The Senate

Education and Employment Legislation Committee

Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023 [Provisions]

April 2023

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List of recommendations

Recommendation 1

2.75 The committee recommends that the bill be passed.

Chapter 1
Introduction

1.1 The Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023 (bill) seeks to amend the *Fair Work Act 2009* (FW Act) and related legislation to improve the workplace relations framework by protecting worker entitlements, including superannuation, addressing gender inequality and removing administrative burdens.

1.2 The bill puts forward the following amendments:

- confirming the status of migrant workers by addressing the interaction between the FW Act and the *Migration Act 1958*;
- improving access to unpaid parental leave (UPL) and complementing recent changes to the *Paid Parental Leave Act 2010*;
- inserting an entitlement to superannuation in the National Employment Standards (NES);
- clarifying the operation of the Fair Work Commission workplace determinations and enterprise agreements;
- expanding the circumstances in which employees can authorise employers to make valid deductions from payments due to employees, where the deductions are principally for the employee's benefit; and
- ensuring that casual employees working in the black coal mining industry are treated no less favourably than permanent employees in the accrual, reporting and payment of their long service leave entitlements under the Coal Mining Industry (Long Service Leave Funding) Scheme.[1]

Context of the bill

1.3 In December 2022, the Australian Government (government) passed the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act* (Secure Jobs, Better Pay Act).[2] That Act amended the FW Act, *Fair Work (Registered Organisations) Act 2009*, the *Building and Construction Industry (Improving Productivity) Act 2016*, and related legislation to make a range of changes to Australia's industrial relations framework.[3]

1.4 In his second reading speech, Minister for Employment and Workplace Relations, the Hon. Tony Burke MP stated that the bill currently before the

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1 Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023, Explanatory Memorandum (Explanatory Memorandum), p. iii.

2 *Journals of the Senate*, No. 27, 1 December 2022, p. 850.

3 Senate Education and Employment Legislation Committee, *Inquiry into the* Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, November 2022, p. 1.

committee builds on the amendments of the Secure Jobs, Better Pay Act. Minister Burke said that:

> Secure Jobs, Better Pay was about raising the bar—raising the bar on awards, raising the bar on enterprise agreements, raising the bar on bargaining and lifting the floor for workers. This year, it's about closing the loopholes that some businesses use to undercut those arrangements. This bill is the first step.[4]

1.5 The Department of Employment and Workplace Relations (DEWR) explained that the bill implements 'technical and clarifying amendments to modernise, embed and extend basic protections' into the FW Act.[5]

The Jobs and Skills Summit

1.6 On 1 and 2 September 2022, the government held the Jobs and Skills Summit (Summit) at Parliament House in Canberra, which brought together businesses, unions, civil society, and the federal, state, and territory governments.

1.7 The Summit was led by the Prime Minister, the Hon. Anthony Albanese MP, and the Treasurer, the Hon. Dr Jim Chalmers MP, and it and the subsequent White Paper were to focus:

- keeping unemployment low, boosting productivity and incomes;
- delivering secure, well-paid jobs and strong, sustainable wages growth;
- expanding employment opportunities for all Australians including the most disadvantaged;
- addressing skills shortages and getting our skills mix right over the long term;
- improving migration settings to support higher productivity and wages;
- maximising jobs and opportunities from renewable energy, tackling climate change, the digital economy, the care economy and a Future Made in Australia; and
- ensuring women have equal opportunities and equal pay.[6]

1.8 Following the Summit, the government agreed to 36 immediate initiatives, including stronger protections for migrant workers, better access to unpaid parental leave, and ensuring workers and businesses have flexible options for reaching agreements.[7]

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4 The Hon. Tony Burke MP, Minister for Employment and Workplace Relations, *House of Representatives Hansard*, 29 March 2023, p. 17.

5 Department of Employment and Workplace Relations, *Submission 13*, p. 3.

6 The Treasury, *Jobs and Skills Summit*, https://treasury.gov.au/employment-whitepaper/jobs-summit (accessed 12 April 2023).

7 The Treasury, *Jobs and Skills Summit Outcomes*, September 2022.

Overview of the bill

1.9 The bill contains eight schedules, which would amend the FW Act and related legislation in relation to protecting worker entitlements.

Schedule 1 – Protection for migrant workers

1.10 Schedule 1 of the bill would insert a new provision at the end of Division 4 of Part 1-3 of the FW Act to deal with the interaction between the FW Act and the *Migration Act 1958*.

1.11 The provision responds to recommendation 3 of the inter-agency Migrant Workers' Taskforce, in its *Report of the Migrant Workers' Taskforce* of March 2019, which recommended that:

> … legislation be amended to clarify that temporary migrant workers working in Australia are entitled at all times to workplace protections under the *Fair Work Act 2009*.[8]

1.12 The amendments also respond to recommendation 3 of committee's previous inquiry into the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, where it called for legislative amendments clarifying that the protections and entitlements under the *Fair Work Act 2009* apply regardless of immigration status.[9]

1.13 The effect of the item is that a breach of the *Migration Act 1958*, or an instrument made under it, does not affect the validity of a contract of employment or contract for services for the purposes of the FW Act. This would ensure that migrant workers (including temporary migrant workers) working in Australia would be entitled to the benefit of the FW Act regardless of immigration status.[10]

1.14 DEWR explained that these amendments address concerns 'expressed by some advocates for temporary migrant workers that Australian workplace laws and conditions are unclear in how they apply to temporary migrant workers'.[11]

Schedule 2 – Unpaid parental leave

1.15 Schedule 2 of the bill progresses outcomes of the Summit, in providing stronger access to unpaid parental leave (UPL), and complements recent changes to the *Paid Parental Leave Act 2010* (PPL Act).

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8 Available at: Department of Employment and Workplace Relations, *Report of the Migrant Workers' Taskforce*, 7 March 2019, https://www.dewr.gov.au/migrant-workers-taskforce/resources/report-migrant-workers-taskforce (accessed 21 April 2023).

9 Senate Education and Employment Legislation Committee, *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 [Provisions]*, Report, November 2022, p. v.

10 Explanatory Memorandum, p. 3.

11 Department of Employment and Workplace Relations, *Submission 13*, p. 5.

1.16 The NES provides for a UPL entitlement for all national system employees, and entitles eligible employees to take up to 12 months of UPL, 'which must generally be taken as a single continuous period' under the NES.[12] As explained by the bill's Explanatory Memorandum (EM):

> The existing provisions allow employees to access up to 30 days of their entitlement as flexible UPL days, which may be taken a day at a time within the first 24 months of the child's birth or adoption placement. Flexible UPL days are an exception to the requirement that UPL must be taken in a single continuous period. Under the current provisions, once an employee takes a day of flexible UPL, the employee forfeits any remaining entitlement to take continuous UPL.[13]

1.17 The bill's amendments seek to increase the portion of flexible UPL an employee may take under section 72A of the FW Act, to align with the changes made to the paid parental leave scheme by the *Paid Parental Leave Amendment (Improvements for Families and Gender Equality) Act 2023* (2023 PPL Act).

1.18 The bill would also allow the entitlement to flexible UPL to be taken before, as well as after, a period of continuous UPL taken under section 71 of the FW Act.

1.19 The EM explains that the Bill would further strengthen access to UPL and remove barriers to parents sharing caring responsibility by:

- allowing employees to commence UPL at any time in the 24 months following the birth or placement of their child;
- removing barriers preventing employee couples from taking UPL at the same time;
- allowing pregnant employees to access flexible UPL in the six weeks prior to expected birth of their child;
- allowing parents to request an extension to their period of UPL, regardless of the amount of leave the other parent has taken;
- removing provisions relating to 'employee couples' and allowing all employees to take up to 12 months UPL and request a further 12 months of UPL, regardless of how much leave their partner or spouse takes; and
- removing the concept of 'concurrent leave' and allowing employees to take UPL at the same time, without limitation.[14]

1.20 The bill also amends references to 'maternity leave' throughout the FW Act, to be replaced with the term 'parental leave'.[15]

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12 Explanatory Memorandum, p. 4.

