NON-WAIVABILITY IN LABOUR LAW — AN AUSTRALIAN PERSPECTIVE

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Abstract:

Australian industrial relations laws traditionally provided detailed mandatory standards through a system of arbitrated occupation-based awards. In the years since a shift to enterprise bargaining, the system has tolerated a greater level of flexibility, even in the way that legislated minima are framed. The options for waiving otherwise mandatory standards are however limited by procedural protections. The Fair Work Commission maintains a supervisory role to ensure that workers are 'better off overall' as a consequence of their bargains. This article explains the many ways in which Australian labour standards permit flexible application, within constraints designed to preclude exploitative practices.

Keywords:

Minimum labour standards, modern awards, enterprise bargaining, flexibility, Fair Work Commission

I. INTRODUCTION

There was a time in Australia's history when it was almost impossible for an employer to avoid highly calibrated conditions of work for employees, if those employees were covered by one of thousands of occupation-specific industrial awards. The old system of conciliation and arbitration of industrial disputes by the making of detailed industrial awards left room for "over award" payments, but no room for avoiding the minimum wages and working conditions set by the labour tribunal, unless the worker left the shop floor and moved into a supervisory role.[1] These old awards stipulated wages, working hours, rostering arrangements, penalty rates for additional or unsociable hours, allowances, and all manner of conditions affecting the performance and payment for work. Foenander described the "authoritative control over the employer-employee relationship" afforded by this system as ensuring a "fair and conscionable distribution of the industrial product among employers and employees" and generally benefitting the "welfare of the people more generally" (Foenander, 1959, p. 35). In the 21st century, that level of prescription is well behind us. Sweeping changes to the underpinning philosophy of industrial relations (now more frequently described as "workplace relations") have created a system in which individual employees can agree to vary their working conditions from the mandated standard. The mantra of "flexibility" and "choice" persists in the Fair Work system first introduced in 2009, notwithstanding that Fair Work was a labour government's response to a conservative regime's failed Work

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[1] For an explanation and appraisal of the virtues of the award system enacted in the Conciliation and Arbitration Act 1904 (Cth) see Foenander (1959). For a more recent description see Naughton (2017, pp. 15–119).

Choices experiment.[2] Although the Fair Work "agenda" purported to retreat from the "excesses of Work Choices", "much of the regulatory rationale remains the same" (Murray & Owens, 2009, p. 63).

To make good this claim that labour standards in Australia have become significantly more flexible in recent years, this article will consider several aspects of the current system. First, Part II considers aspects of the federal statute governing employment rights and obligations that allow for flexible application. Even the legislated National Employment Standard (NES) dealing with maximum working hours for national system employees in Australia is not a fixed standard, but permits agreements to accept "reasonable additional hours" above 38 hours a week, and tolerates averaging of weekly hours over as many as 26 weeks in a year.[3] The apparent entitlement to paid leave on public holidays is similarly affected by an ability to agree to reasonable waiver.[4] The modern awards that supplement the statutory safety net with occupation-specific conditions of work (including pay rates, rostering and allowances) can also be varied in their application to specific individual employees who agree to make an Individual Flexibility Agreement (IFA).[5] All award covered employees — even those in the lowest-paid classifications — can make IFAs. Employees earning more than the high income threshold can agree to opt out of the award completely by accepting a written "guarantee of annual earnings."[6] So even the supposed safety net of minimum standards permits some waiver, subject to certain procedural requirements.

The enterprise bargaining system established in the Fair Work legislation, designed to allow for wages and conditions of work above the safety net, permits groups of employees to opt out of award coverage by making an enterprise agreement.[7] The mandatory processes for making and approving enterprise bargains are designed to protect employees from ill-considered agreements. One such process is the Fair Work Commission's obligation to assess a proposed agreement against a Better Off Overall Test (BOOT) to ensure that employees have not been persuaded to trade off their award entitlements without gaining some compensatory benefits.[8] Enterprise bargains also permit individual employees to agree to waive certain entitlements by making an IFA.[9] Each of these aspects of the Fair Work system of employment regulation is evidence of the infiltration of contract law concepts into statutory labour regulation in Australia. So long as employers comply with certain procedural protections to ensure that individuals have not been coerced or duped into acceptance, there is considerable scope for employees to agree to waive otherwise mandatory entitlements. There is still a level of paternalism in the system (Davidov, 2020, p. 490), but it is left in the hands of Fair Work Commission (FWC) members supervising the approval of bargains to decide whether it is fair in all the circumstances to permit waiver.

