Article

The (Omni)bus that Broke Down: Changes to Casual Employment and the Remnants of the Coalition's Industrial Relations Agenda

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The Morrison Government saw the COVID-19 crisis as an opportunity to reset the debate over Australia's industrial relations system. Its 'Omnibus Bill' was the product of an unusually constructive process of dialogue with the labour movement. Yet the reforms it proposed to the Fair Work regime largely reflected both its own and employer groups' previous concerns. Having abandoned tripartism, it encountered familiar resistance in the Senate. After a chaotic debate, the version which passed as the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Cth) dealt only with the topic of casual employment. We examine the changes made on this important issue, which have replaced one set of problems with another. We also outline the proposals (including on award flexibilities, enterprise agreements, and compliance and enforcement) jettisoned by the government from the original Bill, some of which could easily have been enacted. We assess where all this leaves the Liberal/National Coalition's reform agenda and lament what we see as a missed opportunity to address pressing problems in the labour market.

I Introduction

COVID-19 has created many challenges, not least for the maintenance and regulation of working relationships at a time of extreme labour market disruption.[1] But as the old adage about never letting a good crisis go to waste might suggest, the pandemic has also created opportunities.

Australia's Prime Minister, Scott Morrison, suggested as much in a speech to the National Press Club in May 2020. Signalling the need for a 'plan for a new generation of economic success', he emphasised how 'heartened' he was by the constructive way in which business and labour had worked together

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1 See the various articles in Vol 34 No 1–2 (2021) of this journal. See also J-C Tham, 'The COVID-19 Crisis, Labour Rights and the Role of the State' (2020) 85 *JAPE* 71; A Stewart, 'COVID-19 and the Future of Labour Research, Policy and Regulation' (2021) *Lab & Ind* (advance).

through the crisis to protect jobs. It was time to leverage that cooperation and pursue 'a shared opportunity to fix systemic problems'. Recognising that '[n]o one side has all the answers', his government would bring employer and employee representatives together to chart a 'practical reform agenda ... for Australia's industrial relations system'. But regardless of whether any consensus could be developed on 'a pathway to sensible, long-lasting reform', the government would proceed with its own proposals for change.[2]

The outcome of the promised discussions was a series of proposed amendments to the Fair Work Act 2009 (Cth) (FW Act), set out in the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (Cth). Tabled in Parliament on 9 December 2020, it was already being called the 'Omnibus Bill', since it addressed all of the matters designated by the government as needing attention, rather than dealing with them separately.[3] Despite running to over 100 pages, it sought to tinker with the FW Act, not change it in any fundamental way. It also, however, bore few imprints of the generally constructive process of dialogue that had preceded it, largely advancing proposals that were either already government policy, or that responded to employer as opposed to union concerns. And because of that, it met with what has become a predictable fate for many Coalition reform efforts since 1996: a mixture of staunch and calculated opposition in the Senate.

Having determined to get the Bill passed before the end of March 2021, when both the JobKeeper wage subsidy scheme and associated amendments to the FW Act were due to expire,[4] the government was unable to gain the support of either the opposition or the crossbench for key elements of its proposals. The version which returned to the House of Representatives and duly passed dealt with just a single issue, albeit an important one: the definition and regulation of casual employment. All other elements of the Bill were dropped, even those for which it seemed likely there *was* sufficient support in the upper house.

In Part II of this article, we say more about the process used by the Morrison Government to develop the Omnibus Bill and trace its roots to earlier policy commitments, discussions and preoccupations. Part III examines the parliamentary debates on the Bill and the strange choices that led to the passage of what became the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Cth) (2021 Amendment Act). Part IV analyses the effect of this measure on the treatment of casual employees, explaining the various ways in which it has replaced one set of uncertainties with a new range of problems. In Part V, we outline the proposals culled from the Bill, on the amendment of awards in selected industries, the process for making enterprise agreements, the duration of greenfields

2 S Morrison, *Address, National Press Club*, Media Release, 26 May 2020.

3 See, eg, N Bonyhady, 'Industrial Overhaul to Come in One Big Bill, Making it Harder to Oppose', *Sydney Morning Herald*, 2 October 2020.

4 See Coronavirus Economic Response Package (Payments and Benefits) Act 2020 (Cth); Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (Cth) Part 2; Coronavirus Economic Response Package Omnibus (Measures No 2) Act 2020 (Cth) sch 1; Coronavirus Economic Response Package (Jobkeeper Payments) Amendment Act 2020 (Cth).

agreements, improvements to the compliance and enforcement framework, and the exercise of certain powers by the Fair Work Commission (FWC). Part VI concludes by considering where all this leaves the Morrison Government's reform agenda, and explains why we see the exercise as a missed opportunity to reset the debate over labour regulation.

II The Omnibus Bill: Background and Development

Since taking office in 2013, the Liberal/National Coalition has struggled to sustain a coherent policy agenda regarding the FW Act. Its original plan was to propose limited changes, while asking the Productivity Commission to conduct a broader review.[5] But of the Abbott Government's proposed amendments,[6] only a few were acceptable to the Senate.[7] The Productivity Commission's 2015 report also proved a disappointment to those seeking a blueprint for radical change, finding the Fair Work system to be working effectively and doing little of the damage claimed by employer groups.[8] Although the report still contained many recommendations for change, the Coalition failed to take a public position on them ahead of the 2016 election.[9] Only two proposals were subsequently implemented, neither contentious.[10] The Turnbull Government (as it had now become) was able to secure the passage of two anti-union measures: the restoration of the Australian Building and Construction Commission,[11] and the creation of a new Registered Organisations Commission to oversee the governance of internal union affairs.[12] But later attempts to implement further recommendations from the Royal Commission into Trade Union Governance and Corruption[13] have met with only mixed success.[14] The most significant changes made to the FW Act during the Coalition's second term enhanced rights and protections for employees, by expanding the investigatory powers of the Fair Work

5 Liberal and National Parties, *The Coalition's Policy to Improve the Fair Work Laws*, Liberal Party of Australia, Canberra, 2013.

6 See Fair Work Amendment Bill 2014 (Cth); Fair Work Amendment (Bargaining Processes) Bill 2014 (Cth).

7 See Fair Work Amendment Act 2015 (Cth). See also 'Senate Votes up Greenfields Changes and Strike Restrictions' *Workforce*, No 19832, 13 October 2015.

8 Productivity Commission, *Workplace Relations Framework*, Inquiry Report No 76, Productivity Commission, Canberra, 2015.

9 'Coalition Now Unlikely to Provide Pre-Election Response to PC Report', *Workplace Express*, 30 June 2016.

10 For a rare exception, see Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018 (Cth).

11 Building and Construction Industry (Improving Productivity) Act 2016 (Cth).

12 Fair Work (Registered Organisations) Amendment Act 2016 (Cth).

13 Royal Commission into Trade Union Governance and Corruption, *Final Report*, Commonwealth, Canberra, 2015.

14 See Fair Work Amendment (Corrupting Benefits) Act 2017 (Cth); Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Act 2020 (Cth). Cf Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019 (Cth); Fair Work (Registered Organisations) Amendment (Ensuring Integrity No. 2) Bill 2019 (Cth). The Prime Minister announced in May 2020 that his government would not be proceeding with the latter Bill as a gesture of 'good faith' towards the union movement: see Morrison, above n 2.

Ombudsman (FWO) and strengthening sanctions in relation to underpayments,[15] and by providing leave for victims of family and domestic violence.[16]

When Scott Morrison led the Coalition to election victory in May 2019, he did so with no formal policy commitments on industrial relations.[17] Aside from an earlier promise to act on recommendations from the Migrant Workers' Taskforce, which included criminal penalties for wage underpayments and a national registration system for labour hire agencies,[18] the new government was left with a blank slate. It could seek to move on issues of longstanding concern to the business community. But with no mandate for such changes, and concern about the likely unpopularity of any reductions in wages or working conditions, there was reason for caution. In June 2019, the Prime Minister asked his new Industrial Relations Minister, Christian Porter, to 'take a fresh look at how the system is operating and where there may be impediments to shared gains for employers and employees'. He stressed that any changes 'must be evidence-based, protect the rights and entitlements of workers and have clear gains for the economy and for working Australians'. And he warned that if business groups wanted to see reforms, it would be up to them 'to build the evidence for change and help bring the community along'.[19]

Although subsequently described as a 'review' that would, among other things, investigate changes to unfair dismissal laws, improvements to the process for approving enterprise agreements and a new definition of casual employment,[20] no terms of reference or timeframe were ever identified. By early 2020, five discussion papers had been released. Two dealt with improving protections for employee entitlements and strengthening penalties for non-compliance by employers,[21] matters on which (as noted above) the government had already promised action. The remainder, somewhat randomly, concerned greenfields agreements,[22] the Building Code,[23] and the

15 Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 (Cth).

16 Fair Work Amendment (Family and Domestic Violence Leave) Act 2018 (Cth).

17 'Election Preview: Labor to Shake up IR, Coalition Stands on Record', *Workplace Express*, 16 May 2019.

18 A Fels and D Cousins, *Report of the Migrant Workers' Taskforce*, Australian Government, Canberra, 2019; Australian Government, *Australian Government Response: Report of the Migrant Workers' Taskforce*, Australian Government, Canberra, 2019.

19 S Morrison, *WA Chamber of Commerce and Industry Address*, Media Release, 24 June 2019.

20 E Hannan, 'Christian Porter's Bid to Reshape Workplace Landscape', *The Australian*, 27 June 2019.

21 Attorney-General's Department, *Improving Protections of Employees' Wages and Entitlements: Strengthening Penalties for Non-Compliance*, Australian Government, Canberra, 2019; Attorney-General's Department, *Improving Protections of Employees' Wages and Entitlements: Further Strengthening the Civil Compliance and Enforcement Framework*, Australian Government, Canberra, 2020.

22 Attorney-General's Department, *Attracting Major Infrastructure, Resources and Energy Projects to Increase Employment: Project Life Greenfields Agreements*, Australian Government, Canberra, 2019.

23 Attorney-General's Department, *Review of the Code for the Tendering and Performance of Building Work 2016*, Australian Government, Canberra, 2020.

promotion of workplace cooperation.[24] The Minister also foreshadowed a review of 'complexity' in awards,[25] while a report on the Small Business Fair Dismissal Code discussed shielding small employers from unfair dismissal claims to a greater extent than at present.[26] But there was little to suggest imminent action on that last issue, and the consultations over the matters addressed in the discussion papers were put on hold in March 2020.[27]

In his May 2020 speech, the Prime Minister announced that Minister Porter would chair five working groups, dealing with award simplification, enterprise agreement-making, casuals and fixed term employees,[28] compliance and enforcement, and greenfields agreements.[29] That list reflected both the government's existing policy agenda and — with the obvious exceptions of compliance and enforcement, and the absence of any mention of unfair dismissal — the preoccupations of employer groups.[30]

But if there was continuity in the substance of the reform agenda, the same was not true for the process. Over previous decades, Coalition governments had consistently excluded the union movement from policy discussions, typically disclosing proposals for legislative change only after they had been drafted. But in responding to the pandemic, Porter and Australian Council of Trade Unions (ACTU) Secretary Sally McManus developed what was portrayed as a close working relationship,[31] while one of her predecessors, Greg Combet, provided advice on the impact of the coronavirus on Australian workplaces.[32] Building on that approach, Morrison and Porter chose to bring the ACTU and its constituents inside the tent, at least in a formal sense. The working groups contained equal numbers of union and employer representatives.[33] While presentations were made to the groups by selected experts, the exercise was presented and conducted as one of tripartism.

The working groups held discussions through July, August and September 2020. At first, all appeared to go smoothly. But in mid-September a public squabble broke out among the employer groups over the willingness of the

24 Attorney-General's Department, *Cooperative Workplaces — How Can Australia Capture Productivity Improvements from More Harmonious Workplace Relations*, Australian Government, Canberra, 2019.

25 E Hannan, '"Complex" Awards on Industrial Relations Agenda', *The Australian*, 22 November 2019.

26 Australian Small Business and Family Enterprise Ombudsman, *Review of the Small Business Fair Dismissal Code*, Australian Government, Canberra, 2019.

27 'Coronavirus Puts IR Change Consultations on Back-burner', *Workplace Express*, 24 March 2020.

28 Despite the reference here to fixed term employment, it is not known whether the working group ever considered such arrangements. The Omnibus Bill contained proposals only on casual employment, although their potential impact on fixed term employment is unclear: see text below nn 111–3.

29 Morrison, above n 2.

30 See A Forsyth, 'Morrison Government Invites Unions to Dance, but Employer Groups Call the Tune', *The Conversation*, 28 May 2020.

31 See, eg, M Grattan, 'Christian Porter and Sally McManus are a Match Made in the Coronavirus Pandemic, But Can it Bring Lasting Change?', *The Conversation*, 29 May 2020.

