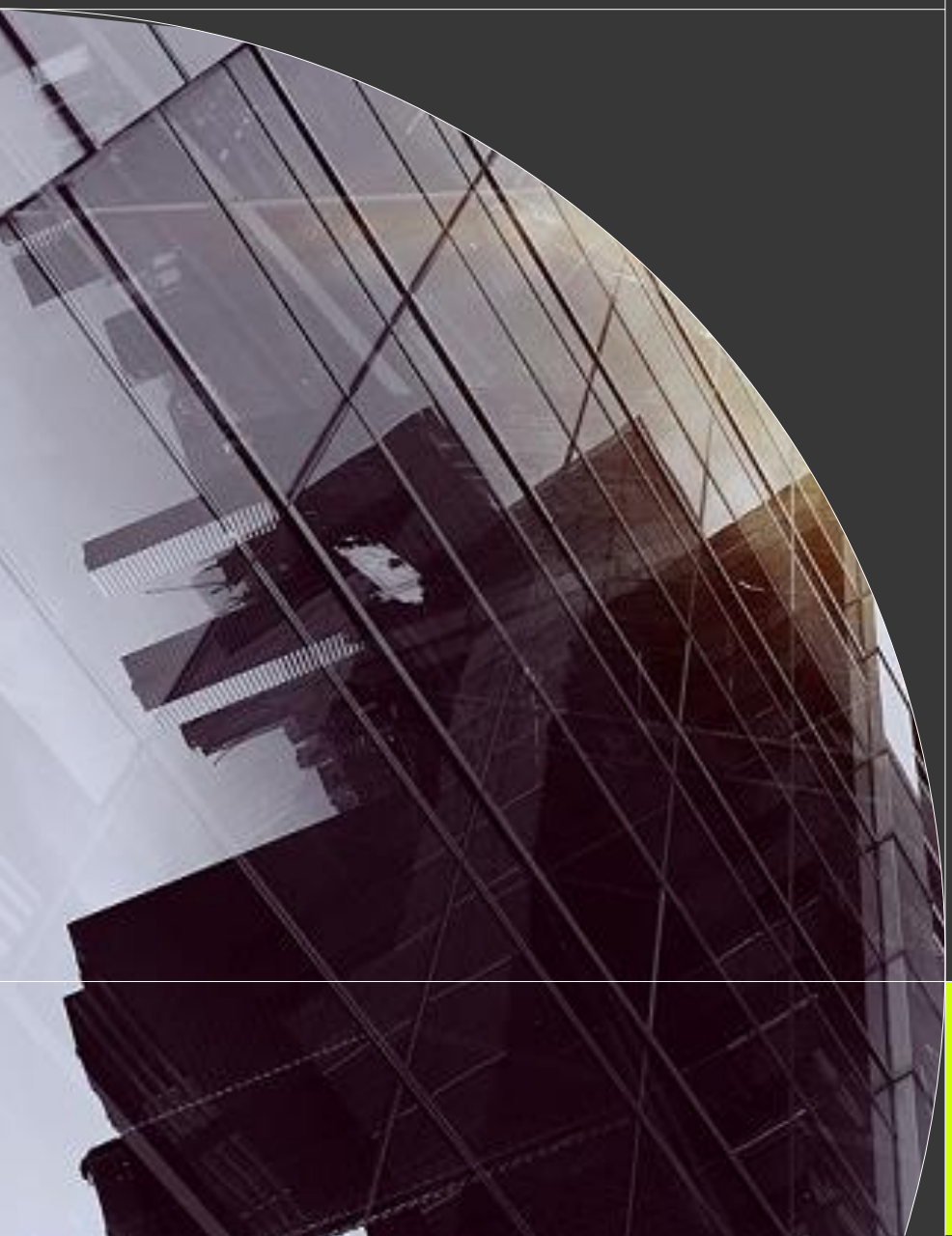
Statutory review of the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022

Submission of the Business Council of Australia

November 2024



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Contents

Figures

1. Overview

On 6 December 2022, the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (SJBP Act) commenced. The SJBP Act made some of the most significant reforms to Australia's workplace relations system since the *Fair Work Act 2009* (Cth) (FW Act) started in 2009. In fact, it undermined the single enterprise bargaining framework created by the FW Act and took industrial relations back to the 1970s and 1980s. These changes include (but are not limited to) amendments to significantly alter the multi-employer bargaining framework, introduce the intractable bargaining regime, restrict outer-limit contracts, prohibit confidentiality of remuneration terms, changes to the way bargaining for replacement agreements can commence, and the abolition of the Australian Building, and Construction Commission (ABCC).

The Business Council of Australia (BCA) represents over 130 of Australia's leading businesses, which employ more than 1.1 million Australians. Our members operate in a range of industries, including manufacturing, construction and infrastructure, information technology, mining, retail, financial services and banking, energy, professional services, transport, health, and telecommunications. Our members include some of Australia's largest employers, most if not all of which have had practical experience with many of the changes made by the SJBP Act.

In relation to workplace relations policy, the BCA advocates for a workplace relations system that drives productivity, flexibility and inclusivity, benefitting employees while allowing businesses to thrive. Fundamentally, we support jobs growth and increasing the real wages for working Australians. The only way to have sustainable wage growth without driving up inflation is through productivity improvements and modernising the way we work. This delivers a benefit to both employers and employees, along with the broader economy.

The SJBP Act was intended to implement many immediate actions identified as outcomes of the 2022 *Jobs and Skills Summit* (Summit). The Summit outcomes report references productivity five times and has as an immediate outcome to "*revitalise a culture of creativity, productivity, good faith negotiation and genuine agreement in Australian workplaces*".[1] However, the changes in the SJBP Act were neither designed to improve productivity nor do they meet certain other outcomes of the Summit, such as creating "*a simple, flexible and fair new framework that ensures all workers and businesses can negotiate in good faith for agreements that benefit them"* or "[removing] *unnecessary complexity for workers and employers*."

Instead, the SJBP Act introduced 296 pages of legislation making several significant and complex changes. The FW Act is now four volumes in length. These changes increased complexity, provided several new avenues for disputation and arbitration in the Fair Work Commission (FWC), and failed to achieve many of the stated outcomes of the Summit.

In considering the effectiveness of the operation of the SJBP Act amendments, the Review should consider the object of the FW Act in s 3. This includes "*… to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:*

(a) providing workplace relations laws that are fair to working Australians, promote job security and gender equality, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations…

(f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action…" (our emphasis).

Further, despite recent claims that the Government's workplace reforms have encouraged more cooperation and less conflict,[2] the FWC 2023-24 Annual Report discloses that "*the 2023–24 financial year has been one of the Commission's busiest years on record.* [The FWC] *received over 40,000 applications, a 27% increase compared to the previous reporting period, and the highest rate of lodgements ever received by the Commission since the inception of the Fair Work Act 2009."* This number included 14,722 unfair dismissal applications, 1,201 industrial action applications, and 5,477 general protection dismissal claims. This calls into question the effectiveness of the amendments made by the SJBP Act and the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) (CL Act), in terms of achieving cooperative and productive workplace relations, as required under the object of the FW Act.

