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Submission to the Senate Education and Employment Committees about the provisions of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020

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Introduction

JobWatch Inc (**JobWatch**) welcomes the Senate Education and Employment Committee's inquiry into the provisions of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (**the Bill**).

About JobWatch

1. JobWatch is an employment rights, not-for-profit community legal centre. We are committed to improving the lives of workers, particularly the most vulnerable and disadvantaged.

2. JobWatch is funded by the Office of the Fair Work Ombudsman, Victoria Legal Aid and the Victorian Government. We are a member of Community Legal Centres Australia and the Federation of Community Legal Centres (Victoria).

3. JobWatch was established in 1980 and is the only service of its type in Victoria, Queensland and Tasmania. Our centre provides the following services:

a) Tailored information and referrals to workers from Victoria, Queensland and Tasmania, via a free and confidential telephone information service (**TIS**);

b) Community legal education, through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other relevant stakeholders;

c) Legal advice and representation for vulnerable and disadvantaged workers across all employment law jurisdictions in Victoria; and

d) Law reform work and advocacy aimed at promoting workplace justice and equity for all workers.

4. Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our TIS. To date we have collected more than 210,000 caller records, with each record usually canvassing multiple workplace problems, such as contract negotiation, discrimination, bullying and unfair dismissal. Our database allows us to follow trends and report on our callers' experiences, including the workplace problems they face and what remedies, if any, they may have available at any given time across State and Federal laws.

5. JobWatch currently assists approximately 12,000 callers to the TIS per year. The vast majority of our callers are not union members and cannot afford to get legal assistance from a private lawyer. In order to become clients of the legal practice, workers must have an employment law matter that has legal merit and their cases must satisfy the requirements of our funding agreements (which typically focus on client vulnerability and public interest issues).

Case studies provided in this submission

6. This submission is based on the experiences of callers to JobWatch's TIS and clients of JobWatch's legal practice. The case studies are already de-identified. Please note that the facts described in the case studies are not findings of a court or tribunal but rather they represent what our callers have told us on the TIS or what our clients have instructed the JobWatch lawyers.

Summary of our recommendations

Casual employees

I. Recommendation 1 [see para 11]: that courts not be statutorily barred from considering the subsequent conduct of either party, beyond the initial offer of employment, when considering claims for unpaid entitlements.

II. Recommendation 2 [see para 12]: that offers of employment be required to be in writing and to include the following:
- whether the employment is casual or permanent;
- the applicable pay rates; and
- in the case of permanent employment, the number and spread of hours per pay cycle.

III. Recommendation 3 [see para 13]: that the employer obligations with respect to casual conversion be made into civil remedy provisions.

IV. Recommendation 4 [see para 14]: that the right be inalienable for either party to refer a dispute about casual conversion to the FWC if discussions at the workplace level do not resolve the issue.

V. Recommendation 5 [see para 15]: that CLC lawyers be exempted from having to seek permission to represent clients in the FWC.

VI. Recommendation 6 [see para 17]: that employers be required to give new casual employees the Casual Employment Information Statement and the Fair Work Information Statement before the employment starts.

VII. Recommendation 7 [see para 18]: that the requirements for employers to give new employees the Casual Employment Information Statement and/or the Fair Work Information Statement be civil remedy provisions.

VIII. Recommendation 8 [see para 19]: that the small claim jurisdiction be amended so as to allow for penalties and/or compensation for failure of employers to provide the Casual Employment Information Statement and/or the Fair Work Information Statement.

Simplified additional hours agreements (flexible work directions)

IX. Recommendation 9 [see para 23]: that a positive duty be placed on employers to notify their existing employees that the new provisions do not apply retrospectively.

X. Recommendation 10 [see para 28]: that Form 13A (Application for the Commission to deal with a JobKeeper dispute) for the FWC be modified and used for disputes concerning flexible work directions.

Enterprise agreements

XI. Recommendation 11 [para 33]: that any explanation of the terms of the agreement and their effect must take into account the nature of the employees to be covered by the enterprise agreement and be tailored to ensure, as far as reasonably possible, that the employees understand the terms of the agreement and their effect.

XII. Recommendation 12 [para 36]: that the FWC have the power to review an enterprise agreement where the employer's business operations have substantially changed after the approval of an enterprise agreement.

XIII. Recommendation 13 [para 38]: that no extra weight should be given to the views of the parties on the question of whether an enterprise agreement passes the BOOT.

XIV. Recommendation 14 [para 39]: that non-monetary benefits in an enterprise agreement should not be weighed equally with financial benefits when comparing the agreement with the relevant award but rather the FWC should maintain its discretion when assessing the value of non-monetary benefits.

XV. Recommendation 15 [para 45]: that any casual employee be able to vote in relation to a proposed enterprise agreement if they performed work for the employer in the 6 months prior to the date of the vote and they are still employed by the employer at the relevant time.

XVI. Recommendation 16 [para 49]: that enterprise agreements continue to transfer with employees transferring between associated entities unless the FWC orders otherwise.

Compliance and enforcement

XVII. Recommendation 17 [para 52]: that the amounts able to be pursued in the small claims jurisdiction be further increased to $100,000.

XVIII. Recommendation 18 [para 53]: that conciliation conferences be automatically listed within a reasonably short timeframe after the initial Form 5 Application is filed.

The Fair Work Commission

XIX. Recommendation 19 [para 57]: that the proposed s587A should not be added.

XX. Recommendation 20 [para 61]: that permission to be represented should not normally be granted to respondents who are capable of representing themselves.

XXI. Recommendation 21 [para 61]: that more resources be allocated to the FWC to enable it to better accommodate self-represented applicants.

XXII. Recommendation 22 [para 61]: that measures be introduced to penalise uncooperative respondents.

XXIII. Recommendation 23 [para 62]: that the proposed repeal of s603 of the FW Act not be added.

Other statutory recommendations that should be considered

XXIV. Recommendation 24 [para 63(i)]: that there should be a statutory definition of employee with a rebuttable presumption in favour of the employment relationship.

XXV. Recommendation 25 [para 63(ii)]: that the FW Act should specify that it applies to workers (or employees, as the case may be) regardless of citizenship or visa status.

XXVI. Recommendation 26 [para 63(iii)]: that the FW Act should strengthen the prohibition against unpaid internships which are not done as part of an accredited course.