32 'Combet to Advise on Coronavirus Workplace Impact', *Workplace Express*, 20 March 2020.

33 'Equal Numbers for Unions, Employers on Working Groups', *Workplace Express*, 11 June 2020.

Business Council to contemplate a deal with the ACTU that would make it easier to get union-negotiated agreements approved, while reserving stricter scrutiny of non-union arrangements.[34] Soon after, McManus complained about some employer representatives breaching confidentiality and failing to participate in good faith. She also revealed that the process had moved into a 'new phase of bilateral meetings' between the government and various parties.[35] She would later decry what she portrayed as a missed opportunity to develop consensus on key issues and noted that the employer groups were 'directly talking' to the Minister about the changes they preferred.[36]

When the content of the Omnibus Bill was revealed, it became clear that the working group process had made very little difference to its content. For the most part, the Bill dealt with the matters flagged for attention in the government's 2019 'review' and responded to employer concerns, not those of the labour movement. There were exceptions. Aside from the long-awaited reforms to the compliance regime in sch 5 of the Bill, some of the changes proposed by sch 3 in relation to agreement-making could be traced to union criticisms of the FW Act. Schedule 6 also proposed new powers for the FWC, responding to a request by the tribunal itself.[37] But generally speaking, the content of the Bill could have been predicted at the start of 2020.

One significant omission was any general attempt to deal with award complexity. Schedule 2 did seek to create new kinds of flexibility for employers in relation to award-covered employees in selected industries.[38] But the government opted to pursue other employer concerns about awards within the existing system.[39] On the same day the Bill was tabled, the Minister formally asked the FWC to consider two sets of changes to awards. The first was to allow 'loaded' pay rates that make payroll administration simpler by combining base rates with potentially applicable allowances and penalties. While these would be up to the FWC to set, the Minister expressed confidence that such rates could be 'optimally structured in a way that ensures workers are not financially worse off over time'.[40] The second change requested was to streamline classification structures. Again, it was suggested that such a 'broad-banding' exercise could be accomplished 'with no reductions in pay

34 E Hannan, 'Employers Brawl Over IR Enterprise Bargaining Law Changes', *The Australian*, 17 September 2020.

35 'ACTU Decries Working Group Employers' Conduct', *Workplace Express*, 25 September 2020.

36 'McManus joins jostling over IR changes', *Workplace Express*, 13 October 2020. For more detail about what happened during the working group discussions, see 'ACTU Confirms Paucity of Consensus in IR Roundtables', *Workplace Express*, 25 November 2020.

37 See Fair Work Commission, *Submission to the Senate Education and Employment Legislation Committee Inquiry into the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020*, Submission 19, Canberra, 2021, at 2.

38 Some flexibilities in the operation of awards during the pandemic had already been delivered through FWC-brokered negotiations between unions and employer groups: see below n 161.

39 It has also since announced funding for 'technology solutions' that will help businesses get information about, and comply with, award pay rates: 'Budget Funds Employer-Friendly Modern Award Assistance', *Workplace Express*, 11 May 2021.

40 See Christian Porter, 'Letter to the Hon Justice Iain Ross P', dated 9 December 2020 at <www.fwc.gov.au/documents/sites/award-flexibility-hospitality-retail/correspondence/am2020-103-correspondence-ag-to-justice-ross-2020-12-09.pdf> (accessed 8 September 2021).

and minimal increases'.[41] Priority was requested for the awards covering 'distressed' sectors hit hardest by the pandemic (general retail, hospitality, restaurants and licensed clubs). The Minister also asked for changes to be introduced by the end of March 2021, if possible.[42] The assumption that it was possible to settle so quickly on loaded rates that would be high enough to leave no workers worse off, yet low enough to be popular with employers, was plainly ill-founded. But the FWC has dutifully proceeded to deal with the request, albeit at a slower and more realistic pace.[43]

The Omnibus Bill also proposed a broad new exception to the better off overall test (BOOT) for enterprise agreements that the ACTU complained had not been raised with them, either during or after the working group meetings.[44] The inclusion of this controversial provision signalled an end to what had become, even if only for a few months, a constructive relationship between the government and the ACTU. Without that provision, and with perhaps just a few more compromises on matters ventilated in the working groups, there could well have been bipartisan support for at least portions of the Bill. But by February 2021 the Australian Labor Party (ALP) had confirmed it would vote against the Bill.[45] With the Australian Greens also opposed, the government would need the votes of at least three of the five Senate crossbenchers.

III The Bill in Parliament

The Omnibus Bill was referred to an inquiry by the Senate Education and Employment Legislation Committee. In contrast to the cooperative approach that saw the establishment of the roundtables, the inquiry and report tabled on 12 March 2021 evinced little of the 'dialogue, discussion and consultation' anticipated by Minister Porter.[46] The public hearings reinforced the absence of consensus between employer and employee groups. And despite the Committee receiving 134 submissions, and hearing evidence from 74 individuals at public hearings, the Coalition Senators failed to take up even one of the suggestions made for improving the Bill. In their report, they recommended that the Bill be passed without amendment. Dissenting reports by the ALP and Greens Senators advised rejection.[47]

Much of the early focus of debate was on the proposed BOOT exception.[48] When the Bill was tabled, Minister Porter said this was not 'the most important part', but necessary because it offered 'an avenue for very distressed

41 Ibid.
42 Ibid.
43 Ibid.
44 P Karp, 'Industrial Relations Bill will Allow Pay Deals that Leave Australian Workers Worse Off', *The Guardian*, 8 December 2020.
45 P Coorey, 'Labor Decides on IR as Pre-election Battleground', *Australian Financial Review*, 2 February 2021.
46 'BOOT Exception Causing Pain for Porter', *Workplace Express,* 10 December 2020.
47 Senate Education and Employment Legislation Committee, *Report on Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020*, Commonwealth, Canberra, 2021.
48 See Karp, above n 44.

businesses where the distress has been caused by COVID'.[49] But shortly after commencing negotiations with the crossbenchers, the government announced on 16 February 2021 that it was withdrawing the proposed amendment.[50] The previous day, Senator Malcolm Roberts from Pauline Hanson's One Nation (PHON) had called on the government to abandon the proposal.[51] Despite the concession, the ALP and the Greens affirmed their continuing opposition to the rest of the Bill.[52] The progress of the Bill was also complicated by the unexpected decision of its architect, Minister Porter, to take extended personal leave.[53] Senator Michaelia Cash was appointed acting Industrial Relations Minister and Attorney-General in his absence, a change later made permanent.[54]

On 11 March 2021 the positions of the Senate crossbenchers were clarified. Senator Roberts set out the extensive changes that he and Senator Hanson were seeking on almost every aspect of the Bill.[55] Centre Alliance Senator Stirling Griff stated that 'amendments would be needed' to secure his support,[56] while independent Senators Rex Patrick and Jacqui Lambie both announced they supported delaying the Bill until at least May 2021, on the basis that Minister Porter's absence made negotiating too difficult.[57]

With the release of the Senate Committee Report on 12 March,[58] and the resumption of Parliament on 15 March, the government maintained its intention to secure passage of the Bill by the scheduled close of Senate business on the 18th.[59] Debate meandered on in the Senate, with vigorous speeches but no detailed consideration of the Bill, while the government sought to strike a deal with Senators Roberts, Hanson and Griff. On 17 March, Senator Roberts set out a list of 'non-negotiable' amendments that PHON was seeking.[60] The following morning, Senator Griff released a statement that he would only support those aspects of the Bill that related to wage theft and 'provide[d] certainty for casuals and their employers'.[61]

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49 'BOOT Exception Causing Pain for Porter', *Workplace Express,* 10 December 2020.

50 'Porter Abandons Contentious BOOT Change', *Workplace Express,* 16 February 2021.

51 E Hannan, 'Put Boot into BOOT Change: One Nation' *The Australian*, 16 February 2021.

52 P Coorey, 'Labor to Keep Campaigning on IR Despite BOOT Backdown', *Australian Financial Review,* 16 February 2021.

53 R Dexter and N Bonyhady, 'As it Happened: Attorney-General Christian Porter Denies Historical Rape Allegation, to Take Leave; Michaelia Cash to be Acting AG, Industrial Relations Minister', *The Age*, 3 March 2021.

54 'Cash in, Porter out after Reshuffle', *Workplace Express*, 29 March 2021.

55 M Roberts, *One Nation Senators Preparing Amendments to Rectify Flaws in the IR Bill*, Media Release, 11 March 2021.

56 'PHON Urges Government to Pay Heed to Omnibus Concerns', *Workplace Express*, 11 March 2021.

57 Ibid.

58 Senate Education and Employment Legislation Committee, above n 47.

59 E Hannan, 'Coalition Closes in on Senate IR Agreement', *The Australian,* 17 March 2021.

60 D Marin-Guzman and P Coorey, 'One Nation says IR Bill Demands "Non-Negotiable"', *Australian Financial Review*, 17 March 2021.

61 S Griff, *Centre Alliance Backs Certainty for Employees and Small Business*, Media Release, 18 March 2021.

At this point, the legislation appeared doomed.[62] But over a frantic few hours, the government secured the passage of amendments that removed all but a revamped version of the sch 1 provisions on casual employment.[63] The three crossbenchers voted with the government to preclude debate on the amendments, or even an explanation of their effect, leading to chaotic scenes in which it was clear that almost nobody in the chamber understood what they were voting on.[64] In all the confusion, the development of a joint agreement between the ACTU and the Council of Small Business Organisations Australia on the casual employment provisions was completely ignored.[65]

Especially perplexing was the defeat of the compliance and enforcement provisions in sch 5 of the Bill, which appeared to have widespread support.[66] Senator Griff told the Senate that he was 'gobsmacked' by the government's decision to 'trash' these important provisions.[67] He joined the ALP, the Greens and Senators Lambie and Patrick in opposing their removal. With PHON supporting the government, the vote on this amendment was tied, which under Senate procedure led to sch 5 being removed. Senator Griff then voted with the Coalition and PHON to pass the Bill in its amended form, abandoning his insistence that the Bill tackle the issue of wage theft.[68] For its part, PHON had dropped almost all of its 'non-negotiable' demands, including for a right for labour hire casuals to receive equal pay and conditions to directly hired workers. In explaining PHON's seemingly anomalous position on sch 5, Senator Roberts later stated that PHON assumed all remaining Schedules would be 'coming back as a package' at a later stage.[69]

IV The Changes to Casual Employment

The need for reform

It is not surprising that the government made sure it salvaged sch 1 dealing with casual employment from the wreck of its Omnibus Bill. Some kind of legislative solution to the perennial problem of defining 'casual' employment in Australia was overdue, and had been made particularly urgent by business

62 'Wheels Falling off Omnibus Bill after Griff Hardens Position', *Workplace Express*, 18 March 2021.

63 Australian Parliament, Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021, at <https://parlinfo.aph.gov.au/parlInfo/download/legislation/amend/r6653_amend_98946f9f-5a6c-4b1a-b241-78f861da66bf/upload_pdf/B21PX114.pdf;fileType=application%2Fpdf> (accessed 8 September 2021).

64 N Bonyhady, 'A Lot of Confusion but No Mistake: One Nation Voted Down Wage Theft Laws it Backs', *Sydney Morning Herald*, 24 March 2021 (A Lot of Confusion).

65 D Marin-Guzman, 'Unions Reach Deal on Casual Reforms with Small Business', *Australian Financial Review*, 18 March 2021.

66 T Lowrey, E Baker and S Dalzell, 'Government Abandons Bulk of Industrial Relations Package in Effort to Save Definition of Casual Work', *ABC News*, 18 March 2021.

67 Commonwealth, *Parliamentary Debates,* Parliament of Australia, 18 March 2021, 2212 (S Griff) at <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2Fb59cf920-6a9c-46a7-ae95-f511dc4bf126%2F0018%22> (accessed 8 September 2021).

68 Bonyhady, 'A Lot of Confusion', above n 64.

69 Ibid.

alarm at the Federal Court's decisions in *WorkPac Pty Ltd v Skene* (*Skene*)[70] and *WorkPac Pty Ltd v Rossato* (*Rossato*).[71] While the High Court would later overturn *Rossato* and determine that the reasoning in *Skene* was erroneous, its decision was not handed down until August 2021,[72] several months after the Bill was introduced and passed to allay employer concerns.

Skene and *Rossato* both concerned fly-in fly-out mine workers who had been engaged by WorkPac on the assumption that they were casual employees.[73] WorkPac relied on the notion, consistent with the FWC's interpretation of award clauses dealing with casual employment, that a casual employee was someone engaged and paid on that basis.[74] In each case, WorkPac had calculated an all-in hourly pay rate sufficient to meet its obligations, including a casual loading. In both cases, however, the employees were engaged for regular and systematic shifts on a roster prepared 12 months in advance. From the perspective of the definition of casual employment in *Reed v Blue Line Cruises Ltd*[75] as work that is 'informal, irregular and uncertain', Skene's and Rossato's working patterns were not truly casual. The High Court subsequently held that the practical reality of an employee's working patterns will be irrelevant to a determination of the employee's status, where unambiguous express contract terms determine that the parties have made no legally binding 'firm advance commitment' to ongoing employment.[76] The Federal Court, by contrast, paid considerable regard to the objective reality of the employees' working patterns.