[1] Australian Government, *Jobs and Skills Summit September 2022 – Outcomes*, p 6.
[2] Senator the Hon Murray Watt, Minister for Employment and Workplace Relations, *Watt, M.* (2024). *Don't look back in anger.* Speech to the National Press Club, Available at: https://ministers.dewr.gov.au/watt/address-national-press-club.

The Review, which was announced on 2 October 2024, has commenced earlier than required by the SJBP Act. We also note that its timeframe has been condensed from the six months permitted by the SJBP Act, with the initial draft report required in January 2025.

We consider the condensed timetable will undermine a thorough assessment of the SJBP Act. We are also concerned that it will limit the evidence available to support the concerns raised by our members, given the transitional periods and timeframes that apply to certain changes before they are determined by the Fair Work Commission (FWC) or Courts (noting that many of the substantive changes to the bargaining framework did not commence until 6 June 2023).

Despite these constraints, we believe there are some key issues which have already become evident and need to be addressed as a matter of urgency. Our submission traverses the deleterious impact some of the SJBP Act changes have had on bargaining, operational flexibilities and productivity for Australian businesses. We argue that several changes should be amended to ensure Australia's productivity decline does not continue. This continues to impact the overall economy and makes it even more difficult to address the challenges of the cost of living and keeping inflation down, resulting in interest rates staying higher longer.

Our key recommendations and further details of our submissions regarding the terms of reference are below.

2. Terms of reference

Section 4 of the SJBP Act requires the Minister for Employment and Workplace Relations to cause a review to be conducted of the operation of the amendments made by the SJBP Act, by 6 December 2024 (Review). The reviewers must give the Minister a written report of the Review within six months of its commencement. The Review must:

a. consider whether the operation of the amendments made by the SJBP Act are appropriate and effective; and

b. identify any unintended consequences of the amendments made by the SJBP Act; and

c. consider whether amendments to the FW Act or any other legislation are necessary to:

   (i) improve the operation of the amendments made by the SJBP Act; or

   (ii) rectify any unintended consequences identified under paragraph (b).

We note the Review will also encompass the operation of the amendments made by Part 16A of Schedule 1 of the CL Act, which allows union officials who do not hold a Federal Entry Permit to exercise rights of entry to premises to assist health and safety representatives (HSR). This review is timely given the conduct alleged against certain representatives of the Construction, Forestry and Maritime Employees Union (CFMEU) concerning right-of-entry breaches.

In our submission to the Review, we have not dealt with every change made by the SJBP Act. Rather, we have focussed our submission on the changes of most concern to BCA members.

3. Key recommendations

1. The Single Interest Employer Authorisation framework should be repealed or alternatively amended so it only applies with the consent of employers involved.
2. The Supported Bargaining Authorisation framework should only apply where employers agree to bargain collectively for a multi-employer agreement. If this amendment is not acceptable, s 243 of the FW Act should be amended such that the criteria in s 243(3) of being "*substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory"* should be satisfied as a mandatory pre-condition for a common interest to be found.
3. To ensure that the Intractable Bargaining Determination framework is operating effectively and appropriately regarding its stated objectives and to mitigate unintended consequences, s270A of the FW Act should be repealed.
4. S 173(2A) of the FW Act, which allows a bargaining representative to compel an employer to bargain without the majority support of employees to be covered by the enterprise agreement (EA), should be repealed.
5. The changes made by Part 12 of the SJBP Act to the ability to terminate an EA should be repealed. As an alternative, consideration could be given to allowing terminations of EAs past their nominal expiry date, subject to the pre-SJBP Act test in s 226, with the addition of some additional protections for employees, such as a requirement for the FWC to take undertakings given by employers not to reduce existing employee rates of pay when an EA is terminated into consideration.
6. The restrictive provisions of the legislation relating to use of fixed term employment should be repealed as they fail to recognise that in certain circumstances/industries there is a strong operational need for fixed term employment due to funding issues, specific projects and other operational reasons. Employers should have the discretion to determine the best mode and type of employment needed to suit the operational needs of their business without legislative interference. Failing that, exemptions to the restrictions on fixed-term contracts should be prescribed for:
    a. Employees employed pursuant to work rights granted by a visa.
    b. Employees receiving vocational training, such as clerkships, internships and graduate programs.

    Other exemptions should be reviewed to ensure they are achieving their policy intent.
7. Re-establish a specialist building industry workplace conduct regulator.
8. Reintroduce a form of the Code for the Tendering and Performance of Building Work including:
    a. Prohibited agreement content and industrial practices.
    b. Penalties for unlawful picketing and unprotected industrial action.
    c. Safety and drug and alcohol testing requirements.
    d. Ensuring freedom of association.
9. The FW Act should be amended to require union officials and employees seeking rights of entry under WHS laws to obtain a Federal Entry Permit.

4. Labor productivity in Australia

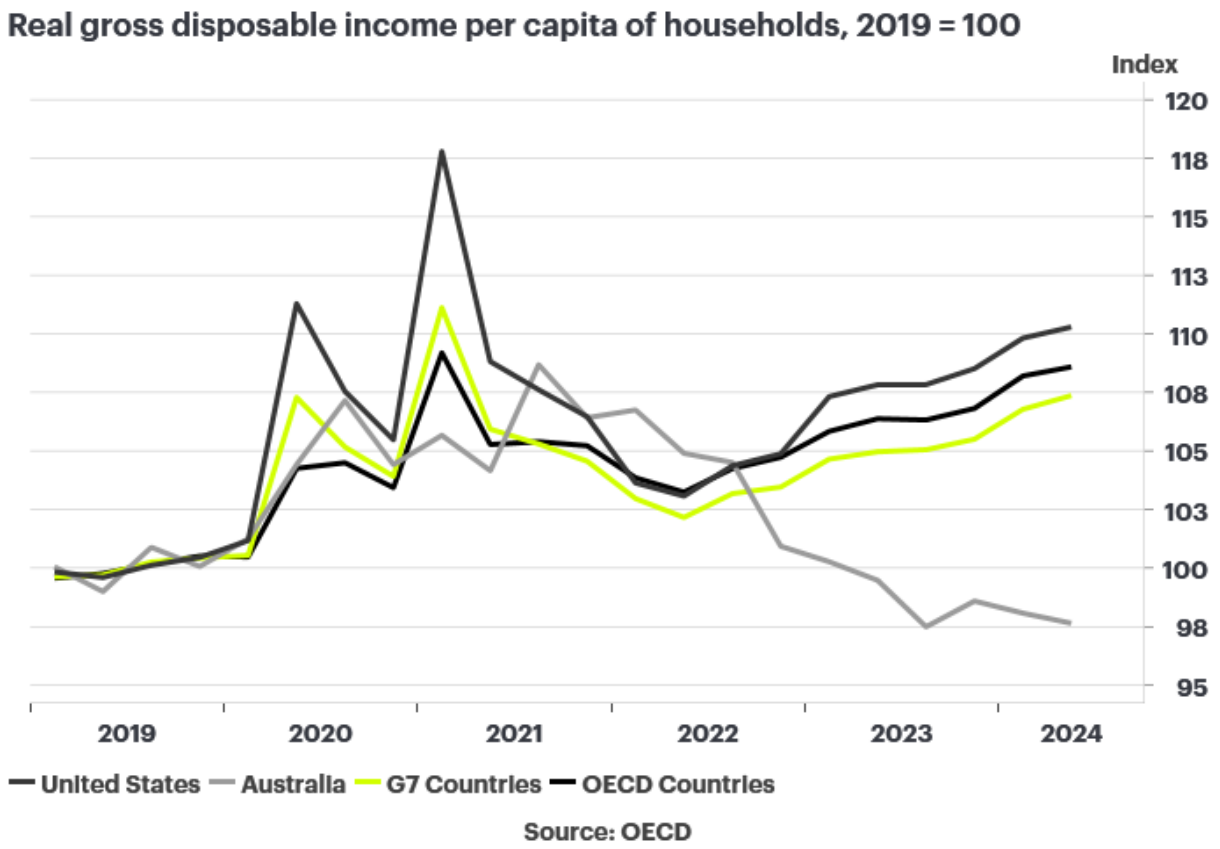
Economic growth is underpinned by the "3 Ps" – productivity, participation and population. Productivity reflects production efficiency; when it rises, employers can offer higher wages and hire more workers, without raising the price of their goods or services, ultimately improving living standards. Labour productivity is the amount each person produces – goods and services – per hour of work.

