SUBMISSION OF SENATOR MALCOLM ROBERTS, SENATOR FOR QUEENSLAND - ONE NATION
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SENATE STANDING COMMITTEE ON EDUCATION AND EMPLOYMENT LEGISLATION
INQUIRY INTO THE PROVISIONS OF THE FAIR WORK AMENDMENT
(SUPPORTING AUSTRALIA'S JOBS AND ECONOMIC RECOVERY) BILL 2020

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INTRODUCTION

I welcome the opportunity to make a submission to the Senate Standing Committee on Education and Employment Legislation (the Committee) inquiry into the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (the Omnibus IR Bill).

One Nation is committed to a fair safety net of wages and entitlements for all workers and to the primacy of the relationship between employer and employee.

One Nation continues listening widely in regard to this Omnibus IR Bill across business, employer groups, unions, workers, the not-for-profit sector and more.

I assert that everyday Australians deserve a better way and this legislation is sadly lacking across a range of measures as to what good law should be. We won't get into whether government COVID lockdowns reduce infection rates, but what we do know is that lockdowns destroy businesses and jobs.

This Omnibus IR Bill introduces significant changes to the Fair Work Act 2009 (Fair Work Act) and related legislation which will hurt many businesses and affect the working conditions and take-home pay of many everyday Australians.

In Minister Porter's words, this Bill will assist Australia's recovery from COVID-19. Yet it is actually far more than that. It could directly hurt everyday Australians and many Australian businesses.

We believe that the employer and employee should be the centre of the workplace relationship, not waiting for the decisions of expensive lawyers, IR advisers, union bosses or the courts. We believe that Australia's industrial relations legislation should be measured against three principles:

1. Does it provide certainty, protection and fairness for both employers and employees?
2. Does it protect business, especially small and family businesses and help them to retain and to create jobs?
3. Does it make the IR rules clearer, simpler, cheaper, quicker and does it reduce red tape? (You shouldn't have to pay an IR lawyer just to hire an employee!).

We do not see genuine reform. This is more words in legislation, more rules and more vagueness in complex definitions. The outcome of this Omnibus IR Bill is that it will not create certainty for people who just want to get back to work. It will add to the complexity of business life.

Only big business, union bosses and the IR Club benefit from complex IR laws. This complexity has destroyed lives for casuals like Simon Turner, who, 5 years later is still fighting big business for his just entitlements – we want to know how the government is going to help people like Simon Turner with quicker, simpler processes.

Australia's industrial relations system no longer serves employers and employees; it serves the people who benefit from its complexity.

The IR Club, the class action lawyers, union bosses and the big employer organisations all earn money which could be better spent by employers and employees on securing jobs and income. What we also know is that abused workers cannot rely on the people they elected to help them, Simon Turner wrote to the ALP's Joel Fitzgibbon in the Hunter many times without success.

What everyday Australians are looking for? The same that has been stated in the FW Act's objects and in the courts for years, employers and employees are looking for "… certainty, stability, fairness, and enforceability".[1]

One Nation has heard the Morrison Government talking about change and industrial relations reform, yet we know that they are just patching up their mistakes like the "casual" issue that they let drag on for years and hurting many abused workers.

Australia and Australian business needs real change and a fair go but it is just not in industrial relations, this government needs to address our BIG PICTURE concerns. Everyday Australians need secure jobs, better pay, property rights, cheaper energy and more.

Ask a small business owner, the real problems that needs fixing in Australia for employers and employee alike are:

- How do we make it easier to hire employees;
- How can we pay people better; and,
- Will my job be safe?

[1] Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (2020) 297 IR 338 at [14], [25].

What small business has clearly stated: “If we are to create jobs, good and well paid jobs, then we need to ensure our industrial relations laws accommodate and reflect that. Those that do not run a business and do not have to find the dollars have no idea of the burdens imposed upon small business owners.”[2]

Years of LNP ‘casual confusion’ and ALP flip-flopping on coal has concerned a lot of employers and workers alike.