XXVII. Recommendation 27 [para 63 (iv)]: that Section 351 of the FW Act (dealing with discrimination) should be amended so as to protect the additional grounds of "visa

status," "person experiencing family or violence" and "irrelevant criminal record."

XXVIII. Recommendation 28 [para 63(v)]: that The FW Act should make sexual harassment in the workplace unlawful and this should be a civil remedy provision.

XXIX. Recommendation 29 [para 63(vi)]: The FWC should be given the power to determine questions of what is reasonable during the employment with respect to maximum weekly hours, requests for flexible working arrangements, eligible community service activity and the entitlement to be absent on a public holiday.

XXX. Recommendation 30 [para 63(vii)]: The 21-day time limit for both unfair dismissal and general protection (dismissal) applications should be extended to at least 3 months.

XXXI. Recommendation 31 [para 63(viii)]: that there should be a statutory obligation on employers to give written reasons why a contract should be offered on a fixed term basis, and fixed-term employees should be deemed to be permanent (full or part-time) after a certain number of contract renewals.

XXXII. Recommendation 32 [para 63(ix)]: that Joint employment should be recognised in the FW Act, particularly in the context of certain labour hire situations.

XXXIII. Recommendation 33 [para 63(x)]: that additional changes that should be made to the small claims jurisdiction, including being able to bring proceedings against accessories and making penalties available.

XXXIV. Recommendation 34 [para 63(xi)]: that the FCCA's service rules should be improved and simplified by, for example, allowing for service to be effected by text messages, emails and messages via other social media platforms.

XXXV. Recommendation 35 [para 63(xii)]: that the FW Act should provide for a simplified system of enforcing orders of the FCCA.

<u>Non-statutory recommendations that should be considered</u>

XXXVI. Recommendation 36 [para 64(i)]: that the FWO should be given increased resources in order for its processes not to be so heavily weighted in favour of voluntary compliance

and/or private mediated settlements.

XXXVII. Recommendation 37 [para 64(ii)]: that additional resources be allocated to the FWO for advertising campaigns.

XXXVIII. Recommendation 38 [para 64(iii)]: that in cases of employer insolvency, the Fair Entitlements Guarantee Scheme (FEG) should be extended to temporary migrant workers.

XXXIX. Recommendation 39 [para 64(iv)]: that more active involvement of CLCs in the area of employment law should be considered by the Government when developing employment laws.

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Schedule 1—Casual employees

7. At JobWatch, we have long considered that the *Fair Work Act 2009* (**FW Act**) should:
   i. define the term *casual employment;* and
   ii. give casual employees who have worked a regular pattern of hours on an ongoing basis for the same employer for a certain amount of time (not necessarily 12 months) the right to be automatically converted to permanent (full or part-time) employment.

We have also been of the view that the onus should *not* be on employees to request the conversion, but rather, the conversion should happen automatically after a certain amount of time. Accordingly, we are pleased to see that this Bill proposes both a statutory definition of the term casual employee and a process for conversion from casual employment, with rules around when and how employers are to confirm the conversion arrangements. However, for the reasons we have set out below, we still have serious concerns around how the Bill addresses both these issues and consider that they could go further to better protect employees.

8. The first of these concerns relates to the proposed definition of *casual employee*, which seems to adopt a form over function approach to be assessed at a particular point in time before work is commenced. This formulation fails to acknowledge the power imbalance between employers and employees who face particular forms of disadvantage (eg young workers, migrant workers and workers with disabilities), especially when it comes to employees who may not understand the difference between casual and permanent work. This is especially a problem as the timing of the assessment of whether a person is a casual employee will be based on the offer of employment and not after the employment has already started.

9. The proposed definition of *casual employee* does not require that the employment be described as *casual employment* from the outset. Nor does it require that the offer of casual employment be in writing. It simply deems an employee to be a casual employee if, when an employer makes an employment offer to an employee, the employer makes *no firm advance commitment to continuing and indefinite work according to an agreed pattern of work*. Particularly troubling are the words in s15A(4): "*To avoid doubt, the question of whether a person is a casual employee of an employer is to be assessed on the basis of the offer of employment and the acceptance of that offer, not on the basis of any subsequent conduct of either party*." In our experience, the proposed definition will, if accepted, lead to the

unintended consequence of some employees being exploited and the definition being misused by unscrupulous employers.

10. The following case study highlights how the proposed definition may end up further disadvantaging already vulnerable employees.

Case study: Larry is a temporary visa holder who recently arrived in Australia from a non-English speaking country. During a telephone conversation with a prospective employer, he is verbally offered a job. The only details he is given are that his job will be as a food and beverage attendant; he will be a part-timer working 20 hours a week on certain days of the week; when to start and where to go. He is not told how much he will be paid and he doesn't ask because he feels intimidated and he's just grateful for securing a job. He is not given a written employment contract or anything confirming the agreed terms. His payslips refer to him as a part-timer and he is paid the lower part-time rate, but in fact he is given different shifts every week and he has to check the weekly roster to see what hours he will work from one week to the next. He never takes any personal leave, forcing himself to attend work even when he feels sick, because he is afraid of losing his job and he is not sure whether he will be paid if he takes a day off sick. Under the current provisions of the FW Act, Larry could argue that he is in fact a casual employee and that his employer should be paying him the casual loading to compensate him for the uncertainty of his work hours. However, the proposed statutory definition of *casual employee* would allow Larry's employer to deny that Larry is a casual employee simply on the basis that at the time he was offered employment the employer told him he would be a part-timer and offered him work on set days. The fact that those days and times changed one or two weeks after he commenced his employment would be irrelevant because the only point of time that is relevant for the purposes of the casual employee definition is the time when the employment offer is made.

11. There needs to be a mechanism for employees who are initially offered permanent employment with set hours, who are not in fact treated as permanent employees because the employer subsequently keeps changing their work hours, to claim that they were casual employees all along and they were entitled to the casual loading. Courts currently have the power to look beyond the terms of employment contracts in order to determine what the reality of a situation is, rather than being limited by appearances or labels. It is dangerous to move away from this and to prevent courts from taking into account any subsequent conduct of the parties, beyond the initial offer of employment. The current draft definition of *casual employee* will essentially block courts from holding employers liable for the employment

entitlements owed to employees who may be told one thing about their status at the outset (when the offer was made) but then their subsequent treatment is at odds with the initial representation.