The Regulatory Impact Statement included in the *Revised Explanatory Memorandum to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (EM) provides:

> *Over the past 30 years, labour productivity growth has accounted for around 80 per cent of Australia's real GDP per person growth. The link between productivity and wages makes productivity growth a vital area for the industrial relations system to focus on. Wages and productivity are highly correlated. Real wages growth is an important indicator of living standards. If wage growth runs ahead of productivity growth, there is a risk of creating inflationary pressure on the economy, making the wage growth unsustainable in the long run.*[3]

However, Australia currently has a productivity problem, one that the SJBP Act does nothing to resolve, despite the objects of the FW Act including a focus on productivity. This has contributed to Australia's living standards, measured by per capita GDP, falling at a faster rate than any other country in the OECD.

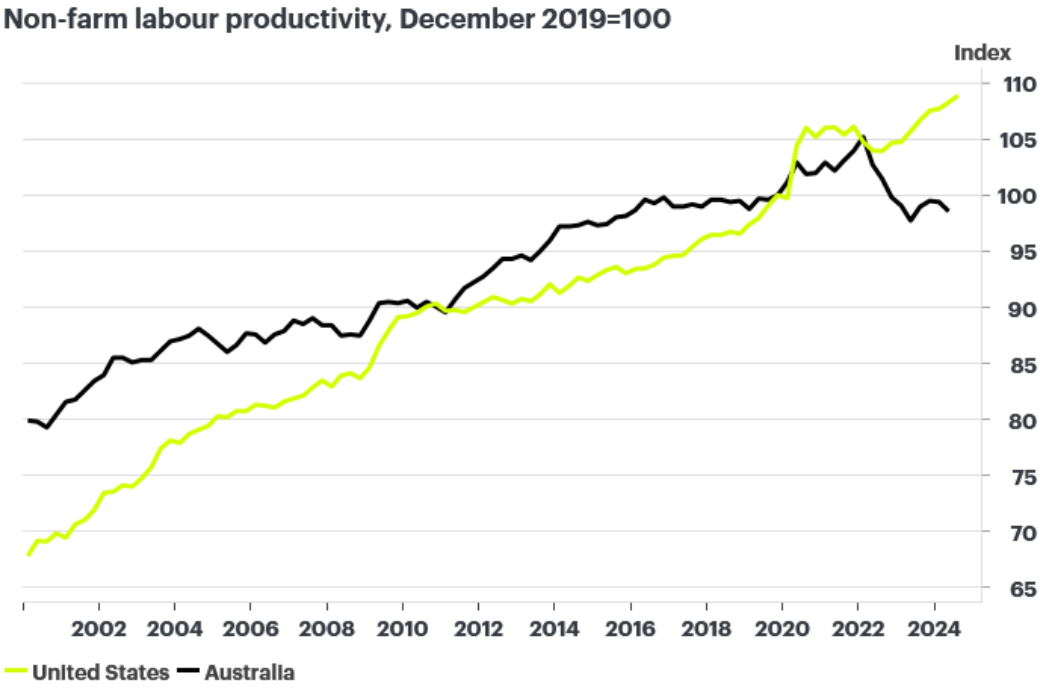
Figure 1 Real gross disposable income per capita of households



The alarming decline is largely a result of several factors: a decrease in our economic dynamism, weak business investment, insufficient spending on research and development, an increased burden of government regulation, a lack of significant reform in critical areas such as taxation, and a rising presence of relatively low-productivity activities in the service industry and care economy.

[3] Department of Employment and Workplace Relations, *Enterprise Bargaining outcomes form the Australian Jobs and Skills Summit*, Regulation Impact Statement, included in the EM.

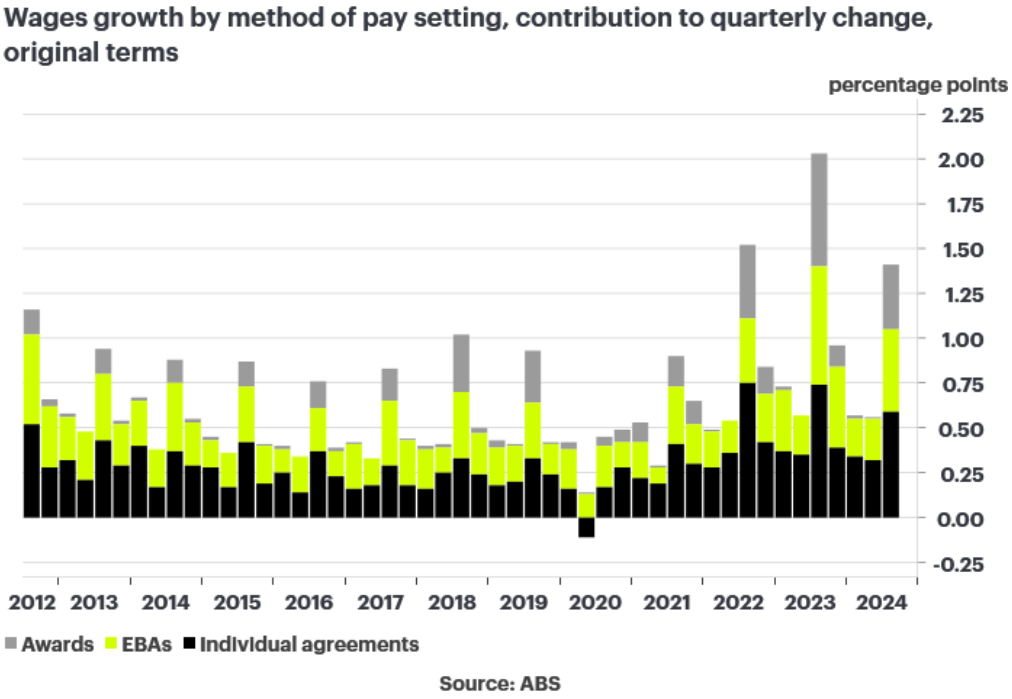
Figure 2 Labour productivity, annual per cent change



Despite the government's objective of seeking to lift productivity, none of the amendments brought in by the SJBP Act can be said to have arrested this decline. Over the last two years, real wages are down 0.5 per cent.