In *Skene*, a Full Court of the Federal Court held that since there was no definition in the FW Act, the term 'casual' in s 86 (dealing with annual leave entitlements) should be given its common law meaning. The court described the 'essence of casualness' as being the 'absence of a firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work'.[77] The court affirmed that an employee is not a casual merely because they are labelled as such. Their work must *objectively* have the characteristics of being temporary, irregular and uncertain. Consequently, Skene was entitled to recover an amount in lieu of untaken annual leave when his employment ended.[78] The court in *Rossato* made similar findings. But it also held that WorkPac could not set off any casual loading previously paid to Rossato against its liability, even though such loadings are paid as a substitute for paid leave entitlements. Nor could it

70 (2018) 264 FCR 536; 362 ALR 311; [2018] FCAFC 131 (*Skene*). For an earlier and similar finding, under equivalent provisions in the Workplace Relations Act 1996 (Cth) (WR Act), see *Williams v Macmahon Mining Services Pty Ltd* (2010) 201 IR 123; [2010] FCA 1321.

71 (2020) 278 FCR 179; 378 ALR 585; [2020] FCAFC 84 (*Rossato*).

72 *WorkPac Pty Ltd v Rossato* (2021) 392 ALR 39; [2021] HCA 23 (*WorkPac*).

73 For a more detailed note on the Federal Court decision in *Rossato*, see G Golding, 'Major Court and Tribunal Decisions in Australia in 2020' (2021) 63 *JIR* 395 at 401–3.

74 See *Re 4 Yearly Review of Modern Awards — Casual Employment and Part-time Employment* (2017) 269 IR 125; [2017] FWCFB 3541 (*Casual Employment and Part-time Employment*) at [362].

75 (1996) 73 IR 420 at 425–6.

76 *WorkPac*, above n 72, at [57].

77 *Skene*, above n 70, at [169], quoting *Hamzy v Tricon International Restaurants* (2001) 115 FCR 78; [2001] FCA 1589 at [38].

78 See FW Act s 90(2).

succeed in a restitutionary claim to recover the casual loading on the grounds that it was paid only by mistake.[79]

In reality, Skene and Rossato were members of that peculiarly Australian species, the 'permanent casual'.[80] It has long been controversial whether this kind of engagement is truly casual.[81] Decisions interpreting provisions related to casual employment in different iterations of federal industrial legislation have offered different solutions to whether a person can be treated as a casual, even when employed on a regular and systematic basis.[82] Despite legal uncertainty, the species has proliferated. In February 2020, before the COVID-19 pandemic, some 2.6 million Australian employees — about one quarter of the employed workforce — were engaged on casual employment contracts.[83] Many of these would have been true casuals, engaged on a genuinely temporary basis, but it beggars belief that such a large proportion of the Australian workforce should be genuinely at liberty to refuse shifts. Indeed, the employment of staff as permanent casuals has been tolerated by almost all awards and many enterprise agreements, which have typically defined a casual as anyone who is 'engaged and paid' as such. As a Full Bench of the FWC noted in a 2017 test case on casual and part-time employment provisions in modern awards, 'casual employment may be used for the performance of short-term, intermittent and irregular work at one end of the range, but at the other end it may be used for long-term work with regular, rostered hours'.[84] According to research quoted in this case, 60% of casuals have regular rosters and have been with their current employer for at least 6 months. Just over a quarter (28%) have a job tenure of over 3 years.[85]

The alarm expressed by business groups following the Federal Court decisions in *Skene* and *Rossato* also suggests that permanent casual engagement is widespread. Employer groups estimated that the potential liability for employers, many of them small businesses, could run into the billions of dollars,[86] depending on how broadly the *Skene* understanding of

79 Neither of these issues were subsequently addressed by the High Court, given its finding that Rossato had not been misclassified: *WorkPac*, above n 72, at [9].

80 R Owens, 'The "Long-term or Permanent Casual" — An Oxymoron or "A Well Enough Understood Australianism" in the Law?' (2001) 27 *Aust Bull Lab* 118.

81 See A O'Donnell, '"Non-Standard" Workers in Australia: Counts and Controversies' (2004) 17 *AJLL* 89 at 94–104; A Stewart et al, *Creighton & Stewart's Labour Law,* 6th edn, Federation Press, Sydney, 2016, at [10.06]–[10.08].

82 See, eg, *Bluesuits Pty Ltd v Graham* (1999) 101 IR 28, where it was held that a hotel worker engaged regularly and systematically was still a casual for the purposes of the unfair dismissal provisions in the Workplace Relations Regulations 1996 (Cth). Cf *Cetin v Ripon Pty Ltd* (2003) 127 IR 205 which came to the opposite conclusion, on the basis that the relevant regulation (reg 30B of the Workplace Relations Regulations 1996 (Cth)) had since been amended.

83 Australian Bureau of Statistics, *Characteristics of Employment, Australia*, *August 2020*, Cat No 6333.0, ABS, Canberra, December 2020, at <www.abs.gov.au/statistics/labour/earnings-and-work-hours/characteristics-employment-australia/aug-2020> (accessed 8 September 2021).

84 *Casual Employment and Part-time Employment*, above n 74, at [85].

85 Ibid, at [115].

86 See Australian Industry Group, *Parliament Needs to Act Quickly to Protect Businesses and the Community from 'Double-dipping' by Casuals*, Media Release, 13 September 2018; Australian Industry Group, *Casual Employment Decision Increases JobKeeper Risks,* Media Release, 21 May 2020. See also S Barklamb, 'Wake-up Call for a Dysfunctional

casual employment was applied.[87]

The federal government had already attempted to deal with these potential claims following the *Skene* decision by tabling the Fair Work Amendment (Casual Loading Offset) Regulations 2018 (Cth), which added reg 2.03A to the Fair Work Regulations 2009 (Cth). This applied where an employer had paid an employee an identifiable casual loading amount in respect of one or more National Employment Standards (NES) entitlements. In such a case, the employer could 'make a claim' to offset the amount paid against any claim to 'an amount in lieu of one or more of the relevant NES entitlements'.[88] Regulation 7.03 purported to give this retrospective effect, though the explanatory material accompanying it justified this on the basis that it was 'merely declaratory of the existing law' and made no change to existing rights.[89] In *Rossato*, two members of the Federal Court took that statement at face value — the regulation did not purport to confer any right of set-off that did not already exist.[90] But the regulation could not in any event relieve WorkPac of an obligation to pay Rossato in respect of his NES entitlements, for the technical reason that he was not seeking payment 'in lieu of' such of an entitlement, but for the entitlement (to be paid for untaken annual leave) itself.[91]

Even without this interpretation, WorkPac's offset claim would not have fallen within the scope of reg 2.03A because its rolled up hourly rate of pay did not clearly identify the amount of casual loading paid, nor stipulate the particular NES entitlements intended to be covered by that loading. This is likely to be the case for many employers who hired 'permanent casuals' prior to the tabling of this regulation. Until the regulation stipulated the need to clarify the amount and purpose of loadings, few employers followed that practice. Survey evidence suggests that casual loadings are often not paid, either at all, or in full.[92]

Although WorkPac had appealed *Rossato* to the High Court, the government was persuaded that the problem required a more immediate legislative solution. Whether the new Act has struck the right balance in solving this problem, however, is a matter of debate.

System: Employer Perspectives on Industrial Relations in 2020' (2021) 63 *JIR* 411 at 414–15.

87 Compare the fairly narrow approach taken in *Birner v Aircraft Turnaround Engineering Pty Ltd* (2019) 287 IR 174; [2019] FCA 1085.

88 Fair Work Regulations 2009 (Cth) reg 2.03A(1)(d).

89 Explanatory Statement, Fair Work Amendment (Casual Loading Offset) Regulations 2018 (Cth), 2.

90 *Rossato,* above n 71, at [262], [1022]–[1024].

91 Ibid, at [943]–[944].

92 D Peetz, *What Do the Data on Casuals Really Mean?*, Centre for Work, Organisation and Wellbeing, Griffith University, November 2020, at 9–10.

The changes in outline

The changes made by sch 1 of the 2021 Amendment Act have three main elements, with some ancillary provisions. The main elements are:

- clarifying the meaning of 'casual employee' by a new definition in s 15A of the FW Act;
- a new NES entitlement to be offered or to request conversion from casual to permanent employment (Part 2-2, Div 4A); and
- a right for employers who have misclassified employees to set off casual loadings against any claims for NES entitlements (s 545A).

The ancillary amendments involve:

- a new definition of 'regular casual employee' in s 12 for the purpose of calculating continuous service in relation to various NES entitlements, and also the qualifying period for unfair dismissal claims;
- a new requirement to give casual employees a Casual Employment Information Statement prepared by the FWO (ss 125A–125B);
- a right to use the small claims procedure in s 548 for disputes over casual conversion rights; and
- provisions requiring the FWC to review and, if necessary, vary terms defining 'casual' employment in modern awards and enterprise agreements (sch 1 cls 45, 48).

Defining 'casual employee'

According to the new s 15A(1) of the FW Act:

> A person is a **casual employee** of an employer if:
>
> (a) an offer of employment made by the employer to the person is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person; and
>
> (b) the person accepts the offer on that basis; and
>
> (c) the person is an employee as a result of that acceptance.
>
> In determining whether this test is satisfied at the time the offer is made, subs (2) provides that regard must be had only to the following factors:
>
> (a) whether the employer can elect to offer work and whether the person can elect to accept or reject work;
>
> (b) whether the person will work as required according to the needs of the employer;
>
> (c) whether the employment is described as casual employment;
>
> (d) whether the person will be entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a fair work instrument.
>
> Subsection (3) specifies that 'a regular pattern of hours does not of itself indicate a firm advance commitment to continuing and indefinite work according to an agreed pattern of work'.

While this new definition uses the language adopted in *Skene* and *Rossato*, there is an emphasis on assessing the character of the relationship only at the point of offer and acceptance. Section 15A(4) asserts that 'any subsequent

conduct of either party' cannot be taken into account, while s 15A(5) provides that a person who accepts an engagement as a casual will remain a casual until their employment is converted to full-time or part-time employment (see below), or their employer offers them alternative employment. This indeed reflects the approach subsequently taken by the High Court in *WorkPac*.[93]

The prohibition on considering any 'subsequent conduct' is out of step with the approach taken at common law to determining whether workers are engaged as employees or independent contractors. It has become well established that subsequent conduct may be relied upon to help characterise a contract for the purpose of determining whether an agreement for the performance of work is an employment arrangement.[94] Recourse to such evidence is particularly important where employers use standard-form contracts, without regard to whether the terms reflect the actual arrangements made with employees. It is also important where employers (often on legal advice) draft contract terms strategically to avoid characterisation of the contract as one of employment, even when they have no intention of applying those terms.[95] The problem is exacerbated when prospective workers have little say in the matter.[96]

In *Skene*,[97] the Full Court emphasised the importance of taking a similar approach to the determination of casual status, insisting that it is necessary to consider '[t]he conduct of the parties to the employment relationship and the real substance, practical reality and true nature of that relationship'. The High Court has now stated, however, that this approach is erroneous. The 'firm advance commitment' must be found in enforceable contract terms, not the parties' 'expectations or understandings'.[98] Indeed some of the comments made by Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ suggest that the High Court may be on the verge of taking a similar approach to the determination of employment status, precluding any recourse to evidence of subsequent conduct in any case in which 'the terms of [the] relationship are committed comprehensively to the written agreements by which the parties have agreed to be bound'.[99] This is likely to be tested in two appeals presently before the court.[100]

Given the new statutory definition, it seems inevitable that it will become standard practice (to the extent it is not already) for any employee whom an employer wishes to treat as a casual to be engaged under carefully drafted

93 *WorkPac*, above n 72.

94 See P Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (2015) 32 *JCL* 149.

95 For notable examples, see *Autoclenz Ltd v Belcher* [2011] ICR 1157; [2011] 4 All ER 745; [2011] UKSC 41; *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146; 295 ALR 407; [2013] FCAFC 3; *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346; 321 ALR 404; [2015] FCAFC 37.

96 See *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114; [2020] FCAFC 119 at [196] (*Jamsek*).

97 *Skene*, above n 70, at [180].

98 *WorkPac*, above n 72, at [57].