12. With many of our clients having only verbal employment agreements, we envisage there will be numerous disputes about whether the offer of employment was made with or without a "firm advance commitment to continuing and indefinite work according to an agreed pattern of work". This evidentiary problem could easily be addressed by requiring employment offers (and agreements) to be in writing. Written agreements, specifying whether the employment is to be permanent or casual, the applicable pay rates and, in the case of permanent employment, the number and spread of hours per pay cycle, would reduce uncertainty and confusion on the part of vulnerable employees about their work rights.

Case study: Aimi is a young temporary visa holder with limited English. The first job she finds in Australia is as a kitchen hand/waitress in a restaurant. When she is offered the job, she is told she will work 6 days a week. She doesn't ask questions because she doesn't feel confident to do so and she expects that she will be treated fairly because Australia has a reputation overseas for being a law-abiding country. The owner of the restaurant offers Aimi accommodation on the work premises and he tells her he will deduct rent from her monthly wages. He also offers to enrol her in an English course and he tells her he will deduct those costs from her wages. She agrees and starts working without knowing any further details about her pay and conditions. Aimi is not given a Fair Work Information Statement, she doesn't receive pay slips and no superannuation contributions are paid into a superannuation fund on her behalf. She gets a different day off each week. She ends up being badly underpaid. The reality is that she is being treated as a casual employee and she should be paid a casual loading. However, according to the draft definition, Aimi's employer would probably dispute that she was a casual employee, claiming that when he made the employment offer, it was presented as a firm advance commitment to continuing and indefinite work on the basis of six days a week, and a court would be prevented from taking into consideration the employer's conduct after the initial offer was made. This would be a grossly unfair outcome.

13. In relation to the casual conversion provisions, we note that ss66B (employer offers), 66E (acceptances of offers), 66G (employer must give a response) and 66J (grants of requests) are not civil remedy provisions. We agree that the obligations contained in each of these

sections are sensible and appropriate but we are concerned that if they are not civil remedy provisions they will in effect be "toothless tigers".

14. Section 66M provides that disputes about the casual conversion provisions may be referred to the Fair Work Commission (**FWC**), if discussions at the workplace level fail to resolve the matter. However, in our view s66M(2) makes it too easy for employers to circumvent the dispute resolution powers of the FWC. Not only can an employment contract (which according to the current draft doesn't need to be in writing) potentially exclude the FWC from a dispute resolution procedure, but, of even greater concern is the fact that if "another written agreement between the employer and employee" provides a dispute resolution procedure, then it will prevail. Potentially, an employee could be presented with an agreement to sign at the first sign of a dispute about casual conversion; the agreement could set out a dispute settlement procedure which requires the employee to financially contribute towards the costs of a mediator or it may in any event exclude the FWC from any dispute settlement procedure; the employee may feel pressured to sign the agreement and go ahead and agree to it. This is not a desirable outcome.

15. Section 66M(6) provides that a party to a dispute about casual conversion may appoint a person or industrial association to provide support or representation for the purposes of resolving, or the FWC dealing with, the dispute. It references s596 of the FW Act, which requires lawyers to be given permission in order to represent clients before the FWC. We consider that community legal centres (**CLCs**) should be treated like unions for the purpose of s596 and the newly proposed s66M(6): that is, a person should be taken not to be represented by a lawyer if the lawyer is an employee of a CLC. Such a move would recognise the vital role CLCs have in filling identified gaps in legal aid services and assisting litigants who would otherwise be unrepresented because they are not union members and they cannot afford private lawyers.

16. Section 125A requires the Fair Work Ombudsman (**FWO**) to prepare and publish a Casual Employment Information Statement and s125B requires employers to give each new casual employee the information statement "before, or as soon as practicable after, the employee starts employment." With respect, this latter requirement is not expressed as well as it could or should be.

17. Firstly, employers should be obliged to give the information statement before the employment starts. It makes no sense to allow employers to give an information statement that explains what casual employment is and outlines the entitlements of casuals after the

employment has already started. Employees - particularly vulnerable ones who are not union members and who may be newly arrived migrants or young people with limited previous work experience – need to understand what kind of employee they will be and what their basic rights will be before they agree to be employed, not after the event.

18. Secondly, the obligation for employers to provide every new employee with a Casual Employment Information Statement (and similarly the obligation to provide a Fair Work Information Statement) should be a civil remedy provision. Otherwise the obligation is virtually meaningless as courts cannot penalise or fine employers who breach this provision.

19. Moreover, employees should be entitled to apply for a pecuniary penalty order in respect of a breach of these provisions even if they choose to proceed under the small claims procedure.

Case study: Li Wei is a temporary visa holder who found a job as a housekeeper in a motel. He remembers signing a form prior to commencing his employment which described him as a permanent part-timer and required that he provide two weeks' notice of termination, but he was not given a copy of this form. He has not received any other written documentation during his employment, such as a Fair Work Information Statement or pay slips. Li Wei is not sure who his employer is. He has always dealt with a husband and wife team who give him directions and send him text messages at short notice about when to come to work. They pay him on a cash in hand basis despite the fact that he provided them with his tax file number upon commencement of his employment. They do not pay him if he is unable to work. Li Wei decides to file a small application for the employment entitlements he was owed as a casual employee under the applicable modern award. He satisfies the judge that he was underpaid. Unfortunately, there is nothing he can do about the fact that he was not provided with a Fair Work Information Statement.

20. Another proposed change that will affect casual employees is that the term *long term casual* will be replaced by the term *regular casual employee*. The definition of the new term will not require a minimum length of regular employment before one can be classified as a regular casual employee. In our view, this is likely to lead to some confusion and uncertainty. For example, s23 of the FW Act, which deals with the meaning of small business employer, will provide that a casual employee should only be counted if, at the relevant time, they are a *regular casual employee* – defined as an employee who is casual and has been employed on a regular and systematic basis (for no minimum period of time). Disputes are sure to arise over

what will constitute a regular and systematic basis: will an employee who has worked the same shifts each week for eight weeks be a regular casual employee? Or will a longer period of regular and systematic work be required. If the definition of *regular casual employee* remains as is currently proposed, courts and tribunals will be called on to decide these questions based on the individual facts of the cases presented to them.

