale the greenfields construction works often exceed four years.

379. Most importantly, the amendments do not change any other aspects of greenfields agreements making under the FW Act. If the changes are passed into law, greenfields agreements would still need to be reached with a union or multiple unions and approved via the current criteria by the FWC.

380. Multiple reviews of the operation and competitiveness of the FW Act have identified the merit in facilitating greenfields agreement to cover the entire construction phase of major projects. The Australian Government also acknowledged the greenfields provisions needed reform as part of its industrial relations consultation being undertaken prior to the pandemic.

381. AMMA has long advocated for this critical reform to provide certainty around cost and timing of world-class resources and energy projects which can take much longer than four years to complete. It is a sensible and long overdue reform, critical to securing the next wave of resources and energy project investment.

382. As detailed in Chapter 2 (see pages 6-7), Australia's resources and energy industry is on the verge of a new growth cycle, with 335 new major projects worth approximately $334 billion in its investment pipeline.

383. AMMA has estimated that 98 projects worth $83.8 billion in capital value is advanced and likely to proceed, bringing an estimated 24,400 new operational jobs and an estimated 50,000 new construction, engineering and flow-on supply sector jobs.

384. This means there are 237 major projects, worth about $250 billion, in earlier stages of feasibility. The employment potential of this more speculative investment pipeline would easily exceed 100,000 jobs. Providing a platform of greater industrial stability to the international investors who make the decisions on where to allocate such capital, would significantly increase Australia's chances at securing a large portion of this investment potential.

5.1. About greenfields agreements

385. "Greenfield" is a term used for a brand-new project or enterprise that does not have any precedents or constraints imposed by prior work. Greenfields projects are entirely new businesses, projects, activities or undertakings for an employer or a group of employers. The term is often used in the construction and resources industries to refer to the building of new assets and infrastructure where none have been before.

386. From an industrial relations perspective, a greenfields operation is one that has not yet engaged employees and for which no workplace agreement is in place. A greenfields agreement is a unique type of industrial agreement negotiated before an enterprise starts and at a point where employees are yet to be engaged.

387. As there are no employees to negotiate with or to approve an agreement, greenfields agreements are an exception to the rule that enterprise agreements must be approved by the employees who will be covered by them. It is for this reason that greenfields agreements must be made between the prospective employer and a union or unions that are eligible to represent a majority of employees who will be covered by the agreement.

388. Under the current framework, enterprise agreements, including greenfields agreements, have a maximum duration of four years following their approval by the FWC. The life of enterprise agreements is 'nominal' in the sense that once the expiry date is passed, the agreement continues to exist until it is terminated (in rare circumstances), or more usually, replaced by another agreement.

389. Due to their unique nature, greenfields agreements are regulated separately in Australia's industrial relations system and are different to all other forms of agreements made with employees. A greenfields agreement is effectively a pre-requisite or precondition to the creation of new workplaces and for the jobs and economic benefits these major projects deliver.

5.2. Greenfields agreements in the resources and energy sector

Greenfields agreements and the investment cycle

390. Greenfields agreements are commonplace in the resources and energy sector where new projects are typically undertaken on greenfields sites. Typically, the project owner will engage a primary engineering, procurement and construction management (EPCM) provider early in the feasibility stage to collaborate on the plan and estimated costs for the construction of the project.

391. The EPCM provider – also known as the 'head contractor' – will then negotiate a project greenfields agreement with a union or, more commonly, multiple unions, to cover the work that would be undertaken during its construction. This 'head contractor' greenfields agreement is typically used as guidance for various other contractors involved in the project throughout the various stages of its construction, which often will negotiate their own greenfields agreements with union/s unless an existing enterprise agreement can be applied to cover the work they will undertake.

392. To provide confidence to investors and increase the probability of the project receiving final investment decision, it is typically necessary for the EPCM provider to have the primary project greenfields agreement in place months, and sometimes years, prior to project construction work commencing.

393. This highlights a critically important function of greenfields agreements for the Australian resources and energy industry - to ensure settled industrial arrangements are in place before work begins, thus providing certainty as to labour costs (wages, entitlements, rosters, shift allowances etc) and protection against the threat of industrial action for the period in which that greenfields agreement is in place prior to its nominal expiry date.