13 Explanatory Memorandum, p. 4.

14 Explanatory Memorandum, pp. 4, 5.

15 Explanatory Memorandum, pp. 7–9.

1.21 The EM states the amendments would give families more choice and flexibility in how they combine their care and work responsibilities, and will encourage parents to share caring responsibilities and facilitate parents' ongoing engagement in the workforce in the early stages of their child's life.[16] The EM concludes that:

> The amendments would overall increase flexibility in how eligible employees choose to take UPL and promote opportunities for shared parenting arrangements, while ensuring parents who take leave post-birth are not disadvantaged.[17]

Schedule 3 – Superannuation contributions

1.22 Employers must pay the superannuation guarantee charge under the *Superannuation Guarantee Charge Act 1992* (SGC Act), if they do not make contributions to a superannuation fund for the benefit of their employees.[18]

1.23 In his second reading speech, Minister Burke made the point that the FW Act does not currently have an explicit requirement for an employer to pay superannuation to their employees, and argued that:

> This is a loophole that needs to be closed. In almost every instance of wage theft, superannuation is also part of how workers have been ripped off. This amendment is about making sure that a worker can recover both superannuation and wages in an underpayment claim under the Fair Work Act. Until now, many workers have had to claim the take home pay and superannuation through two separate processes.[19]

1.24 Accordingly, Schedule 3 of the bill would insert a new Division[20] into the FW Act to provide a new entitlement to superannuation contributions in the NES. It would also make it a requirement for employers to make contributions to a superannuation fund for the benefit of an employee, so as to avoid liability to pay the superannuation guarantee charge under the SGC Act in relation to the employee.[21]

1.25 Proposed new section 116B of the FW Act would also provide a right for Australian workers to pursue their unpaid superannuation as a workplace entitlement, with the amendments intending to 'establish a mechanism through which a broad range of employees … could enforce and recover unpaid

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16 Explanatory Memorandum, pp. 4–7.

17 Explanatory Memorandum, p. 6.

18 Department of Employment and Workplace Relations, *Submission 13*, p. 5.

19 The Hon. Tony Burke MP, Minister for Employment and Workplace Relations, *House of Representatives Hansard*, 29 March 2023, p. 18.

20 New Division 10A to Part 2-2 of the *Fair Work Act 2009*

21 Explanatory Memorandum, p. 19.

superannuation'.[22] The importance of this provision is noted by the EM, which says that:

> Establishing an obligation to make superannuation contributions as a minimum entitlement in the NES is also intended to reinforce the Government's position that underpayment of superannuation is a form of wage theft and worker exploitation.[23]

1.26 The EM explains that there would also be ramifications for contravention of these new provisions:

> An employer who contravenes this proposed entitlement to superannuation contributions could be subject to a civil penalty, as is the current position for all contraventions of the NES. It would also be open to a court to make other orders, including compensation, if these proposed provisions are contravened.[24]

1.27 Part 2 of Schedule 3 would make a consequential amendment to section 149B of the FW Act, to ensure alignment between the new Division in the FW Act and the terms relating to superannuation in modern awards.[25]

1.28 DEWR advised that the changes would come into effect at the beginning of the first financial quarter, six months after Royal Assent—which would:

> … align the NES entitlement with the requirements under superannuation legislation for employers to make contributions on behalf of employees on a quarterly basis in order to avoid liability for the superannuation guarantee charge.[26]

Schedule 4 – Workplace determinations

1.29 Schedule 4 includes more minor and technical amendments. DEWR noted that the amendments of Schedule 4 make clear the common understanding that 'when a workplace determination made by the Fair Work Commission commences operation, an enterprise agreement that was previously in place ceases to operate'.[27] DEWR further clarified that:

> This measure will not disrupt the application of determinations previously made by the Fair Work Commission. It provides consistency and certainty for parties by confirming that workplace determinations that came into operation before this amendment replaced any earlier enterprise agreement.[28]

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22 Explanatory Memorandum, p. 20.

23 Explanatory Memorandum, p. 20.

24 Explanatory Memorandum, p. 19.

25 Explanatory Memorandum, p. 19.

26 Department of Employment and Workplace Relations, *Submission 13*, p. 6.

27 Department of Employment and Workplace Relations, *Submission 13*, p. 13.

28 Department of Employment and Workplace Relations, *Submission 13*, p. 13.

Schedule 5 – Deductions

1.30 Minister Burke, in presenting the bill explained the background to the Schedule 5 provisions:

> For a long time, workers have signed deduction forms which are frequently used for both for both union membership and health insurance, and they've signed them in the knowledge that payments may vary from time to time. At any stage, workers can decide whether they want the deduction to continue. There have been some legal questions raised as to whether the initial deduction authority can continue if fees change over time.[29]

1.31 Schedule 5 therefore proposes amendments to section 324 of the FW Act to expand the circumstances in which employees can authorise employers to make valid deductions from payments due to employees, only where the deductions are principally for the employee's benefit.[30]

1.32 According to the EM, employees would be permitted to authorise employers, in writing, to make regular deductions for amounts that vary from time to time, provided that the deductions are not for the direct or indirect benefit of the employer.[31] In other words, 'where an employer offers deductions, an employee will be able to choose whether they authorise only a set amount be deducted or whether they authorise an ongoing deduction for an amount that varies from time to time'.[32]

1.33 The EM further explains that:

> The provision currently requires employees to provide employers with a new written authority on each occasion the amount of an authorised deduction varies. This creates an administrative burden for employers complying with the provision.[33]

1.34 According to DEWR, it remains open to an employee to choose to specify a monetary cap on the level of variation they are authorising. Further, the bill's amendments offer additional protections for employees by providing that, 'subject to certain exceptions, variable deductions cannot be made where they directly or indirectly benefit the employer'. DEWR concluded that:

> The Bill has reduced as far as possible unnecessary administrative burden associated with the changes. Employers may continue to make deductions in accordance with existing authorisations if they comply with the current provisions, until those authorisations are withdrawn or updated. Employers may also make authorised deductions in reliance on authorisations made

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29 The Hon. Tony Burke MP, Minister for Employment and Workplace Relations, *House of Representatives Hansard*, 29 March 2023, p. 18.

30 Explanatory Memorandum, p. 26.

31 Explanatory Memorandum, p. 26.

32 Department of Employment and Workplace Relations, *Submission 13*, p. 12.

33 Explanatory Memorandum, p. 26.

before the commencement of the provisions, if those authorisations comply with the new provisions.[34]

Schedule 6 – Coal long service leave scheme changes

Background

Coal Long Service Leave Scheme

1.35 The Coal Mining Industry (Long Service Leave Funding) Corporation (Corporation) is the Australian Government corporation established to regulate and manage long service leave entitlements on behalf of eligible employees in the black coal mining industry. Prior to the establishment of the Coal Mining Industry (Long Service Leave) Funding Scheme (Coal LSL), retention of workers in the industry was a challenge, and portable long service leave was identified as an important requirement to retain skills and support industry longevity.[35]

1.36 Payroll levies are collected from employers of eligible employees on behalf of the Australian Government, and the LSL levy is a mandatory employer tax which does not come out of employee wages. Levies are held in a pooled investment Fund which is managed by the Corporation's investments division to ensure financial provision for eligible employees' long service leave entitlements across the industry.[36] Coal LSL allows employees in the black coal mining industry to carry their LSL entitlements with them.[37]

1.37 An independent report of December 2021, entitled *Enhancing certainty and fairness: Independent Review of the Coal Mining Industry (Long Service Leave Funding) Scheme*, reviewed the Coal LSL Scheme and made 20 recommendations to improve the Coal LSL Scheme for employers and employees.

