SUBMISSION OF THE AUSTRALIAN NURSING AND MIDWIFERY FEDERATION

TO THE EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE

FAIR WORK AMENDMENT (SUPPORTING AUSTRALIA'S JOB AND ECONOMIC RECOVERY) BILL 2020

FEBRUARY 2021

Australian
Nursing &
Midwifery
Federation

Introduction

The Australian Nursing and Midwifery Federation (ANMF) is Australia's largest national union and professional nursing and midwifery organisation. In collaboration with the ANMF's eight state and territory branches, we represent the professional, industrial and political interests of more than 300,000 nurses, midwives and carers across the country.

Our members work in the public and private health, aged care and disability sectors across a wide variety of urban, rural and remote locations. We work with them to improve their ability to deliver safe and best practice care in each and every one of these settings, fulfil their professional goals and achieve a healthy work/life balance.

Our strong and growing membership and integrated role as both a trade union and professional organisation provides us with a complete understanding of all aspects of the nursing and midwifery professions and see us uniquely placed to defend and advance our professions.

Through our work with members we aim to strengthen the contribution of nursing and midwifery to improving Australia's health and aged care systems, and the health of our national and global communities.

The ANMF welcomes the opportunity to provide a submission to the Senate Inquiry into the *Fair Work Amendment (Supporting Australia's Job and Economic Recovery) Bill 2020*, referred to as the IR Omnibus Bill (the Bill).

At the outset, the ANMF expresses its disappointment that the Coalition Government has put forward a Bill that fails to support the very workers who have carried Australia through the pandemic and has instead opted to provide employers with one sided flexibility at the expense of workers. Further, the collaborative approach and promise of finding consensus positions through the Industrial Relations round tables held in the second half of 2020 appears to have been abandoned in favour of reforms that primarily benefit employers.

This submission addresses each of the proposed amendments and should be read in conjunction with the submission of the Australian Council of Trade Unions (ACTU). The ANMF supports the ACTU submission. While there are some amendments in the Bill that the ANMF supports, when taken in its entirety the ANMF opposes the Bill.

ANMF Membership

The majority of the ANMF's membership of nurses, midwives and assistants in nursing work in State and Territory public hospital systems and are covered by public sector enterprise agreements. Significant numbers are employed in the private sector at private hospitals, medical centres, providers of medical services and aged care.

Approximately 40,000 members work in private sector aged care, in both the for-profit and not for profit sector. These nurses and care workers are predominantly covered by enterprise agreements and predominantly in part-time or casual employment.

The latest nursing and midwifery workforce data (2019)[1] indicates there was a total of 404,896 nurses registered in Australia with 399,364 registered to practice. 88.7% were female; the average age of the workforce is 43.6 years working an average of 33.5 hours per week. Fifty percent of all employed nurses and midwives worked less than 35 hours per week. Approximately 60% of employed nurses and midwives work in the public sector, 37% in the private sector and 3% work in both the public and private sectors.

ABS Census data for Nursing support and Personal Care Worker and Aged or Disabled Carer (2016)[2] also indicate a predominately female workforce (85% and 80% respectively) working part-time hours.

In the residential aged care and home care sectors, 87% and 89% of the direct care workforce respectively, is female, with 88% in part time and casual employment.[3]

The table below sets out the number of employees in nursing and midwifery and carer roles based on ABS data using the absence of paid leave entitlements as an indicator of casual employment. Noting that there is no precise measure of casual employment, approximately 56,000 nursing, midwifery and nursing support/personal care workers were classified casual employees at May 2020. In relation to the occupation of "Aged and disabled carers" it is estimated that over one third of the 80,200 without paid leave entitlements work in the health and aged care sectors.

[1] National health Workforce Dataset (NHWDS 2020) <https://hwd.health.gov.au/publications.html>

[2] Department of Education, Skills and Employment, Labour Market Information Portal <https://lmip.gov.au/default.aspx?LMIP/Downloads/InteractiveDataFiles>

[3] 2016 National Aged Care Workforce Census and Survey – the Aged Care Workforce, 2016. Commonwealth of Australia as represented by the Department of Health

Customised report of 6291.055.003 - Labour Force, Australia, Detailed, Quarterly, August 19-May 20 for employees by paid leave entitlements status by select occupations
Modified by ANMF

Paid leave entitlements status	Occupation (ANZSCO)	Aug-19	Nov-19	Feb-20	May-20
Employee without paid leave entitlements	Midwifery and Nursing Professionals (254)	38,200	42,300	31,600	29,300
	Enrolled and mothercraft nurses (4114)	5,400	2,200	3,600	3,300
	Nursing Support and Personal Care Workers (4233)	22,000	28,300	31,800	23,200
	Aged or Disabled Carers	70,100	80,200	81,700	80,200
Employee with paid leave entitlements	Midwifery and Nursing Professionals (254)	305,100	303,000	314,100	319,100
	Enrolled and mothercraft nurses (4114)	19,800	17,000	19,700	17,200
	Nursing Support and Personal Care Workers (4233)	69,900	75,300	68,800	62,000
	Aged or Disabled Carers	119,900	123,800	132,900	122,700
Total Employees	Midwifery and Nursing Professionals (254)	343,300	345,200	345,800	348,400
	Enrolled and mothercraft nurses (4114)	25,200	19,200	23,200	20,400
	Nursing Support and Personal Care Workers (4233)	91,900	103,600	100,700	85,200
	Aged or Disabled Carers	190,000	204,100	214,600	202,900

*Note:
The data for 4114 Enrolled and Mothercraft Nurses and 2541 Midwives is volatile. Sampling error is measured by relative standard errors (RSEs). The RSEs for these occupations were above 25%. As a rule, RSE of 25% or greater are subject to high ampling error and should be used with caution.