99 Ibid, at [101].

100 The decisions under appeal are *Jamsek*, above n 96, and *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631; (2020) 381 ALR 457; [2020] FCAFC 122.

written terms that insist there is no commitment that work will be offered, and no expected pattern of hours — even if that is completely at odds with the intended or likely reality of the work arrangement. Despite that, the Attorney-General's Department submission to the Senate Inquiry into the Bill argued that the definition is to be determined objectively, so it would not be enough for an employer to describe an engagement as casual where there was in fact a 'firm advance commitment to continuing and indefinite work'.[101] The submission also states 'it will continue to remain open to the employee to make an application to have their legal status determined by a court'.[102] Precisely how a court would determine such a matter, given that s 15A permits recourse only to evidence of the offer and acceptance, and not to any conduct of the parties, remains to be seen. An employer should not be able to get away with applying a false 'label' to the employment relationship, but the High Court has already said that 'use by the parties in their contract of the label "casual" might be a factor which influences the interpretation of their rights and obligations'.[103]

It is possible for a court faced with this situation to determine that an initial offer of supposedly casual employment was a sham, or pretence,[104] with the 'real' agreement being a verbal or tacit offer of ongoing and predictable employment. Or, if an arrangement formally presented as irregular and unpredictable quickly settles down into a regular pattern, the parties may have implicitly agreed to vary or replace the initial contract, so that there would now be the 'alternative offer of employment' contemplated by s 15A(5).[105] Of those two possibilities, we are inclined to think the first is more likely. In any event, the new formula will not, in our opinion, provide anything like a complete level of comfort to employers who want an unfettered freedom to engage employees as casuals. The insistence on using the 'objective' language of the *Skene* definition, while simultaneously insisting on a preference for contractual form over substance and practical reality, creates a tension ripe for exploitation by subsequent litigants. Nevertheless, until there is case law testing the efficacy of the new definition in avoiding recourse to information about the reality of employment relationships, there is every risk of further proliferation of 'permanent casual' employment patterns.

This is of particular concern when we recall the typical patterns of engagement of labour hire workers. *Skene* and *Rossato* involved workers who were engaged on casual contracts by a labour hire agency, and then 'lent' to

101 Attorney-General's Department, *Submission to the Senate Education and Employment Legislation Committee Inquiry into the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020*, Submission 32, February 2021, at 6.

102 Ibid, at 6.

103 *WorkPac*, above n 72, at [97].

104 As to the distinction at common law between a sham and a pretence, see A Stewart, W Swain and K Fairweather, *Contract Law: Principles and Context*, Cambridge University Press, Melbourne, 2019, at pp 169–70. See further P Bomball, 'Intention, Pretence and the Contract of Employment' (2019) 35 *JCL* 243. It was stressed in *WorkPac*, above n 72, at [55] that there was no suggestion that Mr Rossato's contracts were sham transactions.

105 Note that even if the original contract insisted that any variation must be in writing, this could not preclude effect being given to a subsequent and sufficiently clear oral agreement to vary the original terms: see *Sara Stockham Pty Ltd v WLD Practice Holdings Pty Ltd* [2021] NSWCA 51 (6 April 2021) at [15].

host employers who placed them on long-term permanent rosters, working side-by-side with directly hired employees on higher pay (despite not receiving a casual loading) because of their entitlement to collectively bargained conditions. The concept of labour hire, originally justified as a means of providing temporary staff to deal with unpredictable fluctuations in demand for labour, has become a practice for engaging a permanent workforce. As such, it has contributed to the problem of insecure work in Australia, not because it has necessarily prevented employees from obtaining long-term work assignments, but because their entitlements are often inferior to those enjoyed by directly hired employees.[106]

If these patterns continue, the public health risks exposed by the COVID-19 pandemic may also persist.[107] Defining employment status by reference only to the initial offer of employment encourages continued use of labour hire to engage what is effectively a permanent workforce. Large sections of the workforce will continue to work without paid leave entitlements, and so have an incentive to attend for work when unwell, risking the transmission of communicable diseases. This legislation was said to be justified on the basis that it promised necessary adjustments to the regulation of working relationships in a time of a public health crisis. The new definition of casual employment does nothing to address the problems exposed by the pandemic, and is very likely to exacerbate the public health risks known to have been caused by a proliferation of insecure work.[108] Lest it be suggested that this is an ephemeral risk, soon to pass with a successful vaccination roll out, we should recall that the link between precarious work and public health risks has been well known for over a century. Gregson and Quinlan cite reports in the *Lancet* from the 1880s linking poorly paid piece work with the spread of 'consumption' (tuberculosis).[109] A significant body of scientific research suggests that global pandemics are not '100 year events', but regularly recurring challenges.[110]

What is the status of fixed term employment?

Another peculiarity in the new definition of 'casual employee' concerns the status of fixed term employment contracts. If s 15A(1)(a) is read literally, it captures *all* such contracts, even those expressed to operate for a period of years, because by definition they involve 'no firm advance commitment to

106 See A Forsyth, *Victorian Inquiry into Labour Hire and Insecure Work — Final Report*, Parliament of Victoria, 2016, Pt I; Senate Education and Employment References Committee, *Corporate Avoidance of the Fair Work Act 2009*, Commonwealth, Canberra, 2017, Ch 5.

107 See R Clayton, 'No Paid Pandemic Leave for Healthcare Workers Forces Some to Come to Work Sick', *ABC News*, 14 July 2020.

108 As to those risks, see, eg, J Coate, *COVID-19 Hotel Quarantine Inquiry: Final Report and Recommendations*, Victorian Government, Melbourne, 2020, Vol I, at 24, 193–8, 203–4.

109 S Gregson and M Quinlan, 'Subcontracting and Low Pay Kill: Lessons from the Health and Safety Consequences of Sweated Labour in the Garment Industry, 1880–1920' (2020) 61 *Lab Hist* 534 at 548, at endnote 21, citing 'Special Sanitary Commission on "Sweating" among Tailors in Liverpool and Manchester', 21 April 1888, 131 (3373), 793.

110 See M Quinlan, 'Five Challenges to Humanity: Learning from Pattern/Repeat Failures in Past Disasters?' (2020) 31 *ELRR* 444.

continuing *and indefinite* work' (emphasis added). It seems highly unlikely that there was any intent to treat all fixed term employees as casuals, thus depriving them of annual leave and other entitlements.[111] The FWC has indeed confidently expressed the view, with the support of unions and employer groups, that s 15A 'does not capture fixed term or maximum term employment'.[112] But the question is how to arrive at that result. The most obvious way is to rely on the criteria set out in subs (2), by emphasising in the case of an employee given a lengthy fixed term that they are not working only as required, and nor presumably will they be described as a casual or paid a casual loading. But aside from the difficulty in using what are meant just to be relevant considerations to qualify the operation of the main definition, that then begs the question of how to analyse *short* fixed term contracts, such as those commonly given to casual teachers at universities or schools. Is it enough to make these arrangements casual that the employees are treated and paid as a casual, even though they are obliged to work through the relevant period and it is only their pay and description that marks them as casual? How does that sit with the concept of an 'objective' definition? If a contract for 'some special or defined purpose of brief duration' can safely be treated as casual,[113] exactly how brief does it need to be? Where is the dividing line?

Casual conversion

Apologists for the new casual definition might argue that any injustice caused by the prohibition on considering subsequent conduct is adequately addressed by the insertion of a general right to be offered or to request conversion to permanent status.

In 2017 the FWC decided, as part of its review of modern awards, to adopt a standard provision for the making and determination of requests by long-term casuals to convert to full-time or permanent part-time employment. It was decided that 85 awards should include such a provision, on top of the 27 awards that already provided for casual conversion.[114]

A new Div 4A of Part 2-2 of the FW Act now introduces a (qualified) right to be *offered* conversion as part of the NES, applicable to all national system employees, regardless of whether their employment is governed by an award or an enterprise agreement.[115] If a casual has worked for 12 months, with regular hours over at least the most recent 6 months, they will either need to be formally offered conversion to permanent employment, or given written reasons why such an offer would not be appropriate (which might, for example, include anticipated reductions in working hours).[116] Under an

111 So much is suggested by the new s 66A(2), which is intended to ensure casuals cannot be offered conversion to a contract for a specified period of time. That would not be necessary if such a contract was by definition casual in nature. See also FW Act s 123(1), which deals separately with casual employees and employees engaged for a specified period.

112 *Casual Terms Award Review* 2021 [2021] FWCFB 4144 (16 July 2021) (*Casual Terms Award Review*) at [137].

113 *Shugg v Commissioner for Road Transport and Tramways (NSW)* (1937) 57 CLR 485 at 496–7, quoted with approval in *WorkPac*, above n 72, at [103].

114 *Casual Employment and Part-time Employment*, above n 74.

115 FW Act s 66B.

116 Ibid, 66C(2), which lists a range of reasonable grounds for refusing to offer conversion.

amendment successfully proposed by PHON, small businesses (defined in s 23 as those that employ fewer than 15 employees) are exempt from the obligation to make such offers.[117] If an eligible employee is not offered conversion, they can still request it, with employers again able to refuse on reasonable grounds.[118] Employees of small businesses may also make requests, as the exemption just mentioned applies only to offers of conversion.

The FWC has been given a role in resolving disputes about the operation of these provisions by using its usual powers of mediation, conciliation and making recommendations, but it may only arbitrate if the parties agree.[119] In the case of award/agreement-free employees, employers will be able to contract out of any role for the FWC, even of a facilitative kind, simply by offering an internal and non-independent review.[120]

A casual conversion right (if the opportunity to be offered or request conversion is properly characterised as a 'right') is a poor substitute for properly classifying work arrangements from the outset. There is no evidence that conversion rights have any practical effect. This is partly because of the difficulties an employee may encounter in seeking to challenge their employer, especially without union support. But the more obvious drawback is that few long-term casuals are likely to want to accept a pay cut (through the loss of their casual loading) in return for entitlements that they may or may not ever seek to exercise.[121]

If the conversion provisions are unlikely to provide any real benefit to employees, they will nonetheless create considerable record-keeping and other administrative requirements for employers, given the detailed timing requirements and formalities stipulated in ss 66B(2), 66C(3)–(4), 66G. For example, an employer must make an offer to each eligible employee within 21 days of them completing their 12 months' service, or formally set out reasons why no offer has been made.[122] To compound the cost, transitional provisions will require national system employers (except small business employers) to assess the status of *every casual* working for them, within 6 months of the new provisions commencing.[123]

These provisions will do nothing to address the labour hire issue referred to above, because the nature of the commercial arrangements between labour hire agencies and host employers will likely provide 'reasonable grounds' for refusing conversion. So long as status is assessed on the basis of the agency-worker contract, as is customary,[124] the agency can claim that the risk of termination of the commercial contract between agency and host employer

117 Ibid, s 66AA.
118 Ibid, ss 66F–66J.
119 Ibid, s 66M(5).
120 See ibid, s 66M(2)(b), (c).
121 Stewart et al, above n 81, [10.12].
122 FW Act s 66B(2)(c).
123 Ibid, sch 1 cls 47, 47A.
124 See *Drake Personnel Ltd v Commissioner of State Revenue* (2000) 2 VR 635; [2000] VSCA 122 at [54]; *Staff Aid Services v Bianchi* (2004) 133 IR 29. For a discussion of alternative possibilities see R Cullen, 'A Servant and Two Masters? The Doctrine of Joint Employment in Australia' (2003) 16 *AJLL* 359.

is a sufficient reason to refuse conversion. Legislation granting long-term labour hire employees an option of converting to permanent employment with the *host* might have conferred a meaningful benefit, especially as such an engagement might afford workers access to the more generous pay and conditions under a relevant enterprise agreement. While the focus remains on the contract between the employee and the agency, however, the conversion entitlements are likely to be of no real benefit at all.

Offset provisions for misclassification

The third major aspect of the new legislation is designed to protect employers, both prospectively and retrospectively, against the consequences of misclassifying employees. Under the new s 545A of the FW Act, if an employee who has been paid an identifiable casual loading subsequently establishes that they are not in fact a casual, and seeks payment for certain unmet entitlements (including annual leave, redundancy pay, and pay in lieu of notice of termination), the employer can offset the casual loading paid against the amounts claimed. This in effect overturns a key part of the decision in the Full Federal Court decision in *Rossato*. The employer will remain liable, however, for any penalties that might be imposed by a court for failing to provide the relevant entitlements.

Even without using the language of 'double dipping',[125] there is force in the argument that if an employee has been paid a loading designed and intended to compensate for the absence of certain statutory benefits, that payment should be taken into account in assessing an employer's liability for failing to provide those benefits. Section 545A at least requires that employers (or Fair Work instruments) must stipulate with precision an identifiable amount of loading paid in respect of particular entitlements so that these arrangements are transparent. The problem with this provision, however, is that it entrenches the notion that it is acceptable to cash out certain entitlements in their entirety. In the past, and in the context of assessing enterprise agreements against the former 'no-disadvantage test',[126] entitlements to paid sick leave and recreation leave were considered to be important community standards that should not be traded away for more pay.[127] This policy is reflected in the provisions of the FW Act that prohibit the cashing out of all annual leave entitlements,[128] or all personal/carer's leave.[129] Cashing out is permitted only if the employee keeps a certain amount — generally at least 1 year's entitlement — in the bank. Granting employers a right to trade off a clearly stipulated casual loading in exchange for otherwise mandatory conditions of employment is entirely incongruous with maintaining respect for these established community standards.