1.38 Recommendation 4 of the independent review called on the Commonwealth to 'enact legislative amendments to ensure that casual employees are treated no less favourably than permanent employees in the Scheme'.[38]

Amendments by the bill

1.39 Schedule 6 would legislate the government's commitment to implementing recommendation 4 of the independent review, ensuring that casual employees

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34 Department of Employment and Workplace Relations, *Submission 13*, p. 12.

35 Coal Mining Industry (Long Service Leave Funding) Corporation, *Overview*, https://www.coallsl.com.au/overview/ (accessed 13 April 2023).

36 Coal Mining Industry (Long Service Leave Funding) Corporation, *Governance and Operations*, https://www.coallsl.com.au/overview/how-the-fund-works/ (accessed 13 April 2023).

37 Department of Employment and Workplace Relations, *Submission 13*, p. 6.

38 KPMG, *Enhancing certainty and fairness: Report of the Coal LSL review*, December 2021, p. 13.

are treated no less favourably than permanent employees in the Coal LSL Scheme.[39]

1.40 The bill puts forward several amendments to better support casual employees in the black coal mining sector, including:

- amendments to include casual loading in the definition of 'eligible wages' for the purposes of levy collection, and in the payment of the employee's long service leave entitlement, to address 'confusion about whether the meaning of 'eligible wages' includes casual loading';
- expanding the meaning of 'qualifying service' under the *Coal Mining Industry (long Service Leave) Administration Act 1992*, to deem that certain weeks where a casual employee does not work due to specific rostering arrangements are periods of qualifying service, and to insert a rule-making power to allow for sufficient flexibility should it become apparent other non-rostered weeks for a casual employee should also be prescribed as counting towards qualifying service;
- changing the method for calculating a casual employee's 'working hours' per week so that they more closely align with the employee's actual working hours, enabling fairer accrual of the employee's long service leave entitlements; and
- requiring the Corporation to publish the form of the employer return[40] on the Federal Register of Legislation via notifiable instrument, and to consult with the Secretary of DEWR before approving the form; this will 'result in greater transparency regarding the Scheme's reporting requirements'.[41]

Schedule 7 – Technical corrections

1.41 Schedule 7 of the Bill would make minor technical amendments to paragraphs 237(2)(c) and 771(d) of the FW Act to correct typographical errors, and which do not alter the meaning of the provisions being amended.[42]

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39 Explanatory Memorandum, p. 28.

40 The current employer return form requires employers to list all working hours for eligible casual employees each month, without indicating how these monthly amounts are used to calculate weekly long service leave accrual records for employees; Department of Employment and Workplace Relations, *Submission 13*, p. 8.

41 Explanatory Memorandum, p. 28; Department of Employment and Workplace Relations, *Submission 13*, pp. 6–8.

42 Explanatory Memorandum, p. 41.

Schedule 8 – Application and transitional provisions

1.42 According to the bill's EM, Schedule 8 amends the FW Act and related legislation to make application, saving, transitional and miscellaneous consequential provisions arising from the amendments made by the bill.[43]

Financial impact

1.43 The EM outlines the financial impacts of the bill, primarily in relation to Schedule 6 and the amendments to the in relation to the Coal LSL.

1.44 The Schedule 6 amendments would result in employers of casual employees in the black coal mining industry paying a levy on 'eligible wages', which includes casual loading, into the Coal Mining Industry (Long Service Leave) Fund.

1.45 The EM goes on to explain that despite these amendments, the financial impact on coal long service leave scheme is expected to be minimal:

> The employer can seek a reimbursement from the fund after paying an eligible employee for their long service leave entitlement. The employer will be reimbursed from the Fund at the higher rate (which includes casual loading) despite having paid levy into the fund prior to commencement at the lower rate. The Fund will cover any shortfall of levy payments in order not to disadvantage employees. Given the relatively small number of casuals covered by the Coal LSL Scheme, the financial impact is unlikely to be significant or have an immediate impact on fund viability.[44]

Consideration by other parliamentary committees

1.46 When examining a bill, the committee considers any relevant comments published by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny Committee) and the Parliamentary Joint Committee on Human Rights (Human Rights Committee).

1.47 At the time of writing, neither the Scrutiny Committee nor the Human Rights Committee had considered the bill; however, the statement of compatibility with human rights, included in the bill's explanatory memorandum, concluded that the bill is compatible with *the Human Rights (Parliamentary Scrutiny) Act 2011* because it 'advances the protection of human rights, including labour rights'.[45]

1.48 Specifically, the bill would positively engage with the rights to work and the rights in work; promote employees' right to work on just and favourable conditions; promote equality and non-discrimination, and engage positively with the rights of parents and children.[46]

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43 Explanatory Memorandum, p. 42.

44 Explanatory Memorandum, p. iii.

45 Explanatory Memorandum, p. xvii.

46 Explanatory Memorandum, pp. iv–xvii.

Conduct of the inquiry

1.49 On 30 March 2023, the Senate referred the bill to the committee for inquiry and report by 28 April 2023.[47] The committee completed its inquiry based on the submissions received and other information published about the bill.

1.50 The committee advertised the inquiry on its website and invited submissions by 14 April 2023. The committee received 21 submissions from organisations, which are listed at Appendix 1 of this report. The public submissions are available on the committee's website.

1.51 The committee thanks those organisations who contributed to this inquiry by preparing written submissions.

47 Senate Selection of Bills Committee, *Report No. 4 of 2023*, March 2023.

Chapter 2
Views on the bill

2.1 The Secure Jobs, Better Pay legislation delivered on the Australian Government's (government's) commitment to improve the workplace relations framework, and to 'lift wages, improve job security and close the gender pay gap'.[1] As outlined in its Explanatory Memorandum (EM), the Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023 (bill) being examined by the committee further delivers on this commitment.[2]

2.2 This chapter explores the support for the bill and then examines the evidence and key issues raised by participants, with regard to each specific schedule in the bill.

General views on the bill

2.3 As detailed throughout this chapter, there was support from a variety of stakeholders for both the broad policy intents of the bill and specific schedules within the bill which, according to the Department of Employment and Workplace Relations (DEWR), 'aims to enhance worker protections, promote gender equality, remove unnecessary administrative burden, and clarify aspects of the workplace relations system'.[3]

2.4 In its submission to the inquiry, DEWR also underscored the extensive consultations that informed development of the bill. This included a written submission process and meetings with peak employer bodies, state and territory workplace relations officials, unions and other key stakeholders.[4]

2.5 In providing broad support for the bill, Per Capita endorsed the bill's aims and saw it as 'the next step in building a fairer more secure workplace relations system, after years of neglect'.[5] Similarly, the Australian Lawyers Alliance supported the amendments in the bill, which it argued would 'afford workers

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1 The Hon. Tony Burke MP, Minister for Employment and Workplace Relations, *House of Representatives Hansard*, 29 March 2023, p. 17.

2 Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023, Explanatory Memorandum (Explanatory Memorandum), p. iv.

3 Department of Employment and Workplace Relations (DEWR), *Submission 13*, p. 3.

4 DEWR, *Submission 13*, pp. 4 and 15–18. Written submissions were invited from more than 70 stakeholders including business groups, unions, academics, women's advocacy alliances, social and community peak organisations, organisations with an interest in coal mining, superannuation organisations, states and territories, and Commonwealth agencies such as the Fair Work Ombudsman.