Overview of impact on members

Aged Care needs a secure workforce

The provisions of the Bill are likely to have the greatest negative impact on nurses and care workers in aged care, particularly those who are engaged on a casual or part-time basis. Approximately 88% of the direct care workforce in residential aged care is employed on a part time or casual basis .

Bargaining in the aged care sector has not produced strong outcomes for the sector for multiple reasons, including the level of part-time and casual work, undervaluing of female dominated workforces, access to and communicating with members and workforce reluctance to take any action that will have a negative impact on residents. This is set against a lack of transparency in funding and acquittal of funds and employers seeking to minimise wage costs.

The provisions which allow sub-standard agreements to be approved will serve to further reduce and weaken wages and conditions in the aged care sector. Provisions which reduce access to representation in bargaining further undermine the prospect of achieving strong agreement outcomes. This is contrary to all the evidence that says the sector must become more attractive to workers in order to provide a sustainable workforce supported in delivering safe and quality care.

The aged care sector is approaching a period of generational reform arising from the Aged Care Royal Commission into Aged Care Quality and Safety. Key to those reforms will be ensuring trained, skilled staff are attracted to and retained in the sector. To do this, well paid, secure work with working conditions that recognise and support those skills will be essential. At the same time, providers of aged care services, must be encouraged to offer secure employment. The Bill instead provides ample opportunity for employers to further fragment and undervalue this crucial workforce.

COVID-19

Throughout the course of 2020, health and aged care workers have been hailed as heroes in their role as frontline workers. The community has expressed its gratitude for the care provided to themselves and loved ones in circumstances that were subject to rapid change, shortages of PPE, long hours, personal discomfort, stress and tragic loss of life, especially in aged care.

The impact of COVID-19 served to draw attention to the risks associated with a casualised, insecure workforce. In a range of circumstances, including in health and aged care, movement across work sites was identified as an infection risk. The response was to ask employees to forego secondary employment. This highlighted the level of dependence many workers have on multiple jobs in order to make a living.

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[4] 2016 National Aged Care Workforce Census and Survey The Aged Care Workforce, (2016) p 25 Table 3.16

During the course of the pandemic, employees have been stood down, had hours reduced and been required to work at single sites to limit the spread of infection. In many instances, this has been done without compensation for the loss of paid working hours. For example, in Queensland and South Australia, workers in aged care were subject to State Government direction to work at single sites in residential care without compensation for the loss of income this entailed. This resulted in hardship for many members.

We know that care delivered by a workforce that is secure, valued and recognised for its skill will deliver quality and safe care to elderly people and recipients of health and aged care services. For this reason, it is difficult to understand why the Bill does not focus on promoting secure work and working conditions, but rather seeks to provide employers with greater flexibility to further fragment and undervalue the workforce. This flies in the face of what we know about infection control and prevention together with providing safe and quality care.

Wages Growth

The Bill proposes a range of measures, that when viewed in totality, will serve to reduce wages and do nothing to end Australia's sustained period of wage growth stagnation. Union enterprise agreements have historically produced stronger wage outcomes than non-union agreements.[5] The Bill seeks to make it easier for employers to make non-union agreements and limits the current capacity for FWC to intervene to ensure minimum standard wages and conditions are met in enterprise agreements. This is largely proposed through the measures set out in Schedule 3- Enterprise Agreements.

The agreement making process is proposed to be amended to:

- Expand the Objects of the Part to give greater emphasis to employer needs and priorities[6]
- Give employers more time to provide the NERR[7] - thus limiting the opportunity for meaningful union and worker involvement in negotiations

[5] Alison Pennington, The Australia Institute, Centre for Future Work Briefing Paper: How Non-Union Agreements Supress Wage Growth- and Why the Omnibus Bill Will Lead to More of Them, p3

[6] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, s171

[7] s173(3)

- Reduce employer obligations to provide information to employees in the pre-approval process[8] - thus leading to less informed voting and less understanding and awareness of agreement terms that may be less favourable to employees

- Limiting voting eligibility for agreements and variations with respect to casual employees to only those who work during the access period[9] - thus excluding a portion of the workforce from the democratic process and creating incentive to manipulate casual employee attendance during the access period to influence voting outcome

- Expanding the grounds upon which an agreement that does not pass the BOOT may be approved by FWC[10] by creating a low threshold under which employers can seek approval for enterprises affected by COVID- thus creating agreements that offer lower entitlements and conditions that can remain in place for years to come and setting lower baselines for future bargaining

- Requiring FWC to give significant weight to the views of employers with regard to the BOOT[11] thus shifting power to the employer and reducing the capacity of FWC to act as an independent assessor of agreements with respect to the BOOT

- Requires FWC to approve agreements in a reduced timeframe[12] - thus limiting the FWC capacity to scrutinise agreements and encourage the parties to provide appropriate undertakings

The ANMF opposes each of these measures and is extremely concerned about the total impact they will have on bargaining in the private health and aged care sector.

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[8] s180(2) and (3)

[9] ss181 and 207

[10] s189(2)

[11] ss193 and 211

[12] S255AA

Lost opportunity

In his second reading speech, Minister for Industrial Relations, Mr Porter states that the purpose of the Bill is "to create jobs" by removing barriers that stifle job growth[13]. The Bill, can be broadly described as seeking to achieve jobs growth by giving greater flexibility to employers, making it easier to engage employees as casuals, removing the ability of people who have been incorrectly characterised as casuals to recover entitlements and empowering employers to seek approval of agreements that offer ever lower wages and conditions.

One of the key purposes of the Bill is to minimise the perceived risk of casual employees seeking to recover their legal entitlements in the event that they have been miscategorised as casual, rather than permanent employees. Employer representative campaigning against the outcome of the Workpac decisions appears to be a driving force behind the Bill. The voice of unions and the workers they represents appears to have been ignored, despite the promises made to work collaboratively over the course of 2020.