The unions and the ALP are not the solutions because they seem to think that they need conflict to gain members and voters, union bosses don’t support a simple or a fair IR system. They are not going to deliver reforms that can help protect us through 2021 in the uncertain post-JobKeeper world.

It is time the ALP and all union bosses stood up in front of everyday Australian workers and families and unequivocally confirmed that that they will not bargain away the pay and entitlements of everyday Australian workers in exchange for 100% union membership in enterprise agreements. This must be a hard and fast principle; workers jobs and conditions must come before the union bosses’ interests.

COVID recovery will be a testing time for businesses across many industries and of every size. What is clear is that the government and FWC/FWO need to be responsive and flexible – one size of business and one law does not always fit all. I recommend that there should be a full review of the IR laws after 12 months to ensure that the laws are meeting their intended purpose and if problems persist, the government should act promptly to address problems, especially for workers and small business.

While I recognise there may be a need for flexibility during the COVID recovery period, I am also concerned to ensure that this approach is fair for both employer and employee, and will be seeking the government’s assurances that workers will be protected from abuse or long term disadvantage.

What everyday Australians need now is to know that their jobs and businesses are safe, and that this legislation will enable business growth across all sectors.

Yet what the Omnibus IR Bill seems to do as a priority is to shift the ‘casual risk’ from big business to small business.

How? Because the heartland of **casual employment** is in small business where they need a dynamic workforce and simple rules to be competitive. Minister Porter is trashing the “long term flexible but predictable” casual employment arrangements that suited many small business employers and employees because it was abused by big business, e.g. labour hire in the coal industry.

While casual work is not for everyone, rewriting it as the government has done may have many unintended consequences for everyday Australians, such as pay cuts and rosters that change from week to week to protect the employer from creating a ‘firm advanced commitment’. This will be hard for a student or a single parent to work around their fixed family/time commitments.

This legislation could hit the hundreds of thousands of small businesses through increased hiring costs, compliance costs, accounting costs (e.g. accrued entitlements and reporting for same) and an inflexible workforce subject to rules that may make the business uncompetitive.

[2] Small Business Association of Australia

SMALL BUSINESS

One Nation continues listening widely in regard to this Omnibus IR Bill across business, employer groups, unions, workers, the not-for-profit sector and more, many have expressed concerns stating:

> *This Bill just shifts the casual risk from big business to small business, and hundreds of thousands of small businesses and true casual employees will be affected.*

Context for Australian business including small business:

- × Small business in Australia has never faced a more difficult economic environment.
- × COVID-19 lockdowns have dramatically impacted their trade and liquidity.
- × International tourism and the income it generates has stopped.
- × Big online retailers – many based overseas – are stealing market share and not paying a fair share of tax in Australia.
- × Many businesses are locked in to high rents and staff costs, which they are juggling to manage.
- × The government support that has kept many small businesses afloat is ending.
- × While a few businesses have thrived, many are still barely surviving.
- × Preserving the hundreds of thousands of small and family businesses is critical.
- × When a small business goes bankrupt:
    - Employees lose their jobs.
    - Business owners lose their livelihoods.
    - Many business owners lose their savings and their homes.
    - There are economic and social ripples throughout communities especially in rural and regional Australia.
    - A combative IR approach based upon expensive and lengthy litigation is counter productive.
    - Employees need jobs. Businesses need employees.
    - We need to get our economy up and running again.

Small business creates jobs and it deserves better than what this government is offering. Why, because we understand that small business owners work hard, they are resource poor and they do not have the deep pockets to employ lawyers and the IR Club that big business takes for granted.