Schedule 2—Modern awards

21. In relation to the provisions about additional hours for part-time employees: we acknowledge that what is proposed is a simple and straight forward procedure for employers to follow when offering additional hours of work to part-time employees in particular industries (including retail, fast food and hospitality industries), above the contracted hours. The amendments will allow employers to reach an agreement with their employees about working additional hours, without having to pay overtime rates for those extra hours.

22. We do not accept that these amendments are necessary or that they are justified on the basis that the current system is overly complex and varied across different awards. Changes to rosters or to the contracted work hours are already permitted by modern awards. Whilst it is true that each of the identified modern awards is drafted differently, it is unlikely that the same employer would need to be familiar with multiple awards across different industries. That is, it would not be common for an employer to operate in the fast food industry and also in the business equipment and/or the pharmacy industry and/or the meat industry at the same time. Generally, therefore, employers need to be across the requirements of one modern award and they are free to seek guidance from the FWO about how to reach agreement with part-time employees about changes to contracted hours. In circumstances where part-time employees are required to work additional time, in excess of the hours agreed or varied in accordance with the award, those hours should be paid at overtime rates.

Case study: Rosa works as a permanent part-time kitchen hand in a restaurant. She is covered by the *Restaurant Industry Award 2020*, which provides as follows:

"10.4 At the time of engaging a part-time employee, the employer must agree in writing with the employee on all of the following:
(a) the number of hours of work which is guaranteed to be provided and paid to the employee each week or, where the employer operates a roster, the number of hours of work which is

guaranteed to be provided and paid to the employee over the roster cycle (the guaranteed hours); and
(b) the days of the week on which, and the hours on those days during which, the employee is available to work the guaranteed hours (the employee's availability).
10.5 Any change to a part-time employee's guaranteed hours may only be made with the written consent of the employee…
10.13… (b) An employer must pay a part-time employee at [overtime] rates… for all time worked in excess of:
… (iii) the employee's rostered hours.
15.3 Rosters (full-time and part-time employees)… (*d) The roster of an employee may be changed at any time by the employer and employee by mutual agreement or by the employer giving the employee 7 days' notice of the change."*

Rosa works 20 hours a week. Her employer wants her to increase her hours. There is nothing in the modern award that prevents Rosa from agreeing to increase her guaranteed hours. A written agreement could be made in accordance with the award. The proposed simplified additional hours agreement is unnecessary and undesirable.

23. If the proposed amendments are adopted, we are concerned that some unscrupulous employers may think that the provisions operate retrospectively enabling them to avoid back-paying part-time employees who may have already been underpaid while working hours in excess of their contracted hours. Accordingly, we recommend that if the proposed provisions are accepted, a positive duty be placed on employers to notify their existing employees that the new provisions do not apply retrospectively. We also consider that community legal education will be required to explain the meaning of these amendments to employees in the identified industries, especially those who work for small businesses.

24. The proposed flexible work directions – whereby employers in certain industries may direct employees to temporarily, for up to two years, change their work duties (provided the duties are within the employee's skills and competency, they are safe, they are reasonably within the scope of the employer's business operations and the employee is licensed or qualified to perform the duties) and/or the location where those duties are performed - are, in our view, problematic. Current mechanisms under the FW Act and at common law already allow for employees and employers to enter into agreements to make temporary changes to employment contracts. We do not agree that the changes are necessary and we consider that the provisions may be misused by unscrupulous employers.

Case study: Liliana works on a full-time basis in a community centre. The community centre closes for a period due to COVID-19 and Liliana continues her role partly from home and partly from a new location. Eventually, with the community centre still closed, Liliana's employer asks her to change both her duties and her work location, by requesting that she work in a residential care facility. Liliana is worried about bringing COVID-19 into the residential care facility because her family members are front line workers and she asks that an alternative role be considered or that she be allowed to use some of her annual leave. Her employer refuses her requests and insists that she must obey the direction. If the proposed changes are adopted, Liliana would need to argue that the flexible work direction is unreasonable in all of the circumstances. She would need to rely on the dispute settlement procedure in her modern award (assuming she is not an award-free employee) to resolve the dispute with her employer.

25. Introducing a statutory entitlement for employers to *direct* employees to change their duties or their work location, even with the proposed safeguards, is risky. It is reminiscent of the archaic notion of the master-servant relationship, where employees could be treated like pawns on a chessboard and moved around subject to the employer's will, regardless of whether they agreed to any proposed changes. We understand that employers who wish to issue flexible work directions are required to have information before them that leads them to reasonably believe that "the direction is a necessary part of a reasonable strategy to assist in the revival of the employer's enterprise" (s789GZK), but that requirement seems aspirational given that the employer is not required to produce evidence to the employee concerned about the necessity of any such direction.

26. We also acknowledge that employers are required to give at least three days' written notice before issuing a flexible work direction. We do not consider three days to be a sufficient period of time, but even this requirement is watered down, as a lesser period of notice is allowed, provided the employee "genuinely" agrees to it. Consultation is required but no details or guidance are given about what will constitute consultation and it is clear that the employee's agreement to the changes is not necessary.

27. Article 6(1) of the *International Covenant on Economic, Social and Cultural Rights*, ratified by Australia in 1975 and entered into force via the *Industrial Relations Reform Act 1993* (Cth), provides that a person must be free to have the opportunity to gain a living by work which s/he *freely chooses or accepts*. The flexible work directions fly in the face of this. They do not give employees the freedom to reject changes to work duties or location unless they can show that the proposed direction is unreasonable in all of the circumstances.

28. The Bill allows for disputes about flexible work directions to be dealt with in accordance with the dispute resolution clause in the applicable modern award. We recommend that the current Form 13A be modified and used for these disputes as the modern award dispute resolution processes have some inherent limitations which concern us. For example, the current dispute resolution clause in the *General Retail Industry Award 2020* gives the FWC the power to conciliate or mediate a dispute or conduct an arbitration, but only if both parties agree (see cl 36.5). The practical reality is that an employer may not agree to an arbitration by the FWC, in which case there may be no further avenues available to the employee. Moreover, in the case of award-free employees, they would appear to have no access to a dispute resolution procedure and that is a deficiency of the current draft of the Bill which needs to be rectified.