In light of what we have experienced as a community and the burden front line workers shouldered in the last year, this is an extremely disappointing position for the Coalition Government to have taken.

This Bill represents a lost opportunity to promote secure, well paid work that recognises the contribution of countless workers, including at the forefront, those in health and aged care who have protected and cared for our community in the most difficult of times. The Bill is short-sighted, politically motivated and squanders much of the good will unions, employers and government brought to trying to improve working conditions in response to the pandemic.

Specific concerns with the Bill

This submission addresses the particulars of the Bill below, in the order presented within it, using the same headings as the Bill.

Schedule 1 Casual Employees

The ANMF is opposed to these provisions in the Bill.

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[13] Christian Porter (Attorney General, Minister for Industrial Relations and Leader of the House) Second Reading Speech (9 December 2020)

Definition of casual employee

The Bill creates a subjective basis for categorising employees as casuals, which is likely to increase the number of casual employees, rather than encourage employers to offer permanent work at the time of engagement. The provisions for conversion from casual to ongoing are not adequate to counter this.

The definition of a 'casual employee' in the Bill is an attempt to overturn the Workpac decisions[14] and gives pre-eminence to the description of the employment as 'casual' by the employer at the point of engagement. This is clearly the time where a prospective employee is not in a strong position to negotiate terms of employment, nor to dispute whether the work to be performed will in fact be genuinely casual in nature. It is wrong to suggest that the employer and employee are equals in negotiating employment terms. The proposed section 15A allows the employer to designate future employment as casual, simply by stating it is so.

When viewed as a whole, s15A works strongly in favour of employers to allow employees to be engaged on a casual basis, whether this would be a correct characterisation or not. The exclusion of subsequent conduct in conjunction with the unequal nature of entering an employment relationship gives encouragement to employers to offer casual work at the expense of ongoing work and gives employees little scope to challenge this practice.

The ANMF is particularly concerned about the impact s15A may have in the aged care sector. Consistency of care provision in residential care is an important factor in ensuring quality and safe care can be delivered; staff who are familiar to residents and who know residents are better able to care for those residents. For example, it is recognised that people with dementia need continuity of care to ensure the best outcomes. [15] [16]

The ANMF supports the inclusion in the *Fair Work Act 2009* (FW Act) of a definition of casual employee that reflects the common law and that accepts that the nature of employment may evolve over time.

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[14] WorkPac v Skene [2018] FCAFC 131 (Skene) and WorkPac v Rossato [2020] FCAFC 84 (Rossato)

[15] Kitwood, T. and Bredin K. 'Towards a Theory of Dementia Care: Personhood and Well-being' Ageing and Society 1992;1 2: 269-287

[16] Nazzarko, L. 'Providing high quality dementia care in nursing homes' Nursing and Residential Care Vol. 11, No. pp. 296-300

Conversion

The Bill introduces new Division 4A- Offers and requests for casual conversion as part of the NES. The ANMF supports casual conversion entitlements being included in the NES, but does not support the proposed amendments.

The opportunity to convert to permanent employment only arises after 12 months of employment and is based on an assessment of work patterns over at least the preceding 6 months. At this point consideration of whether an employee has worked a regular pattern of hours on an ongoing basis can be made to determine eligibility for conversion. These provisions allow an unscrupulous employer to engage a person as a casual employee and then set a regular pattern of work that is more consistent with permanent work for a period of up to a year before conversion offers some examination of the characterisation of the pattern of work. The employer may receive the benefits of having a permanent employee without accruing the obligations associated with permanent employment.

The opportunity to request conversion must be made available earlier in the employment relationship.

While the employer is obliged to consider offering casual conversion, there remains ample scope for the employer to refuse conversion or to offer conversion. Any dispute in relation to conversion can only be dealt with by consent arbitration.

Set off

In circumstances where a casual employee successfully demonstrates that during the employment period, they were not in fact a casual employee s545A(b) mandates that a court must reduce any amount payable by amount equal to the loading amount. This obliges a court to conduct, after examination of any fair work instrument or contract, a forensic exercise in apportioning owed entitlements against the casual loading amount.

The ANMF has serious concerns with this provision. The true amount of casual loading must be established, noting in many cases, workers do not receive the full 25% loading and approximately half receive none at all.[17] Any entitlements paid must also be established and then set off proportionately.

[17] https://www.griffith.edu.au/__data/assets/pdf_file/0024/1212675/What-do-the-data-on-casuals-really-mean-v5.pdf p23

For an employee to succeed in recovering lost entitlements will require an onerous, forensic style assessment of pay rates – for many casual employees, this will be excessively difficult and costly.

A mandatory off set is likely to result in nil or negligible payments of outstanding entitlements, acting as a disincentive to pursuing legitimate entitlements.

The concept of set off of the loading against entitlements is contrary to established common law and contract law principles, which say an amount paid for a specific purpose may not retrospectively be claimed as allocable to a different purpose.[18]

Casual employees who have worked regular, set patterns of work over many years, without the benefit of permanent employment, will by virtue of these provisions, lose any effective right to recover their legitimate entitlements.

Schedule 2 Modern Awards

Part 1 - Additional hours for part time employees

The Bill inserts a new Division 9 – which allows for simplified additional hours agreements (SAHAs).

Part-time workers covered by 12 awards can be asked to enter into an agreement to work extra hours without overtime so long as they are working more than 16 hours a week. The list of awards can be added to by Regulation, giving broad discretion to the government.

The current proposal does not include any awards covering ANMF members however our experience of a similar provision in the *Nurses Award 2010* (Award) presents a useful insight into the potential dangers and misuse of this type of arrangement by employers, particularly in the aged care sector.