Casual employment affords employers and employees with flexibility, often on an hour to hour basis. Such flexibility is rational where:

- The employer operates a business where other employees undertaking the same role are likely to require such flexibility or the need for individuals to undertake specific roles is not always clear, necessitating short notice shift changes or a distinct variation in shift patterns during the employment relationship,[3]
- The employee requires such flexibility due to other commitments, and,
- The employer and employee agree that, due to such uncertainty in the employment relationship it is undesirable to provide set entitlements. As such, casual employees are provided with a loading to account for the lack of entitlements.

[3] Hamzy v Tricon International Restaurants & Anor (2001) 115 FCR 78, 93 [quoting Professor Mark Woden (a Professorial Fellow with the Melbourne Institute of Applied Economic and Social Research at the University of Melbourne, who was and expert whose evidence was adduced by the Minister): 'Firms value the flexibility afforded by casual employment. In particular they value the ability to vary working hours quickly and sever employment relationships at short notice.'

The Explanatory Memorandum[4] to the Bill presented to the House of Representatives on 9 December 2020 cites the need for reform in relation to the proposed changes under sections 15A and 66A to 66M for small or medium businesses a mere total of 10 times. Yet the majority of the 50 plus court cases citing *Skene*[5], 16% involve labour hire companies with 44.44% of the cases citing paragraph [197] of the Court's judgement (in relation to 'casuals') involving labour hire companies. And of the approx. 20 cases which cite *Rossato*[6], of which 20% involve labour hire companies. While this is not a majority, a substantial percentage are concerned with the labour hire industry, not small business. This was not a small business problem until the government misrepresented small business needs.

Our concern for small business is that while the overwhelming majority of claims against small business settle before arbitration, small business owners have suggested this is because they have learned to pay 'go away' money. This is said to be driven by the practical reality that it is not commercially viable for a small business to defend a case to arbitration[7] even where an employer believes they had good reason to dismiss an employee. It is suggested that the time and cost associated with defending a claim and the uncertainty regarding the outcome of arbitration drives the payment of this 'go away' money.[8]

This approach represents a failure for the current IR system and we do not see where this matter is being addressed for the approx. 445,000 small businesses in Queensland, let alone throughout Australia.

In the FW Act's first year of operation, unfair dismissal claims increased substantially. This is unsurprising given the removal of the 100-employee exemption at that time. Despite a small reduction in 2017/2018, the unfair dismissal claims volume has remained consistently high since the FW Act came into operation. The steep increase in claims since the introduction of the FW Act supports a conclusion that a significant number of claims are made against employers with fewer than 100 employees yet again, this Omnibus IR Bill is doing nothing to ensure the economic safety of small business.

The Productivity Commission noted[9] the common advice was for a small business to seek legal advice if ending an employee's employment and that if this was 'seen as the sensible course of action, the Code is failing its purpose'. Amendments to the Small Business Code to minimise the grounds upon which compliance is open to interpretation and challenge together with simplification of the processes of the Fair Work Commission in the management of claims are also needed so they are less resource intensive and costly and able to be navigated without small business having to seek out legal advice that they cannot afford in terms of money and time away from work.

Needs: Strengthen the Small Business code and ensure protections for small to medium business from costly court action that they can't afford.

Comment: In regard to the small business code limitations by the Australian Chamber of Commerce and Industry[10]

[4] Explanatory Memorandum, Fair Work Amendment (Strengthening Australia's Economic Recovery) Bill 2020 (Cth) Fair Work Amendment Explanatory Memorandum, 2020
[5] WorkPac Pty Ltd v Skene (2018) 264 FCR 536
[6] WorkPac Pty Ltd v Rossato (2020) 378 ALR 585
[7] National Retail Association, Inquiry into Australia's Workplace Relations Framework, March 2015, p. 9.
[8] Productivity Commission, Workplace Relations Framework, December 2015 pp. 578 - 579.).
[9] Productivity Commission, Workplace Relations Framework, December 2015.
[10] Productivity Commission Inquiry into the Workplace Relations Framework Submission 161.