Schedule 3 – enterprise agreements

29. The Bill aims to improve the operation and usability of the national industrial relations system by streamlining and improving the enterprise agreement making and approval process. We understand that the Government hopes that the proposed amendments will reverse the decline in the number enterprise agreement approvals and revive collective bargaining in Australia and, to that end, a number of substantive and procedural amendments are proposed by way of Schedule 3 of the Bill.

30. Whilst JobWatch generally supports any measures that simplify the enterprise agreement making process, which is currently heavy on procedural technicalities, such changes should not come at the cost of employee entitlements and protections.

31. The current provisions in the FW Act require an assessment of whether the employer has taken '*all reasonable steps to ensure that*' the terms of an agreement, and their effect, are explained to relevant employees. This is so that the FWC can be satisfied that there has been a genuine agreement reached between an employer and its employees, because obviously if employees do not understand the terms of an agreement or their effect, including the possible removal of award entitlements, then there cannot be a genuine agreement. The FWC's usual approach to this requirement is to analyse the employer's conduct regarding the information and explanation provided to employees regarding any proposed agreement and to refuse to approve a proposed enterprise agreement where that information or explanation is found to be lacking on the basis that the employees have not 'genuinely agreed' to the proposed agreement as a result.

32. The changes proposed by the Bill are subtle but significant, in that the 'all reasonable steps' requirement is removed and replaced with a broad requirement for the employer to '*take reasonable steps to give employees a fair and reasonable opportunity to decide whether to approve the agreement*'. The employer will be taken to have achieved this if they provide the agreement and any incorporated documents, notify voting details, and explain the terms of the agreement and their effect. Therefore, under the amendments proposed by the Bill, the mere fact that there was an explanation by the employer of the terms of the agreement and their effect will be enough to satisfy the FWC that this approval requirement has been meet. Whether or not the explanation was accurate or sufficient or whether employees understood the explanation provided by the employer seem to be no longer relevant. For this reason, JobWatch opposes this proposed amendment in its current form.

33. JobWatch is concerned that the proposed amendment could lead to employers satisfying the FWC that they have taken '*reasonable steps to give employees a fair and reasonable opportunity to decide whether to approve the agreement*' when in reality a 'genuine agreement' has not been reached because employees did not fully understand the terms of the agreement or their effect. This is especially likely to be so where workplaces have high numbers of non-unionised employees, young employees, employees from culturally and linguistically diverse backgrounds, casual employees or any other vulnerable and disadvantaged employees. JobWatch recommends that the proposed amendment should include a section to the effect that 'the explanation of the terms of the enterprise agreement and their effect by the employer must take into account the nature of the employees to be covered by the enterprise agreement and be tailored to ensure, as far as reasonably possible, that the employees understand the terms of the agreement and their affect'.

34. Let's consider an example of a cleaning company which employs 25 staff - all of whom are recent immigrants or temporary visa workers, with English as their second or third language. The cleaning company proposes to commence bargaining for an enterprise agreement. It would clearly be unsatisfactory for the employer to provide an explanation of the proposed enterprise agreement and its terms only in English because, if it did, it could not be said that a 'genuine agreement' was reached. Nevertheless, under the proposed amendment, the mere fact of the explanation by the employer of the terms of the enterprise agreement and their effect would likely be enough to satisfy FWC that this enterprise agreement approval requirement had been met by the employer.

35. Currently, in considering whether to approve an enterprise agreement, the FWC must be satisfied that the enterprise agreement passes the BOOT, meaning that all employees covered or that could be potentially be covered by the agreement must be better off overall as compared to the relevant modern award. The FWC may have to consider hypothetical employees that may be employed by the employer after the agreement is approved. Under the changes proposed by the Bill, in analysing the agreement, the FWC will only be permitted to have regard to patterns or kinds of work which are actually being performed at the workplace concerned, or are 'reasonably foreseeable'. Whilst JobWatch does not oppose this change, we are concerned that it could be open to abuse by unscrupulous employers in certain circumstances. For example, an employer which operates a large cleaning business but has outsourced all its accounts and payroll functions to a genuine contractor finally implements its long-term plan to insource its accounts and payroll functions, but only does so after the enterprise agreement is approved. This would mean that the new admin staff would now be covered by the enterprise agreement but they were not contemplated when the FWC considered whether the proposed enterprise agreement passed the better off overall test. In that scenario, the FWC would only need to assess the proposed agreement against the relevant cleaning award, not against other possible awards like the clerks award.

36. In circumstances where the employer's business operations may substantially change after an enterprise agreement has been approved, where the changes weren't reasonably foreseeable, the FWC should have the power upon application by a relevant party, e.g. trade union or employee, to vary or terminate the enterprise agreement. The type of variation that the FWC could be empowered to make would be to effectively incorporate the relevant modern award into the enterprise agreement to reflect the changes in the employer's business. For example, the FWC could order that the *Clerks- Private Sector Award 2020* applies to the relevant clerical employees to the extent of any inconsistency between the enterprise agreement and a provision of the modern award that provides a greater benefit than the enterprise agreement.

37. Another change proposed by the Bill requires the FWC to 'give significant weight to the views of the parties who are covered by' the agreement, on the question of whether it passes the BOOT. Further, the changes make clear that both financial and non-financial benefits in an agreement must be weighed equally in comparing its impact against the underlying Award. In JobWatch's view, these changes are unnecessary.

38. Firstly, parties are already entitled to make submissions to the FWC regarding whether or not an enterprise agreement passes the BOOT. Ultimately the FWC must determine

whether the enterprise agreement actually passes the BOOT, and that is a question of fact. In other words, significant weight should not be given to the views of a person who is clearly wrong. Moreover, where the question of passing the BOOT is less clear, just because two parties with vested interests (usually the employer and a trade union) agree that the enterprise agreement passes the BOOT, does not mean that the FWC should accept the parties' views, but rather the FWC should make its decision based on the facts as determined from the evidence presented by the parties.

39. Secondly, suggesting that financial and non-financial benefits in an enterprise agreement must be weighed equally is counter to the basic 'work for pay' bargain that underpins the employment relationship and would be something that most working people would find disagreeable. The proposed change also removes the FWC's discretion to assess enterprise agreements on a case by case basis where sometimes non-financial benefits may be equivalent to financial benefits (although it is difficult to imagine when this would be) and where sometimes non-financial benefits would be less valuable than financial benefits which would usually be the case. There is also a risk that this proposed change will open the door to employers attempting to load up enterprise agreements with non-financial benefits in lieu of award entitlements such as penalties, overtime pay and allowances and the FWC's hands would be tied to treat these non-monetary benefits.