Clause 28.1(d) of the Award sets out overtime arrangements for Part-time employees as follows:

> *All time worked by part-time employees in excess of the rostered daily ordinary full-time hours will be overtime and will be paid as prescribed in clause 28.1(a).*

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[18] Ray v Radano [1967] AR (NSW) 471 cited in Rossato at [827], [1989]FCA 492 at[42]

The effect of this clause is that any additional hours worked by part-time employees in excess of their agreed or rostered hours are paid at ordinary time unless the additional hours are in excess of the rostered daily ordinary hours of a full-time employee.

Similarly, a part time employee may agree to work additional hours or days in the week at ordinary time rate of pay subject to the ordinary hours of work for full time employees under clause 21 'Hours of work' and clause 22 'Span of hours' provisions in the Award.

As a result, it is common practice for employers covered by the Award to engage part time employees on minimum hours contracts and subsequently offer a variable number of additional hours or shifts over a roster period. Employers will ask part time employees to provide their "availability" for additional shifts. The employee may or may not be provided the additional hours or shifts.

Part-time employment is effectively reduced to a minimum, with all additional hours treated as casual, without the casual loading. Members engaged in this way are required to be available to work, but without any certainty of work. This impacts on other commitments, such as family and caring commitments and the ability to rely on income from set and predictable hours.

Below are some case studies outlining how the terms of the Nurses Award has negatively affected members:

CASE STUDY

Sector: Aged Care

Organisation: Small for-profit residential aged care facility

Industrial Instrument: Nurses Award 2010

Member is a Nursing Assistant from overseas

Over a four-year period there were multiple contacts from the member seeking advice on increasing her contracted hours to reflect the actual hours she worked with no success and in the end resigning from her job

- Member originally employed as casual and told on hiring that after 3 months she would be made permanent. After 7 months member is still a casual and her hours have been reduced.
- Member is finally given a contract which is to be renewed every 12 months. She is contracted to work 8 hours a fortnight, however she is working much more than this.
- On her second year member is again given her contract of 8 hours per fortnight to sign. Member has been working almost full-time hours and wants this reflected in her new contract. Member requests this from the DON but has had no response. Member is afraid if she doesn't sign the contract she will be terminated. Member signs the contract of 8 hours per fortnight.

Study Cont'd

- After taking LWOP due to work stress, member returns to work and is told by the DON she has made her casual and there are no more shifts.
- The New South Wales Branch of the ANMF contacts the DON who advises member is part-time. Member resigns from employer as she doesn't want to pursue the matter.

CASE STUDY

Sector: Aged care

Organisation: Redacted due to privacy concerns

Industrial Instrument: Enterprise agreement

An employee working in aged care was employed part time to work less than 10 hours per week, according to their contract.

For more than 12 months, the employee has worked in excess of 30 hours per week and has subsequently requested a review of the minimum contracted hours to reflect the hours actually worked.

The request has repeatedly been ignored and the employee has no option but to initiate a dispute under the enterprise agreement. In this case, if the matter is not resolved through the dispute settlement process, the employee can refer the dispute to the FWC for conciliation and ultimately arbitration.

However, an employee in a similar situation who does not have access to arbitration under their agreement or is award reliant will not have an access to arbitration unless the employer agrees, which is most unlikely. This puts the employee in an untenable position, entrenches unfair contracts perpetuating insecure work and financial hardship.

The provisions of Division 9 providing for simplified additional hours agreements for part-time employees may operate in a similar way to the provisions in the Nurses Award, outlined above. SAHAs will encourage employers to offer low contract hours to part-time employees in the knowledge that additional hours can be arranged on short notice. Despite being described as an agreement between the parties, the reality is that many part-time employees will be obliged to accept low hours contracts with ad hoc SAHAs in order to procure employment and gain enough shifts to earn a satisfactory income.

The SAHA provisions are subject to consent arbitration, again reducing the capacity to bring a dispute. The provisions shift negotiations about rostering arrangements to the individual, and reduce the incentive for employers to collectively bargain.

The far preferable alternative would be to compel employers to offer permanent work that reflects the actual hours of work performed assessed over a reasonable time frame. This would promote secure, quality work.

Part 2 - Flexible Work Directions (FWD)

The ANMF opposes the Part 6-4D which will allow employers under 12 identified awards to given written unilateral directions to their award dependent employees about the duties to be performed and the location of the work. The directions are in line with those that could be made where employers were part of the of JobKeeper scheme. These provisions extend the employer flexibility, without the correlating payment to support employees ongoing employment.

The basis for making an FWD is broad and subjective. An employer must only show that it has information that leads it to reasonably believe that the direction is a necessary part of a reasonable strategy to assist in the revival of the employer's enterprise. There is no mechanism for establishing the baseline for revival, in the way that businesses were required to establish a measurable loss to be eligible for JobKeeper. It is difficult to envisage an employer or business that is not able to demonstrate efforts to 'revive' a business at any point in time. Again, this provision gives flexibility to the employer at the expense of employees.

Part 3 - Repeal Part 6-4D (after two years)

These provisions will operate for a period of 2 years from approval. In the course of the next two years, any FWD may become entrenched as a work practice and go well beyond any post COVID 'revival' . Further, the clauses will form part of the BOOT test and can therefore form part of enterprise agreements that operate after the 2 year period.

Schedule 3 – Enterprise agreements

The ANMF strongly opposes the package of proposed amendments set out in Schedule 3. The overall effect of the provisions is to make it easier for employers to undercut employment conditions and undermine employees' fundamental right to union representation in bargaining. We refer to the submission of the ACTU for detailed analysis of the flaws of these provisions.