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125 See, eg, 'O'Dwyer Posits Three Solutions to Casual Leave "Double Dip"', *Workplace Express*, 22 November 2018.

126 See WR Act s 170XA.

127 See *Re Fabricorp Pty Ltd Enterprise Flexibility Agreement* 1995 (1996) 64 IR 370, concerning the cashing out of sick leave, and *Re Arrowcrest Group Pty Ltd and Metal Industry Award* 1984 (1994) 36 AILR 402, concerning annual leave.

128 FW Act ss 92–94.

129 Ibid, ss 100–101.

The retrospective operation of these provisions also warrants concern. The transitional provisions now set out in cl 46(1) of sch 1 to the FW Act state that '[s]ection 15A of the amended Act applies on and after commencement in relation to offers of employment that were given *before*, on or after commencement' (emphasis added). Clause 46(3) goes on to provide that the new definition also applies 'before commencement in relation to offers of employment that were given before commencement'. An exception to retrospective effect is granted in each of these cases where a court has already (prior to commencement of the amending Act) made a binding determination that a person was not a casual employee of the employer;[130] or the person had already converted to permanent employment prior to commencement.[131] Lest there be any doubt over the status of claims already in preparation following the *Rossato* decision, cl 46(4) states that an employee who could have made a claim for accrued entitlements prior to commencement, can no longer do so. The offset provisions in s 545A also have an explicitly retrospective effect.[132]

Clearly, the government has responded to business alarm following the Federal Court decisions in *Skene* and *Rossato*, and is seeking to curtail further litigation claiming large scale underpayments. We should not forget, however, that the problem exposed by these cases was in no sense new, as the extensive earlier case law canvassed in those decisions reveals. The risk of misclassification has been recognised for many years.[133] Clearly many employers (and certainly those with access to professional advice) have been choosing to take the risk of adverse legal decisions as to the status of long-term casuals. It is not clear why such employers should be shielded now from the consequences of their own decisions.

In any event, any retrospective change to the law ordinarily warrants justification and careful analysis, but no such justification was provided in the explanatory material for the Omnibus Bill. Retrospectivity of laws can produce considerable injustice to parties who have organised their affairs conscientiously on the basis of the law as it stands. To take just one example, what is the status now of any annual leave payouts previously made to employees who were correctly determined on the basis of the law as it stood at the time to be permanent employees, but who would now be deemed by the new s 15A to have been casuals all along? Is the employer now entitled to a refund?

Adero Law, a firm which (at least until the High Court overturned *Rossato*) was undertaking a major class action for underpayment of entitlements to misclassified casuals prior to the enactment of this legislation, has signalled that it is investigating the potential for a challenge to the retrospectivity of these provisions, on the basis that it involves the acquisition of property (in the form of claimants' right to sue for their entitlements) without providing the

130 Ibid, sch 1 cl 46(2)(a), (3)(a).

131 Ibid, sch 1 cl 46(2)(b), (3)(b).

132 Ibid, sch 1 cl 46(6)–(8). The terms expressing an intention that these provisions apply retrospectively are 'unequivocal': *Commonwealth v Hazeldell Ltd* (1918) 25 CLR 552 at 563.

133 See, eg, B Creighton and A Stewart, *Labour Law*, 5th edn, Federation Press, Sydney, 2010, [8.07].

'just terms' required by s 51(xxxi) of the Australian Constitution.[134]

Assuming any such challenge fails, the shield now offered to employers is most likely to be exploited by those who have knowingly taken the risk of misclassification and anticipated a challenge by ensuring they can point to a clearly identified 'loading amount'. This raises the broader question of whether the protections offered by s 545A should be available to employers who have intentionally or recklessly misclassified workers. Employers who misclassify employees as independent contractors may fall foul of the 'sham contracting' provisions in ss 357–9 of the FW Act. These provisions were originally introduced by the Howard Government,[135] demonstrating that Australian governments of all persuasions have been alert to the risks of permitting mischaracterisation of employment relationships. As presently drafted, however, these provisions deal only with sham independent contracts. Unfortunately, no anti-avoidance provisions accompanied the casuals amendments, to discourage any practice of documenting offers of employment in terms that deliberately disguise what is really continuing employment.

Ancillary amendments

In order to avoid inconsistency between the new s 15A and other provisions of the FW Act dealing with the entitlements of long-term casuals, a new definition of 'regular casual employee' has been inserted in s 12. Such an employee is a casual employee (according to s 15A) and 'has been employed by the employer on a regular and systematic basis'. Amendments to ss 65(2) (rights to request flexible work), 67(2)(a) (parental leave), and 384(2)(a)(i) (eligibility to make an unfair dismissal application) now ensure these provisions adopt this concept.

A number of other provisions have also been amended to ensure that time served as a 'casual employee' (according to the s 15A definition) does not count as a relevant period of service for accrual of entitlements to annual leave (s 87), personal/carer's leave (s 96), minimum notice upon termination of employment (s 117), or redundancy pay (ss 119–21).[136]

The new NES entitlement to be offered or request conversion from casual to permanent employment is supported by a requirement that employers issue all casual employees with a Casual Employment Information Statement prepared by the FWO, which informs them of their entitlements.[137]

A late addition to the Bill included a right to use the small claims procedure in s 548 of the FW Act to deal with disputes over casual conversion rights. The small claims jurisdiction of the FW Act has traditionally been designed to resolve monetary claims in a way that is quick and less resource-intensive. To

134 'Constitutional Challenge to Omnibus Casual Provisions?', *Workplace Express*, 22 March 2021.

135 Workplace Relations Legislation Amendment (Independent Contractors) Act 2006 (Cth) sch 1.

136 Cf *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Donau Pty Ltd* (2016) 262 IR 18; [2016] FWCFB 3075.

137 FW Act ss 125A–125B. The new Statement is now available: *Fair Work Ombudsman,* 'Casual Employment Information Statement', at <www.fairwork.gov.au/employee-entitlements/national-employment-standards/casual-employment-information-statement> (accessed 8 September 2021).

this end, legal representation is allowed only with the permission of the court and there is some alleviation of procedural formality in the small claims procedure.

In rushing through the amendments, it appears that little consideration has been given to the appropriateness (or otherwise) of funnelling such disputes through the court system. Under s 548 as it originally stood, a small claims proceeding could only be invoked by a person applying for 'an order' relating to 'an amount that an employer was required to pay to, or on behalf of an employee'. By contrast, the new s 548(1B) provides that a person may use the small claims jurisdiction to apply for any type of 'order' (other than for a pecuniary penalty) in connection with a dispute relating to casual conversion rights. As these new rights form part of the NES, a breach of the casual conversion provisions will contravene s 44(1), a civil remedy provision. This triggers the general remedies under s 545, which permits the Federal Court or Federal Circuit Court to make 'any order [it] considers appropriate'.

Given this broad remedial power, the note which accompanies the new s 548(1B) makes little sense, given that it provides highly specific, and unnecessarily narrow, examples of orders that a court may make with respect to disputes over casual conversion. These include requiring an employer to 'consider' whether to make an offer of conversion, as opposed to just offering it. Another potential source of confusion is the application of s 548(2). By setting a cap (currently $20,000) on any 'award' in small claim proceedings, it seems to assume that any court order will necessarily be compensatory in nature.

In our view, matters concerning whether a casual employee has been denied conversion to permanency without good reason warrant the significantly more prompt, inexpensive and informal processes available from the FWC. While the tribunal is empowered to help resolve such disputes, it may only arbitrate with the parties' consent, under either s 66M or the dispute settlement procedure in an award or enterprise agreement. This is a limitation that should be removed. If workplace bullying and unfair dismissal are appropriate for tribunal determination, it is not clear why matters concerning the proper classification of casual and permanent employees should be elevated to litigated proceedings before a court.

Review of existing award and enterprise agreement provisions

As already noted at the outset, the new s 15A definition is inconsistent with the terms of many existing modern awards and enterprise agreements. Clause 45 of sch 1 to the FW Act therefore empowers the FWC to resolve uncertainties or difficulties concerning the operation of casual employment provisions in enterprise agreements, including with retrospective effect. Clause 48 goes further by *requiring* a review to be undertaken of affected provisions in modern awards, within 6 months of the Amendment Act taking effect. At the time of writing the tribunal was nearing completion of this significant task. It is beyond the scope of this article to discuss the many

decisions made in the course of this process.[138] But two key determinations have been to replace almost all existing award definitions with a reference to s 15A, and similarly to delete the great majority of casual conversion clauses, on the basis that they are inconsistent with the new NES provisions.[139]

While the FWC has done its best to chart a way forward, there is still the question of how to make sense of the past. The retrospective operation of s 15A raises a series of questions that the government has made no effort to answer, and which seem likely to cause considerable confusion if raised.

Section 136(1) of the FW Act states that awards may only include terms that are specifically permitted (or in some cases mandated) by the statute. Section 139(1)(b) allows terms about 'type of employment, such as ... casual employment'. If that reference must now be read as being governed by s 15A, it could be argued that any award provision with a different definition must be treated as non-allowable, and therefore of no effect by reason of s 137. If so, then prior at least to the recent review, no modern award could be regarded as ever having permitted casual employment!

It is hard to imagine that interpretation being favoured, not least because of its practical implications. But that still leaves two other ways of giving retrospective effect to s 15A. One is to assume that since awards are made under the authority of the FW Act, the meaning of any terms they use must conform with any statutory definitions. If so, the s 15A definition would be deemed to have been part of each award all along. That would ensure coherence with the NES and other provisions in the Act. But it would also mean many employees wrongly treated as casuals would retrospectively lose some entitlements (such as their casual loading), while gaining others (such as greater rights to overtime pay). While it is unlikely that too many parties would seek to agitate such issues, retrospectively applying the s 15A definition might well impact both existing and future proceedings relating to underpayments of award entitlements. At the very least it would complicate any calculations — especially for employees now considered not to be casuals, but lacking the formal agreement on hours of work generally required for (permanent) part-time employees.[140]

To avoid such problems, it may be considered instead that modern awards are (and always have been) allowed to define casual employment differently to s 15A. Given that the FWC is expressly permitted by the transitional provisions to vary awards only with prospective effect,[141] this may well be what Parliament will be taken to have intended. But that enshrines the very problem that the legislation was supposedly intended to resolve: that an employee may previously have been a casual for award purposes (including entitlement to a loading), yet is deemed never to have been a casual for NES purposes and can thus claim annual leave, notice of termination and so on.

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138 See Fair Work Commission, 'Casual Terms Award Review 2021', at < https://www.fwc.gov.au/awards-agreements/awards/modern-award-reviews/casual-terms-award-review-2021> (accessed 8 September 2021).

139 See, eg, *Casual Terms Award Review*, above n 112, at [59]–[111], [186]–[257].

140 See, eg, *General Retail Industry Award 2020 [MA000004]*, at cl 10.

141 This is apparent from the absence in cl 48 of sch 1 of any equivalent to cl 45(3), which allows any variation to an enterprise agreement to operate from a day before the variation is made.

Depending on how s 15A is interpreted, the reverse might even be true in the case of an award with a more restricted definition of casual employment. It is possible that an employee might have been a casual for NES purposes, and thus ineligible for various entitlements, yet not be a casual under an award, denying them the loading that is meant to compensate them.

The FWC's decision to amend awards to incorporate the s 15A definition should avoid these problems for the future. Employers negotiating new enterprise agreements will presumably also seek to ensure as best they can that any casual employment provisions reflect the new statutory definition. But both they and the courts have an unenviable task in seeking to unravel the tangles unnecessarily created by the retrospective effect of the new definition.

The new approach to casual employment: Out of the frying pan ...

In seeking to deal with a longstanding area of uncertainty, the status of permanent casuals, the 2021 Amendment Act has substituted a different and arguably more complex set of problems. If the government had waited for the High Court's ruling in *Rossato*, WorkPac's successful appeal would have alleviated some of that uncertainty. Alternatively, and preferably, the government could have negotiated a resolution that tackled the long-term problems created by the practice of 'permanent casual' employment, while protecting employers against liability for innocently misclassifying casuals in the past. It seems clear that the ACTU for one was amenable to some sort of deal along those lines.[142] As it is, the Amendment Act appears to have created the worst of all worlds, simultaneously entrenching the misclassification of what should be permanent employees, while creating all manner of new uncertainties as to both past and future practices.