40. The FW Act currently allows approval of agreements which do not pass the BOOT where, because of exceptional circumstances, approval would not be contrary to the public interest (for example, where the enterprise agreement is part of a reasonable strategy to deal with a short-term crisis in, or to assist with the revival of, the business). One of the Bill's proposed changes is to remove the reference to 'exceptional circumstances,' to allow the FWC to approve enterprise agreements that do not pass the BOOT, where it is not contrary to the public interest to do so, taking into account the following matters:

a. the views of the parties to the agreement;
b. their circumstances, and those of any unions seeking to become bound by the agreement;
c. any impact of COVID-19 on the enterprise; and
d. the extent of employee support for the agreement.

41. This change is significant in that it opens up a broader discretion for the FWC to approve enterprise agreements that do not pass the BOOT. We do not necessarily oppose this change, provided there is a 'genuine agreement' between the employer and its employees.

42. JobWatch agrees that an enterprise agreement approved under this mechanism will be limited to no more than two years' duration, and that the temporary mechanism will sunset after two years.

43. Under the Bill, where an enterprise agreement covers multiple employers within the same franchise, a new franchise operator may ask its employees to vote to vary the agreement so that it will cover that new employer. This will be an efficient way for new franchisors to achieve agreement coverage when they commence operations. The employees who must be given an opportunity to vote are only the employees of the new franchisor at the time. JobWatch supports this change, provided there is a 'genuine agreement' between the employer and its employees.

44. Another proposal in the Bill is that certain collective agreements, which were made before the FW Act commenced operation, will automatically cease operation on 1 July 2022. JobWatch supports this change in order to remove a number of 'ghost' or 'vampire' collective agreements from the system which have passed their nominal expiry date up to 10 years ago but are still in effect and are depriving many vulnerable and disadvantaged workers of what would otherwise be their entitlements under the applicable modern award.

45. In our view, most of the procedural changes proposed by the Bill seem innocuous and unlikely to encourage greater participation in the collective bargaining. For example, if an enterprise agreement approval application is not determined by the FWC within 21 days of the date of the application being made then the FWC must provide written reasons why. It is unclear how such changes promote the making of enterprise agreements. The procedural changes we are mindful about are these:

i. The FWC is required to 'recognise the outcome of bargaining at the enterprise level': JobWatch does not oppose this change, provided there is a 'genuine agreement' between and employer and its employees regarding any proposed enterprise agreement.
ii. That only those causals who performed work at any time during the enterprise agreement access period are required to be given an opportunity to vote on a proposed enterprise agreement: given that the access period is the 7 days immediately prior when voting occurs in relation to a new enterprise agreement, we are concerned that this will be open to abuse by unscrupulous employers in that it may be possible for employers to effectively vote rig in relation to whether or not a proposed enterprise agreement will be likely voted up or down.

For example, if an employer did not want some or all of its casual staff to vote on a proposed enterprise agreement, all it would have to do is not roster them on for shifts during the 7 day access period. Conversely, if the employer wanted its most likely non-unionised casual staff to vote in relation to the proposed enterprise agreement, it could roster all casual staff to work at least one shift during the access period even if work was not required to be done thereby artificially inflating the number of casual employees with the right to vote in relation to the enterprise agreement. To avoid this scenario, a better option would be to allow any casual employee - who has performed work for the employer in the 6 months prior to the date of the vote and who is still employed by the employer - to vote in relation to the proposed enterprise agreement.

46. In JobWatch's view, the proposed amendments regarding enterprise agreements are unlikely to reinvigorate collective bargaining in Australia. It is possible that the real reason there has been a decline in collective bargaining over the years is that the 'safety net' in the FW Act (being National Employment Standards and the modern award system) has essentially got the balance right, with most employers preferring to accept the minimum employment terms and conditions provided by modern awards as being fair and reasonable and get on with business rather than attempting to reinvent the industrial instrument wheel, so to speak.

47. In relation to the Bill's provisions which deem that there is no transfer of business if the employee's employment transfers from one employer to an associated entity of that employer and the transfer is at the employee's initiative: JobWatch opposes this proposed amendment. Currently, under the transfer of business provisions in the FW Act, when an employee transfers between associated entities of an employer, any applicable enterprise agreement will follow the employee, so that the new employer becomes bound by that enterprise agreement in relation to the transferring employee unless the FWC orders otherwise. The main purpose of this provision is to prevent unscrupulous employers from creating a new entity and simply transferring their employees to the new entity, thereby avoiding any obligations under the enterprise agreement that applied to the previous employer. The proposed amendment opens the door for dishonest employers to achieve the very outcome that the current transfer of business provisions are designed to avoid, except that under the Bill the employee's transfer must be voluntary, or 'at the initiative of the employee'.

48. The Bill's explanatory memorandum states that this change is not intended to apply to an employee who accepts alternative employment within a corporate group with an associated entity in the context of an organisational restructure (for example, in a redundancy, redeployment or stand down scenarios). In such cases, the employee's move from one employer to another arises from an operational decision of the employer, and is not properly characterised as being at the employee's initiative. For example, new s311(1A) would not apply to a situation where:

- the old employer stands down an employee without pay, who then takes up employment with an associated entity of the old employer; or
- an employee seeks employment with a new employer on the basis that their current employment is to be terminated or otherwise significantly altered.

49. The situation provided in the explanatory memorandum of where the new provision would apply is where employees might apply for a job with an associated entity of their current employer at their own initiative (eg to enhance their career prospects) and they are successful in obtaining the new job. In this scenario, any enterprise agreement that previously applied to the employees would not transfer to the new employer. It is unclear how such a situation will increase collective bargaining or improve the enterprise agreement making process. Nevertheless, our concern is that some employers may incentivise employees to transfer to an associated entity at the employee' own initiative. For example, an employer could incorporate a new entity, advertise new jobs to the world at large and offer a $1000.00 sign-on bonus to any current employees of the first employer who accept an offer of employment with the new entity. On the face of it, the employees would be transferring to the associated entity voluntarily, at their initiative, and so any enterprise agreement that covered them previously would not transfer to the new employer. Therefore, it would be possible for some employers to avoid an enterprise agreement transferring in what would clearly be a transfer of employment situation. For this reason, JobWatch recommends that unless FWC orders otherwise, enterprise agreements should continue to transfer with employees transferring between associated entities.