As outlined above, bargaining in the aged care sector has not achieved the outcomes necessary to promote quality, attractive work in the sector. Provisions that further move the bargaining landscape in favour of employers will not achieve what is so vitally necessary in the sector- improved wages and conditions and greater job security.

The ANMF is particularly concerned about the extension of time for employers to provide the NERR. The proposed provisions allow employers to provide the notice well after bargaining has commenced. In many cases it is through employees receiving the NERR that unions become aware of bargaining. Extending this time will allow employers to push through bargaining and leave little opportunity for genuine negotiation with employee industrial representatives.

Part 3 - Pre-approval requirements

This Part significantly weakens the pre-approval requirements on employers attempting to have an enterprise agreement approved at the FWC.

The Part changes the operation of the approval steps of enterprise agreements by replacing the compulsory procedural steps set out in ss180(2), (3), (5) and (6) of the FW Act, which require an employer to "take all reasonable steps" (our emphasis) to ensure that:

1. relevant employees have access to the agreement;
2. there is an appropriate explanation of its terms, and;
3. details of the voting process are provided;

and replaces it with a general requirement that employers must "take reasonable steps to ensure that the relevant employees are given a fair and reasonable opportunity to decide whether or not to approve the agreement".

A new s180(3) then states that "without limiting" this general requirement, the employer is "taken to have complied" with the general requirement if that employer "takes reasonable steps" to ensure the relevant employees have access to the agreement and an appropriate explanation of its terms and details of the voting process.

Part 4 - Voting requirements

The ANMF is strongly opposed to the provisions in the Bill that seek to explicitly disenfranchise some casual workers. For further information on this point please refer to the ACTU submission.

Part 5 - Better off overall test

A new public interest exemption is contained within the Bill which will operate for a period of 2 years. It adds a new limb to the public interest exemption at s189(2)(1A) of the FW Act.

It states:

(1A) The FWC may approve the agreement under this section if the agreement is not a greenfields agreement and the FWC is satisfied that:

(a) it is appropriate to do so taking into account all the circumstances, including:

i. the views of the employees, and of the employer or employers, covered by the agreement and of the bargaining representatives for the agreement; and

ii. the circumstances of those employees and employers, and of any employee organisation that has given a notice under subsection 183(1) that the organisation wants the agreement to cover it, including the likely effect that approving or not approving the agreement will have on each of them; and

iii. the impact of the coronavirus known as COVID-19 on the enterprise or enterprises to which the agreement relates; and

iv. the extent of employee support for the agreement as expressed in the outcome of the voting process referred to in subsection 181(1); and

(b) because of those circumstances, the approval of the agreement would not be contrary to the public interest.

In accordance with clause 2 of the Bill, the new s189(2)(1A) of the FW Act would cease to apply two years after Royal Assent.

This new subsection in the FW Act would allow the FWC to approve agreements that do not meet the BOOT as long as it is "appropriate to do so taking into account all the circumstances". There is no requirement under this new limb of the test for exceptional circumstances to exist.

The base rate of pay from an award cannot be undermined as s 206 of the FW Act remains, however all other award terms, penalties and allowances are at risk. This is particularly relevant to ANMF members, most of whom rely upon penalties and loadings to supplement their income.

Our members in South Australia, have told us recently that a loss of penalty rates would prompt them to cease working unsociable hours, move out of the health and aged care sector and have a very significant impact on their quality of life.

As one member in aged care told us:

> *To cut our penalties would have a devastating effect not only on our workers but the economy as a whole as there will be less money to spend. I think a lot of older workers (one of them being me) will leave or cut down on their shifts worked and the aged care sector is made up of a lot of older workers. We will end up with a chain reaction that will not be beneficial to anyone.*[19]

Another member observed:

> *To allow the possibility of removing the protection of EBA standards is a slap in the face for myself and all the other nurses in the state.*[20]

While approximately 90% of residential aged care facilities are either fully or partially covered by enterprise agreements, the long standing problems with bargaining in this sector means that agreements are already substandard and provide marginal benefit particularly for carers and assistants whose wage rates are very close to Award rates.

Sometimes employers have tried to have agreements approved which did not meet the requirements of the BOOT. The FWC has been able to successfully ensure that undertakings were made that raised the rate of pay. This is nearly always for lower paid ANMF members.

CASE STUDY

Sector: Aged care
Organisation: Infinite Aged Care, South Australia
Industrial Instrument: Enterprise agreements

The ANMF (SA Branch) commenced enterprise bargaining with Infinite Aged Care (the employer) in 2018. Bargaining was slow, protracted and continued for approximately three years. It resulted in the approval of three separate agreements covering nurses. The latter two agreements, one covering the 'Rose Court' aged care facility and the other covering the 'Churchill Retreat' aged care facility, were approved by the Fair Work Commission after undertakings were provided by the employer.

The undertakings provided with the Rose Court agreement address the following Nurses Award 2010 (the Award) entitlements that were otherwise excluded or provided at a sub-Award standard in the agreement.[21] These included:

- Notice of termination (in circumstances of abandonment of employment)
- Travel allowance
- Overtime wage rates
- Overtime meal allowance

[19] ANMF SA Branch Member, Aged Care sector, South Australia

[20] ANMF SA Branch Member, Private Hospital sector, South Australia

[21] Rose Court Aged Care Facility and ANMF-SA Branch Nursing Employees Enterprise Agreement 2020 [2020] FWCA 6929

Study Cont'd

- Time off in lieu of overtime
- Minimum engagement for casual employees

The Rose Court agreement provides wages for some nursing classifications that are a mere 2% above current Award rates. The Churchill Retreat agreement was similar, requiring almost all of the above undertakings, and offering some wages at only 3.5% above the Award.[22] If the Better Off Overall Test had not necessitated the employer's undertakings, it appears there was a real risk that nurses would be worse off than what they would otherwise be under the Award

The ANMF is opposed to the above changes to the BOOT which seek to undermine the safety net provided in the FW Act. These changes will have a direct impact on our lowest-paid and most vulnerable members.