5 Per Capita, *Submission 3*, p. 1.

greater protection of their entitlements and improve fairness in our workplace relations system'.[6]

2.6 There was also support for specific elements on the bill. For example, stakeholders such as the Federation of Ethnic Communities' Councils of Australia (FECCA), the Migrant Justice Institute (MJI), and the Uniting Church in Australia, Synod of Victoria and Tasmania expressed strong support for the amendments relating to protections for migrant workers.[7] Likewise, both Per Capita and the Australian Council of Trade Unions (ACTU) welcomed the provisions dealing with unpaid parental leave.[8]

2.7 While supporting the bill, some participants put forward amendments or clarifications. For example, while the Australian Chamber of Commerce and Industry (ACCI) described the amendments as 'largely uncontentious' and did not oppose passage of the bill, it suggested that 'some improvements could be made to minimise the adverse impact on businesses'.[9]

2.8 A similar view was expressed by the National Electrical and Communications Association (NECA), which drew attention to the operation of some provisions but did not oppose the bill in totality, given the uncontroversial nature of many of the amendments.[10]

2.9 However, stakeholders expressed a range of views in relation to particular aspects of the bill. For example, the Council of Small Business Organisations Australia (COSBOA) indicated in-principle support for amendments relating to protection for migrant workers and conditional in-principle support for increased flexibility in unpaid parental leave entitlements. At the same time, COSBOA raised concerns about the provisions relating to superannuation and opposed the proposed changes to employee authorised deductions, as discussed later in this chapter.[11] In addition, the Ai Group—which had no issues with some provisions of the bill but raised concerns with others—argued that the bill required amendment before being passed.[12]

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6 Australian Lawyers Alliance, *Submission 8*, [p. 1].

7 Federation of Ethnic Communities' Councils of Australia (FECCA), *Submission 11*, p. 3; Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission 14*, p. 2.

8 Per Capita, *Submission 3*, p. 4 and Australian Council of Trade Unions (ACTU), *Submission 12*, p. 2.

9 Australian Chamber of Commerce and Industry (ACCI), *Submission 16*, p. 2.

10 National Electrical and Communications Association (NECA), *Submission 18*, [p. 1].

11 Council of Small Business Organisations Australia (COSBOA), *Submission 2*, pp. 1–3.

12 Ai Group, *Submission 17*, pp. 2, 3 and 26. The Ai Group did not identify any issues with the provisions relating to protections for migrant workers, accessing unpaid parental leave for employee couples, and implementing gender neutral language.

2.10 Despite this, a number of submitters who proposed amendments still advocated for the passage of the bill. For example, the MJI strongly supported 'the passage of the bill in the current form', while the Refugee Council of Australia also recommended that the bill be passed.[13] Likewise, while the ACTU put forward 'minor changes', it contended that the bill contained 'common sense measures which the ACTU supports and encourages the Parliament to promptly pass'.[14]

Schedule 1 – Protection for migrant workers

2.11 Submitters expressed support for amendments in Schedule 1, in relation to protection for migrant workers and the government's commitment to meeting recommendation 3 of the Migrant Workers' Taskforce Report of 2019.[15]

2.12 The National Electrical and Communications Association (NECA) saw the amendments as 'not only protecting migrant workers but also deterring employers from breaching minimum employment standards', while assisting compliant employers.[16]

2.13 The Uniting Church in Australia, Synod of Victoria and Tasmania, offered its strong support for the Schedule 1 amendments, submitting that the 'measure will go some way to address the criminal behaviour of employers that seek to exploit people working in breach of their visa conditions'.[17]

2.14 The Fair Work Ombudsman (FWO) recognised the intention of the provisions to expressly clarify that migrant workers are entitled to protections of the FW Act and stated that this was:

> … consistent with the FWO's existing and long-standing approach that temporary migrant workers are entitled to the same workplace rights and protections, and the same minimum rates of pay, as other national system employees. [18]

2.15 The MJI commended the government's FW Act amendments which will protect all workers, regardless of immigration status, calling the amendments 'much-needed and overdue'. MJI called for complementary amendments to the *Migration Act 1958* to 'ensure this reform extends to labour protections beyond

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13 Migrant Justice Institute, *Submission 4*, p. 2 and Refugee Council of Australia, *Submission 6*, p. 3.

14 ACTU, *Submission 12*, [p. i].

15 See, for example: Council of Small Business Organisations Australia, *Submission* 2, p. 1; Ai Group, *Submission 17*, p. 3.

16 National Electrical and Communications Association, *Submission 18*, p. 1.

17 Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 14*, p. 2.

18 Fair Work Ombudsman, *Submission 19*, p. 3.

the FW Act', in areas such as workers compensation and anti-discrimination laws.[19]

2.16 The Law Council of Australia (LCA) indicated it was supportive of the principle that a 'migrant worker should be entitled to the same pay and conditions, and workplace protections, as an Australian worker'. As with MJI, the LCA suggested additional amendments to the bill which would better consider the provisions of the *Migration Act 1958*, and would clarify that the amendments as currently in the bill apply to circumstances where no contract had been created but the FW Act nevertheless applies.[20]

2.17 Broader concerns about the exploitation of migrant workers via superannuation and wage theft was voiced as a concern by several organisations. The Federation of Ethnic Communities' Councils of Australia (FECCA), for example, recommended establishment of a Wage Theft Act to criminalise wage theft.[21]

Schedule 2 – Unpaid parental leave

2.18 Various submissions to the inquiry supported amendments which would improve access to unpaid parental leave (UPL), and which would in turn better support families after the birth or placement of a child, promote shared caring responsibilities, and therefore gender equality.

2.19 Expanding UPL provisions to allow non-birthing parents to take leave and share in early-life care was commended by Per Capita, which submitted that:

> By increasing the provision for flexible unpaid parental leave, allowing UPL to be taken in the weeks preceding birth, and removing 'employee couple' and 'concurrent leave' provisions, the Bill promotes shared caring responsibilities and gender equality.[22]

2.20 The ACTU welcomed the changes, stating '[t]hey will make a positive contribution to better supporting parents to balance care and work, and in particular, drive shared parenting and gender equality'. The ACTU recommended that further flexibility be introduced, including reducing the notice period from 10 weeks, as in the bill and legislation currently in effect, to 8 weeks. They also recommended adjustment so that the unpaid leave must start in the 24-month period from birth or placement, but does not have to end in that period, so that parents with various work patterns may make full use of their leave entitlements.[23]

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19 Migrant Justice Institute, *Submission 4*, p. 2. See also: Refugee Council of Australia, *Submission 6*, p. 2.

20 Law Council of Australia, *Submission 20,* pp. 1–2.

21 FECCA, *Submission 11*, p. 5.

22 Per Capita, *Submission 3*, p. 1.

23 Australian Council of Trade Unions (ACTU), *Submission 12*, pp. 2–3.

2.21 DEWR confirmed in its submission that the proposed amendments would 'mean more choice for families and how they take leave' and will therefore 'encourage better sharing of care responsibilities in a child's early years'.[24]

2.22 In its supplementary submission, DEWR highlighted that increasing the flexibility of UPL also has benefits for business:

> Flexibility has many benefits for businesses. It can mean experienced employees gradually recommence work after becoming a parent sooner, or only needing to fill a partial vacancy, instead of a full one.[25]

Alternative views on the UPL amendments

2.23 Despite support for the UPL amendments from many stakeholders, some expressed concerns about the provisions.

2.24 Ai Group, for instance, argued that the amendments would have 'severe and impossible consequences for employers, co-workers and replacement employees'.[26] The Ai Group put forward a number of suggested amendments to the bill around the UPL provisions, claiming that:

> The uncertainty, complexity and regulatory costs of administering flexible UPL as an NES entitlement will likely stunt the momentum of employers adopting their own paid parental leave schemes. Such schemes typically offer the employee's usual rate of pay for employees on parental leave and play an important role in limiting the loss of earnings experienced by parents (and disproportionately women) on periods of UPL.[27]

2.25 The Motor Trades Association of Australia (MTAA) noted that it 'strongly supports the principal' that UPL should 'assist employees in managing their work and care responsibilities'. However, the MTAA cautioned that 'the needs of employees must necessarily be balanced with the operational requirements of the business for which they work'. The MTAA summarised its concerns around the proposed UPL provisions as:

- the disproportionate adverse impact on smaller businesses;
- confusion over the quantum of the entitlement for part-time and casual employees;
- insufficient detail in employee notification requirements for flexible unpaid parental leave; and
- the lack of certainty over employee notice period requirements.[28]

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24 Department of Employment and Workplace Relations, *Submission 13*, p. 9.

