



Supporting Australia's Jobs and Economic Recovery – At a Glance

How the Bill supports Australia's jobs and economic recovery

The Bill will amend the Fair Work Act 2009 and contains six main schedules, the first five dealing with the key areas for reform focused on creating jobs, plus an additional schedule outlining new measures designed to support the Fair Work Commission (FWC).

Schedule 1 - Casual employees: *Certainty, fairness and a pathway to permanency*

Measures in the Bill will ensure businesses have the confidence to engage casual staff, while ensuring employees have pathways to permanent employment.

Recent court outcomes such as the Rossato decision have made it very difficult to be certain of an employee's status – even if the parties follow an award or agreement definition. The Bill will address these issues by:

- Legislating a new statutory definition of casual employment – addressing a gap from when the Fair Work Act was drafted in 2009.
 - A person will be considered a casual employee if they accept an offer of employment where there is no firm advance commitment to continuing and indefinite work according to an agreed pattern of work.
 - To ensure certainty for businesses and their employees, an exhaustive list of indicators of what constitutes 'no firm advance commitment' will be provided.
- Legislating a new, broad based casual conversion right.
 - It will require employers to assess all casual employees once they have been employed for 12 months and, if appropriate, offer them conversion to full-time or part-time employment.
 - Casual employees who choose not to convert, or are not made an offer, can request casual conversion at a later stage provided they meet the eligibility criteria.
 - In conjunction with greater flexibility for part time employees, this is likely to see more use of part time employment, and less need to engage employees on a casual basis.
- Ensuring employers are protected from paying for the same entitlements twice.
 - The Bill will ensure employers who paid an employee an identifiable loading as compensation for leave entitlements is not then forced to also pay for leave entitlements without the capacity to offset that liability via the compensation already paid.
- Ensuring employees who received no casual loading remain entitled to back-pay.
- Placing the needs of small business as a key focus of new Fair Work Ombudsman (FWO) communication and guidance material to increase awareness and communication of these reforms. This will support small business in understanding and applying the changes in their workplace.

Industrial Relations Reform

These changes will restore confidence, particularly for small businesses, making it clearer and simpler to engage casual employees as needed. Casual employees will also receive enhanced rights to convert to permanent work if it is their wish to do so.

Schedule 2 - Award Flexibilities: *Secure employment and more opportunity for work*

In those industries hardest-hit by COVID-19, the Government is working to make it as simple as possible to re-grow jobs, without reducing employee protections.

There are a number of critical changes the Government is implementing to 12 Modern Awards¹ in two of our most distressed industries – retail and hospitality – to assist businesses and their employees to get back to work, including:

- Legislating two COVID-19 JobKeeper flexibilities concerning duties and location of work for distressed industries for a further two years.
 - These flexibilities, which have already saved thousands of jobs during the pandemic, will allow employers and employees to continue to work together to navigate the challenges of working in a post-COVID world.
- Legislating increased access to flexible part-time arrangements that allow an employee to agree to take on additional hours at their normal rates of pay when it suits them, subject to important safeguards.
 - This measure will help to reduce employer reliance on more traditionally flexible forms of employment, incentivise the use of permanent roles with paid leave entitlements and allow employees who want more hours the chance to earn more each week.
 - The employee must work at least 16 hours per week, be given additional hours of no fewer than 3 hours in a shift and still be paid applicable penalty rates.
- Working through the Fair Work Commission processes to modify key distressed awards within the hospitality and retail sectors² by simplifying classifications and introducing loaded rates and/or exemption rates to make it easier for small businesses in particular to create jobs.³
- Establishing a co-design process involving the FWC, FWO, employer groups & unions to design a RegTech product that will make it simpler for employers to pay their staff and employ more people.
- Undertake a review of common and duplicative award terms that should be migrated to the NES to simplify the awards system and added to the legislated safety net.

¹ Relevant awards are the Business Equipment Award 2020, the Commercial Sales Award 2020, the Fast Food Industry Award 2010, the General Retail Industry Award 2020, the Hospitality Industry (General) Award 2020, the Meat Industry Award 2020, the Nursery Award 2020, the Pharmacy Industry Award 2020, the Restaurant Industry Award 2020, the Registered and Licensed Clubs Award 2010, the Seafood Processing Award 2020 and the Vehicle Repair, Services and Retail Award 2020.

² The General Retail Industry Award 2020, the Hospitality Industry (General) Award 2020, the Restaurant Industry Award 2020, and the Registered and Licenced Clubs Award 2010

Industrial Relations Reform

Schedule 3 - Enterprise agreements: *Working together to drive jobs and wages growth*

Unions and employers know the enterprise bargaining system is not working as it was intended. The Government a range of reforms that will make bargaining a more viable option, and encourage employers and employees to unlock the benefits of higher productivity and higher wages – as the system was designed to achieve.