V The Unsuccessful Proposals

Modern awards

The proposals in sch 2 of the original Omnibus Bill were underpinned by a policy intention to increase productivity and efficiency in sectors specifically impacted by COVID-19. Two new regimes were envisaged: 'simplified additional hours agreements' (SAH agreements) and 'flexible work directions' (FWDs). The first regime effectively comprised a method of contracting out of overtime pay entitlements, while the latter would have permitted employees to be redeployed or relocated without their consent. While sch 2 was drafted so as to confine both regimes to certain industries, they could have been later extended to apply to all award-covered workers.

Simplified additional hours agreements

If SAH agreements had been implemented, under a proposed new Div 9 to Part 2-3 of the FW Act, they would have allowed permanent part-time employees who worked at least 16 hours a week, and to whom an 'identified modern award' applied, to agree to work additional hours at ordinary rather

142 See Marin-Guzman, above n 65.

than overtime rates of pay. The 'identified modern awards' were those applicable to the following industries or occupations: business equipment, commercial sales, fast food, general retail, hospitality, meat, nursery, pharmacy, restaurant, registered and licensed clubs, seafood processing, and vehicle repair, services and retail. But that list could be expanded at any time by regulation.

SAH agreements would not be able to cover shifts of less than three hours, or that fell outside the span of ordinary hours specified under the relevant award, or that took the employee over certain award limits, such as 38 hours per week. Nor (at least in theory) could an employer require employees to enter into SAH agreements, put them undue pressure to do so, or take adverse action against them for failing to do so. Agreements would also be terminable by either party on 7 days' notice.

The stated policy intention underpinning the creation of SAH agreements was to promote flexibility and efficiency for business.[143] However, no cogent evidence that this proposal would have led to efficiency or productivity gains was presented in the explanatory material accompanying the Bill. The impact on workers, by contrast, would have been substantial, in at least three ways.

Firstly, SAH agreements would have enabled employers to contract out of a minimum labour standard. They would have deprived part-time employees of overtime pay intended to compensate for the substantial inconvenience of working longer, unsocial, irregular or unpredictable hours, often with limited notice.[144] Secondly, as more women than men are currently employed on a part-time basis,[145] they would likely have had a disproportionate impact on women workers. That is particularly significant given that the gender pay gap continues to favour men across all levels and industries in Australia;[146] and inequality and gaps in labour market outcomes, already rising prior to COVID-19,[147] seem to have worsened for women due to the pandemic.[148] Thirdly, SAH agreements would have incentivised employers to reduce guaranteed hours for permanent part-time staff, knowing they could request

143 Explanatory Memorandum, Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (Cth), House of Representatives (Explanatory Memorandum) at ii, xxix–xxxix.

144 See, eg, *Casual and Part-time Employment*, above n 74, at [546]–[550], agreeing to a claim that casual workers in the hospitality sector be entitled to overtime rates.

145 Australian Bureau of Statistics, *Labour Force, Australia, Detailed, July 2021*, at <https://www.abs.gov.au/statistics/labour/employment-and-unemployment/labour-force-australia-detailed/jul-2021> (accessed 8 September 2021).

146 Workplace Gender Equality Agency (WGEA), *Australia's Gender Equality Scorecard: Key Results from the Workplace Gender Equality Agency's 2019–20 Reporting Data*, November 2020, at <www.wgea.gov.au/sites/default/files/documents/2019-20%20Gender%20Equality%20Scorecard_FINAL.pdf> (accessed 8 September 2021), at 4–7. See also KPMG, Workplace Gender Equality Agency and Diversity Council of Australia, *She's Price(d)less': The Economics of the Gender Pay Gap*, 2016, at <www.wgea.gov.au/sites/default/files/documents/She%27s-Price%28d%29less-2019-Summary-report_0.pdf> (accessed 8 September 2021), at 35.

147 P Davidson et al, *Inequality in Australia, Part 1: Overview*, Australian Council of Social Service and UNSW, Sydney, 2020, at 9.

148 E Hill, *Reducing Gender Inequality and Boosting the Economy: Fiscal Policy after COVID-19*, Labour Market Policy after COVID-19 Research Series, Committee for Economic Development of Australia, 2020; Davidson et al, above n 147, at 16.

additional hours without overtime penalties. This would have exacerbated rather than addressed the problem of chronic underemployment in the Australian labour market,[149] and shifted more of the burden of fluctuating demand onto part-time workers. The present arrangements in modern awards generally operate to strike an appropriate balance between an employer's desire for flexibility and the desire of award-covered employees for stable and predictable working arrangements.[150] There was no explanation in the supporting material for the Bill why this task of should not be left to the FWC.

It is possible to argue that under current modern award terms requiring the payment of overtime rates, part-time workers would never have been offered additional hours over casual staff. If so, SAH agreements would have made some part-time workers better off financially. However, in practical terms, these workers would have been working more hours for less pay than they would have been entitled to receive under current modern award terms. And the casuals who might previously have been getting those extra hours, also more likely to be women,[151] would have lost out.

Flexible work directions

In April 2020, Part 6-4C was added to the FW Act.[152] It allowed employers participating in the JobKeeper scheme the flexibility to stand down workers receiving government payments, or to reduce their hours of work, or change their job locations or duties. Those provisions expired on 29 March 2021.[153] However, the Bill proposed to replace them with a new Part 6-4D, to operate for a period of 2 years. This would permit certain employers to continue to direct employees to perform any duties within their skill and competency, or to perform their duties at somewhere other than their normal place of work, by issuing FWDs. These powers could be exercised even in relation to employees never covered by the JobKeeper scheme. They would have been available initially only for employers and employees to whom an 'identified modern award' applied — the same awards as those listed above in relation to SAH agreements. Again, however, the provisions could be extended to any other award at any time by regulation.

FWDs would not have been allowed to reduce working hours, nor cause any reduction in the employee's base rate of pay. They could apply only to the extent they were necessary to assist in the revival of the employer's enterprise, and were not unreasonable in all the circumstances. But the 'revival', it may be noted, need have nothing whatsoever to do with the pandemic, or the circumstances that spawned the need for JobKeeper and Part 6-4C.

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149 See M Lloyd-Cape, *Slack in the System: The Economic Cost of Under-Employment*, Per Capita Discussion Paper, May 2020, at <https://percapita.org.au/wp-content/uploads/2020/05/Slack-in-the-System_FINAL.pdf> (accessed 8 September 2021).

150 See, eg, *Hospitality Industry (General) Award 2020 [MA000009]*, at cl 10; originally added by the 2017 test case: see *Casual and Part-time Employment*, above n 74.

151 Australian Bureau of Statistics, *Gender Indicators, Australia,* ABS, Canberra, 2020, at <www.abs.gov.au/statistics/people/people-and-communities/gender-indicators-australia/2020> (accessed 8 September 2021).

152 Coronavirus Economic Response Package Omnibus (Measures No 2) Act 2020 (Cth) sch 1 Part 1 item 5.

153 Ibid, sch 1 Part 2.

The stated policy intention underpinning FWDs was to extend those two temporary JobKeeper flexibilities to employers in certain industries. However, the proposal would have unfairly reduced certainty of labour conditions and/or flexibility for employees. At least four criticisms can be advanced.

First, none of the 'identified modern awards' presently include terms that limit employees to specific work locations. In fact, some explicitly anticipate that employees' work locations will change from time to time.[154] It is already possible at common law for an employer to issue relocation directions, at least within reasonable limits.[155] This raises the question of why FWDs regarding work location were even necessary.

Secondly, the proposed change incorporated the terminology of 'flexibility' in a manner that had little regard to the key distinction between employer-led directions to enhance flexibility for businesses, and employee-led requests for flexibility to address conflict between work and non-work obligations, such as family or carer responsibilities.[156] This is particularly unsuitable, given the FW Act currently uses the concept of 'flexible working' (in s 65) to denote the arrangements some employees request from employers to promote substantive equality at work.

Thirdly, the Bill provided little information regarding how employers and employees were to determine whether a FWD was 'reasonable in all of the circumstances' under proposed s 789GZJ. Nor was there guidance on the obligation on an employer to consult with an employee before issuing a FWD. This would have undermined the significant benefits that genuine consultation can produce for employers and employees, including minimising disputes.[157]

Fourthly, the proposal evinced limited contemplation regarding the interaction of FWDs with terms of modern awards. The proposed provision was intended to operate subject to the NES,[158] but would nevertheless prevail over an inconsistent term of an identified modern award to the extent of any inconsistency.[159] It is unclear whether this was intended to exclude potentially more favourable entitlements, such as the right to request flexible working arrangements under the model term inserted in *Family Friendly Working Arrangements*.[160]

The case for reform

Both the proposals set out in sch 2 overlook the role already played by the FWC in addressing these matters. If there is a need for flexibilities of these kinds on an ongoing basis in any particular sector, appropriate applications can be made to the FWC, which is in a position to consider the case for change on an industry-by-industry basis. The FWC has demonstrated during the

154 See, eg, *Meat Industry Award 2020 [MA000059]*, at cl 20.3(c).

155 See Stewart et al, above n 81, [17.02]–[17.04].

156 See D Allen and A Orifici, 'Home Truths: What did Covid-19 Reveal About Workplace Flexibility?' (2021) 34 *AJLL* 77.

157 *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Ltd [No 2]* [2010] FCA 652 (22 June 2010) at [49].

158 Proposed s 789GZO(4) of Omnibus Bill.

159 Proposed s 789GZf of Omnibus Bill.

160 (2018) 276 IR 249; [2018] FWCFB 1692.

COVID-19 crisis that it has both the flexibility and willingness to respond quickly and effectively where the evidence for change is sufficiently compelling.[161]

Enterprise agreements

One of the core commitments made by the ALP in introducing the FW Act was to put 'collective agreements' at the heart of the industrial relations system, restoring genuine 'good faith' collective bargaining.[162] However, there is now a growing consensus that the FW Act has failed to deliver on this promise, if the measure of success is defined as increased collective agreement coverage and a better employee share of the benefits of productivity growth in the form of improved wages and conditions.[163]

The diagnosis of the problems with the enterprise agreement provisions varies, but the reforms proposed in sch 3 of the Omnibus Bill almost universally responded to employer dissatisfaction with aspects of the agreement-making and approvals process.[164] The amendments wholly ignored a raft of more systemic problems that have been raised by researchers and trade unions relating to the failure of the FW Act to require representation of workers or collective bargaining within agreement-making processes,[165] and the continued suppression of workers' ability to take protected industrial action.[166]

The most contentious change proposed to the enterprise agreement provisions was the addition of a new ground to allow for the approval of an enterprise agreement that otherwise failed the BOOT, where it would be 'appropriate to do so', taking into account all the circumstances including the views of the affected parties, the circumstances of the employer(s) and employees, the impact of COVID-19 on the enterprise, and the extent of employee support for the agreement (as determined by the vote to approve it).[167] Agreements so approved could only have a nominal expiry date of up to 2 years, and the power of the FWC was to sunset after 2 years. However, the impact of the provision would have been more far reaching, as expired agreements continue in operation until they are terminated or replaced.

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161 See, eg, *Australian Industry Group and Australian Chamber of Commerce and Industry* [2020] FWCFB 6985 (22 December 2020). See also J Murray, C Schaffer and B Shribman-Dellmann, '"Invidious Choices"? Adapting the Fair Work Safety Net During the Pandemic' (2021) 34 *AJLL* 60.

162 K Rudd and J Gillard, *Forward with Fairness: Labor's Plan for Fairer and More Productive Australian Workplaces*, ALP, April 2007, at 3, 14.

163 See S McCrystal, B Creighton and A Forsyth (eds), *Collective Bargaining under the Fair Work Act*, Federation Press, Sydney, 2018; A Pennington, 'The Fair Work Act and the Decline of Enterprise Bargaining in Australia's Private Sector' (2020) 33 *AJLL* 68.

164 Explanatory Memorandum, above n 143, at xlvi–liv.

165 K Walpole, 'The Fair Work Act: Encouraging Collective Agreement-Making but Leaving Collective Bargaining to Choice' (2015) 25 *Lab & Ind* 205; M Bray, S McCrystal and L Spiess, 'Why Doesn't Anyone Talk About Non-Union Collective Agreements?' (2020) 62 *JIR* 784.

166 See J Stanford, *Historical Data on the Decline in Australian Industrial Disputes*, Centre for Future Work, The Australia Institute, Sydney, 2018; S McCrystal, 'Why is it So Hard to Take Lawful Strike Action in Australia?' (2019) 61 *JIR* 129.