Part 6 - New model NES interaction term

The ANMF notes that there is currently a model term that has been developed by the FWC which is mirrored by this legislation. However, in light of the whole package of the Bill and demand for short turnaround times for agreement approval, the ANMF is concerned that any model clause will be a vehicle for employers to attempt to undermine the NES in general as scrutiny of enterprise agreements will dramatically reduce.

Part 8 -Terminating agreements after nominal expiry date

Part 8 of the Bill precludes an application for termination of an enterprise agreement being made until 3 months after the Nominal Expiry Date has passed

This is a slight improvement on the current situation however it does not go nearly far enough in protecting workers, including ANMF members. The Aurizon decisions in the FWC and Federal Court mean that the threat of unilateral termination of expired enterprise agreements is used by employers as a tactic to force workers onto worse wages and conditions either by becoming award-reliant or voting for an inferior replacement enterprise agreement.

Employers should not be able to compel their workers to accept cuts to their employment conditions by successfully terminating an enterprise agreement in order to place them in circumstances where they are even worse off.

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[22] Churchill Retreat Aged Care Facility and ANMF-SA Branch Nursing Employees Enterprise Agreement 2020 [2020] FWCA 6932

Part 9 - How the FWC may inform itself

The ANMF is opposed to this change which seeks to undermine the safety net provided in the FW Act. These changes will have a direct impact on ANMF members.

This part of the Bill restricts the discretion of the FWC in ss 589 and 590 of the FW Act to consider any information it sees fit in approval applications for new agreements and variations. It will prevent workers covered by the agreement from being represented by the ANMF if it was not a bargaining representative unless 'exceptional circumstances' exist. Workers covered by an agreement should have the right to be represented by their union in all matters before the FWC involving an enterprise agreement.

The effect of this provision is that the FWC would not be allowed to consider submissions from the ANMF in cases where we were not a bargaining representative but have members covered by a proposed enterprise agreement. The capacity for unions like the ANMF who were not bargaining representatives to make submissions to the FWC about the impact of an agreement is a significant safeguard which should be retained. The ANMF refers to the numerous examples provided by the ACTU and other unions to demonstrate why this is the case, in addition to our own example below:

CASE STUDY

Sector: Labour hire
Organisation: Workpac Pty Ltd
Industrial Instrument: Nurses Award 2010

In 2010 Workpac attempted to have an enterprise agreement approved.[23]

Despite not having any members, the Queensland Nurses' Union of Employees (a branch of the ANMF) made submissions and was allowed to appear at the hearing[24] into the approval of the agreement, to raise concerns about its rates of pay with respect to workers who would otherwise be covered by the Nurses Award 2010 and the ballot method used to gain approval for the propose enterprise agreement.

Commissioner Raffaeli refused to approve the agreement.

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[23] Workpac Pty Ltd [2010] FWA 4247 (8 June 2010)

<https://www.fwc.gov.au/documents/decisionssigned/html/2010fwa4247.htm>

[24] Transcript of proceedings, Application by WorkPac Pty Ltd (7 June 2010)

<https://www.fwc.gov.au/documents/documents/transcripts/070610ag20108647.htm>

Part 10 - Time limits for determining certain applications

The ANMF agrees with the ACTU position on this part of the Bill.

What is proposed is unsound as it will lead to enterprise agreements being rushed through without appropriate scrutiny and also mean the FWC will be forced to reject applications rather than working with employers, unions and workers to make the proposed enterprise agreement compliant with the FW Act.

Part 11 - FWC functions

Part 11 of the Bill seeks to insert a new s 254B into the FW Act. It states:

> *254B FWC to recognise outcome of bargaining at enterprise*
>
> *The FWC must perform its functions and exercise its powers under 7 this Part in a manner that recognises the outcome of bargaining at 8 the enterprise level.*

Whilst this may not appear to be a substantial change, it is clear this is part of the government's focus on removing the role of the FWC even further than is already the case. The outcome of such a provision will not be known until the case law develops but it is difficult to see how this provision is in the interests of workers. Most "bargaining" between employers and workers not represented by unions consists largely of "take it or leave it" styled arrangements with very little to no negotiation involved.

Therefore the ANMF is opposed to this part of the Bill.

Part 12 - Transfer of business

The ANMF is opposed to these provisions in the Bill and refer to the ACTU submissions in this regard.

Part 13 - Cessation of instruments

The Bill will sunset (by 1 July 2022) agreements approved prior to the commencement of the FW Act and during the 'bridging period' prior to the start of modern awards, being 1 July 2009 to 31 December 2009. These are commonly referred to as "zombie agreements".

The ANMF strongly believes that there is no reason to delay the application of this provision for over a year.

The ANMF acknowledges that terminating zombie agreements will mean that employers will no longer have to compete with businesses operating under terms and conditions of employment that were not assessed against the BOOT. It will remove unwarranted competitive advantage that the continued operation of these agreements facilitate by allowing some employers to legally provide terms less favourable than the relevant modern award.

However, there is no provision in the Bill to protect workers who might be left worse off by the termination of a zombie agreement.

Schedule 4 – Greenfields agreements

The ANMF opposes the provisions of Schedule 4, which allows greenfields construction agreements to extend for up to 8 years from the date specified in the agreement. We refer to and support the submission of the ACTU with regard to these provisions. In particular, we note the concern with respecting to locking FIFO workers into 8 year agreements. The impact of FIFO work on employees is associated with mental health concerns. Any terms of employment in a greenfields agreement that may contribute to placing excessive stress on workers, such as rosters that keep workers away from their families for extended or disrupted periods of time, must be subject to negotiation through bargaining as early as possible.