The clock starts ticking

394. While establishing a greenfields agreement well prior to the start of construction is necessary to secure final investment approval, the fact that all agreements are immediately in-term

following their approval by the FWC creates a situation whereby the 'clock starts ticking' on the effective life of a major project greenfields agreement.

395. With final approvals and early construction works (such as access roads, clearing of land etc) required before primary construction workforce can commence on-site, it is common for head contracts to have an effective greenfields agreement life of three years or less.

396. This creates a significant problem for major resources and energy projects, which often exceed four years' total construction time, and very often exceed the three years (or less) period in which the initial greenfields agreement/s may be effectively in-term. Consider, for example, that the major LNG projects built during Australia's previous investment wave took an average of seven years to build and commission.

397. It is similarly very common to see enterprise agreements negotiated and approved early in a greenfields investment cycle to then expire within the final year or two of a project, often when critical completion and hook-up and commission works is taking place just in time to meet tight project completion timeframes. The impact this can have on destabilising a project and increasing labour costs in the final stages can, and has proven to be, highly unpredictable and disastrous for investor confidence.

Threat of mid-project industrial action

398. The most damaging aspect of the current greenfields agreement framework is that it exposes major resources and energy projects to the threat of mid-project industrial action. Given greenfields agreements will typically reach their nominal expiry dates about three years into the project construction, almost all resources and energy projects of above $500 million capital value (and many exceeding $250 million) will experience industrial disruption, uncertainty and the threat of industrial action, irrespective of whether the total build timeframe is four, five, six or seven years.

399. The absence of a mechanism enabling greenfields agreements to cover the entire duration of project construction has already exposed some of Australia's most nationally significant major resources and energy developments to significant industrial disruption, often at critical points in their completion schedule. Examples include:

    a) In 2015, with work 87% completed, employees on the $55 billion Gorgon LNG Project gave notice of their intent to take protected industrial action unless their new roster demands were met.

    b) In 2017, with less than 12 months remaining, the $34 billion Ichthys LNG Project was threatened with industrial action by unions campaigning to reduce the construction roster.

    c) In 2014, the three LNG processing plants being built on Queensland's Curtis Island were simultaneously threatened with industrial action until the contractor agreed to a 13% pay increase for construction employees already earning in excess of $160,000 per annum.

    d) In 2010, the $15 billion Pluto LNG project was subject to protected industrial action being taken by subcontractor employees that cost the operator $3.5 million in damages per day.

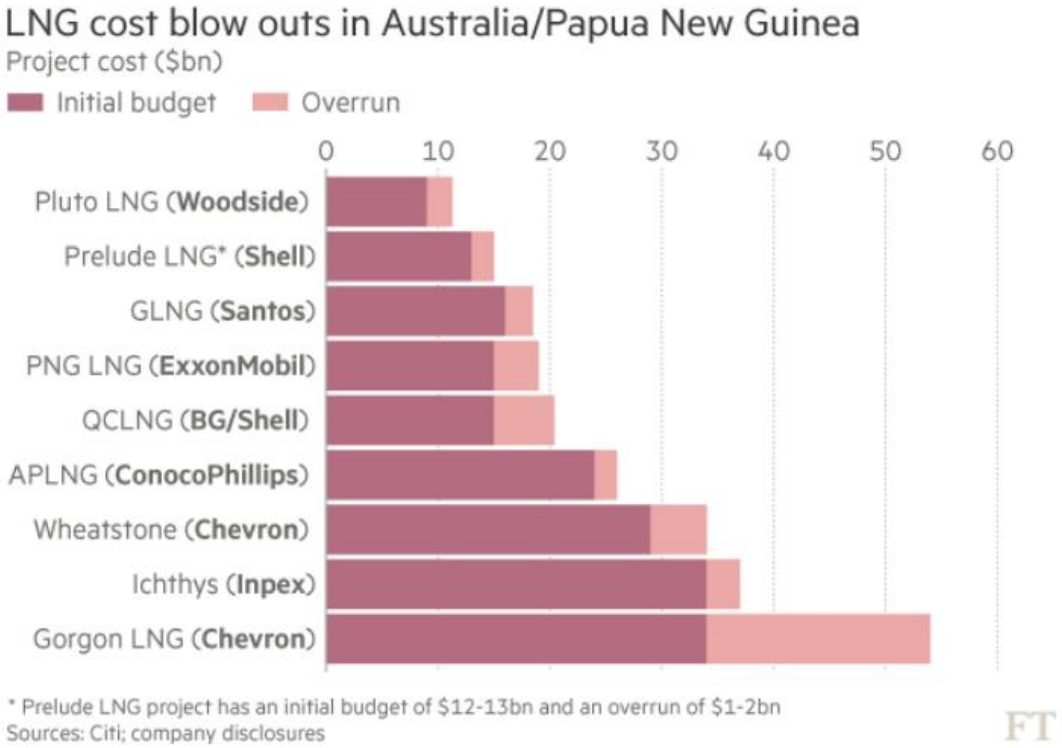
    Note: These examples are provided in greater detail in AMMA's submission to the A-G's discussion paper on Project Life Agreements, available in full online.