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[2] For an explanation of the Work Choices laws introduced by the Howard Liberal Coalition government in 2005, see Naughton (2017, pp. 171–202).

[3] Fair Work Act 2009 (Cth) sections 62–64.

[4] ibid., section 114.

[5] ibid., section 144.

[6] ibid., sections 329–332. The high-income threshold is adjusted annually according to a statutory formula set out in the Fair Work Regulations 2009 (Cth) Regulation 2.13, and was set at $A175,000 from 1 July 2024.

[7] Fair Work Act 2009 (Cth) section 57.

[8] ibid., section 193.

[9] ibid., sections 202–3.

Perhaps the most significant opportunity for a worker to waive entitlements to labour standards arises as a consequence of the continued reliance on the common law definition of employment for coverage of the Fair Work scheme, and continued deference to the contract of engagement in characterising work relationships. Notwithstanding some legislative amendments in 2024 to "close loopholes" in the system, it is still the case that the form of contractual agreement entered into between a hirer and worker will determine whether the worker is able to access any of the statutory benefits of employment status.[10] Even where a contract is deemed to be one of employment, it is a relatively easy matter in Australia to establish that the contract is for casual (i.e., temporary) employment, which carries fewer of the standard labour entitlements to benefits such as paid sick leave and recreation leave, notice of termination, and severance pay upon redundancy (the definition of casual employment in Australian law is explained in Part III Section B, below). So Part III will consider the extent to which Australian jurisprudence on the characterisation of contracts for the performance of work permits escape from labour standards.

Part IV considers the extent to which employment entitlements can be waived at the dispute resolution stage, when an allegation of denial of rights has been met with an offer to settle the dispute. While the orthodox position is that parties cannot generally contract out of mandatory statutory entitlements, another norm of our system permits and even encourages settlements of disputed claims, on the basis that it benefits everyone to avoid expensive litigation.[11] There is nevertheless a considerable risk that pressure to settle claims in the interests of saving legal costs will encourage forfeiture of otherwise mandatory entitlements.

The article concludes with observations on the persistent contest between flexibility and security in the Australian system of labour regulation. Protection of workers from exploitation is important, but the mantra of "freedom of contract" and individual flexibility has been particularly strong in contemporary rhetoric surrounding labour regulation in Australia. Although the inevitable inequality of bargaining power in employment relationships is still recognized in Australian law, it seems that the system of statutory regulation focuses increasingly on the provision of process rights (to forestall coercive agreements) rather than immutable mandatory standards.

II. STANDARDS WITH IN-BUILT FLEXIBILITY

B. National Employment Standards

Protection from sweating must be one of the earliest concerns of labour regulation. In Australia excessive working hours have generally been controlled by the imposition of punitive rates of pay for working long and/or unsociable hours. For example, it is not uncommon for a modern award to impose penalty rates of 150 per cent of ordinary rates for working overtime, and 200 or 250 per cent for work undertaken on weekends or public holidays.[12] The argument in favour of this approach is that pricing hours at punitive rates provides some brake on employers demanding long hours, without impeding the liberty of employers and employees to agree to extra working time where that would be mutually beneficial. The NES for maximum working hours reflects this

[10] See Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024 (Cth), particularly section 15AA.

[11] *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26, 31.