Schedule 5 – Enforcement/compliance

Part 1 - Orders relating to civil remedy provisions

Division 1 of this part of the Bill considerably increases maximum penalties with respect to the non-payment, late payment or underpayment of wages and entitlements, defined as "remuneration-related contraventions" (RRCs). The effect of this change is that for contraventions maximum penalties will be increased by 50%.

In addition, changes in Division 1 allow for courts to consider the "value of the benefit" for RRCs. When a court is working out the maximum penalty for an RRC, it would calculate the value of the benefit obtained from each contravention, based on the amount of remuneration employees would have received, retained or been entitled to if the contravention had not occurred. For numerous breaches arising from part of a single course of conduct taken to be a single contravention, the benefit obtained from each breach is combined.

Under the FW Act, the Fair Work Ombudsman, individuals and unions are entitled to initiate a single proceeding seeking both a penalty and compensation.

The Bill proposes at subsection 546(3A) that where a penalty is awarded on the basis of the value of the benefit obtained, such penalty must only be paid to the Commonwealth, irrespective of who brought the action in the first place.

The current situation provides that a penalty may be paid to the Commonwealth or other person or unions; whoever brought the action. The "usual order" is that the person or organisation that brings the proceedings recovers the penalty, in recognition of "...the trouble, risk and expense of bringing proceedings which are in the public interest which advance the objects of the legislation and which benefit the wider community".[25] This is under the concept of that person being a "common informer", which has existed for hundreds of years in the common law.

The consequence of this new provision excluding payment of the penalty to other person or organisation will be further limits the capacity of anyone other than the Commonwealth to properly resource compliance efforts.

Allowing the "common informer" who brings the proceedings to be paid the penalty ameliorates the expense of legal proceedings to some degree. The long-standing policy rationale for this approach does not evaporate by reason of there being a new method of calculating maximum penalties. The so-called "common informer" legislation that is now found in s 546(3) of the FW Act, has been a part of the industrial relations laws of the Commonwealth since the Conciliation and Arbitration Act 1904. The current position should be retained.

The value of the benefit as defined in proposed section 546A usually equates to the value of the underpayment and will usually be easy to calculate. A court is required to ascertain the maximum available penalty as part of its reasoning in every case. The effect of proposed s546(3A) will be to create deterrents for persons and unions to begin proceedings of a more serious nature where the value of the underpayment exceeds the maximum value of penalty as determined in the usual way. This is an absurd effect of the Bill and cannot be allowed to stand.

Part 2 - Small claims

The ANMF broadly supports this part of Schedule 5 of the Bill, although the ANMF believes the quantum of the small claim threshold needs to be raised to $100,000 and should also be indexed, similar to how filing fees in the FWC are indexed.

[25] United Voice v MDBR123 Pty Ltd (No 2) [2015] FCA 76. See also Sayed v Construction, Forestry, Mining and Energy Union [2016] FCAFC 4 (22 January 2016) for a detailed discussion of the concept of the usual order.

Involving the FWC in the conciliation process is a positive step as it will lead to more complaints being resolved without the cost and hassle of going to court.

However, the ANMF shares the concerns raised by the ACTU in its submission concerning the small claims process outlined in the Bill. The small claims process cannot be allowed to become more technical and complex than it already is, which is the outcome if the Bill becomes law. Please refer to the detailed submissions of the ACTU for further information.

Part 3 - Prohibited Advertising

The ANMF believes that the introduction of civil penalties for advertising jobs at below minimum wages set by the National Minimum Wage Order is a welcome development.

The ANMF does not understand why only the Fair Work Ombudsman will be able to bring enforcement proceedings in court for such matters. The effect of this limitation is that it will lessen the possibility of employers who do contravene the provision ever being detected and facing legal consequences.

Unions with the relevant industrial coverage of the work in question should also be able to initiate proceedings in court, similar to how they can currently initiate proceedings for underpayment of wages.

Part 4 - Compliance Notices, Infringement Notices and Enforceable Undertakings

The ANMF supports the 50% increase in penalties for non-compliance with a compliance notice. It is not a contentious proposition.

The ANMF also supports the submissions of the ACTU made concerning this part of the Bill.

Part 5 - Sham Arrangements

The 50% increase in penalties for sham contracting is welcome and also not contentious.

Part 6 - Functions of the ABC Commissioner and the Fair Work Ombudsman

The ANMF only comments on that part of the Bill concerning the FW Act.

This item of the Bill inserts a new function for the FWO so it has a requirement to publish information relating to the circumstances in which it will commence proceedings in accordance with the FW Act or, alternatively, defer proceedings to deal with suspected non-compliance through other compliance mechanisms.

The ANMF believes this is a positive step, not just for employers as identified in the explanatory memorandum for the Bill for all stakeholders concerned with the FW Act.

Part 7: Criminalising underpayments

The ANMF is opposed to the current wording in the Bill that purports to deal with wage theft. It does not address the problem and is not nearly enough of a deterrent for reprobate employers.