400. By allowing multi-billion-dollar capital investment projects to be effectively held to ransom midway through their construction, the current greenfields agreements framework has significant contributed to cost blow-outs and schedule overruns.

401. With multi-billion-dollar export deals at stake and their investment being placed at risk, the system effectively forces project owners to accept inflated and uncompetitive union demands or risk further delays to project approval.[54] Many resources employers have reported they have agreed in the past to certain conditions just to obtain a replacement agreement and ensure that the project progresses to construction commencement.

402. This includes agreeing to demands well in excess of 'average increases', even taking into consideration reasonable adjustments for the work conditions and activities, in order to avoid delays and additional costs in the completion of a project[55]. Not only does this have the potential to result in higher labour costs for individual projects, but such an environment can entrench non-competitive labour arrangements including wages and conditions across the industry that are not relative to the market conditions of the day[56].

403. This was evident in the most recent phase of investment which saw several LNG mega-projects suffer significant cost overruns[57].



404. While not the only factor, these damaging impacts of Australia's industrial relations framework is widely considered to have contributed to the sudden decline in the nation's attractiveness as a place to invest and build major resources and energy projects.

405. In the 12 months to April 2013, Australia lost around $150 billion worth of resources and energy investment when projects slated for development were suddenly cancelled or deferred indefinitely. By April 2018, committed project investment had dropped from $268 billion to just $30 billion[58].

406. It is no coincidence that the below listed projects where all cancelled or deferred around the time there was significant commentary (locally and abroad) about the industrial relations issues experienced at existing major projects, leading to significant cost and timeframe overruns.

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[54] Reid, T. (2018) *A New Horizon, Guiding Principles for the Future of Work*, AMMA
[55] KPMG (2015) *Workplace Relations and the Competitiveness of the Australian Resources Sector*
[56] KPMG (2015) *Workplace Relations and the Competitiveness of the Australian Resources Sector*
[57] Institute for Energy Economics and Financial Analysis, Australia's Export LNG Plants at Gladstone: The Risks Mount.
[58] Historic data available via the Office of the Chief Economist's *Resources and Energy Quarterly* series

Cancelled or Deferred Project	Company	Estimated Value ($b)
Browse LNG	Woodside	36
Outer Harbour	BHP Billiton	30
Olympic Dam Expansion	BHP Billiton	20
Sunrise LNG	Woodside	12
Abbot Point T4-9	NQBP and partners	11
West Pilbara Iron Ore	Aquila Resources	7.4
Wandoan coal mine	Xstrata	6.0
Kooragang Island Coal Terminal 4	PWCS	5.0
Anketell Point Port	Fortescue / Aquila	4.0
Cape Lambert Magnetite project	MCC Mining	3.7
Southdown Magnetite Project	Grange Resources	2.9
Yarwun Coal Terminal	Metro Coal	2.2
Mount Pleasant coal mine	Rio Tinto	2.0
Weld Range iron ore project	Sinosteel Midwest	2.0
Balaclava Island coal terminal	Xstrata	1.5
Fisherman's Landing LNG	LNG Limited	1.1
Surat Basin Rail	Aurizon / Xstrata	1.0
Wilkie Creek coal mine	Peabody Energy	1.0
Total		***149***

407. If Australia is to effectively compete and secure the next wave of major resources and energy project investment, the system for making greenfields agreements must avoid situations where the threat of mid-project industrial action can significantly blow-out the forecasted budge and completion schedule.