[12] See for example the Legal Services Award 2020 clause 21.5(a)(iii).

attitude. While the standard apparently sets a maximum of 38 hours per week, an employer can request that an employee work "reasonable" additional hours,[13] and can also request that an employee agree to average their working hours over as long as 26 weeks.[14] In case of any dispute, what is reasonable will be measured by juggling a range of factors listed in Fair Work Act 2009 (Cth) section 62(3), and these include "whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours."[15] If the employee is covered by a modern award or collective enterprise agreement, the award or agreement will determine whether additional hours attract an overtime premium, but non-award employees (generally white collar professionals) can be asked to work reasonable additional hours without additional remuneration, on the assumption that their annualized salary builds in a degree of flexibility in working hours from week to week. This is permitted because the list of factors in section 62(3) also includes "the needs of the workplace or enterprise", "the usual patterns of work in the industry", and "the nature of the employee's role, and [...] level of responsibility."[16] The same range of factors is taken into account in disputes over whether employers' requests that employees agree to work on public holidays are reasonable.[17]

While the Fair Work Act, in many sections, pays regard to employee welfare (for instance, by listing risks to employees' health and safety, and employees' family responsibilities, as factors to be considered when assessing whether an employer's request for more work is reasonable) it also permits "cashing out" of entitlements to rest and recreation. The standard entitlement to 20 days of paid annual leave each year can be accumulated indefinitely if an employer does not direct an employee to take the leave, and excess leave accruals can be cashed out by written agreement, so long as the employee retains a balance of at least 20 days.[18] This provision can be contrasted with the view generally taken by Commission members determining whether to approve such agreements under the earlier Industrial Relations Act 1988 (Cth). In *Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union v Tweed Valley Fruit Processors Pty Ltd*[19] for example, the Commission held that the entitlement actually to take recreational leave should be preserved as a community standard and ought not be traded for cash.[20] The Fair Work solution might be accused of encouraging the stockpiling of leave balances for trading off as cash bonuses. Whether this is an acceptable form of flexibility depends upon whether one does accept that taking leave annually is an important community standard, and whether one accepts that the

[13] Fair Work Act 2009 (Cth) section 62(1)(b).
[14] ibid., section 64.
[15] ibid., section 62(3)(d).
[16] ibid.
[17] ibid., section 114(4)(d).
[18] ibid., section 94. Note that entitlements to paid personal leave (for sickness and carer's responsibility) cannot be cashed out except according to the limited exceptions in a modern award or enterprise bargain, and generally these permit cashing out only of excessive balances.
[19] (1995) 61 IR 212.
[20] ibid., p. 233. See also *Arrowcrest Group Pty Ltd re Metal Industry Award 1984* (1994) 36 AILR 402; *Enterprise Flexibility Agreement Test Case May 1995* (1995) 59 IR 430, 456; *Re Application by Deckway Pty Ltd (trading as Lilianfels Blue Mountains)* (1995) AILR 1276; *Re Fabricorp Pty Ltd Enterprise Flexibility Agreement 1995* (1996) 64 IR 370*; Re Independent Order of Oddfellows of Victoria Friendly Society* (1996) 65 IR 129.

requirement of a written agreement by the employee is sufficient protection from coercion by employers who would rather pay out the leave than suffer the inconvenience of an employee's absence.

B. Individual Flexibility in Modern Awards

A second tier of the safety net of minimum employment conditions in Australia is the set of 122 modern awards that set wages, rostering conditions, and allowances for different industries and occupations.[21] It is a statutory requirement that all modern awards contain a "flexibility term" that allows employers and employees to agree to make "individual flexibility arrangements," varying terms of the award in the interests of the "genuine needs of the employer and employee."[22]

An example of the use of IFAs is to allow individual employees to agree to work preferred hours outside of the span of ordinary hours prescribed by a modern award, without attracting the penalty rates that would normally apply to work undertaken during those particular hours.[23] For example, ordinary hours in the Meat Industry Award 2020 vary depending upon the kind of establishment employing the meat industry worker. Ordinary hours in meat processing establishments (abattoirs) are six a.m. till eight p.m., Monday to Friday, but ordinary hours in a retail establishment (a butcher shop in a high street) are four a.m. till nine p.m. Monday to Friday, four a.m. till six p.m. on Saturday, and eight a.m. till six p.m. Sunday.[24]