25 Department of Employment and Workplace Relations, *Submission 13.1*, p. 9.

26 Ai Group, *Submission 17*, p. 2.

27 Ai Group, *Submission 17*, p. 2.

28 Motor Trades Association of Australia, *Submission 5*, p. 4.

2.26 The Council of Small Business Organisations Australia (COSBOA) also noted that the UPL changes could impact on small businesses with a lesser number of employees, and called for a review of the provisions six months following their implementation.[29]

2.27 On the other hand, the Australian Chamber of Commerce and Industry (ACCI) proposed some 'improvement' to Schedule 2, but concluded 'ultimately, ACCI does not oppose the proposed amendments'.[30]

2.28 Generally speaking, organisations representing business groups expressed mixed views about Schedule 2, with a majority supporting the principle of flexible parental leave. Some held concerns about the ad hoc use of UPL negatively affecting business operations[31] and discouraging adoption or expansion of employer-funded paid parental leave schemes.[32]

2.29 Requirements for consulting and negotiating with an employer about planning UPL, and an employer's right to refuse the UPL on reasonable grounds were suggested,[33] with NECA recommending 'the committee turn its attention to how to address workforce and employee shortfalls'.[34]

2.30 DEWR addressed concerns about notice periods in its submission, explaining that:

> The Bill substantively retains the existing notice requirements for taking unpaid parental leave, which recognise the importance of balancing certainty for employers to plan their workforce with flexibility for employees to adjust their leave plans where unexpected circumstances arise. Employees and employers can also agree to unpaid parental leave policies and notice requirements that are more beneficial than the minimum safety net provided by the NES.[35]

2.31 DEWR also noted that employers are 'not obliged to allow an employee [to] take unpaid parental leave if they have not complied with the notice requirements in the Act'. In addition, DEWR made that point that:

> It is expected that in most cases employers and employees will maintain open communication about the employee's leave plans, avoiding the risk of

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29 Council of Small Business Organisations Australia, *Submission 2*, p. 2. See also: Motor Trades Association of Australia, *Submission 5*, p. 4.

30 Australian Chamber of Commerce and Industry (ACCI), *Submission 16*, p. 7.

31 Council of Small Business Organisations Australia, *Submission 2,* Motor Trades Association of Australia, *Submission 5*; Ai Group, *Submission 17*; ACCI, *Submission 16.*

32 Ai Group, *Submission 17*.

33 Motor Trades Association of Australia, *Submission 5.*

34 National Electrical and Communications Association (NECA), *Submission 18*, p. 2.

35 DEWR, *Submission 13*, p. 9.

> any disputes arising. If there is a dispute, this can be dealt with like any other dispute under the NES, including at the FWC if necessary.[36]

2.32 DEWR further explained the amendments complement the recent reforms to Paid Parental Leave and implements commitments made at the Jobs and Skills Summit.[37]

2.33 To further accommodate these changes, the FWO advised that it would update its advice to 'reflect any amendments made' to UPL provisions, following passage of the bill. The FWO would also incorporate any amendments into the FWO's existing materials and 'communicated accordingly'.[38]

Schedule 3 – Superannuation

2.34 Support was received for enshrining the right to superannuation in the National Employment Standards (NES).[39] Inquiry participants recognised the importance of a compulsory superannuation scheme to support people in their retirement, and the significant issue of lost superannuation payments amounting to billions in wage theft.[40]

2.35 In relation to unpaid superannuation, Cbus Super (Cbus) pointed out that 'non-compliance with the Superannuation Guarantee (SG) is a steady leak in Australia's retirement system', and reported that 'across the economy workers lose out on $6 billion a year in super'. Cbus therefore welcomed the move to include superannuation in the NES, observing that:

> The issue of unpaid super is not just a problem for workers, it penalises the majority of business which do the right thing and also represents significant lost Government revenue and an increased reliance on the Age Pension.
>
> …
>
> Cbus has long advocated for a legal avenue for all workers to recover unpaid super, as already exists for recovery of unpaid or underpaid wages. Parliament should empower workers and their representatives, including their superannuation fund, to take action against employers engaged in this form of wage theft for the under and non-payment of the SG or superannuation contributions.[41]

2.36 The Financial Services Council (FSC) was overall supportive of the bill's amendments and inserting superannuation into the NES, and suggested it

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36 DEWR, *Submission 13*, p. 10.

37 DEWR, *Submission 13*, p. 10.

38 Fair Work Ombudsman, *Submission 19*, p. 4.

39 See, for example, Australian Chamber of Commerce and Industry, *Submission 16*, p. 10.

40 See, for example, Australian Lawyers Alliance, *Submission 8*, p. 1; Association of Superannuation Funds of Australia (ASFA), *Submission 9*, p. 1.

41 Cbus Super, *Submission 15*, pp. 1-2. See also: Industry Super Australia, *Submission 10*.

would 'bolster the importance of the system within Australian workplace culture and deter employer non-compliance'.[42] The FSC continued that it would welcome clarity on:

> … a clear explanation of outcomes for employees so that there is a "no wrong doors" approach to addressing non-payment of superannuation. That is Government will need to make the pathways to the resolution of unpaid superannuation clear to the public to ensure that issues can be easily resolved, and employees can be assured of receiving the same outcome (payment of their owed superannuation) if the matter is pursued either through the ATO or the FWC.[43]

2.37 MJI also expressed its support for the superannuation amendments, observing that 'many vulnerable migrant workers are not only denied their minimum wage, but do not receive any superannuation'.[44] MJI continued that:

> Without access to individual recourse, many workers never recover their superannuation. They may complain to the ATO, but we understand that, in many cases, no action is taken, and the worker is left without any enforcement options. The amendment proposed will more effectively enable vulnerable workers to recover their superannuation.[45]

2.38 Inquiry participants acknowledged the current system to make a claim for unpaid super through the Australian Taxation Office may not be the most efficient, leading submitters to the view that opening a new pathway to claims for unpaid superannuation via the FWO would be a positive development.[46]

2.39 The MJI gave evidence the amendment would greatly benefit migrant workers as well as other working people in Australia:

> Many vulnerable migrant workers are not only denied their minimum wage, but do not receive any superannuation. Without access to individual recourse, many workers never recover their superannuation. They may complain to the ATO, but we understand that, in many cases, no action is taken, and the worker is left without any enforcement options. The amendment proposed will more effectively enable vulnerable workers to recover their superannuation.[47]

2.40 DEWR explained in its submission that employers who met their obligations under superannuation legislation would not be in contravention of the NES provision, and would not face duplication of work:

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42 Financial Services Council, *Submission 1*.