'*The Code is of limited value to small business because reliance upon it is open to challenge. While the reliance on the Code can be disputed this weakness will persist regardless of its content or any widening of its content or widening of its application*.'

Comment: Housing Industry Association excerpt[11]

- *Although small businesses are exempt from unfair dismissal claims if they can show they have complied with the Code, there is evidence that it is not working.*
- *The Code does not provide businesses with the certainty they need and does not prevent the bringing of unfair dismissal claims. The matters subject of the Code are still subjective and capable of challenge.*
- *Terms such as 'reasonable grounds', 'valid reason' and 'reasonable chance' are all matters that need to be determined on the facts, as discoverable in evidence. The Code also sets out procedural requirements that, if not adhered to, will be fatal to an employer's ability to rely on the Code.*
- *While the Code may serve as helpful guidance for a small business, the reality is that the requirements of the Code are not dissimilar to the criteria set out in s.387 of the Act which is relevant to all businesses.*
- *Rather than provide an exemption for small businesses, the unfair dismissal regime imposes further compliance requirements.*
- *The FW Act has the effect that a failure to meet technical procedural requirements may result in a claim for unfair dismissal, even in the case of a position genuinely being made redundant because the job is no longer required to be performed by anyone.*
- *Consultation provisions within modern awards are complex for an under resourced small business employer and do not change the fact that an employee's position is no longer available.*

The current Modern Award framework does enormous damage to small businesses. It is highly confusing, difficult to interpret and lacks the flexibility that small businesses need.

Small businesses are constantly at risk of failing to meet their obligations under the current Modern Award framework, struggling with the myriad of entitlements and varying rates of multiple applicable awards.

A simple Small Business Modern Award which links coverage to number of employees could make identifying the correct entitlements for employees much simpler, reducing the risk of underpayment, which is to employers' and employees' benefit, and will ease the administrative burden and anxiety of uncertainty for small businesses.[12]

[11] Productivity Commission Inquiry into the Workplace Relations Framework Submission 169

[12] Small Business Association of Australia

REDEFINING THE CASUAL EMPLOYEE

Parliament has been informed that these amendments are designed to reduce uncertainty for small and medium businesses. This is misleading because existing litigation is primarily concerned with billion-dollar companies that have business models which in the past have prevented prevent Australian workers from securing permanent employment.

There is one case involving a small business which cites Rossato, and four cases where the employer's size is not apparent, out of 63 cases considering either matter. On this basis, it is inappropriate to present litigation risk for small businesses as a rationale for the proposed changes to the definition of casual.

There is no direct, current data on how many casual employees in Australia are employed by labour hire companies. However, it is stated that[13]: 'Almost four in five (78.8 per cent) of labour hire employees in August 2018 were employed on a casual basis compared with the average for all employees of 24.6 per cent.' Further, it appears that 106,830 people are likely engaged by labour hire companies of which 84,182 are casual employees.

We have also identified that casual workers in the black coal industry earn less than their permanent counterparts, placing these employees in a comparatively vulnerable position. Casual workers cannot access the security provided to permanent employees. These Australian workers cannot plan their lives, are unable to get mortgages and other loans, and are denied personal, carer's and sick leave when they most need it.

If left unchecked, we predict that there could be an explosion in 'casualised' labour in the mining sector and beyond. Australian employers could be inappropriately enticed to shift their workforce to a labour hire model that will further weaken employee's legal rights.

The definition of casual employee in proposed s 15A of the FW Act centres on the nature of an employer's offer of casual employment and a person's acceptance of the offer of employment on that basis at the commencement of the employment of the employee.

In accordance with proposed s 15A(1), a person is a casual employee if the employer makes an offer of employment on the basis of no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person. Proposed s 15A(2) sets out the considerations to which regard must be had in determining whether an offer was made on that basis.

It is arguable that a consequence of these provisions as they are envisaged is that, if an employer does not make an offer in the exact terms (be it in writing or orally), the employee will, at law, be considered a permanent employee as they will not fall within the definition of casual employee in s. 15A.