Let's say an individual meat worker employed in an abattoir wants to commence their shift early, at five a.m. so that they can leave work earlier to pick up children from school. Employees with childcare responsibilities have a right to request flexible working arrangements under the Fair Work Act section 65, and employers are obliged to give serious consideration to such requests. According to the Meat Industry Award, that first hour before ordinary hours commence at six a.m. would need to be paid at a penalty rate of 150 percent of the ordinary rate, even though the employee will finish the shift an hour earlier to compensate for the early start. An employer who sees no particular benefit in allowing the worker to commence the shift earlier will not wish to do so, if granting permission attracts a higher wage. As this example shows, agreeing to enter into an IFA allows the employer to accede to the employee's request for a flexible working arrangement: the IFA will effectively vary the span of ordinary hours for this one employee alone. An IFA can only be entered into after the commencement of employment.[25] IFAs must be made without coercion,[26] and result in the employee being "better off overall."[27] In our example, the worker would be better off overall by being able to complete a full complement of working hours, while still meeting their childcare responsibilities. This assumes of course that the worker had a genuine need for this

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[21] For a list of the modern awards currently in operation see <https://www.fwc.gov.au/document-search/modern-awards-list>.

[22] Fair Work Act 2009 (Cth) section 144.

[23] For a full explanation of preferred hours clauses, see Cameron (2012).

[24] For a case illustrating the significance of these differences, see *Australian Meat Industry Employees Union v Dick Stone Pty Ltd* [2022]FCA 512.

[25] Flexibility clauses in awards make this stipulation. See for example the Aged Care Award 2010 [MA000018] clause 7.3.

[26] Fair Work Act 2009 (Cth) section 344(c). See *Fair Work Ombudsman v Australian Shooting Academy Pty Ltd* [2011]FCA 1064.

[27] Fair Work Act 2009 (Cth) section 144(4)(c).

flexibility, and granting the flexibility would be detrimental to the employer, without the ability to relieve the employer of the obligation to pay the penalty rate.

Unions have typically treated IFAs with suspicion because of the clear risk they present in allowing individual employees to agree to forfeit hard-won penalty rates. The FWC does not assess IFAs against the BOOT before they are implemented, in the way that it assesses collective enterprise agreements (discussed below); however, an individual employee who decides that the IFA does not make them better off can access the termination provisions that allow them to terminate the IFA unilaterally by giving the employer not more than 28 days written notice, after which the standard modern award terms will apply.[28]

C. Enterprise Level Flexibility and "Flexibility Within Flexibility"

Modern award IFAs allow variation of award conditions for particular individuals (an IFA will not affect the application of the modern award to all other employees).[29] By contrast, whole classifications of employees can waive award conditions entirely by making collective enterprise agreements.[30] The enterprise bargaining system first introduced in Australia in 1993 has evolved through various iterations, and allows employees to opt out of award coverage, so long as mandatory processes for bargaining and approving agreements are followed.

One of the peculiarities of the contemporary system of collective bargaining in Australia is that it is not necessary that bargaining will involve trade unions acting on behalf of employees. Employees need to be advised of their right to engage a bargaining representative, but this need not be a union, and they need not exercise that right.[31] Enterprise bargains can be made and approved without any genuine negotiation having taken place (Chaudhuri & Sarina, 2018). A proposed enterprise agreement can be presented to employees, and so long as more than 50 percent of the employees who bother to cast a vote agree to accept it, the enterprise bargain terms will bind the employer in respect of all employees, to the exclusion of the modern award terms, once the agreement has been approved by the FWC.[32] The Fair Work system purports to protect against the risk of unrepresented employees agreeing to disadvantageous bargaining by charging the FWC with certain responsibilities before approving an agreement. The FWC must be satisfied that the bargain has been "genuinely agreed" by employees after proper explanation of its terms, and must test the agreement against a BOOT to ensure that any trade-offs against award entitlements do not diminish employees' overall benefits.[33]

There have been cases where the FWC has refused to approve an agreement — even where it has initially been endorsed by a trade union purporting to represent the industrial interests of employees — on the basis that the agreement did not pass the BOOT in respect of a particular cohort of workers. A notable example was the agreement scrutinized in *Hart v Coles Supermarkets Australia Pty Ltd*, where approval of