Schedule 4 – Greenfields agreements

50. In relation to the Bill's proposal that extends the maximum duration of greenfields agreements to eight years (up from four): we note that this makes it possible that in certain situations (involving 'major projects') employees working on new projects that take up to eight years will never get the right to negotiate and vote on a new enterprise agreement. To counter this, the 'major projects' greenfields agreements must provide for at least an annual

increase to the base rate of pay for each employee covered by the agreement during its normal term of operation. Ultimately JobWatch does not oppose this change but we find it disconcerting that the profits of big business are seen to take precedence over the rights of ordinary employees to negotiate and vote on a 'genuinely agreed' enterprise agreement.

Schedule 5 - Compliance and enforcement

51. JobWatch welcomes many of the proposed changes outlined in Schedule 5 of the Bill. These changes include increases to pecuniary penalties for remuneration-related breaches of civil remedy provisions of the Act as well as the criminalisation of dishonest and deliberate contraventions by individuals. However, we note that enforcing civil remedy provisions remains prohibitively complex and expensive for vulnerable employees who seek advice and assistance from CLCs. A simplification of the process, or the possibility of pursuing penalties for breaches of the civil remedy provisions via a more readily accessible jurisdiction such as the Small Claims jurisdiction of the Federal Circuit Court is urgently required.

52. We consider that the increase in the amounts able to be pursued via the small claims jurisdiction from $20,000 to $50,000 are a step in the right direction; however, we maintain that the amount should be further increased to $100,000 (as stated in previous submissions drafted by JobWatch in response to the criminalisation of wage theft.)

53. Additionally, we welcome the proposal that the FWC play a part in the conciliation of small claims matters. This would have the benefit of potentially reducing the burdens on the courts and allow matters to be resolved quickly and inexpensively. However, for these provisions to achieve their maximum efficacy, JobWatch would argue that conciliation conferences should be automatically listed within a reasonably short timeframe after the initial Form 5 Application is filed. Current wait times for hearings in small claim matters can be up to 12 months and this is unacceptable.

Schedule 6 – The Fair Work Commission

54. The Bill proposes to introduce measures to make the FWC processes 'more efficient'. The effects of the specific proposed amendments to the FW Act intended to achieve this are summarised as follows:

i. Making it easier for the FWC to dismiss applications, by providing that an application may be dismissed if it is "misconceived or lacking substance" or "is otherwise an abuse of the process of the FWC", in addition the existing bases for dismissal.

ii. Empowering the Full Bench of the FWC to order that a person cannot make future applications without permission and, further, that such orders cannot be appealed.
iii. Removing the need for the parties to consent to an appeal being conducted "on the papers" (without a hearing).
iv. Empowering the FWC to vary or revoke its own decisions relating to enterprise agreements and workplace determinations.

55. Presumably, the first three of the above proposed amendments are aimed at addressing perceived inefficiencies caused by misconceived or abusive applications. The proposed insertion of s587A also suggests a perception that such applications are repeatedly made by the same applicants. In JobWatch's view, there is little evidence that these perceptions are accurate, nor are they consistent with the role of the FWC. The FWC is established as a relatively informal forum where disputes between self-represented parties can be resolved or arbitrated. This is reflected in many provisions of Part 5-1 of the FW Act, for example:

- Section 577 of the FW Act provides that the FWC "must perform its functions and exercise its powers in a manner that ... is quick, informal and avoids unnecessary technicalities".
- Section 586 allows the FWC to correct or waive formal irregularities in applications.
- Section 590 allows the FWC to "inform itself", without relying entirely on submissions from parties in reaching its decisions.
- Section 591 provides that the FWC is not bound by the rules of evidence.
- Section 596 sets out the limited conditions under which it may grant permission for a party to be represented by a lawyer.
- Section 599 provides that the FWC's decisions need not be made in the terms of the application.

56. It is inevitable that compared to professionally-prepared and conducted proceedings, applications by self-represented applicants are more likely to be incomplete, poorly argued or structured, or otherwise requiring more time and effort on the part of the FWC to deal with the matter fairly. However, as set out above, this is a vital part of the FWC's role, and should not be compromised for the sake of efficiency any more than absolutely necessary. For these reasons, JobWatch believes that the existing grounds for dismissal in s587 - namely, that the application is frivolous, vexatious or has no reasonable prospect of success - are already adequate, and further grounds should not be added.

57. It is of great concern that the proposed s587A could allow a person whose application is dismissed under s587(2) to be banned from any future applications to the FWC. It is notable that the proposed amendment does not limit the prohibition to applications of any particular kind or concerning any particular subject matter, and would permit "blanket bans" of indefinite duration, even preventing applications relating to entirely different matters from being made. In JobWatch's view, this is too broad a power.

58. It is of equal concern that the proposed s587A(7) would remove altogether the right to appeal a decision under s587A.

59. Also concerning is the proposed amendment to s607 that may result in a party being denied the right to a hearing on appeal, and would only require the FWC to have "taken into account the views of the persons" affected by a decision to consider an appeal on the papers without a hearing. Obviously, it is a very serious step to remove or limit a person's ability to seek a legal remedy or a review of a decision affecting their legal rights. That such a step should only be taken in the most extreme circumstances is a matter of long-standing legal principle. The proposed amendments do not expressly impose any such limitations. Further, in JobWatch's view, where such circumstances do exist, such decisions should be able to be made only by a court.

60. In JobWatch's experience, inefficiencies attributable to self-represented applicants are relatively minor and are an inherent part of the role for which the FWC was established. Inefficiencies resulting from the conduct of respondents, on the other hand, are more significant and run counter to the purpose of the FWC. Such conduct takes two distinct forms:

I. Small business operators who are unrepresented and fail to respond to applications or comply with directions, or refuse to engage in conciliation conferences or other FWC processes.

II. Larger businesses who engage high-end law firms to defend applications, sometimes utilising litigation insurance, despite already having well-resourced HR departments. This can result in disproportionate steps being taken to delay or discourage applications, for example, raising numerous technical, interlocutory or jurisdictional matters, or submitting voluminous evidentiary material of marginal relevance, designed to burden the applicant. The proposed amendments to ss587 and 587A would only provide more opportunities for such conduct.