Many employers, especially small business employers, are unlikely to offer casual employment to a person in such clearly defined terms. This is particularly the case when an offer of employment is made orally which is more common than formalised employment arrangements.

Under this Bill's provisions, an employer may consider they have offered casual employment to a person but, if they have failed to meet the prescriptive terms in proposed s 15A, the employment

[13] Geoff Gilfillan, 'Characteristics and use of casual employees in Australia' (Research Paper, Research Paper Series, 2017 18, 19 January 2018)

will be permanent by default. This is likely to lead to significant confusion among employers and employees about their employment relationship and the entitlements that derive from the characterisation of the relationship.

Conversely, an employee who falls within the definition of casual employee at the commencement of employment but whose nature of employment subsequently changes, is nonetheless deemed to continue to be a casual employee (subject to the limited and unenforceable circumstances in which conversion can occur or an alternative offer of employment is accepted).

Furthermore, an employer and employee may make a contract of employment that complies with the requirements of proposed s 15A (1) but the employer's subsequent conduct is inconsistent with s 15A (2)(a) – for example, the employer subsequently prevents the employee from electing to reject work. The employee would still, at law, be considered a casual employee because the initial employment contract was consistent with s 15A (1) yet, due to the employer's conduct, the casual employment may in fact be a contrivance.

In accordance with proposed s 15A (5) an employee remains a casual employee until:

i. the employee has converted from casual employment pursuant to proposed Division 4A Subdivision B (employer offer of casual conversion);
ii. the employee has converted from casual employment pursuant to Division 4A Subdivision C (employee request for casual conversion); or
iii. the employee accepts an 'alternative offer of employment' (other than as a casual employee) by the employer and commences work on that basis.

The IR Club will love these changes, not so the hundreds of thousands of small and medium Australian businesses.

Recommendations:

1. **Sch. 1 – Casuals – three parts - definition, conversion and double dipping. Casuals definition S.15(A) is a compromise "as requires" is confusing, we recommend that an amendment be made.**

2. **The casual problem is still around the new definition of "firm advance commitment" for example, the bus industry and corner stores have regular hours because of routine peak periods and both the business and the employees want this. We recommend that an amendment is required.**

CASUAL EMPLOYEE CONVERSION RIGHTS

Litigation regarding 'casual' classification has arisen from a disconnect between the definition of 'casual' under the modern award framework and the safety net requirements afforded to permanent employees.

Approximately 42% of all casuals have been employed in the same role for two years or longer indicating a disconnect between understandings of casual 'irregularity' and practical realities of the Australian workforce.

While we will have more to say in regard to the effects of this Omnibus IR Bill, issues such as conversion rights and small business flexibility must be considered further.

For example, it appears that, based on the illustrative example provided in the Explanatory Memorandum to the Bill at page 6, an agreement offered by an employer and accepted by the employee to change the employee's hours from casual, irregular hours to regular hours on an ongoing basis would not constitute an alternative offer of employment within the meaning of s 15A (5)(b).

In that example, the person falls within the definition of a casual employee, works shifts that are irregular and change significantly week to week for the first several months of his/her employment. After a part-time colleague quits, the subject worker Ollie is asked by his employer to cover the shifts of the former part-time employee. Ollie agrees and thereafter works shifts from 10am to 3pm, Thursday to Saturday each week. Ollie therefore remains a casual employee despite working the regular part-time hours formerly worked by a part-time colleague. This results in Ollie receiving different entitlements to the former employee that worked those hours. Ollie will have no entitlement to annual leave or sick leave and will be required to be paid casual rates (at least until a possible casual conversion).

In practice, it is likely to be difficult to differentiate an employer offering a casual employee the regular hours previously performed by a part-time employee and an employer offering an employee a part-time position that constitutes an alternative offer of employment. The provisions are likely to introduce uncertainty about the nature of the relationship and the entitlements that derive from the work performed.