[28] ibid., section 145(4)
[29] ibid., section 144(3).
[30] The current provisions dealing with the making of collective enterprise agreements are in Fair Work Act 2009 (Cth) Part 2-4. For a comprehensive explanation of the system see Stewart et al (2024).
[31] Fair Work Act 2009 (Cth) sections 173-176.
[32] ibid., section 182(1).
[33] ibid., sections 193–193A.

an agreement put forward by the employer with the support of the Shop, Distributive and Allied Employees Association (SDA) was overturned, because it was found to disadvantage workers who worked only on weekends.[34] The agreed increase to ordinary rates of pay did not outweigh the reduction in weekend penalties for those who only worked shifts attracting penalty rates. It is frequently alleged (mainly by a rival union, the Retail and Fast Food Workers Union, RAFFWU) that agreements supported by the SDA do not pass the BOOT, at least in respect of the casual workers who tend to fill shifts on weekends. This tension reflects very much the fact that over time the interests of workers in the retail and fast food sector have become fractured by the dominance of casual work. The (often young) workers who work casual shifts on weekends are affected differently from permanent employees who work their hours during "ordinary hours" on weekdays. The difficulties of meeting the BOOT in respect of a heterogeneous group of workers whose industrial interests differ has been recognised in recent amendments to the legislation which provide that in applying the BOOT the FWC must consider patterns or kinds of work that are reasonably foreseeable at the test time, so that purely hypothetical scenarios (such as the employee who works only on public holidays) will not compromise the possibility of trading off some reduction in penalty rates for improved ordinary rates of pay.[35] All complexities aside, the number of cases considered by the FWC, and the frequency of decisions rejecting bargains for failing the BOOT, suggests that the process for scrutinising decisions is in fact limiting the risk that employees will waive award rights without adequate compensation.[36]

Proof of an employer's failure to properly explain the terms of an agreement can also result in the FWC refusing approval, even if the agreement would not fail the BOOT on other grounds.[37] Likewise, any agreement that is found to have been made following misrepresentations by the employer will also be refused approval.[38] These provisions support the principle that all compromises of award rights — even apparently beneficial ones — need to be genuinely agreed. "[O]nly free choices can be considered valid (if we decide to allow waivers at all)" (Davidov, 2020, p. 495).

Nevertheless, there is scope for an employer to persuade the FWC to approve an agreement notwithstanding its failure of the BOOT, if it is "not contrary to the public interest" to approve the agreement, taking into account arguments related to the ongoing viability of the employer's business.[39] This provision is designed to allow agreements between employers and a majority of their employees to make accommodations to allow a business to survive a short term crisis, presumably because maintaining employment is preferable to allowing a business to fail for insolvency. Agreements approved under this provision must have a nominal expiry date no longer than two years from approval.[40] Notably, it is for the FWC to determine the question of public interest. It is not sufficient for the employees themselves (or even

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[34] [2016]FWCFB 2887.

[35] See Fair Work Act 2009 (Cth) section 193A(6), enacted by Act No 79 or 2022.

[36] Examples of cases where agreements failed the BOOT include: *RSL Care RDNS Limited trading as Bolton Clarke* [2024]FWC 2870; *Application by Skilled Workforce Solutions (NSW) Pty Ltd* [2024]FWC 2625; *Application by Hawthorne Plant and Logistics Pty Ltd* [2024]FWC 2756.

[37] See for example *LFP Australia Pty Ltd trading as Subway* [2024] FWC 2013.

[38] See for example *National Tertiary Education Industry Union v Southern Cross University, CPSU, the Community and Public Sector Union SPSF Group* [2023] FWCFB 200.

[39] Fair Work Act 2009 (Cth) section 189.