To the extent Australian employees have experienced wage growth, the main contributor to that growth has been individual agreements (not EAs, multi-employer or otherwise):

Figure 3 Contributions to quarterly wage growth by method of setting pay. Source: ABS, Wage Price Index Australia, September 2024



Nothing in the SJBP Act could fairly be said to have improved the ability of employers and employees to negotiate individual agreements, the main driver of recent wage growth. Rather, to the contrary, significant impediments have been placed in the way of outer limits agreements and other initiatives requiring contract reviews and re-writing, such as prohibitions on pay confidentiality terms. The ability to implement individual agreements is further compromised by the ability for unions to compel bargaining for EAs, without employer agreement, or in the case of the amendment to s 173(2A) of the FW Act, without the majority support of employees affected.

As such, while the changes in the SJBP Act may promote short-term wage growth, particularly in low-paid government-funded sectors, they do little to promote sustainable real wage increases into the future.

5. Multi-employer bargaining

An outcome of the Summit was to increase wages by encouraging more enterprise bargaining and fixing problems for low-paid workers. However, rather than confine changes to address this goal, the SJBP Act introduced fundamental changes to the bargaining system, including two streams of compulsory multi-employer bargaining, detailed below. These changes undermined the interests and agency of employers (and, in some cases, employees), increased complexity and red tape, and brought conflict and disputation to industries already highly paid and productive, such as the mining sector.

5.1 Single Interest Employer Authorisation Stream

5.1.1 Are these changes operating effectively and appropriately?

The BCA opposed these changes at the time of the Senate Inquiry into the SJBP Bill,[4] raising concerns that they would reduce productivity by removing the ability of businesses to negotiate what is most appropriate for their enterprise. Our position has not changed.

The single interest employer authorisation (SIEA) stream of multi-employer bargaining allows a party to apply to the FWC for an order compelling a group of employers to bargain together for a multi-employer agreement (MEA) without their agreement, where it is satisfied those employers have "reasonably comparable" operations and business activities and common interests.[5] If an employer has at least 50 employees at the time a union or other bargaining representative makes an application for an SIEA, it is presumed that the operations and business activities of the employer are reasonably comparable with those of the other employers that will be covered by the agreement (simply because they are named in the application), unless the contrary is proved.[6] In determining whether an employer has common interests with another, the FWC may consider geographical location, regulatory regimes, and the terms and conditions of employment in the relevant enterprises.[7] Once an SIEA MEA is made, other employers who were not part of the bargaining process and had no say in the terms of the MEA can be 'roped in' on application by a union or other bargaining representative so long as they do not have an in-term agreement, and they have a sufficiently common interest, and reasonably comparable business activities to the existing covered employers.[8] As at 4 November 2024, there have been 19 applications for SIEAs, with 14 granted by consent.[9] The first contested application was in the East Coast black coal mining industry referred to below.

The EM provides that these amendments "*are intended to make it easier to obtain a single-interest employer authorisation*."[10] In that sense, the provisions have likely achieved their intent. MEAs are, however, inherently anti-competitive. While the former Minister for Employment and Workplace Relations said that the provisions are intended to prevent wage competition between employers, purportedly in a "*race to the bottom*", stating "*that's not the sort of competition that the economy needs*",[11] this is at odds with comments made by then Productivity Commission Chairman, Michael Brennan who stated:

[4] BCA submission to the Senate Education and Employment Legislation Committee, November 2022.
[5] FW Act, s 249.
[6] FW Act, s 249 (1AA).
[7] FW Act, s 249(3).
[8] FW Act, s 216DC.
[9] Speech by Adam Hatcher, President of the FWC to the Australian Labour Law Association Conference on 8 November 2024, Geelong.
[10] At [43].
[11] Minister Tony Burke, Interview with David Speers, *7.30*, 2 November 2022. Accessed at: Employment Minister Tony Burke: "Every agreement ends up landing you above the award" - ABC News.

> *"The predominant view in the literature is you get better productivity outcomes from a firm-based system than an industry-based system because that's what allows productive firms to grow, expand, offer a different deal to their workers.*
>
> *[It] allows workers to move towards higher productivity firms. And that's a very important mechanism by which economy-wide productivity growth occurs."*[12]

Similarly, Treasury's Competition Review of non-compete clauses in employment is seeking to increase wage competition between employers by increasing job mobility and decreasing perceived barriers to employees moving between enterprises. The Competition Review website states:

> *"Job mobility – the movement of workers between jobs – plays an important function in a dynamic and competitive economy, with empirical evidence linking lower rates of job mobility in recent decades with reduced productivity growth, both in Australia and across the OECD."*[13]

Industry-level multi-employer bargaining is the antithesis of this, and in our submission, it is not appropriate or effective to achieve this aim.

5.1.2 Case studies

5.1.2.1 Heating, ventilation and air-conditioning

In assessing the appropriateness and effectiveness of the amendments, it is also worth having regard to two SIEAs that have been made to date as case studies for the operation of the amendments. These case studies indicate that the SJBP multi-employer bargaining frameworks are not operating to provide "*a simple, flexible and fair new framework*" for enterprise bargaining.

Firstly, the AMWU sought a SIEA to cover a series of employers and their employees who work in connection with the installation, major modernisation, servicing, repair or maintenance of air-conditioning or ventilation (including apprentices and trainees). The employers, each operating in the heating, ventilation and air conditioning (HVAC) industry, consented to the application. The employers were found to have common interests on the basis that they operated in NSW, had common regulatory regimes to comply with in relation to HVAC work, all operated in the same industry and had employees covered by the same award. The FWC granted the SIEA.[14] Pursuant to that SIEA, the *AMWU On-Site Construction HVAC Workers NSW Enterprise Agreement 2023 – 2027* was approved by the FWC on 14 June 2024 (HVAC MEA).[15]

After the HVAC MEA was made, reports in the media revealed that the AMWU and relevant employer associations were seeking to rope in a further six employers to the MEA. It was also reported that the plumbers' union is unhappy with the HVAC MEA because new employers being roped in have had no role in negotiations (this is a function of the statutory framework for SIEA MEAs referred to above). One air conditioning employer has reportedly liquidated their company to avoid the terms of the HVAC MEA. The Plumbers Union NSW secretary Theo Samartzopolous has stated, significantly, that "*Workers…don't have a voice in multi-employer bargaining and our* [single enterprise agreements] *are superior with high wages and conditions*."[16]

[12] McIlroy, T. and Coorey, P. (2022) 'Multi-employer bargaining less helpful for productivity: Brennan', *Australian Financial Review,* 02 November, Available at: https://www.afr.com/politics/federal/multi-employer-bargaining-less-helpful-for-productivity-brennan-20221102-p5buzk (Accessed: 04 November 2024).
[13] https://treasury.gov.au/review/competition-review-2023/non-compete-clauses accessed on 4 November 2024.
[14] *"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)* [2024] FWC 395.
[15] AMWU On-Site Construction HVAC Workers NSW Enterprise Agreement 2023 - 2027 | Fair Work Commission
[16] Marin-Guzman, D (2024) 'Landmark multi-employer deal sparks union turf war', *Australian Financial Review*, 10 October 2024. Accessed at: https://www.afr.com/work-and-careers/workplace/landmark-multi-employer-deal-sparks-union-turf-war-20241009-p5kgxk on 4 November 2024.