61. In JobWatch's view, rather than the serious curtailment of applicants' rights proposed in the Bill, efficient FWC processes would be better served by:

a) Allocating more resources to the FWC to enable it to better accommodate self-represented applicants;
b) Introducing measures to penalise uncooperative respondents; and
c) Amending s596 FW Act so that permission to be represented will not normally be granted to respondents capable of representing themselves.

62. The Bill proposes to repeal the provisions of s603 of the FW Act (which currently prevent the FWC from varying or revoking enterprise agreements and workplace determinations). The Explanatory Memorandum states that the goal of the proposed amendment is to allow the FWC "to correct minor errors" without the need for fresh approvals to be made. JobWatch understands this aim, but in our view the proposed amendment goes further than this. The FWC's power under s603 to vary or revoke decisions is not restricted to minor errors. The proposed repeal of paragraphs 603(3)(b) and (c), which currently exclude enterprise agreements and workplace determinations, would mean that this unqualified power would apply to those instruments. In JobWatch's view, the exclusion of those instruments is for good reason, and the removal of this protection is too broad. Furthermore, the proposed amendment is unnecessary, as the FWC can already correct "obvious errors" under s602.

Other changes that should be considered

63. In JobWatch's view, the proposed Bill does not go far enough in *improving the operation and usability of the national industrial relations system* and in ensuring that *employees also receive their share of benefits that flow from economic recovery*. We call on the Government to take this opportunity to make a number of additional amendments to the FW Act, as outlined below.

i. There should be a statutory definition of employee, rather than relying on the common law definition of who is an employee. The statutory definition should include a rebuttable presumption in favour of the employment relationship. This would alleviate the great uncertainty that often surrounds the status of workers, with people unsure about whether they are employees or contractors or some other class of worker. Many dishonest employers play on this uncertainty by, for example, paying workers cash-in-hand or telling workers that they need to get an ABN and issue

invoices before they can be paid. Workers in these situations often do not consider themselves employees and accordingly they do not think they have any of the minimum employment entitlements. We all share deep concerns about the growing number of workers in the gig economy, who either do not have, or do not *think* they have, the right to a minimum pay or superannuation.

ii. The FW Act should specify that it applies to workers (or employees, as the case may be) regardless of citizenship or visa status.

iii. The FW Act should strengthen the prohibition against unpaid internships which are not done as part of an accredited course.

iv. Section 351 of the FW Act (dealing with discrimination) should be amended so as to protect the additional grounds of "visa status," "person experiencing family or violence" and "irrelevant criminal record." CLCs have seen many cases of workers being subjected to adverse action because of one of these attributes and we would be happy to share case studies to demonstrate why these extra protections are urgently needed.

v. The FW Act should make sexual harassment in the workplace unlawful and this should be a civil remedy provision.

vi. The FWC should be given the power to determine questions of what is *reasonable* during the employment with respect to:
   1. maximum weekly hours (s62);
   2. requests for flexible working arrangements (s65);
   3. eligible community service activity (s108); and
   4. the entitlement to be absent on a public holiday (s114).

vii. The 21-day time limit for both unfair dismissal and general protection (dismissal) applications should be extended to at least 3 months. This would bring Australia into line with the United Kingdom, Canada and New Zealand. The current 21-day time limit, together with the high threshold currently required for extensions of time – being *exceptional circumstances* (section 366) – prevent many workers from making claims about their unfair or unlawful dismissals. This is one of the big flaws of our current compliance mechanism.

viii. There should be a statutory obligation on employers to give written reasons why a contract should be offered on a fixed term basis (eg because the position is tied to funding for a particular project or to cover a parental leave position) and fixed-term employees should be deemed to be permanent (full or part-time) after a certain number of contract renewals (eg if an employee's fixed-term contract has already been renewed twice, on the third occasion the employee automatically becomes a permanent employee).

ix. Joint employment should be recognised in the FW Act, particularly in the context of certain labour hire situations.

x. Additional changes that should be made to the small claims jurisdiction should include these:

i. Applicants should be able to bring proceedings against accessories (including franchisors and holding companies) as well as the employer.
ii. Penalties should be available as well as compensation for the amount of the underpayment. Otherwise, the worst possible outcome a non-compliant employer faces is simply to pay what the employee was owed a long time ago, with no additional fine, and this provides no incentive to comply with the FW Act.

xi. The FCCA's service requirements should be amended as they are archaic and too onerous, particularly for employees who bring proceedings against an individual (for example, a sole trader, members of a partnership or the individual trustee of a trust which is the holder of a business for whom the employee worked). In these cases, the sealed court documents need to be personally served on an individual respondent. Given that it is not uncommon for individual respondents to be very good at "going underground" and avoiding service, the service rules should be improved and simplified by, for example, allowing for service to be effected by text messages, emails and messages via other social media platforms.

xii. The FW Act should provide for a simplified system of enforcing orders of the FCCA. Currently, applicants need to spend considerable money and energy enforcing small claims orders through the sheriff's office and, in our experience at JobWatch, this is often not worth our clients' effort because there is a good chance that nothing will be recovered.

64. Apart from considering the statutory changes outlined above, we also urge the Government to consider the following:

i. The FWO should be given increased resources in order for its processes not to be so heavily weighted in favour of voluntary compliance and/or private mediated settlements. More resources should be dedicated to issuing and enforcing compliance notices and issuing legal proceedings, to better deter non-compliant employers from opting to take a calculated risk of getting caught by the FWO.

ii. Additional resources should also be allocated to the FWO for an advertising campaign like the one against drink driving or the one against wasting water (eg the 'Don't be a Wally with Water' campaign in Victoria) or WorkSafe Victoria's advertising campaign about 'More Inspectors, More Inspections'. The FWO urgently needs to launch an advertising blitz, warning employers of the actions they face if they don't comply with the FW Act.

iii. In cases of employer insolvency, the Fair Entitlements Guarantee Scheme (**FEG**) should be extended to temporary migrant workers. FEG should also cover superannuation entitlements.

iv. Finally, we call on the Government to keep in mind that CLCs in the area of employment law play a unique role in this space and we want to work in meaningful partnership with Government in the areas of education and enforcement of employment law.

We thank you for considering our recommendations. We would welcome the opportunity to answer any questions or provide further case studies to highlight the various issues we have raised.