Wage theft in Australia is rampant and successive federal governments have failed to act for far too long. There have been numerous reports and inquiries into wage how widespread wage theft is in Australia, including (but not limited to):

- *International Students and Wage Theft in Australia (2020) which found that "Underpayment of international students was systemic and widespread"*[26]
- *The Wages Crisis in Australia, University of Adelaide Press (2018)*[27]
- *Inquiry into Wage Theft in Western Australia (2019)*[28]
- *Corporate Avoidance of the Fair Work Act (2017)*[29] *in which Chapter 6 is dedicated to wage theft.*

The Bill inserts a new criminal offence of "dishonestly engaging in a systematic pattern of underpaying one or more employees" with maximum penalties of 4 years imprisonment or 5,000 penalty units for an individual and 25,000 penalty units for a body corporate. 'Dishonest' is defined as:

a. dishonest according to the standards of ordinary people; and

b. known by the defendant to be dishonest according to the standards of ordinary people

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[26] Migrant Worker Justice Initiative, International Students and Wage Theft in Australia (June 2020), p. 8 <https://static1.squarespace.com/static/593f6d9fe4fcb5c458624206/t/5ef01b321f1bd30702bfcae4/1592793915138/Wage+-Theft+and+International+Students+2020.pdf>

[27] <https://www.adelaide.edu.au/press/system/files/media/documents/2019-04/uap-wages-crisis-ebook.pdf>

[28] <https://www.commerce.wa.gov.au/labour-relations/inquiry-wage-theft-western-australia>

[29] Australian Senate, Education and Employment References Committee, Corporate Avoidance of the Fair Work Act, Commonwealth of Australia (2017) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/AvoidanceofFairWork/Report/c06>

[30] Bill, s324B

Both Queensland and Victoria have already passed laws to criminalise certain underpayments, including those made by employers covered by the FW Act. The Bill proposes to override the provisions in these laws with an inferior model where securing convictions will be more difficult and with reduced penalties.

For example, s6(11) of the *Wage Theft Act 2020* (Vic) (WT Act) defines dishonest as "dishonest according to the standards of a reasonable person." Unlike the proposed changes for the FW Act, the subjective knowledge of the offending under-payer of wages is irrelevant. The maximum penalty of 4 years imprisonment compares poorly to the Victorian [31] and Queensland [32] schemes where maximum imprisonment is 10 years, similar to other theft offences.

In addition, the Bill's requirement for a "systematic pattern of underpaying" is far more lenient than the laws operating in Queensland and Victoria, which do not require a pattern of underpaying.[33] This means that an employer who refuses to pay a large sum to an employee on a single occasion will likely not be subject to the criminal penalty regime of the Bill. For example, an employee who was made redundant after 9 years of service would be entitled to a large redundancy payment (at least 16 weeks pay under the NES) plus other outstanding leave entitlements. An employer who withholds this final payment for whatever reason would not be liable to criminal prosecution irrespective of how much money was stolen from the employee under the proposed wage theft provisions of the FW Act. The same employer could be prosecuted under the WT Act and the Criminal Code in Queensland.[34]

CASE STUDY

Sector: Education

Organisation: Private school

Industrial Instrument:
NSW Catholic Independent Schools (Support Staff - Model B) Multi-Enterprise Agreement 2020

A member of the ANMF NSW Branch worked as a registered nurse covered by the above enterprise agreement.

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[31] WT Act s6(1)(b)

[32] Ashurst, Wage theft now a criminal offence in Queensland: What employers need to know, (23 September 2020) <https://www.ashurst.com/en/news-and-insights/legal-updates/wage-theft-now-a-criminal-offence-in-queensland-what-employers-need-to-know>

[33] See for example s6 of the WT Act

[34] See ss391(6A) and (7) of the Criminal Code

Study Cont'd

The member was terminated by their employer but was not paid their notice in lieu and accrued but untaken annual leave. No reason was provided by the employer as to why the final payment was not made. Eventually these entitlements were paid after representations by the union.

In this scenario the employer likely cannot be prosecuted for wage theft under the Bill as there is no pattern of underpaying.

The ANMF believes that the bar for securing a conviction is set so high because the Commonwealth Government wants a device to override state and territory wage theft criminalisation provisions rather than have a serious set of laws to combat wage theft.

Schedule 6 – Fair Work Commission

The FW Act sets as one of its objects:

> *enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms;*[35]

The amendment to s587 and proposed introduction of s587A are contrary to the stated objectives of the FW Act.

Section 587 currently provides for FWC to dismiss an application that is not made in accordance with the FW Act, is frivolous or vexatious or has no reasonable prospect of success. These grounds for dismissal are reasonable and necessary. The proposed amendment adds two grounds: that the application is misconceived or lacking in substance, or is otherwise an abuse of process.

As outlined in the submission of the ACTU it is not clear what these additions will achieve, nor has any justification been provided for them. These provisions, particularly the ground of an application being misconceived or lacking in substance will particularly disadvantage self-represented applicants, who may lack the knowledge and skill to frame an application appropriately, notwithstanding having a genuine issue in dispute.

[35] FW Act s3(e)

The addition of s587A represents a serious erosion of access to justice. This provision allows FWC to order that an applicant cannot make further application to FWC without approval of the President, a Vice President or Deputy President, if a previous application has been dismissed under s587 as amended. There is no timeframe limiting the condition, nor link between the application dismissed in the first instance and the nature of the order under s587A. Again, these provisions disadvantage self-represented applicants in particular and could also prevent employee representatives from making further applications. The ANMF refers to the more detailed submission of the ACTU with respect to the concerns arising from these provisions of the Bill.

Access to justice is further limited by the proposed amendment to s607(1)(b) which provides FWC with the discretion to determine appeals on the papers, rather than, as is currently the case, with the consent of persons who would otherwise make submissions.

When viewed together, the ANMF considers these amendments pose a threat to access to justice and impede FWC's capacity to meet and operate within the objects of the FW Act.

Conclusion

The ANMF urges this Senate Inquiry to recommend the Bill be rejected in its entirety. If passed, workers will be worse off and facing more insecure and lower paid working conditions than ever. The health of the economy will not be improved by providing short-term gains for employer flexibility measures. Nor will our community be served in the ongoing efforts to control and eliminate the effects of COVID-19 on our health and lifestyle by the passing of this legislation.

Australian workers, including those who have worked in the frontline of caring for our community deserve far better. They deserve secure, ongoing, quality, well paid work and a legislative framework that supports these goals.