167 Omnibus Bill, sch 3 item 19.

No convincing case supported by evidence was presented for this change, nor was any failure identified on the part of the FWC to use its existing power under s 189(2) to approve enterprise agreements that fail the BOOT in exceptional circumstances. The proposed change was not limited to the COVID-19 context, and would have allowed for substandard agreements to be approved without any requirement that the circumstances be 'exceptional' in nature. This proposed change was quickly seized upon by the ALP and the ACTU as evidence that the Omnibus Bill would cut pay for workers. As noted earlier, it was quickly ceded by the Coalition in negotiations over the passage of the Bill.[168]

One of the Bill's themes of the approach to agreement-making was that the FWC does not give adequate weight to the views of employers and employees when applying the statutory tests for agreement approval. The FWC was to be required to perform its functions in a way that recognised 'the outcome of bargaining' at the enterprise level,[169] and obliged to give 'significant weight' to the views of those involved in making an agreement as to whether the agreement passed the BOOT.[170] These proposed changes appear to respond to employer frustrations with the stringency of the application of the statutory provisions by the FWC. However, statutory questions of whether or not an agreement has been made in accordance with the Act, or complies with the guaranteed minimum safety net, should not be answered by reference to the agreement vote, which is not designed for such purpose. This may be particularly concerning where an agreement has not been the product of any bargaining, or has been agreed by a very small number of employees with the intention that the agreement subsequently apply to a much larger group.[171]

The Bill also contained a proposed 'model NES interaction term', for all enterprise agreements.[172] The proposed clause provided that the terms of the NES would prevail over the enterprise agreement to the extent of any inconsistency, removing the need for the FWC to examine the terms of proposed agreements for inconsistency with the NES, as s 186(2(c) of the FW Act currently requires, or to require extensive undertakings from employers where inconsistencies are identified. This may appear to be a neat solution to the problem caused by inconsistent terms within agreements, but it ignores the practical difficulties it would create in easily and accurately identifying actual terms and conditions of employment. Both employers and employees would be unable to rely on the plain text of their enterprise agreement (along with undertakings), and would need to read the agreement subject to the NES. This task might be very challenging for employees in particular, especially if they even had reason to think that their enterprise agreement was not able to operate according to its express terms.

At agreement approval stage, the FWC is required to be satisfied that various procedural steps have been taken by the employer or bargaining

168 N Bonyhady, 'Government Dumps Controversial Pay-Deal Change from Proposed IR Overhaul', *Sydney Morning Herald*, 16 February 2021.

169 Omnibus Bill, sch 3 Part 11.

170 Ibid, sch 3 Part 5.

171 See especially *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* (2018) 262 FCR 527; 356 ALR 535; [2018] FCAFC 77.

172 Omnibus Bill, sch 3 Part 6.

representative(s) in the process of making an agreement,[173] although approval can still be granted if the FWC is satisfied that any shortcomings in the process involved minor procedural or technical errors that were not likely to have disadvantaged the relevant employees.[174] This latter qualification was added to the FW Act in 2018 to overcome any doubt over the FWC's discretion to overlook essentially minor or administrative errors.[175] However, despite this qualification being used extensively by FWC members to approve agreements despite process errors,[176] the Omnibus Bill proposed to change the agreement approval requirement to provide that the FWC need only be satisfied that the employer has taken reasonable steps to ensure employees are given 'a fair and reasonable opportunity to decide whether to approve the agreement'.[177] Compliance with the previously mandated approval steps would satisfy this test, but this would not be required. The effect of this amendment would have been to abrogate any uniform legislative process for the creation of enterprise agreements, relying instead on FWC discretion in respect of what constitutes 'reasonable steps' and a 'fair and reasonable opportunity'. It would mean the parties would have to read FWC published decisions to ascertain the minimum necessary for an employer to undertake a fair agreement-making process.

As noted above, the FW Act does not require employee representation in agreement-making, and where employees are unrepresented, the agreement approval phase may be the only time at which the agreement, and the making of that agreement, are scrutinised. The Omnibus Bill also contained an amendment that would have restricted the ability of employee associations or interested parties to intervene in agreement approval cases where they had not been a bargaining representative for an agreement.[178] This would have had the effect of limiting any outside scrutiny of agreement approvals, which has been very valuable to date, not least in identifying suspect 'small cohort' agreement practices.[179]

Another change of some significance was an amendment proposing to prevent unilateral applications to terminate enterprise agreements in the 3 month period following the expiration of an agreement.[180] This proposed amendment appears to have been in response to concerns raised by unions over the use of agreement termination applications by employers to bring pressure on employees in contested bargaining negotiations.[181] However, as a

173 FW Act s 188(1).

174 Ibid, s 188(2).

175 Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018 (Cth) sch 2.

176 Senate Education and Employment Legislation Committee, above n 47, at 9.

177 Omnibus Bill, sch 3 Part 3.

178 Ibid, sch 3 Part 9.

179 See U Chaudhuri and T Sarina, 'Employer Controlled Agreement-Making: Thwarting Collective Bargaining under the Fair Work Act' in S McCrystal, B Creighton and A Forsyth (eds) *Collective Bargaining Under the Fair Work Act*, Federation Press, Sydney, 2018, p 138.

180 Omnibus Bill, sch 3 Part 8.

181 See Senate Education and Employment Legislation Committee, above n 47, at 12. See also S McCrystal, 'Termination of Enterprise Agreements under the Fair Work Act 2009 (Cth) and Final Offer Arbitration' (2018) 31 *AJLL* 131.

response to those concerns, the change was woefully inadequate and even counterproductive. The provision had the potential to strengthen an employer's hand, allowing them to signal a 'deadline' on negotiations of just 3 months after agreement expiration, before a potential termination application would be brought. It would also have potentially created the new problem of prohibiting the termination of substandard agreements for an additional 3 months post expiry!

Most of the remaining proposed changes were more straightforward, such as the provisions designed to clarify: when casual employees should be counted on the roll of voters for an enterprise agreement;[182] or the operation of the transfer of business provisions in the context of employees moving between related employers.[183] One proposed change was long overdue — the sunsetting of enterprise agreements created prior to the commencement of the FW Act.[184] It is lamentable that this amendment did not make it through.

Greenfields agreements

Schedule 4 of the Omnibus Bill proposed to allow greenfields agreements to have a nominal term of up to 8 years, for construction projects declared by the relevant Minister to be 'major projects'. This compares to a maximum duration of 4 years for other agreements, per s 186(5) of the FW Act. Such agreements would have needed to provide at least annual increases to the base rate of pay for each employee engaged under the agreement. As with the existing provisions, such agreements would be made either through the agreement of a trade union and an employer in the normal way,[185] or an 'agreement' could be imposed by the FWC where no consensus had been reached between the parties during a declared 6-month negotiating period.[186]

These proposals responded to employer frustrations over the difficulty of adequately costing major long-term projects, where agreements could expire after 4 years, leaving them exposed to wage claims, and the potential for industrial action to impact or delay the completion of the project.[187] However, the change would have further restricted the affected employees' right to take protected industrial action, for reasons related to the employer's convenience, and without access to independent and impartial arbitration of wage or other disputes, during the life of the agreement. This would be of concern even where a trade union had agreed to such a deal, but in the context of agreements imposed by the FWC, it would be a clear breach of international standards in respect of the right to strike and the principles of freedom of association that Australia has committed to respect.[188]

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182 Omnibus Bill, sch 3 Part 4.

183 Ibid, sch 3 Part 12.

184 Ibid, sch 3 Part 13.

185 FW Act s 172(4).

186 Ibid, ss 178B, 182(4).

187 See Senate Education and Employment Legislation Committee, above n 47, p 13.

188 See International Labour Conference, *Giving Globalisation a Human Face: General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization, 2008*, 2008, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part IB), Geneva, 2012, at [124].

Compliance and enforcement

The provisions in sch 5 dealing with compliance and enforcement were less controversial or surprising than many other proposals in the Omnibus Bill. The final report of the Migrant Workers' Taskforce,[189] together with the Attorney-General's consultation papers,[190] had effectively flagged the direction of likely reform. The working group on this topic was also widely viewed as engendering the greatest level of consensus, albeit there was still some bickering about the level, nature and target of sanctions.[191]

Before discussing the more substantial proposals in greater detail, it should be noted that the Omnibus Bill also sought to make a number of separate, and smaller changes to the compliance and enforcement framework of the FW Act. These included: expressly permitting a court to make an adverse publicity order in the context of civil remedy proceedings;[192] prohibiting employment advertisements with a pay rate less than the minimum wage;[193] codifying the factors that the FWO may take into account when deciding whether to accept an enforceable undertaking;[194] and expressly requiring the Australian Building and Construction Commissioner and the FWO to publish information relating to the circumstances in which they will commence or defer enforcement proceedings.[195] There was also a proposal to raise maximum penalties for other types of contraventions beyond underpayment claims, including contraventions involving a failure to meet the terms of a compliance or infringement notice, or sham contracting.[196]

While these proposals were broadly in line with the Government's stated desire to deliver greater doses of deterrence, the Omnibus Bill did little to expand the scope of the relevant compliance powers or ease barriers to their greater use. For example, a string of inquiries have recommended that the 'recklessness' defence to sham contracting under s 357(2) of the FW Act be narrowed to a test of 'reasonableness'.[197] While this modest amendment to the sham contracting provisions is long overdue, it was noticeably absent from the Omnibus Bill. Similarly, a host of other important recommendations, such as the establishment of a national labour hire licensing regime, were either consciously ignored or deliberately excluded by the government before tabling the Bill.

New criminal offence

Following the enactment of wage theft offences in Victoria and Queensland,[198] one of the most hotly anticipated reforms was the introduction of a federal

189 Fels and Cousins, above n 18.
190 As to the two relevant consultation papers see, above n 21.
191 Senate Education and Employment Legislation Committee, above n 47, pp 91–5.
192 Omnibus Bill sch 5 Part 1.
193 Ibid, sch 5 Part 3.
194 Ibid, sch 5 item 35.
195 Ibid, sch 5 Part 6.
196 Ibid, sch 5 Part 4.
197 See, eg, N James, *Report of the Inquiry into the Victorian On-Demand Workforce*, Victorian Government, Melbourne, 2020, at 205–6.
198 See Wage Theft Act 2020 (Vic); Criminal Code and Other Legislation (Wage Theft) Amendment Act 2020 (Qld).

criminal offence for 'the most egregious and persistent kinds of underpayments'.[199] Proposed s 324B of the FW Act would have made it a criminal offence for an employer to engage in a dishonest and systematic pattern of underpaying one or more employees. The maximum penalty for an individual offender was to be imprisonment of up to 4 years, and/or 5,000 penalty units, or both. For a corporation, the maximum penalty would have been 25,000 penalty units.[200] It was further proposed that a person convicted of this offence would also be automatically disqualified from managing a corporation for a period of 5 years. While this proposal reflected key recommendations of the Migrant Workers' Taskforce,[201] there remained some residual concerns about the scope and framing of the offence.

The Bill proposed to amend s 26 of the FW Act to express an intention to operate to the exclusion of state or territory laws seeking to criminalise underpayment or recordkeeping failures. While the introduction of a federal offence of wage theft would have provided a neater solution, rather than navigating distinct and potentially conflicting state schemes, the federal criminal offence was framed in narrower terms than under either the Victorian or Queensland laws. For example, the new offence would only apply to dishonest *and* systematic underpayment.[202] In comparison, under the Wage Theft Act 2020 (Vic) it is an offence merely to engage in dishonest underpayment, providing a wider platform for prosecutions.[203] Victoria has separately made it an offence to falsify, or fail to keep, employee entitlement records with a view to dishonestly obtaining a financial advantage.[204] The Victorian legislation also incorporates a due diligence defence, absent in the federal proposal, which potentially guards against liability avoidance behaviours which may make it harder to detect the wrongdoing, or to bring a prosecution.[205] Furthermore, the limited scope of the federal offence, combined with its overlap with civil remedy provisions relating to serious contraventions under s 557A of the FW Act, may have made enforcement of this criminal offence more difficult and/or less appealing in practice.

With no federal regime to (expressly) pre-empt them, Victoria and Queensland's wage theft laws are set to explore the boundaries of what is constitutionally possible, in terms of state agencies seeking to hold national

199 Explanatory Memorandum, above n 143, at cxvii-cxviii.

200 This is lower than the criminal penalties available under state laws directed at wage theft. For example, the Queensland Criminal Code provides penalties of: 10 years' imprisonment and/or an unlimited fine for stealing; and 14 years' imprisonment and/or an unlimited fine for fraud.

201 Fels and Cousins, above n 18, at Recommendation 6.

202 Victorian Government, *Submission to the Senate Education and Employment Legislation Committee Inquiry into the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020*, February 2021, at [31].

203 Furthermore, unlike the Queensland wage theft offences, the framing of the federal criminal offence meant it would be difficult to prosecute an employer for non-compliance with pay-related obligations arising outside the FW Act (such as the superannuation guarantee or long service leave): Queensland Government, *Submission to the Senate Education and Employment Legislation Committee Inquiry into the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020*, February 2021, at 8.