408. Such an outcome is surely not the intended purpose of the greenfields agreement making provisions and is clearly not in the national interest.

5.3. Benefits of the proposed amendments

409. The effects of the IR Reform Bill's amendments to greenfields agreements are simple:

    a) Allow major projects with a capital value equal to or exceeding $500 million to utilise greenfields agreements of up to eight years, when agreed by employers and unions; and

    b) Extend eligibility to major projects of between $250 million and $500 million capital value, upon special application to the Minister, who will determine the application based on factors including the national interest, economic significant, and job creation.

410. This new system would deliver increased confidence to major project investors and significantly increase the prospects of new projects receiving final approval by:

    a) providing certainty over total expected labour costs which comprise a significant portion of the total project development budget;

    b) providing protection for investments, often of multi-billions of dollars, from the threat of disruption and delays arising from the potential for mid-project industrial action;

c) providing commodity customers with greater certainty on first cargo of resources delivery, thus facilitating the early reaching of supply contracts necessary for final investment approvals;

d) providing greater flexibility for employers to negotiate greenfields agreements early in the feasibility and approvals stages, delivering certainty and stability to investors as early as possible without unnecessary time pressures to commence construction works; and

e) encouraging greater cooperation between employers, employees and employee representatives on long-term, high-paid major project employment arrangements.

411. AMMA urges the Committee, when considering the ethics of extending the maximum duration for major project greenfields agreement to eight years, to carefully note the following:

a) The characteristics of major project workforces mean they are among the least vulnerable and highest earning employees in the country;

b) All greenfields agreements, of any type of duration, must be negotiated with and agreed upon by trade unions to be approved; and

c) The resources and energy industry is making significant in-roads towards improving the mental health and wellbeing of major project workforces.

412. Evidence on each of these critical points is provided below.

Major project employees are very well paid, and highly mobile

413. The Australian resources and energy industry is already the highest paying in the country, with an average weekly wage in excess of $2,500. It is very arguable that the multilayered safety net of the FW Act, designed to protect vulnerable groups of Australian workers, has very little application or relevance to resources and energy workers.

414. This is particularly the case for employees involved in the construction of new major resources and energy projects, where exorbitant wages exceed award rates and nationally averages many times over:

a) A labourer on a major resources project will typically earn around $114,000 to $120,000 per annum, or over $2200 per week. This is 260% above the on-site building award rate[59] ($821 per week or $42,700 annually) and 280% greater than the average labourer wage across all industries ($782 per week or $40,700 annually)[60].

b) A tradesperson (i.e. electrician) will typically earn $120,000-$160,000 per annum, or over $2300 per week, on a major resources project. This is 230% above the award ($1,009 per week or $52,500 annually)[61] and 180% greater than the average wage for technicians and trades workers across all industries ($1,266 per week or $65,800)[62].

415. A comparison of these rates compared to major project earnings is illustrated by the below annualised earnings for a spread of classifications on a selection of major resources and energy projects.

a) Bechtel Construction (Australia) Pty Ltd Wheatstone Project Agreement 2013

- $118,046 per annum for labourers

[59] Pay Guide - Building and Construction General On-site Award 2010 (Level 1 (CW/ECW 1 (level d))) fwo.gov.au
[60] Australian Bureau of Statistics, Characteristics of Employment, Australia, Table 4, August 2018 abs.gov.au
[61] Pay Guide - Building and Construction General On-site Award 2010, (Level 9 (ECW 9)) fwo.go.au
[62] Australian Bureau of Statistics, Characteristics of Employment, Australia, Table 4, August 2018 abs.gov.au

- $129,480 per annum for machine and crane operators
- $131,680 per annum for electrical tradespersons
- $139,228 per annum for tower crane operators

b) Workpac Pty Ltd Roy Hill AWU Greenfields Agreement 2014

- $97,356 per annum for riggers/scaffolders
- $105,868 per annum for carpenters
- $110,459 per annum for electrical tradespersons
- $125,104 per annum for crane operators

c) Leighton Contractors Pty Ltd – Gorgon Project – Barrow Island Enterprise Agreement 2015