43 Financial Services Council, *Submission 1*. See also: NT Working Women's Centre, *Submission 21*, p. 3.

44 Migrant Justice Institute, *Submission 4*, p. 5.

45 Migrant Justice Institute, *Submission 4*, pp. 5–6.

46 See, for example, ACTU, *Submission* 12, p. 4; Financial Services Council, *Submission 1*, p. 1.

47 Migrant Justice Institute, *Submission 4*, p. x.

> The Australian Taxation Office (ATO) will still have primary responsibility for ensuring compliance with the superannuation guarantee and associated obligations. All employees will continue to be able to report superannuation underpayments to the ATO. The Fair Work Ombudsman will be able to make referrals of unpaid superannuation to the ATO and, in appropriate circumstances, pursue unpaid superannuation in a complementary role to the ATO, under both the new NES entitlement and pursuant to a term of a modern award, enterprise agreement, or other industrial instrument.
>
> The Bill provides that an employee cannot use the new NES entitlement to recover unpaid superannuation through the court if the ATO has already commenced legal proceedings to recover those same amounts of unpaid superannuation. This is to ensure that employers cannot be subject to multiple actions under both the Fair Work Act and superannuation legislation for the same unpaid superannuation contributions. [48]

2.41 The Association of Superannuation Funds of Australia Limited (ASFA) considered these to be 'sensible settings which allow the new entitlement to operate efficiently and in alignment with existing mechanisms'.[49]

Alternative views on the superannuation amendments

2.42 Despite the support offered for the superannuation amendments, some stakeholders took a more cautious view. Ai Group, for example, opposed these amendments and suggested the bill's provisions raise 'significant concerns around the integrity and efficacy of superannuation legislation and enforcement generally'.[50]

2.43 While COSBOA supported the principal that all employees should receive all eligible superannuation payments, it made clear its view that the amendments in the bill would 'do nothing to improve the superannuation payment process imposed upon employers'.[51]

2.44 Like COSBOA, the Housing Industry Association (HIA) supported the broad policy intent of a compulsory superannuation scheme, but it opposed the inclusion of superannuation in the NES, for two reasons:

> Firstly, there is a risk that 'deeming' of independent contractors as 'employees' for superannuation purposes could be conflated with the application of other employment related obligations on legitimate independent contractors.

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48 DEWR, *Submission 13*, pp. 5–6.

49 Association of Superannuation Funds of Australia Limited, *Submission 9*, p. 3.

50 Ai Group, *Submission 17*, p. 4.

51 Council of Small Business Organisations Australia, *Submission 2*, p. 2.

> Secondly, the approach adds another enforcement and penalty regime on top of what is already an extensive and complex regime administered by the Australian Tax Office.[52]

2.45 In response to claims of increased regulatory burdens, DEWR clarified that an employee could not use the new NES entitlement to recover unpaid superannuation through the courts, if the Australian Taxation Office (ATO) has already commenced legal proceedings to recover those same amounts. DEWR confirmed that:

> This is to ensure that employers cannot be subject to multiple actions under both the Fair Work Act and superannuation legislation for the same unpaid superannuation contributions.[53]

2.46 In addition, DEWR advised that the commencement of the new provisions would align the existing and new NES provisions:

> The changes are proposed to come into effect at the beginning of the first financial quarter 6 months after Royal Assent. This will align the NES entitlement with the requirements under superannuation legislation for employers to make contributions on behalf of employees on a quarterly basis in order to avoid liability for the superannuation guarantee charge.[54]

Schedule 4 – Workplace determinations

2.47 The proposed amendments to workplace determinations outlined in Schedule 4 of the bill were supported by submitters. DEWR provide a fulsome explanation of the operation of the amendments, saying:

> The Department is aware that the Fair Work Commission has made 66 workplace determinations since the commencement of the Fair Work Act. A determination will commonly include a clause which states that the determination applies to the exclusion of other industrial instruments, including enterprise agreements. This measure … provides consistency and certainty for parties by confirming that workplace determinations that came into operation before this amendment replaced any earlier enterprise agreement.

2.48 DEWR was of the view that the amendments were 'not controversial' and would 'not disrupt the application of determinations previously made by the Fair Work Commission.'[55]

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52 Housing Industry Association, *Submission 7*, p. 2.

53 Department of Employment and Workplace Relations, *Submission 13*, p. 6.

54 Department of Employment and Workplace Relations, *Submission 13*, p. 6.

55 Department of Employment and Workplace Relations, *Submission 13*, p. 13.

2.49 The ACTU agreed, saying the amendments 'resolved an ambiguity in the Act'. The ACTU made clear its view that these amendments presented a 'helpful change, especially given the likely increase in workplace determinations under the new bargaining changes that come into operation shortly'.[56]

2.50 The Australian Chamber of Commerce and Industry (ACCI) also observed that the amendments around workplace determinations would 'provide greater clarity for employers'.[57]

Schedule 5 – Employee authorised deductions

2.51 There was support for the amendments put forward by the bill which reduce administrative burdens around authorised regular deductions from worker payments.

2.52 For example, the Australian Council of Trade Unions (ACTU) considered the amendments to be a 'small common sense change', which would 'reduce red tape for the parties, and particularly for employers', while providing appropriate protection that the deductions are principally for the employee's benefit.[58]

2.53 In its submission, the FWO made the point that the bill's amendments would 'not negate the important legal requirements that a deduction authorised by an employee must be authorised in writing and principally for the employee's benefit'. The FWO continued that the current legislation already contained 'important protections' to help reduce exploitative arrangements and:

> … ensure employees receive their full wages and entitlements. In the FWO's experience, exploitative arrangements are more likely where there is an absence of documentation or proper authorisation.[59]

2.54 In order to reduce any risks of worker exploitation, it was put to the committee that deductions could be itemised with a meaningful descriptor, so that workers know exactly what is coming out of their pay.[60]

2.55 However, Ai Group urged careful consideration of the practical implications the proposed deduction provisions, questioning whether they 'may give rise to a situation in which an employer could be forced to process changes to the quantum of deductions frequently or at short notice' and considered such outcomes as 'unworkable'.[61]

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56 ACTU, *Submission 12*, p. 5.

57 Australian Chamber of Commerce and Industry, *Submission 16*, p. 11.

58 Australian Council of Trade Unions, *Submission 12*, p. 5.

59 Fair Work Ombudsman, *Submission 19*, p. 4.

60 Migrant Justice Institute, *Submission 4*, p. 6.

61 Ai Group, *Submission 17*, p. 22.

2.56 Similarly, COSBOA opposed the amendments, on the basis that it was 'unaware of any issue with the current system whereby an employee notifies an employer of their desired change to a deduction from their pay'. COSBOA further suggested the amendments would not decrease red tape or the regulatory burden on employers.[62]

2.57 Notwithstanding these views, DEWR made clear that the bill has instead 'reduced as far as possible unnecessary administrative burden associated with the changes', and advised that 'employers may continue to make deductions in accordance with existing authorisations if they comply with the current provisions, until those authorisations are withdrawn or updated'.[63]

Schedule 6 – Coal mining long service leave scheme amendments

2.58 Changes to the Coal Long Service Leave Scheme (Coal LSL Scheme) were largely supported by inquiry participants. Submitters agreed it was important that casual employees did not continue to be treated less favourably than other employees in terms of accrual of long service leave entitlements.[64]

2.59 DEWR explained in its submission that this measure would improve the treatment of casual workers under the Scheme, would not create any additional entitlements, and would not unduly compensate casual workers in comparison to other workers in the black coal mining industry. DEWR explained:

> Permanent employees accrue paid entitlements like personal leave and annual leave while on long service leave. The Bill provides equity for casuals as they will continue to receive casual loading (which was designed to compensate casuals for lack of paid entitlements and the insecure nature of their role) during their period of long service leave. Specifically including casual loading as part of the long service leave entitlement will alleviate possible disputes around some casuals taking a 'pay cut' during their period of long service leave. These amendments would make the Scheme broadly consistent with State and Territory portable long service leave schemes.[65]

2.60 Inclusion of casual loading amounts in long service leave entitlements was queried by some submitters who determined this would treat casual workers more favourably than other workers in the black coal mining industry.[66] Others

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62 Council of Small Business Organisations Australia, *Submission 2*, pp. 2–3.