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

A quicker and easier process will encourage more businesses to return to bargaining and make best use of the opportunity to achieve productivity improvements, pay higher wages and create jobs. Major changes include:

- Making it easier for businesses and their employees to make agreements that suit their needs by revising the better off overall test (BOOT) in the following ways:
 - continuing to ensure it is applied to each current and prospective employee,
 - removing consideration of hypothetical scenarios and having regard only to work patterns that are in place or are reasonably foreseeable,
 - Requiring the FWC to give significant weight to the parties' views in considering whether the BOOT has been met, and
 - placing emphasis on monetary and non-monetary improvements for employees.
- Legislating to require all agreements to be approved as far as practicable within 21 working days.
- Building on provisions in the Fair Work Act since its introduction in 2009 that allow the FWC to approve an agreement that doesn't comply with the BOOT where parties agree and where it is in the public interest to do so.
- Limiting non-bargaining parties' ability to intervene at the approval stage.
- Replacing the existing prescriptive technical test for genuine agreement with a simple test that focuses on the substance of the agreement making process.
- Restricting when an application to terminate an expired agreement can be made.
- Requiring 'zombie agreements' from the early 2000s to cease by 1 July 2022.
- Reviewing the existing low-paid bargaining stream to ensure it is operating as intended.
- Tasking the FWC to address pain points in the agreement making process, including through the adoption of tech solutions, which will make the bargaining process easier to navigate, and the consideration and approval of agreements faster and more efficient.

Schedule 4 - Greenfields agreements: *Greater investment, more jobs*

By providing certainty about workplace conditions during the construction phase of mega-projects, Australia can incentivise global investment in more job-creating initiatives. This change will ensure that the nominal term of greenfields agreements can better match the construction length of major projects, preventing the need for costly re-negotiation of agreements part-way through projects. The changes to greenfields agreements include:

- Allowing up to 8 year greenfields agreements that relate to the construction of major projects valued over \$500 million or for projects above \$250 million and up to \$500m in value, where the project has national or regional significance or is likely to contribute to significant jobs creation.

Industrial Relations Reform

- Ensuring greenfields agreements that will operate for more than 4 years, must provide for annual wage increases for the nominal term of the agreement.
- The Government will also support improvements to mental health for fly-in fly-out and drive-in drive-out workers, who are often employed on greenfields agreements.

Schedule 5 - Compliance and Enforcement: *Confidence to employ and safeguarding entitlements*

The Government is working to create a system that is easier to comply with, so businesses have the confidence to spend more time growing their business and creating jobs, and to ensure employees receive their correct entitlements.

The Bill introduced various reforms to help businesses comply, rectify issues expeditiously where they arise and a number of enhanced safeguards for both employees and employers who do the right thing, but face being undercut by unscrupulous operators:

- A new criminal offence for the worst forms of deliberate, dishonest and systematic underpayments of one or more employees, punishable by up to 4 years imprisonment and significant fines. Individuals convicted of the criminal offence will be disqualified from managing corporations for five years under the *Corporations Act*.
- Increases to existing *Fair Work Act* maximum civil penalties for underpayments, building on the 10-fold increase to penalties for serious contraventions already introduced since coming to Government.
- Introducing a new 'benefit obtained' penalty for medium and large businesses – where the maximum penalty for an underpayment contravention could be two times the benefit gained through the underpayment, or three times for serious contraventions, bringing the workplace system into line with other jurisdictions like corporations and consumer law.
- Increases to the maximum penalty for sham contracting, infringement notices and not complying with a compliance notice.
- Prohibiting employers from advertising jobs specifying pay rates that are below minimum wage.

The government also recognises that the vast majority of underpayments are not deliberate and that the key is for employers, especially those in small business, to be given greater assistance to help them understand and comply with their obligations, avoid making genuine mistakes or rectify them where they do occur. The Government will do this through a number of important new measures and initiatives:

- Additional funding for the Fair Work Ombudsman (FWO) to ensure its role is better understood by employers and employees in order to deliver the best possible guidance and services to make understanding and abiding by obligations as easy as possible.
- Working with industry to design a new, free 'Employer Advisory Service' from the FWO that will make it easier for small business to comply with their obligations by seeking advice from the regulator in the knowledge that the regulator will not take legal action if they have acted honestly and followed the FWO's advice.⁴
- Codifying regulator's enforceable undertaking powers and instituting a Deferred Litigation Process for inadvertent underpayments that are rectified quickly and in good faith.

⁴ To commence 1 July 2021, with final detail on scope and mechanics of the provision of advice and specific consequence of good faith, detailed, and accurate reliance to be consulted upon with employer groups and unions.

- Expanding and improving the existing small claims process, by increasing the small claims cap to \$50,000, allowing courts to refer issues to the FWC for resolution via conciliation or genuine consent arbitration and fast-tracking timeframes for resolution of underpayment issues where possible.

Schedule 6 – Fair Work Commission

The Fair Work Commission needs appropriate powers to be able to deal with vexatious applications more effectively. This will reduce costs incurred to both responding employers and the public, and assist the Commission in concentrating its resources on dealing with meritorious cases.

The Bill will amend the Fair Work Act to:

- enable the Commission to dismiss applications that are misconceived, lacking in substance or otherwise an abuse of the process (in addition to its existing power to dismiss applications that are frivolous, vexatious or have no reasonable prospects of success), and
- enable a Full Bench of the FWC to order a person whose application is dismissed for such reasons not to make further applications to the FWC (including applications of a particular type, or against a particular person).

This power is modelled on the Administrative Appeals Tribunal's powers to deal with vexatious applications and balances procedural fairness and the need for the FWC to minimise further appeal avenues for vexatious litigants.