- $114,252 per annum for labourers
- $121,900 per annum for tradespersons
- $122,408 per annum for machine and crane operators
- $137,015 per annum for tower crane operator

d) EnMerch Pty Ltd Ichthys Onshore Construction Enterprise Agreement 2019

- $114,097 per annum for labourers
- $116,251 per annum for forklift operator
- $118,445 per annum for rigger/scaffolders
- $120,644 per annum for tradespersons

416. Clearly there is no risk to Australian workers that facilitating extended greenfields agreements would result in people being paid below the FW Act's safety net. Given the enormous chasm between award rates and major resources greenfields project rates, there is simply no conceivable way that any length of greenfields agreement would see employees eventually become at risk of being paid under award minimums.

417. Further, it is important to note that major project employees are highly mobile. While the proposed amendments would provide industrial certainty for major projects for up to eight years, this does not mean a large proportion of the workforce would be employed at that project for the full length of the greenfields agreement.

418. Due to high labour mobility and the specialised phases of major project engineering and construction, it would be rare for any individuals to be employed under a greenfields agreement for longer than four to five years. Any attempts to characterise extended greenfields agreements as a mechanism to "trap" employees for an unreasonable or excessive number of years, would be disingenuous and ignorant of the phased approach to major project construction.

419. The real risk to major project employees is not longer-term agreements, but rather Australia failing to secure the potential new major resources and energy projects in its investment pipeline, foregoing the opportunity to provide construction employees with the highest paid job opportunities in the country.

All greenfields agreement terms must be reached with unions

420. A second key consideration for the Committee is that greenfields agreements can only be approved when they are reached with a union or unions eligible to cover employees on the project.

421. While alternative options where available to employers under previous workplace laws, in 2009 the FW Act granted unions, for the first time in Australia's history, a legal monopoly or veto right over greenfields agreements terms. This new and unprecedented power was actively exploited by unions during the tail-end of the previous resources investment boom, leading to the excessive costs and delays detailed on pages 51-53).

422. Under the FW Act, the only real choice for employers seeking to negotiate the necessary greenfields agreements for new project approval is to agree to unions' wage and conditions demands. The alternative is to risk huge costs associated with delays to commencing construction.

423. The capacity to hold out in their negotiations has provided unions with excessive bargaining power. Unlike other enterprise bargaining scenarios, where protracted bargaining or union intransigence would result in employees being delayed pay rises, there is little to lose for unions playing 'hard ball' with their wages and conditions claims when negotiating a greenfields agreement.

424. For this reason, it is truly bizarre that some unions that have a mandated role in greenfields agreement negotiations in the resources and energy sector, and will effectively have a veto right over any greenfields terms in the future, are already campaigning against the proposed greenfields amendments on the basis of removing bargaining rights.

425. The mandated role for unions in greenfields agreement making should further provide confidence to the Committee that employee rights will not be diluted in any way through these amendments.

Mental health and wellbeing

426. AMMA notes that during the IR Working Groups and in subsequent media commentary, some employee representative groups have expressed a desire to address mental health and wellbeing issues that arose during the past resources and energy major project construction phase, and that have been associated with fly-in, fly-out (FIFO) work more generally.

427. Given the unique nature of the industry, resources and energy employers recognise that managing workforce mental health and wellness is a critically important, ongoing challenge that, alongside physical health and safety, must be the industry's highest priority. Industry leaders recognise they have a shared commitment to physical and psychological safety are playing a pivotal role in contributing and sharing best practice on this important issue.

428. As the leading voice on workplace matters AMMA is working with a wide number of industry leaders, mental health and wellness experts and workplace professionals to develop a suite of initiatives to support its members in building capability and supporting mentally healthy workplaces. Such initiatives include:

    a) The *Resources and Energy Industry Mental Health Advisory Board* (MHAB).

       Comprised of members across various functions and levels of leadership, the MHAB provides a broad representation of the skills, experiences, and insights regarding workplace mental health in the resources and energy industry. The MHAB assists resources and energy employers to promote mentally healthy workplaces and to reduce the stigma of mental health in the industry and Australian community.