204 Wage Theft Act 2020 (Vic) ss 7, 8.

205 T Hardy, J Howe and M Kennedy, 'Criminal Liability for "Wage Theft": A Regulatory Panacea?' (2021) *Mon ULR* (forthcoming).

system employers to account for underpaying their workers. It seems likely that even without the amendment contemplated by the Bill, the detailed compliance provisions in the FW Act would be held to be inconsistent with the state legislation. But it remains to be seen how long it take a suitable test case to reach the High Court — and what kinds of enforcement activities might be mounted at state level before it does.

Increase in maximum civil penalties

The amendments to s 546(2) of the FW Act would have increased the maximum penalties available for 'remuneration-related contraventions'. Significantly, they also proposed a new 'value of the benefit' penalty for corporate wrongdoers (other than small business employers). In broad terms, these changes were designed to ensure that the magnitude of the penalties adequately reflected the seriousness of the breaches.[206] Again, deterrence concerns were front and centre.[207]

While this change was widely supported in principle, it did present a range of practical challenges. In particular, the new provisions added an extra layer of complexity to the unenviable task of calculating the maximum penalty when making submissions, conducting settlement discussions and/or determining orders. To identify the relevant maximum pecuniary penalty under the scheme proposed in the Bill, it would have been necessary to work through a series of steps, such as whether the contravention was 'remuneration-related'; whether the contravention was likely to be characterised as serious;[208] whether the grouping provisions were applicable;[209] and which maximum penalty was the greater — that calculated with reference to penalty units or the value of the benefit obtained.[210]

In addition, under the Bill, it was unclear whether the 'value of benefit' penalty could be invoked against persons other than the direct employer. This uncertainty was exacerbated, if not created, by a statement in the Explanatory Memorandum that the 'new "value of the benefit" penalty is only available in relation to primary contraveners who are employers, and does not extend to accessories (see s 550)'.[211] This seems to represent an unnecessarily restrictive reading of the statutory provision. Further, from a policy perspective, it is critical that the court be empowered to impose sanctions, such as civil penalties, against a range of involved parties, including individuals and third-party firms.

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206 This change also reflected recommendations of the Migrant Workers' Taskforce Report: Fels and Cousins, above n 18, at 86, 88.

207 Attorney-General's Department, above n 101, pp 33–4.

208 FW Act s 557A.

209 Ibid, s 557.

210 Accurately quantifying an underpayment claim and determining the relevant 'value of the benefit' for penalty purposes may not be straightforward. For example, Woolworths initially admitted to an underpayment of $300 million, however, later external estimates suggested that it may be more than double this figure. See 'Woolworths Wage Theft Blows out, Flags Redundancies', *The New Daily,* 23 June 2020.

211 Explanatory Memorandum, above n 143, at [343].

Changes to small claims proceedings

The third, substantive proposal was principally directed at enhancing redress mechanisms, rather than strengthening deterrent sanctions. In particular, Part 2 of sch 5 of the Bill sought to amend the small claims jurisdiction in three main ways to enable claimants 'to recover their entitlements more easily, quickly and cost-effectively through the small claims process'.[212] First, it was proposed that the cap on claims be lifted from $20,000 to $50,000. There was a second proposal that claimants be entitled to recover the costs of any filing fees. Finally, and most significantly, relevant courts would have the capacity to refer small claims matters to the FWC for conciliation and, with the consent of the parties, arbitration.

In seeking to overhaul the wage recovery system, it was never entirely clear why a referral model was selected over other alternatives, such as allowing claimants to initiate matters with the FWC in the first instance — something already possible in relation to adverse action claims under Part 3-1 of the FW Act.[213] There are several aspects which make the FWC a preferable forum for such matters.[214] For a start, it minimises some of the problems faced by unrepresented litigants accessing the court system.[215] Upfront filing fees are much lower in the FWC than in the courts, which is especially important in relation to claims involving smaller amounts.[216] Allowing claims to commence in the FWC, and removing the circularity of the referral system, would reduce confusion for applicants. It could also allow underpayment matters to be rolled up with other related claims, such as unfair dismissal or adverse action, and heard together. It would streamline representation rights and minimise the potential for misunderstanding as to who has standing.[217]

Fair Work Commission powers

The proposals in sch 6 of the Omnibus Bill sought in generally useful ways to expand the FWC's powers and discretions in relation to three matters: the dismissal of applications; the variation or revocation of certain decisions; and the capacity to conduct appeals or reviews without a hearing. Among other things, a revamped s 587 of the FW Act would permit the tribunal to dismiss an application on the ground that it was 'misconceived', 'lacking in substance' or 'otherwise an abuse of the process of the FWC'. A new s 587A would allow a Full Bench to restrict further applications from anyone who had previously had an 'unmeritorious' application dismissed, although the criteria for taking

212 Ibid, at iv.

213 FW Act ss 365, 372.

214 Cf J Riley, 'Rethinking the Fair Work Protection Against Discriminatory Dismissal' (2013) 41 *Fed L Rev* 181, making similar arguments in relation to adverse action claims.

215 Fels and Cousins, above n 18, at 94.

216 The current filing fee for a small claims proceeding brought in the Federal Circuit Court is $245 (for claims less than $10,000) or $400 (for claims between $10,000 and $20,000). In comparison, the current filing fee for a general protections matter in the FWC is $74.50.

217 As to the current position in relation to the involvement of industrial associations in small claims proceedings, see A Stewart et al, *Submission to the Senate Education and Employment Legislation Committee Inquiry into the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020*, February 2021, at 52.

that radical step were not specified.[218] Changes to s 603 would also give the FWC greater flexibility in correcting errors in relation to the approval of an agreement.

VI Conclusion: A Missed Opportunity for Meaningful Reform

After a parliamentary debacle that saw the Morrison Government leaving insufficient time to negotiate with the crossbench, and then choosing to vote down the bulk of its own Bill to get one segment through the Senate, where does this leave the Coalition's policy agenda on industrial relations?

The comments of Senator Roberts noted earlier suggest an understanding between the government and PHON that the discarded elements of the Omnibus Bill will be returned to parliament,[219] although to date the government's only public commitment has been to reintroduce its proposals on greenfields agreements.[220] The prospect of further negotiations could explain why the government did not seek to retain the Div 5 provisions on compliance and enforcement, even though it plainly had the numbers to get them through. Rather than simply being an act of 'spite', as Senator Griff suggested,[221] their omission might have been a tactical move, to create an incentive for the crossbenchers to agree to some of the more controversial reforms on award flexibilities and enterprise bargaining.

The question then is whether the government seeks to do more than just recycle the bulk of the Omnibus Bill. It is certainly possible to imagine a 'remnants Bill' being reintroduced in mid-2021, to fulfil the government's commitments to PHON and the business groups behind most of the changes, but then languishing for lack of sufficient (or indeed any) crossbench support for the contentious elements. That is what happened to the last such measure, the Fair Work Amendment (Remaining 2014 Measures) Bill 2015 (Cth), which lapsed in 2016 without ever being debated.

Yet there are other options. One might be a decision that the time is finally right to stop tinkering and instead propose major changes to the FW Act. If the Coalition genuinely believes that creating greater 'flexibility' for employers to offer lower wages and removing employment protections will create more economic activity and boost employment, as opposed to just profits, it might frame a new set of amendments accordingly and, if baulked by the Senate, take them to the next election. Yet there has been little over the past decade to suggest that the Coalition wants to move back into this dangerous political territory. While the last-minute inclusion in the Omnibus Bill of the BOOT exception hinted otherwise, the fact it was dropped so quickly, and that so little has been done about award complexity, suggest that the pragmatist view remains in the ascendancy.

A very different choice would be to go back to what had been Plan A for most of 2020 and engage in a genuinely consultative process with the labour

218 Ibid, at 60.

219 Bonyhady, 'A Lot of Confusion', above n 64.

220 'Major Greenfields Deals Back on Agenda; Employers Push for More', *Workplace Express*, 9 June 2021.

221 'Stripped-down Bill Returns to House on Monday', *Workplace Express*, 18 March 2021.

movement, to explore a workable compromise on the rest of the Omnibus Bill. But after choosing to abandon tripartism, it would be hard for the government to persuade the ACTU of a renewed commitment to meaningful dialogue. And with an election looming, the ALP would have every incentive to resist compromises and talk up the Coalition's 'real' agenda for more radical reform.

If there is a wild card here, it may be the states, and in particular the ALP governments in Victoria and Queensland. The 'non-excluded' areas in which the states are expressly permitted to legislate by s 27 of the FW Act, such as health and safety, long service leave or discrimination, offer fruitful possibilities for regulatory experimentation. It will be especially interesting to see how far the Victorian Government goes in regulating the burgeoning gig economy.[222] It is possible that initiatives from the states may force the Commonwealth into action, for example in introducing its long overdue national labour hire registration system.[223]

Returning to the Omnibus Bill, its most disappointing feature was its failure to address pressing and fundamental concerns about the design and operation of the FW Act. Nothing was done, for example, to tackle the continuing problems of wage stagnation.[224] Many of the recommendations made in previous inquiries on unlawful underpayment and worker exploitation were overlooked.[225] So too, initially, was the ground-breaking *Respect@Work* report on sexual harassment,[226] although later controversies forced a belated response from the Morrison Government.[227] The longstanding difficulties in determining whether certain workers should be classified as employees, so as to attract the operation of the labour protections in the FW Act and other statutes, were likewise ignored.[228] And far from seeking to reduce the

222 See James, above n 197; Victorian Government, *The Victorian Government Response to the Report of the Inquiry into the Victorian On-Demand Workforce*, Industrial Relations Victoria, Melbourne, 13 May 2021.

223 See 'Coalition Backs Criminal Sanctions, Labour Supplier Registration to Combat Exploitation', *Workplace Express*, 7 March 2019; 'Porter Sets out "Guiding Principles" for National Labour Hire Scheme', *Workplace Express*, 24 January 2020.

224 See A Stewart, J Stanford and T Hardy (eds), *The Wages Crisis in Australia: What It is and What to Do About It*, University of Adelaide Press, Adelaide, 2018; J Stanford, 'The Fair Work Act and Wages' (2020) 33 *AJLL* 18.

225 For example, absent from the Omnibus Bill were provisions concerned with: the inclusion of superannuation as part of the NES (Education, Employment and Small Business Committee, *A Fair Day's Pay for a Fair Day's Work? Exposing the True Cost of Wage Theft in Queensland*, Queensland Parliament, Brisbane, 2018, at Recommendation 13); extending liability for underpayments to non-employing firms outside franchising and corporate groups (Fels and Cousins, above n 18, at Recommendation 11); or introducing an express obligation to pay wages directly into bank accounts (Black Economy Taskforce, *Final Report*, Treasury, Canberra, 2017, at Recommendation 3.2).

226 Australian Human Rights Commission (AHRC), *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces,* AHRC, Sydney, 2020.

227 Australian Government, *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces*, at <https://www.ag.gov.au/sites/default/files/2021-04/roadmap-respect-preventing-addressing-sexual-harassment-australian-workplaces.pdf> (accessed 8 September 2021); Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021 (Cth).

228 Cf C Roles and A Stewart, 'The Reach of Labour Regulation: Tackling Sham Contracting (2012) 25 *AJLL* 258; P Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (2020) 44 *MULR* 502; James, above n 197, at chap 7.

prevalence of insecure work,[229] the new legislation has deliberately chosen to perpetuate the practice of 'permanent casual' employment, as discussed in Part IV.

Despite the Prime Minister's recognition of the value of greater cooperation between management and labour,[230] the Omnibus Bill ultimately did nothing to promote that either. Research has strongly demonstrated the value of expert third party assistance in helping businesses overcome the adversarialism that has long been the default mode for Australian industrial relations.[231] It is an aspect of the FWC's work that could and should be given greater support.[232] But having initially seen the pandemic as offering an opportunity not just for a policy reset, but to make the process of labour policy-making something more than just a private conversation with business representatives, the Coalition ultimately fell back into old habits. Australia is, and will be, the poorer for that failure.

229 See Forsyth, above n 106, at Part II; D Nahum and J Stanford, *2020 Year-End Labour Market Review: Insecure Work and the Covid-19 Pandemic*, The Australia Institute's Centre for Future Work, Canberra, 2020.

230 See, eg, Morrison, above n 2.

231 See M Bray, J Macneil and A Stewart, *Cooperation at Work: How Tribunals Can Help Transform Workplaces*, Federation Press, Sydney, 2017.

232 See Fair Work Commission, *Cooperative Workplaces Program*, at <https://www.fwc.gov.au/disputes-at-work/cooperative-workplaces> (accessed 8 September 2021); Cf Attorney-General's Department, *Cooperative Workplaces*, above n 24, a discussion paper that sees cooperation in almost exclusively unitarist terms, as opposed to the 'pluralist collaboration' that may hold greater prospects for success: see M Bray, J Macneil and A Stewart, 'The Cure for Workplace Strife', *Australian Financial Review*, 4 December 2019.