A comparison between the wage rates between first class sheet metal workers under the *Flowrite HVAC Projects Pty Ltd And CEPU - Plumbing Division NSW Branch Mechanical (HVAC) Enterprise Agreement 2023–2027,*[17] being an example of a recent CEPU HVAC EA (CEPU HVAC EA), and the HVAC EA is below:

	CEPU HVAC EA Sydney/ACT rate (pay rate applicable from 1 April each year)	HVAC MEA (pay rate applicable from 1 May each year)	Difference per hour between CEPU single EA and AMWU MEA
2024	$51.54	$50.96	$0.58
2025	$54.63	$54.01	$0.62
2026	$57.91	$57.25	$0.66
2027	$61.96	$60.69	$1.27

Travel allowances, redundancy accrual and superannuation are also higher in the CEPU HVAC EA than in the HVAC MEA. Higher rates still for Sydney/ACT based first class sheet metal workers are included in the *New Edge Group HVAC Pty Ltd And CEPU - Plumbing Division NSW Branch Mechanical (HVAC) Enterprise Agreement 2023–2027*.[18] Accordingly, it is far from clear that the SIEA stream of multi-employer bargaining is resulting in higher wages than can be achieved via the existing single enterprise bargaining framework in the FW Act.

5.1.2.2 Coal mining

On 23 August 2024, the FWC made a SIEA following an application by the Association of Professional Engineers, Scientists and Managers Australia (APESMA), compelling three coal mining employers (Peabody, Glencore and Whitehaven) to bargain together for a MEA.[19] This was despite the employers opposing the application and leading evidence that they were operationally distinct and did not share common interests. This decision is currently under appeal to the Federal Court of Australia. In terms of what this case tells us about the appropriateness of the operation of these amendments, it is worth considering again statements made by the former Minister for Employment and Workplace Relations, Tony Burke. Minister Burke has stated that it was "*not really realistic*"[20] that mining would be impacted by multi-employer bargaining. Minister Burke also stated:

> *"A lot has been made of the mining sector. There's a difference between the east coast to the west coast with respect to mining. Neither will actually be significantly impacted by this bill. In the east coast, you largely have work sites where people are already on enterprise agreements. If you're already on an enterprise agreement, then you're ineligible for multi-employer bargaining. The whole concept of what we're establishing here is for the people who've been left out of bargaining."*[21]

Having regard to these statements by the Minister, the fact that one of the first contested SIEA Applications was made against East Coast mine employers indicates that the amendments are not operating appropriately compared to their stated impact. The application of these provisions to the mining sector is in fact a consequence of these amendments and was an issue that the BCA was concerned would occur at the time.

[17] AG2024/921.
[18] AG2024/399.
[19] *Association of Professional Engineers, Scientists and Managers, Australia v Great Southern Energy Pty Ltd T/A Delta Coal, Whitehaven Coal Mining Ltd, Peabody Energy Australia Coal Pty Ltd, Ulan Coal Mines Ltd* [2024] FWCFB 253
[20] Burke, T. (2022a) *Interview - ABC 7.30*, 3 November 2022 Available at: https://ministers.dewr.gov.au/burke/interview-abc-730 (Accessed: 04 November 2024).
[21] Burke, T. (2022) *Transcript - Doorstop, Parliament House - Thursday, 10 November 2022*, *Tony Burke MP*. Available at: https://www.tonyburke.com.au/speechestranscripts/2022/transcript-doorstop-parliament-house-thursday-10-november-2022 (Accessed: 04 November 2024).

5.2 Supported bargaining stream

The supported bargaining stream reformed the existing low-paid bargaining framework in the FW Act. It allows the FWC, on application by a union or an employer, to make a supported bargaining authorisation (SBA) compelling "reasonably comparable" groups of employees and employers to bargain for an agreement. The SBA provisions were intended to "*assist those employees and employers who may have difficulty bargaining at the single-enterprise level. For example, those in low-paid industries such as aged care, disability care, and early childhood education and care who may lack the necessary skills, resources and power to bargain effectively*".[22] During the second reading speech for the SJBP Bill, Minister Burke stated:

> *"The bill will rename and remove barriers to access the existing low-paid bargaining stream, with the intention of closing the gender pay gap and improving wages and conditions in sectors such as community services, cleaning, and early childhood education and care, which have not been able to successfully bargain at the enterprise level.*
>
> *Unnecessary hurdles to entry in the current low-paid stream will be replaced by a broad discretion for the Fair Work Commission to consider the prevailing rates of pay in the industry, including whether workers in the industry or sector are low paid."*

As of 4 November 2024, there have been seven applications for SBAs with five granted by the FWC.[23]

The BCA recognises the critical importance of work done by people employed in the low paid government funded sector, such as work done in aged care, disability support services and childcare. In that regard, the BCA has acknowledged the role of the supported bargaining stream for these sectors.

However, we also argue that to ensure these essential services, including aged care and the NDIS, remain viable and sustainable and to continue to offer meaningful employment to Australians without unduly burdening taxpayers, it is essential that productivity gains are made in the non-market sector as well.

While there have been significant pay increases in some feminised industries recently, such as aged care and early childhood education and care (ECEC), these wage outcomes cannot be attributed to multi-employer bargaining or SBAs. In the case of aged care, wage increases have arisen because of the Aged Care Work Value Case (and commitments as to funding increases from the Federal Government). In respect of the ECEC sector, while multi-employer bargaining is in progress for one SBA EA, the Government has committed to funding wage increases for employees of all ECEC providers who meet relevant grant conditions and have an appropriate workplace instrument (including an individual flexibility agreement) in place.[24]

Further, despite the stated intent of the SBA provisions to apply in industries such as community services, cleaning and ECEC, and the relevance of government funding to the employers in question, on 5 August 2024, the Shop, Distributive and Allied Employees Association (SDA) applied for an SBA against 14 employers operating McDonald's franchises in South Australia.[25] Those 14 employers operate around 60 of McDonald's 74 restaurants in South Australia. McDonalds has a history of bargaining, with its last EA nominally expiring in 2017 and terminated in 2019. This case runs counter to the commentary in the EM and the Minister's statements regarding the intended operation of the provisions. Given the application to extend the SBA regime to the retail sector, it is reasonable to conclude that SBAs will be a significant feature of agreement-making in the future and will likely not be confined to the government-funded sectors or those without a history of bargaining. For this reason, we recommend that reforms are required to align the regime with the Minister's statement of the intended scope for these provisions.

[22] EM, [37].
[23] Above, note 8.
[24] See the *Wage Justice for Early Childhood Education and Care Workers (Special Account) Bill 2024*.
[25] Shop, Distributive and Allied Employees Association - application for a supported bargaining authorisation | Fair Work Commission

5.3 Amendments required to multi-employer bargaining

The BCA considers that:

- The SIEA framework should be repealed or alternatively amended so it only applies with the consent of employers involved; and
- The SBA framework should only apply where employers agree to bargain collectively for an MEA. If this amendment is not acceptable, s 243 of the FW Act should be amended such that the criteria in s 243(3) of being "*substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory*" should be satisfied as a mandatory pre-condition for a common interest to be found.