63 Department of Employment and Workplace Relations, *Submission 13*, p. 12.

64 See, for example, Australian Chamber of Commerce and Industry, *Submission 16*, p. 14; ACTU, *Submission 12*, pp. 5–6.

65 DEWR, *Submission 13*, pp. 6–7.

66 See, for example, Australian Chamber of Commerce and Industry, *Submission 16*, p. 14; Ai Group, *Submission 17*, p. 23.

sought clarity on some of the definitions included in the bill, including 'ordinary rate of pay'[67] and 'ordinary hours of work'.[68]

Committee views and recommendation

2.61 Submitters to the inquiry offered their support for the protection of worker entitlements and for practical, common sense reforms to the workplace relations framework. The proposed changes put forward by this bill will protect important entitlements like superannuation, help to protect migrant workers, and remove administrative burdens on employers.

2.62 The amendments to the FW Act to better protect migrant workers were broadly welcomed by submitters, and the committee anticipates that these overdue and long called-for amendments will provide clarity and fairness for all workers moving forward. Migrant workers are entitled to the same protections afforded to all Australian workers, including the right to full pay for time worked. As DEWR noted in its supplementary submission, the Government has made further commitments in relation to protecting migrant workers from exploitation, including implementing the recommendations of the Migrant Workers' Taskforce.

2.63 Likewise, the bill's amendments clarifying the operation of workplace determinations will help to provide consistency and certainty for both employers and employees around the operation of these agreements. The committee welcomes the support offered in evidence for these provisions.

2.64 The committee welcomes the bill's provisions which remove the legal ambiguity around the continuing effect of employee authorised deductions, in the event the originally authorised amount is varied. The bill also ensures the deductions remain for the employee's benefit. The committee concurs with the evidence it received suggesting these were common sense amendments, reducing red tape on both employers and employees.

2.65 The amendments around coal mining long service leave will provide equality for casual workers in the black coal mining industry, and finally puts them on par with their permanent colleagues in accruing long service leave. The inclusion of casual loading in determining a long service leave entitlement means that causal employees in the industry will no longer be disadvantaged, and the committee commends the bill for delivering these outcomes. The committee notes the Government has made additional commitments to providing fair pay and conditions for casual coal workers, the most important of which is the Same Job, Same Pay policy.

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67 Law Council of Australia, *Submission 20*, p. 4. The Law Council of Australia put forward detailed concerns about some of the provisions proposed by Schedule 6 of the bill; see pp. 3-4.

68 Ai Group, *Submission 17*, p. 25.

Unpaid parental leave

2.66 Significant provisions in the bill strengthen access to UPL, in both the time available as UPL, and increasing flexibility in how UPL is used. The committee acknowledges the benefits that flexibility provides to employees and employers alike, but also notes the claims made by some submitters about the possibility that these provisions may have adverse impacts on some employers.

2.67 However, on balance, the committee is persuaded by the advice of DEWR which makes clear that existing notice requirements on employees intending to take UPL will be retained. This will ensure that employers can continue to plan their workforce arrangements with certainty and flexibility. In addition, it remains open to employers and employees to agree to UPL policies and notice requirements, that are more beneficial than those provided by the NES. Conversely, an employer is not obliged to allow an employee to take UPL if they have not properly given notice to the employer.

2.68 Together, these ongoing protections will ensure that parental leave remains flexible and adequate for modern workplaces and family structures. The proposed amendments around UPL will have significant, positive impacts on parents balancing work and care responsibilities, and will particularly help with women remaining engaged with the workforce.

Superannuation

2.69 Including superannuation in the National Employment Standards is vital to ensuring that all Australian workers receive the payments to which they are legally entitled. For too long, superannuation loopholes have been used as a means of facilitating wage theft, and including superannuation in the NES sends a strong message to non-compliant employers.

2.70 The bill provides that superannuation will apply to those employees who are not covered by awards, while improving the avenues available to employees to recover both underpaid superannuation and wages under the FW Act.

2.71 It is important to note, however, that despite some claims to the contrary, under these provisions employers will not face duplication of work and will not be subject to multiple actions under both the FW Act and superannuation legislation, for the same contributions.

2.72 The committee welcomes these essential amendments and the fact that superannuation will become an even stronger part of Australia's workplace relations system.

2.73 The committee acknowledges that a broad range of issues in relation to workplace relations were raised in submissions to this inquiry. While these issues may be out of scope for the bill currently being considered and have not been discussed further in this report, the committee recognises that reform of the workplace relations system is a constant process. As acknowledged by

Minister Burke, this bill is a 'first step' in improving rights for workers and ameliorating administrative burdens on employers.

2.74 Given the important initiatives put forward by the bill to improve fairness in the workplace relations system, promote gender equality and relieve administrative burdens, the committee recommends that the bill be passed.

Recommendation 1

2.75 The committee recommends that the bill be passed.

Senator Tony Sheldon
Chair

Coalition Senators' Additional Comments

1.1 Coalition Senators propose a number of amendments to this bill in order to provide greater certainty to both employers and their employees.

Superannuation

1.2 The Coalition notes a number of concerns of stakeholders about the bill's proposed changes to superannuation, which would give employees the right to pursue unpaid superannuation as a workplace entitlement.

1.3 The Council of Small Business Organisations Australia (COSBOA) stated in their submission:

> We are very concerned that this amendment creates yet further red tape and burden upon an employer to now report and substantiate superannuation payments to a second government regulator.[1]

1.4 It is important that the Government clarify what extra reporting obligations will be required from Australian businesses as a result of their proposed changes.

1.5 Australian businesses have had obligations to pay superannuation for a number of decades since the introduction of the *Superannuation Guarantee Charge Act 1992*, with the Australian Chamber of Commerce and Industry commenting in their submission that the 'majority of employers are already compliant with these obligations'.[2]

1.6 The Coalition notes there are a number of concerns from stakeholders about these proposed changes and their potential to create extra red tape for businesses, including confusion about whether that business should deal with the Australian Taxation Office (ATO) or the Fair Work Ombudsman (FWO) when it comes to superannuation matters.

1.7 The Coalition welcomes provision in the legislation, through section 116D, which would prevent duplicate action through the ATO or the FWO, however, there are continued stakeholder concerns that these changes do not go far enough.

1.8 The Australian Industry Group (Ai Group) states in its submission that:

> The Bill should be amended to ensure that employers are not subject to any pecuniary penalty when they have adopted an approach to compliance with superannuation legislation that is consistent with current Administratively Binding Advice (ABA) or interpretive guidance issued by the ATO.
>
> Section 116D only addresses the need to prevent enforcement proceedings under the FW Act if the Commissioner of Taxation has also commenced

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1 Council of Small Business Organisations Australia (COSBOA), *Submission 2*, p. 2.