Employers, especially small business employers, often do not have written contracts of employment at the commencement of employment and are even less likely to execute a new written contract for changes to employment status throughout the relationship. And these provisions are likely to cause confusion and uncertainty in those relationships.

A real example might be the corner takeaway which should not be disadvantaged when they may need casuals on regular hours for flexibility, example, the businesses usual peak periods - we suggest a small business exemption be incorporated into the Bill.

ENFORCEABLE RIGHT FOR CASUAL CONVERSION TO PERMANENCY

The proposed s 66B of the FW Act requires an employer to make an offer of permanent employment to an eligible casual employee within 21 days of the employee having been employed for 12 months. This is onerous and more red tape for small business.

The proposed s. 66C(1) provides that an employer does not have to make an offer if there are reasonable grounds not to make the offer and the reasonable grounds are based on facts that are known, or reasonably foreseeable, at the time of deciding to make the offer. The 'reasonable grounds' are stated in the proposed s. 66C(2). Similarly, s. 66H provides that, where an employee has requested a conversion to permanency, an employer may refuse the request on reasonable grounds, this is to some extent unclear and fails to take account of the onerous nature of additional record keeping for small business.

Further, the only mandated requirement in the dispute settlement procedure in the new s. 66M and in awards is that, in the first instance, the parties must attempt to resolve the dispute at the workplace level. It is then discretionary as to whether a party refers an unresolved dispute to the FW Commission. Furthermore, the FW Commission cannot arbitrate the dispute unless the parties agree to arbitration this is still both lengthy and costly for small business and must be addressed.

Of concern on this point is that small business cannot afford the time or the cost of lengthy processes that are outside of their capability to manage. Further, were Australia to encounter an economic downturn in the future, then many true casuals may see the benefit of converting to permanent en masse. What can be done to assist both the employer and the employee, for example, in small business? Likewise, it has been hard for true casuals to obtain finance such as a mortgage. The government must explain how these possible risks can be managed as a part of their IR solution.

ENTERPRISE BARGAINING AND THE BOOT TEST - AGREEMENTS THAT DO NOT PASS THE BOOT

The proposed Omnibus IR Bill requires further consideration, in particular in relation to the Fair Work Commission's role in protecting employee rights at the initiation of enterprise agreements.

The rubber stamping of agreements like the CHANDLER MACLEOD NORTHERN DISTRICT OF NSW BLACK COAL MINING AGREEMENT 2015 and the behaviour of that labour hire employer and mine owner in the Hunter Valley have damaged many casual employees like Simon Turner and others. Simon and others are hardworking casual coal production workers who fell through 'gaps' in the legislation – these gaps are yet to be closed **because nobody except One Nation cares**. It did not go unnoticed by us that there is nothing in the current legislation to amend the Black Coal Mining Industry Award to include casual black coal production workers. Again, the government is letting everyday Australian workers down.

Schedule 3, Part 5 of the Bill proposes to insert a new s. 189(1A) into the FW Act to enable the FW Commission to approve an enterprise agreement that does not pass the BOOT if it is appropriate to do so taking into account, amongst other things, the impact of COVID-19 on the enterprise/s to which the agreement relates.

It is noted that s 189(2) of the FW Act currently allows the FW Commission to approve an agreement that does not pass the BOOT if it satisfied that, because of exceptional circumstances, the approval of the agreement would not be contrary to the public interest.

Section 189(3) provides that an example of such a case is where the agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the enterprise of an employer covered by the agreement.

It is submitted that proposed s. 189(1A) is an unnecessary amendment and, furthermore, significantly dilutes the fundamental protection of the BOOT. Section 189(2) currently enables the FWC to approve an agreement that does not pass the BOOT if it is satisfied that, because of the exceptional circumstances of the impact of COVID-19 on an enterprise, the agreement is not contrary to public interest. Proposed s. 189(1A) should therefore be deleted.