In our submission, these recommendations would minimise unintended consequences, assist in achieving the productivity objective of the FW Act, ensure cooperative and flexible workplace relations and provide support for optimal and sustainable wage increases to be achieved via enterprise bargaining, that includes productivity improvements to benefit both workers and employers.

6. Intractable bargaining determination framework

6.1 Are these changes operating effectively and appropriately?

The BCA supports voluntary enterprise bargaining to drive real wage growth. We also seek an industrial relations system that preferences collaboration and co-operative workplace relations between employers and their workforce, over one that entrenches disputes and arbitration. The SJBP Act should have sought to make the bargaining framework in the FW Act less complex and more user-friendly than before. Instead, the intractable bargaining framework has incentivised drawn out bargaining disputes over a period of at least nine months, mired in formal disputation, and removed any reason for employees and unions to agree to modernise working arrangements to support real wage increases.

The SJBP Act introduced a new framework to allow the FWC to resolve 'intractable disputes' via arbitration resulting in the making of an 'intractable bargaining determination' (IBD).[26] An IBD in effect sets the terms and conditions for employment of those employees who it covers, as an EA otherwise would. The factors that the FWC must take into account in deciding the terms of an IBD are broad and include factors, such as "*the merits of the case*", "*how productivity might be improved in the enterprise or enterprises concerned"* and the public interest.[27] The EM states that "*These amendments support the Jobs and Skills Summit outcome of giving the FWC the capacity to proactively help workers and businesses reach agreements that benefit them."*[28]

In the Second Reading Speech for the SJBP Bill, Minister Burke said:

> *The bill will allow the Fair Work Commission to resolve intractable disputes through arbitration, where there is no reasonable prospect of agreement being reached. These changes are intended to provide a strong incentive for good-faith negotiations, reduce the time for enterprise agreements to be finalised and allow for quicker resolution of intractable disputes.*

However, the experience of our members has been diametrically opposed. Due to an amendment to the FW Act[29] introduced by the Greens Party as part of the *Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024* (Cth) (CL2 Act), terms of an IBD (save for the rate of wage increases), must be "*no less favourable"* on a term-by-term basis for any employee than an existing EA that applies to those employees. The effect of this is there is little incentive for employees and their bargaining representatives who are negotiating a replacement EA to engage in good faith bargaining with a view to making an agreement. This is particularly so where the employer seeks to vary an existing agreement that may no longer meet the operational requirements of the business, or otherwise to improve productivity, in return for higher wages for employees. As a result, our members report that unions are surface bargaining, not engaging with reasonable proposals, not participating meaningfully in FWC processes including under s 240 of the FW Act and/or are tabling only ambit claims or unrealistic logs of claims without any prospect of varying

[26] SJBP Act, Part 18.
[27] FW Act, s 275.
[28] EM, [822].
[29] FW Act, s 270A

existing terms to meet wage claims. This is being done with a view to achieving the best possible arbitrated outcome as part of an IBD where employees have nothing to lose and everything to gain. In the circumstances, we do not consider the IBD amendments are proactively helping businesses reach agreements that benefit them, providing an incentive for good faith negotiations or reducing the time for EA to be finalised. This does not meet the objective of cooperative workplace relations.

A prerequisite to applying for an IBD is that the FWC has dealt with a dispute about the agreement under s 240 of the FW Act.[30] These are only available when bargaining representatives are in a dispute about the agreement and are unable to resolve the dispute between themselves.[31] Evidence of the increasing number of intractable bargaining processes can be found in the significant increase in applications to the FWC under s 240 of the FW Act, which rose by 27 per cent from 160 in FY22/23[32] to 203 in FY23/24.[33]

The BCA objected to the amendments to the IBD framework made by the CL2 Act at the time they were tabled in January this year, as did the Victorian Treasurer, Tim Pallas, who stated that the amendments:

> *"remove[s] the incentive for unions to reach an agreement as they know that they will be no worse off on a clause by clause basis as against a current enterprise agreement. The amendment also seems at odds with how bargaining works – that is, that it's a package and during the course of bargaining trades offs are considered and made."*[34]

6.2 How they are operating practically

The IBD framework (as amended by the CL2 Act) has created significant challenges for key utility providers in New South Wales, including a number of BCA members, such as Endeavour Energy. Far from meeting the Jobs and Skills Summit outcome of creating '*a simple, flexible and fair new framework that ensures all workers and business can negotiate in good faith for agreements than benefit them*", the IBD framework has incentivised unions to delay and obfuscate bargaining, and disincentivises workers from agreeing to modernise outdated working arrangements or to make productivity improvements that can lead to more innovative workplaces and create sustainable real wage growth.

This has led to lengthy and protracted enterprise agreement negotiations, with unions unwilling to resile from lengthy logs of claims, when there remains little incentive for them to do so under the intractable bargaining framework. Substantial industrial action taken over months of bargaining has also had a deleterious impact on their customers (being the NSW public), subcontractors (many of whom are small businesses), developers, and for the construction of critical infrastructure and new residential dwellings.

Bargaining has been drawn out over several months for utilities providers with substantial industrial action taking place. In the case of Endeavour Energy, the enterprise agreement negotiations, ongoing since September 2023, have involved over 60 bargaining meetings. Despite extensive negotiations, including 30 meetings on common business issues and 30 sub-committee meetings for specific areas, agreement remains elusive. The FWC intervention has been required, with disputes lodged under s. 240 of the FW Act and good faith bargaining orders sought under s. 229. The FWC has now made intractable bargaining declarations.[35] This was despite employers making generous bargaining offers to employees. In the case of Endeavour, it offered a 16.6% compounded wage increase and a $6,500 sign-on bonus to employees in a deal that was narrowly voted down.

The current legislative framework, particularly under the amendments moved by the Greens, ties the FWC's hands: any terms imposed must be no less favourable than the previous agreements in place. This leaves no room to introduce necessary productivity or operational improvements in exchange for wage increases, a core intended function of enterprise bargaining. Instead, conditions can only be maintained or improved for employees, while wage increases will also be applied. It also undermines the bargaining process, where one party has little to lose by refusing to reach agreement during the bargaining process and awaiting arbitration by the FWC. The ETU is understood to have encouraged employees to vote no to Endeavour's most recent agreement offer, to allow them to continue to pursue an IBD.[36]

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[30] FW Act, s 235.
[31] FW Act, s 240.
[32] Fair Work Commission, *Annual Report 2022–23.*
[33] Fair Work Commission, *Annual Report 2023-24.*
[34] McSweeney, J., & Thompson, A. 18 January 2024, *Victorian treasurer to lobby Federal Senate crossbench over IR changes*. The Sydney Morning Herald. https://www.smh.com.au/politics/federal/victorian-treasurer-to-lobby-federal-senate-crossbench-over-ir-changes-20240118-p5eybf.html.
[35] *Application by Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2024] FWC 3063.
[36] Vote NO to Endeavour Energy's substandard offer, accessed on 6 November 2024.

These lengthy and damaging bargaining processes were an obvious outcome of the amendments made to the intractable bargaining framework under the CL2 Act, which clearly incentivises union bargaining representatives to seek an IBD rather than to agree on reasonable and mutually beneficial terms with an employer, in circumstances where the FWC can only maintain or improve working conditions, and has shown a willingness to order significant wage increases and backpay.[37]

6.3 Recommended amendments

To ensure that the IBD framework is operating effectively and appropriately having regard to its stated objectives, and to mitigate unintended consequences, s270A of the FW Act should be repealed.