It works towards this vision by assisting in development of practical programs to be implemented in resources and energy workplaces, and providing updates to the broader employer base on best practice prevention, data trends and other key information.

b) AMMA delivers the *Resources and Energy Mental Health Training* program to members nationally. The program was designed by a variety of resources and energy employers and workplace mental health experts for the industry. It provides awareness and practical application of workplace mental health specific to Australia's resources and energy industry.

c) AMMA is presently coordinating an industry-wide research program to evaluate the impact of COVID-19 on the mental health of employees and leaders in the resources and energy industry. The research will inform the development of industry tailored interventions which maximise organisational productivity, improve the wellbeing of leaders and employees and assist in the recovery from the impacts of COVID-19.

429. Further, AMMA is aware of many other mental health initiatives and programs undertaken in collaboration by other employer groups, industry associations and trade unions, including:

a) Representatives from ACCI, the ACTU and Ai Group work alongside Commonwealth, State and Territory representatives as members of Safe Work Australia (SWA). SWA provides significant resources to help employers create mentally safe and healthy workplaces, with consideration currently being given to the development of a model code of practice on Psychological health and safety.

b) A large number of industry associations, trade unions and direct employers support and utilise the various initiatives of *Mates in Mining* and *Mates in Construction.*

c) The ACA, in association with the NSW and Victorian Governments, has established a Construction Industry Culture Taskforce providing a forum for governments and industry to work together to address the culture challenges impacting industry.

d) Ai Group recently commissioned Griffith University to undertake research and prepare a report on the Triggers, Facilitators and Barriers to Implementing Mental Health Initiatives in Australian Businesses.

430. While industry leaders understand that supporting the mental health and wellbeing of their workforces is an ongoing, continuous priority, the above demonstrates the resources and industry is taking these issues very seriously and is already working on a number of key initiatives that address the concerns of employee representatives in this space.

431. It is AMMA's strong view that any discussions about how to further improve mental health outcomes in the industry occurs within the context of these industry, union and government driven programs, and in relation to state workplace health and safety laws.

432. Attempting to somehow deal with highly complex health and safety matters in federal industrial relations law – particularly an area as specialised as greenfields agreement making – would be very ineffective and unadvisable.

5.4. How the Committee should proceed

433. Based on the justification and evidence within this submission, including the enormous job-creating opportunities within Australia's major project investment pipeline, AMMA recommends the Committee supports the amendments contained with Schedule 4 of the IR Reform Bill.

6. FINAL AMMA RECOMMENDATIONS

435. AMMA recommends the Australian Senate pass the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020,* with minor amendments listed below.

436. In its final report, AMMA urges the Senate Education and Employment Legislation Committee to consider the enormous national value that will come from supporting the Australian resources and energy sector in securing additional major projects investment.

437. AMMA would be pleased to provide further evidence and submissions should the Committee require it.

Schedule 1 – Casual employees

438. the Committee should recommend the passage of Schedule 1 of the IR Reform Bill with the following minor text amendments regarding the casual loading offset provisions:

    a) new section 545A(1)(a) should make reference to "*a person who is or has been employed*" to ensure past employees are captured in its application.

    b) new section 545A(1)(d) should be amended to read:

    "the person (or another person for the benefit of the person) makes a claim for, or to be paid an amount for, one or more of the 28 relevant entitlements with respect to the employment period."

Schedule 3 – Enterprise Agreements etc

439. The Committee should recommend the passage of Schedule 3 of the IR Reform Bill with no amendments.

Schedule 4 – Greenfields Agreements

440. The Committee should recommend the passage of Schedule 4 of the IR Reform Bill with no amendments.

Other parts of the Bill

441. AMMA refers to and endorses the evidence of the Australian Chamber of Commerce and Industry for the parts of the Bill not referenced in this submission, including:

    a) Schedule 5 – Compliance and enforcement

    Underpayments cases are extremely rare in the Australian resources and energy industry, which has long been Australia's highest paying, and in which average wages well exceed award minimums.

    However AMMA recognises and draws the Committee's attention to concerns from the broader business community about the measures contained within Schedule 5.

    b) Schedule 6 – Fair Work Commission

    AMMA supports amendments that would ensure court and tribunal resources are not wasted on vexatious or wrongly conceived litigation.