My concern is that the Fair Work Commission was not up to the job of protecting workers rights before and now they may become even more just a rubber stamp. What they should be doing is due diligence to protect workers and employers alike so we do not just see more businesses in court.

I propose that the government keeps the BOOT as it is and ensures that the FW Commission has better governance to review and to improve agreements – due diligence not a rubber stamp.

AWARDS

Put simply, our concern is that there are too many complex levels in our industrial relations system and this government is not doing anything to make things easier for employers or employees. We may soon be getting to the stage where lawyers just know one part of the IR system and make a lifetime living off that. The current IR system just feeds the IR Club of lawyers, union bosses and IR advisers.

We need fit-for-purpose IR laws that make the primary workplace relationship between employer and employee and simple laws which enable them to work together to build better workplaces and to improve productive capacity.

As an example, how many places is annual leave referred to, all four layers, if an employee is covered by an enterprise agreement. This is not acceptable. At time there are multiple sources of rules and this is plainly wrong and unfit for purpose. If there is to be more than one layer, then they should compliment and cross-reference each other – small business deserves better.

Clearly, it is time for a better way.

Our submission to this inquiry and to the government is that the entire IR system must be reviewed and a new fit-for-purpose system be in place which empowers employers and employees equally to take control of the employment relationship.

The FW Amendment Bill proposes to extend this flexibility for at least another two years, but only for employers covered by certain Modern Awards. Because of the lack of a small business Modern Award, many small businesses who are in desperate need of the flexibility provided to larger businesses are falling through the cracks in the system.[14]

We strongly recommend that the government and the opposition both give the workers and businesses of Australia an undertaking in their election policy that they will undertake a complete review and rewrite of Australia's IR laws and regulations with a focus on simplicity and fairness, and based upon open consultation.

[14] Small Business Association of Australia

GREENFIELDS AGREEMENTS

Schedule 4 introduces changes to provisions for greenfields agreements, while in principle some have expressed support for the change, it is clearly aimed at pleasing union bosses. It does provide for employee benefits such as pay increases for the life of the agreement. However, our concern is that this amendment focuses on what are primarily major government infrastructure projects and large mine sites. These projects are invariably won by the 'Tier One' companies which are foreign owned and who repatriate their vast profits to China or Europe.

It is time we ignored these giants, who can look after themselves, and focussed on the Australian tier two Australian constructors! We should be enabling Australian businesses to grow, to employ more people and to re-invest their profits in Australia – more jobs.

The question is - what are Australian companies getting in this Omnibus IR Bill to make them more competitive?

COMPLIANCE AND ENFORCEMENT OF IR LAWS

One Nation welcomes the Federal Government's decision to deal with issues of dishonest and systematic underpayment of employees.

However, our experience is that the relevant authorities and indeed, due process, takes a long time before a court would make relevant compensatory orders and this could significantly disadvantage workers who were the subject of wage theft due to delays in receiving unpaid wages.

Again, complexity and a litigious approach does not solve the problems that everyday Australian workers and small business owners face. Consideration must be given to delegating the courts with the discretion to enable civil proceedings in relation to unpaid worker entitlements to commence or continue, notwithstanding the commencement or continuation of criminal proceedings that relate to substantially the same conduct.

On the whole, business owners and managers do not intend to act dishonestly.

I recommend a refocus of the FW Ombudsman Inspectors and FW Ombudsman support for small business to be solutions focussed first (not penalty first or driven by quotas) available to co-operatively undertake pro-active inspections and to suggest improvements to workplaces, and to take measured enforcement action in response to employee complaints, is considered as essential.

RECOMMENDATIONS

It is business that creates jobs and business deserves better than what this government is offering. Why, because they work hard. For example, small business is resource poor and they do not have the deep pockets to employ lawyers and the IR Club that big business takes for granted. Employers and employees must be at the centre of any consideration relating to industrial relations – especially the hundreds of thousands of small businesses. Business owners would all rather be at work earning money and not in court. Australia's industrial relations system no longer serves employers and employees; it serves the people who benefit from its' complexity – the IR Club.