7. Ability to commence bargaining for a replacement agreement

7.1 Are these changes operating effectively and appropriately?

The SJBP Act[38] inserted a new subsection 173(2A) into the FW Act, which allows a bargaining representative to commence bargaining for a replacement EA that has nominally expired in the past five years, simply by written notice and without the majority support of employees concerned. The EM provides this amendment was intended to "*simplify the process for initiating bargaining*."[39] While this amendment has simplified the commencement of bargaining for employee bargaining representatives, in our submission, this amendment is neither appropriate nor effective. It undermines the choices of employees, who may have enjoyed good wages and conditions in highly-paid industries via direct engagement with their employer, and for whom union intervention will create conflict and disputation, a further hand break on some of our most productive industries, such as mining and resources.

Bargaining representatives could already compel bargaining where they obtained a majority support determination (MSD), a comparatively straightforward process requiring the bargaining representative to show that the majority of the employees who are to be covered by the proposed EA want to bargain, the group of employees is fairly chosen and it is reasonable in the circumstances for the MSD to be made.[40] However, this provision has been used to compel negotiations in highly paid sectors without any evidence of majority support from employees to be covered by a proposed EA, such as in the iron ore mining sector in the Pilbara.

There are other reasons why the operation of this provision is not appropriate. This includes, that there may be valid reasons why an employer has chosen not to commence bargaining for a replacement agreement at a certain time. This could be that the employer is awaiting the outcome of tenders or contract renewals, broader business reviews and labour requirement projections, economic or profit forecasts or data, or a multitude of other reasons that could impact the terms and conditions it can offer employees or agree to as part of bargaining. Forcing employers to the table at this stage cannot be conducive to the efficient conduct of good-faith bargaining and is a waste of the productive resources of all parties concerned.

7.2 Recommended amendments

S 173(2A) of the FW Act, which allows a bargaining representative to compel an employer to bargain without the majority support of employees to be covered by the EA, should be repealed.

[37] *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd* [2024] FWCFB 287.
[38] Part 15.
[39] [751].
[40] FW Act, s 236-237.

8. New test to be able to terminate enterprise agreements

8.1 Are these changes operating effectively and appropriately?

Under changes made by the SJBP Act,[41] employers can no longer effectively terminate existing agreements unilaterally during bargaining. Previously, the ability to do this was an option of last resort in bargaining to encourage employees to make concessions or meaningfully engage in the bargaining process. It should be noted that this option was infrequently used.

Since the commencement of the SJBP Act, the process for terminating an expired enterprise agreement has become significantly tougher. The FWC can now only terminate an agreement under specific circumstances, such as if its continuation is deemed unfair to employees (only), if it no longer covers any employees, or if certain criteria are met regarding business viability and employment security.[42] These changes remove the FWC's previous discretion, making it nearly impossible for employers to terminate expired agreements, especially during ongoing negotiations, even subject to the public interest test. As a result, businesses can be stuck with outdated agreements that no longer suit their needs or those of their employees. This can act as a further drag on productivity where EAs contain outdated or legacy conditions that affect efficacy of the enterprise. This difficulty is compounded by the inability to vary such terms via the IBD regime referred to above, particularly when unions and employees refuse to negotiate on any changes to pre-existing conditions (a position our members inform us has become the norm in bargaining post the introduction of the SJBP Act). The cumulative impact of this change, along with others made by the SJBP Act, is to decrease bargaining power for employers significantly and to make bargaining less attractive for some. While this appears to be consistent with the intended operation of these provisions, in the BCA's submission, the operation of this provision is neither effective nor appropriate having regard to the objects of the FW Act, as it is not consistent with the principle of seeking to increase enterprise bargaining uptake.

8.2 Recommended amendments

The changes made by Part 12 of the SJBP Act to the ability to terminate an EA should be repealed. As an alternative, consideration could be given to allowing terminations of EAs past their nominal expiry date, subject to the pre-SJBP Act test in s 226, with the addition of some additional protections for employees, such as a requirement for the FWC to take into account undertakings that may be provided by an employer not to reduce existing employee rates of pay when an EA is terminated.

9. Limitations on outer limit employment contracts

9.1 Are these changes operating effectively and appropriately?

The SJBP Act introduced restrictions on the use of outer limits or maximum-term employment contracts. While these are referred to in the legislation as "fixed term" contracts, they are not limited to true fixed term agreements (where there is no ability for either party to terminate within the term). Rather, the legislation imposes limits on any contract that includes a term that provides for termination at the end of an identifiable period (whether or not the contract also includes terms that provide for termination within the term).[43] The restrictions include that an outer limits contract cannot be for a period of greater than two years (comprising a single or multiple terms) and cannot be renewed or extended more than once.[44] There are numerous, albeit patchy, exceptions to the rule, the application of which is yet untested and unclear. These range from exemptions for employees engaged to perform a distinct task involving "specialised skills", essential work in peak demand periods, emergency circumstances, employees earning more than the high-income threshold and time-limited governance roles, along with further amendments prescribed by regulation. These changes increase the regulatory and compliance burden on employers, with little evidence they were required to increase the job security for employees, particularly given the development of the common law as to whether anything except a true 'fixed term' contract could satisfy the exceptions to redundancy pay and unfair

[41] Part 12.
[42] FW Act, s 226.
[43] FW Act, s 333E.
[44] FW Act, s 333E.

dismissal where an employee is employed for a specified period of time, task or season, and also the applicability of the unfair dismissal jurisdiction for employees dismissed following a series of time-limited contracts.

One area in which the operation of these changes is neither effective nor appropriate is in vocational training arrangements, such as clerkships or internships intended to lead to graduate employment. Typically, clerkships and other forms of undergraduate employment are fixed in duration until such time as an employee gains their degree or other qualification. It would be logical, therefore, for those employees to be employed on a maximum-term contract tied to their status as undergraduates. Similarly, some BCA members structure their graduate programs with a fixed duration, often one to two years, and comprising several rotations in different areas of the business to give the employee broad exposure. The combined terms of clerkship/internship programs and graduate programs are, therefore, longer than two years in many cases. This leaves employers unable to offer maximum-term employment to those employees. Businesses, therefore, may elect to offer casual employment to interns/clerks and like training positions, which offer less security than maximum term employment and do not have the benefits attached to non-casual employment, such as the entitlement to many forms of paid leave. It may also mean that employers are less likely to offer a regular pattern of work to these students to avoid breaching the new casual definition inserted in the FW Act by the CL2 Act. This is unlikely to benefit the student employees. While there is an exemption for employees on training arrangements (formal traineeships or apprenticeships), the same exemption is not extended to non-trade training programs. In our submission, it should be.

Further, these provisions have had harmful unintended consequences on the Higher Education/University sector, which deals with a myriad of external funding issues associated with research and had very specific Award/EA provisions already in place dealing with Fixed Term employment issues. In response to this, Government has twice issued regulations delaying the start of the provisions for the Higher Education/University Sector, which remain unresolved. Additionally, there is an FWC Award review case running now dealing with fixed term reasons and the legislative exceptions in the underpinning Awards operating in this sector.