2 Australian Chamber of Commerce and Industry, *Submission 16*, p. 10.

> enforcement proceedings to recover an amount of superannuation guarantee charge from the employer in relation to the same employee.
>
> It is conceivable that the limited scope of the Bill's section 116D and the wide discretion of the courts afforded by current sections of the FW Act could enable an employer to be subject to a pecuniary penalty under the FW Act, notwithstanding that the employer may have followed the advice or interpretative guidance of another regulator in another jurisdiction; namely the ATO.[3]

1.9 The Coalition believes amendments need to be made to this section of the bill to ensure that there are greater protections for businesses, particularly small and medium businesses, from penalties if they have previously relied on a ruling from the ATO. It is also important that businesses are not subject to extra red tape or reporting requirements when complying with their superannuation obligations.

Unpaid Parental Leave

1.10 The Coalition supports parental leave, both paid and unpaid, as a means of ensuring that Australians are able to balance their work and family responsibilities and believe that parental leave greatly assists women, in particular, remaining connected to the workforce.

1.11 Businesses of all sizes work closely with their employees to plan for periods of paid and unpaid parental leave, which will often last for a significant period of time. The Coalition notes that different businesses will have differing needs when it comes to planning for when an employee takes parental leave and believes that employers and employees working together to plan for these periods is best for both employers and employees.

1.12 The Coalition notes the concerns of a number of stakeholders relating to the proposed changes to unpaid parental leave and their potential impact on the operation of a business when insufficient notice is given that an employee will be taking unpaid parental leave, particularly when a start and an end date of a period of leave is not nominated.

1.13 The Coalition believes that amendments should be made to this bill which ensures that businesses are given sufficient notice when an employee wishes to access unpaid parental leave. The Coalition notes the suggestion that an employee should be required to nominate the intended dates for a particular period of leave, as proposed by Ai Group:

> Section 74(3C), included as amended by the Bill, would not require an employee to advise their employer of the intended start and end dates of the flexible UPL, but only the total number of days. It is essential that section

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3 Australian Industry Group (Ai Group), *Submission 17*, p. 18.

74(3C) require employees intending to take flexible UPL to provide written notice of their intended dates, not just the number of days.[4]

1.14 The nomination of specific dates for a period of leave is particularly important for small and medium businesses which may not have the resources to adequately plan for certain periods of leave at short notice. The Coalition proposes that the bill should be amended to clarify this matter.

1.15 Coalition Senators also support COSBOA's proposal to have a review into this part of the legislation six months after it has commenced.

Employee Authorised Deductions

1.16 Schedule 5 is a particularly concerning part of this bill, which appears to reduce protections for Australian employees who have deductions made from their take home pay. The Liberal and National parties believe that Australians should be able to keep more of the money that they earn, and it is important that any deduction from their take home pay should be closely scrutinised.

1.17 The ultimate effect of this change means that an organisation (such as a trade union or health insurer) which is in receipt of a deduction from an employee's take home pay will benefit from a worker's potential inattention to the cost of that deduction. If an increase to the deduction can be made without the employee having to agree, it is likely that prices will increase at a faster pace and fewer employees will opt out of having those deductions made. The overall effect will likely mean more revenue for the organisations which are in receipt of the deductions at the expense of the individual worker. This change makes it less likely that workers will opt out of contracts they no longer wish to have, because there is no requirement for their agreement to a price increase.

1.18 Coalition Senators think it is appropriate that when there is an increase in the level of deduction being made to an employee's take home pay, the employee concerned should have to agree to that cost increase. The Coalition does not oppose this process being streamlined, such as the employee being able to agree to the price increase electronically, but an increase to a deductible expense without the agreement of the employee is a principle we cannot support.

1.19 Under this section of the bill, it appears that once an employee signs up to an agreement to have some of their pay deducted, the amount could be subject to potentially unlimited price increases without the employee being formally notified and relies heavily on the employee having to review their pay slip and challenge any particular deduction. Given that some employees do not directly receive or access their pay slips regularly, many employees will continue to pay for a service they no longer want without realising the true cost. Employees

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4 Ai Group, *Submission 17*, p. 11.

whose pay varies between pay periods (such as casual workers) are also less likely to notice an increase in deduction.

1.20 COSBOA noted that this will also put an increase in administrative burden on employers:

> This proposal will create additional administrative burden upon employers to take on the role of notifying employees of a change in the amount of a deduction due to actions of which the employee may not be aware. In order to minimise employee confusion, the employer will now have to instigate communication of changes whereas the current system of the employee requesting a change to their salary arrangements maintains a simple and understood process.[5]

1.21 The result of these provisions in the bill is that the administrative burden for being made aware of a price increase to a take home pay deduction shifts to the individual employee and potentially the employer, which the Coalition does not consider to be appropriate. Being notified of a price increase for a particular product is an important protection for Australian consumers, which gives them the right to reconsider whether the product they are paying for is actually value for money.

1.22 When an electricity provider, a health insurer, a bank or a streaming service such as Netflix increase their prices, it is only appropriate for consumers to be notified of that increase and then have the opportunity to reconsider whether they are receiving value for money and whether they should shop around for a better deal. If these increases were not notified, many consumers could be caught unaware that their prices have increased and pay a higher price than they would otherwise have agreed to.

1.23 Employees should have similar protections for their take home pay deductions, but unfortunately this bill does not provide that assurance, but instead makes it easier for prices to increase without their agreement. It appears in this case that the Government is attempting to change this section of the *Fair Work Act 2009* to benefit those who are in receipt of employee deductions, such as trade unions.

1.24 Given union membership has fallen to 8 per cent of the private sector workforce, this appears to be the latest attempt to address a decline in union membership. Signing up to a union should not be like signing up to a timeshare agreement, and employees should be notified when the cost of that service increases and be given an opportunity to assess whether they wish to continue with that membership.

1.25 As such, Coalition Senators propose that this section of the bill should be amended to ensure that an organisation which is in receipt of a deduction from

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5 COSBOA, *Submission 2*, p. 3.

an employee's take home pay first get the agreement of that employee before that deduction is increased.

Coal Mining Long Service Long Service Leave Scheme

1.26 Coalition Senators note the comments from stakeholders that technical amendments should be made to this section to better clarify what allowances are included as comprising the 'ordinary rate of pay' when calculating long service leave payments. In particular, the Ai Group submitted that:

> … where a quantifiable casual loading is not discernible from an industrial instrument, the reference to '*ordinary rate of pay*' should, if it is intended to encompass a casual loading, the Bill should specifically exclude any separately identifiable amounts apart from incentive-based payment, bonuses or the casual loading.[6]

1.27 Coalition Senators believe the Government should review this provision to provide more clarity to employers and employees affected by these proposed legislative changes, including potentially amending the bill.

1.28 The Coalition will continue to consult with stakeholders about this bill and consider any further suggestions or amendments to improve it.

Senator the Hon Michaelia Cash
Deputy Leader of the Opposition in the Senate and Participating Member
Liberal Senator for Western Australia

Senator Matt O'Sullivan
Deputy Chair
Liberal Senator for Western Australia

Senator Kerrynne Liddle
Member
Liberal Senator for South Australia

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6 Ai Group, *Submission 17*, p. 23.

Appendix 1
Submissions

1 The Financial Services Council
2 Council of Small Business Organisations Australia
3 Per Capita
4 Migrant Justice Institute
5 Motor Trades Association of Australia
6 Refugee Council of Australia
7 Housing Industry Association
8 Australian Lawyers Alliance
9 The Association of Superannuation Funds of Australia
10 Industry Super Australia
11 The Federation of Ethnic Communities' Councils of Australia
12 Australian Council of Trade Unions
13 Department of Employment and Workplace Relations
- 13.1 Supplementary to submission 13

14 Uniting Church in Australia, Synod of Victoria and Tasmania
15 Cbus Super
16 Australian Chamber of Commerce and Industry
17 Ai Group
18 National electrical and communications association
19 Fair Work Ombudsman
20 Law Council of Australia
21 Working Women's Centre NT

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