What are everyday Australians looking for? The same that has been stated in the FW Act's objects and in the courts for years, employers and employees are looking for "… certainty, stability, fairness, and enforceability", and, "acknowledging the special circumstances of small and medium-sized businesses." I propose a number of recommendations:

1. Recommend a complete review and rewrite of the entire Act and IR structure, after the two-year deadline for the flexible arrangements viz. mid-2023. No more 'patches'.

2. Recommend a detailed interim effectiveness review and amendment of the IR legislation as required after 12 months – the government needs to be responsive to the changing economic and business landscape. Say by mid-2022.

3. Refocus FWO Inspectors and FWO support for small business to be solutions focussed first (not penalty first or driven by quotas) available to undertake pro-active inspections of workplaces, and to take measured enforcement action in response to employee complaints, this is considered as essential.

4. We strongly recommend that the government and the opposition both give the workers and businesses of Australia an undertaking in their election policy that they will undertake a complete review and rewrite of Australia's IR laws and regulations with a focus on simplicity and fairness, and based upon open consultation.

5. Introduce greenfields agreement benefits for Australian 'tier 2' construction companies.

6. I propose that the government keeps the BOOT as it is and ensure the FWC has better governance to review and to improve agreements – due diligence not a rubber stamp.

7. Schedule 1 – Casuals definition S.15(A) is a compromise because the term "as requires" is confusing. I recommend that an amendment be made.

8. The casual problem is still around the new definition of "firm advance commitment" for example, the bus industry and corner stores have regular hours because of routine peak periods and both the business, and the employees want this. We recommend that an amendment is required.

9. Small and medium businesses need greater protections and exemption from the excessive complexities that big business can afford. Strengthen the small business code and ensure protections for small to medium business from costly court action that they can't afford.

10. Recommend a practical solution for small business in awards or a small business award. Because of the lack of a small business Modern Award, many small businesses who are in desperate need of the flexibility provided to larger businesses are falling through the cracks in the system.

ATTACHMENT:

Small business specific recommendations.

As a reminder to the government, the Productivity Commission noted the common advice was for a small business to seek legal advice if ending an employee's employment and that if this was 'seen as the sensible course of action, the Code is failing its purpose'.[15]

a) Review and remove drafting inconsistencies where national employment standards and awards overlap and address technical drafting problems.
b) Simplify administration by inserting the option of using loaded rates into relevant awards (where there are a significant proportion of small businesses), recognising the majority of Australian businesses are micro or small businesses.
c) Recognise and legally accept the common small business practice of paying a buffer above the minimum award wage on the assumption this will 'take care' of additional obligations (all up rates, and require the FWO to take additional payments into account in recovery and enforcement activities (effectively codification of the way FWO already operates).
d) For small businesses, allow for a dignified end to employment when an employee is no longer a 'good fit' for the business. This would be equivalent to a payment under the NES entitlement. An employee who is a 'bad fit' in a small workplace can be a huge problem for all staff members. Currently the only options are a manufactured redundancy or a performance-based exit. Both options are bad for the business and the employee.
e) Create a dedicated small businesses Award or Enterprise Bargaining Agreement (EBA) that streamlines requirements from an EBA in place for bigger and more complex business in a given sector.
f) Better balance the level of compensation relief that can be granted against a small business in dismissal cases, reducing the maximum compensation from 6 months to 3 month's pay.
g) Have a differential liability for settlements that is proportionate for small business (maximum compensation limited to 13 rather than 26 week's pay), recognising the financial resources available to a small business.
h) Failing this, add an express consideration of the unique circumstances and resources available to small businesses to the criteria the FWC uses to assess compensation.

[15] Productivity Commission, Workplace Relations Framework, December 2015, p 600.