We are also concerned about the consequences of exemptions relating to government funded and not-for-profit research positions not having general applicability to for-profit research, and the consequences of creating a two-tiered system for positions in the medical research field. Feedback from members is that there is a lack of clarity and definition around a range of exemptions to the general limitation on outer-limits contracts. These should be reviewed to ensure they are achieving the desired policy intent.

9.2 Visa holders

There is no exemption to the limitation on outer limits contracts for employees with Australian work rights only pursuant to a visa. This is significant omission and complicates the ability of employers to comply with their simultaneous but now inconsistent obligations under the FW Act and migration law.

Employees working in Australia pursuant to temporary work visas are necessarily allowed to work in Australia for a maximum term, given the visas and the work rights they bestow are time bound. The logical mode of engagement for migrant workers on fixed-duration visas is on contracts, the term of which is tied to the duration of the employee's Australian work rights under their visa. This is to ensure that migrant workers understand that the term of their employment is limited to the period in which they are lawfully able to work in Australia and that employers do not purport to offer ongoing employment when there is no lawful right to do so. Before these restrictions were implemented, employees on visas were often engaged on maximum-term contracts for more than two years based on the duration of their visa. There could also be multiple extensions to the initially agreed period of employment when a visa worker seeks to remain in the country, either to extend their employment or pursue permanent residency.

Various visas bestow work and residency rights in excess of the two years allowed for fixed-term employment under the new s 333E(2) of the FW Act. For example, under Subclass 482, Temporary Skill Shortage Visa, a skilled worker on a medium-term stream visa can be sponsored by an employer to stay for up to 4 years. 408 visas also allow work in Australia for periods of up to 4 years.

Without an exemption to the restrictions on outer limits contracts for visa workers:

- Employers may limit visa workers' contracts to two years, despite longer work rights available, posing uncertainty for workers.
- Employers face an uncertain requirement to prove exceptions to fixed-term limitations.
- Indefinite employment offers could lead to unfair dismissal claims when a visa expires.

- Complications may arise from relying on technical legal concepts like abandonment of employment or frustration of contract.
- Visa workers' expectations regarding employment duration aligning with their visa will result in dissatisfaction.

These discrepancies highlight the need for clear regulations to support both employers and migrant workers.

9.3 Recommended amendments

The BCA's members call for the restrictive provisions of the legislation relating to the use of fixed-term employment to be repealed as the legislation fails to recognise that in certain circumstances/industries, there is a strong operational need for fixed-term employment due to funding issues, specific projects and other operational reasons.

Failing that and given the government has recognised the need for exceptions to avoid negative consequences from the restrictions on fixed-term contracts, there is a glaring exemption for visa workers and employees who undertake vocational training and graduate programs. Accordingly, we recommend that additional exemptions to the restrictions on fixed-term contracts be prescribed for:

- Employees employed pursuant to work rights granted by a visa.
- Employees receiving vocational training, such as clerkships, internships and graduate programs.

Other exemptions should be reviewed to ensure they are achieving their policy intent.

10. Abolition of the ABCC

10.1 Are these changes operating effectively and appropriately?

The SJBP Act abolished the ABCC and the Registered Organisations Commission (ROC), with some of the previous powers and responsibilities of those regulators being assigned to the Fair Work Ombudsman (FWO) and the FWC respectively.

For reasons that are self-evident in the move by the Government to place the Construction and General Division of the CFMEU into administration (including the serious and wide-reaching allegations of criminality and corrupt conduct uncovered by the Building Bad investigation conducted by the Age, the Sydney Morning Herald, the Australian Financial Review and 60 Minutes), the abolition of the ABCC has been a serious misstep.

As we noted in our Submission to the Senate Education and Employment Legislation Committee inquiry into the SJBP Bill in November 2022, the FWO was not well placed to replace the ABCC, including because:

- It does not have the requisite industry-specific expertise
- It does not have the same evidence-gathering powers as the ABCC, i.e. the ability to require the compulsory production of evidence, which was recognised by the industry as being necessary to deal with the culture of intimidation of witnesses in the industry
- It will have insufficient funding to take on the duties of the ABCC
- The maximum penalties available to it are lower than what was available to the ABCC.

Consistent with our submission, we remain of the view the nature of industrial relations in the building and construction industry requires industry-specific solutions. At the heart of these problems is the systemic culture of law-breaking and recidivism of the main union in the industry, the construction and general division of the CFMEU. Courts have found that the CFMEU has repeatedly and deliberately breached industrial legislation, undertaking disruptive, threatening, and abusive behaviour towards employers and employees. This repeated and consistent unlawful behaviour should be unacceptable in any modern workplace.

In our view, these submissions still stand, and if anything, have been further reinforced by the recent reports of union misconduct in the industry, and the fact that productivity in the sector has gone backwards by more than ten per cent in the last decade.

10.2 Recommended amendments

While the administration of the CFMEU goes some small way to addressing these problems, our members in the industry remain concerned. Enforced pattern bargaining for EAs containing terms asserting the rights to control subcontractor selection, payment of funds to union-preferred income protection and severance funds, and rights to attend workplace inductions by the CFMEU under administration fail to recognise the cultural issues that have led to these issues in the first place. Similarly, an apparent continuation of inappropriate workplace behaviour that falls short of 'menacing' workplace conduct remains.

As such, our recommended amendments to address these problems are to:

- Re-establish a specialist building industry workplace conduct regulator.
- Reintroduce a form of the *Code for the Tendering and Performance of Building Work* including:
  - Prohibited agreement content and industrial practices.
  - Penalties for unlawful picketing and unprotected industrial action.
  - Safety and drug and alcohol testing requirements.
  - Ensuring freedom of association.

11. Changes to right of entry to assist Health and Safety Representatives (HSRs)

11.1 Are these changes operating effectively and appropriately?

Until amendments made by the CL Act, the Courts had clarified that union officials required a Federal Entry Permit to exercise a right of entry under the FW Act, or under State or Territory work health and safety (WHS) laws.[45] To obtain a Federal Entry Permit, among other things, the union official or employee must demonstrate they are a 'fit and proper' person.[46] However, under changes introduced by Part 16A of the CL Act, union officials entering workplaces to assist a health and safety representative (HSR) under a WHS law are no longer required to hold a Federal Entry Permit. This change was made in response to Recommendation 8 in the 2018 *Review of the Model Work Health and Safety laws Final Report* (Boland Report). The Boland Report also detailed concerns raised by employers about potential misuse of these provisions, including that they could be used to circumvent the usual right of entry rules, and the capacity for HSRs to be pressured by union organisers (who do not hold a Federal Entry Permit) to arrange for their entry.[47]

These concerns remain and are heightened by reports of convicted criminals being appointed as CFMEU health and safety officials.[48] The test for a Federal Entry Permit is not a high bar, and union officials who seek to exercise rights of entry to private workplaces should be fit and proper persons to do so.

11.2 Recommended amendments

The FW Act should be amended to require union officials and employees seeking to rights of entry under WHS laws to obtain a Federal Entry Permit.

[45] *Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89.
[46] FW Act, s 512.
[47] Boland Report, p. 66.
[48] McKenzi, N et al, 'Bikies, underworld figures and the CFMEU takeover of constructions' *Australian Financial Review,* 13 July 2024.

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