[40] ibid., section 189(4).

their trade union representative) to agree to accept an agreement with disadvantageous terms in order to save their jobs. This provision is an illustration of the principle that Professor Davidov describes as prevention of the risk of "harm to others" (Davidov, 2020, p. 494). If the employees of one enterprise are permitted to accept conditions that undercut the award, even for their own benefit, it can influence the "expectations of employers in the labour market," and encourage a "race to the bottom" (Davidov, 2020, p. 495).

As noted above, enterprise agreements are made by a majority vote of employees, so it is possible that employees in the minority will have different preferences as to terms. To accommodate a level of individual flexibility, enterprise agreements must also include flexibility terms permitting individual employees to agree to make an IFA which genuinely reflects their personal need for conditions other than those stipulated by the collective enterprise agreement.[41]

D. Reflections

The Fair Work regime straddles the enforcement of a robust safety net of mandatory entitlements, and facilitation of the kind of flexibility demanded by an increasingly diverse workforce. The participation of women — particularly those with carer responsibilities for children and aged relatives — and efforts to increase the workforce participation of persons with disabilities, have influenced the rhetoric around flexible labour standards, particularly in the years since the COVID-19 pandemic. At the height of the pandemic, during the lockdowns that prevented many businesses from requiring staff to attend workplaces, emergency temporary measures were introduced to allow variation of award requirements, particularly in respect of "ordinary hours." During this time many employees who were working from home needed to be able to squeeze their working hours in around home schooling, and the restrictions arising from sharing working space (often kitchen benches and living room couches) with cohabitants.

The FWC varied several awards, largely by consent between unions and employer groups, to facilitate working from home, reductions in working hours, and changes to the entitlements of employers regarding directing employees to use up annual leave entitlements (Ross, 2021, p. 14). These measures were "firmly designed to protect jobs and conserve the viability of businesses by introducing new forms of flexibility in three areas: functional flexibility, temporal flexibility and geographic flexibility" (Murray et al., 2021, p. 65). While these measures were temporary, they sparked ongoing debate about the scope for greater worker-friendly flexibility in the post-COVID world, where at least some level of working from home is now tolerated, at least for clerical and professional styles of work that are suitable for remote working.

One useful observation from this period of crisis is that the capacity for flexibility inherent in Australia's Fair Work system — managed as it is by the FWC with broad powers to set and reset standards in consultation with unions and employer stakeholders — proved to be highly responsive to the emergency, perhaps illustrating that the capacity to waive mandatory standards is a valuable feature in a contemporary system of labour regulation (Murray et al., 2021, p. 75). The trick is to ensure safeguards against the risk that the capacity for flexibility will be coopted only in the interests of reducing labour costs for employers, at the expense of workers and their living

[41] ibid., section 202.

standards. The Fair Work Act's requirement that the FWC regard a balanced range of objects when performing its various functions seeks to guard against this risk. Those objects include guaranteeing a "safety net of fair, relevant and enforceable minimum terms and conditions" of work while also "assisting employees to balance their work and family responsibility by providing for flexible working arrangements."[42] One of the specific objectives is:

> ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system.[43]

To the extent that an IFA is a "statutory individual agreement" this object directs that it must not be made so as to undermine provision of fair arrangements for employees.

III. CONTRACTING OUT ENTIRELY

A. Contractors

The discussion above presumes that the worker is an employee, covered by the Fair Work system. The Fair Work Act continues to rely on the common law definition of employment to determine which workers are eligible for most of its protections.[44] Given that employment is still seen as a contractual relationship, dependent upon the parties' own agreement as to terms, it is possible for workers to waive an entitlement to coverage by labour standards by agreeing to perform their services as contractors. Simply labelling a work contract as an independent contract will not be sufficient to permit the parties to escape the consequences of what is in fact an employment contract. For example, an initial statement that "this contract does not create any employment relationship," will not be conclusive.[45] However, including terms that permit the worker discretion as to whether, and when, to perform the services, and allowing the worker to subcontract tasks to others, will generally be sufficient to take the arrangement outside of the scope of employment.

For a time, Australian law would look only to the express terms of the contract made between the parties to determine whether the engagement bore the character of employment.[46] A recent amendment to the Fair Work Act brought the Australian approach to determining employment into line with jurisprudence in the United

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[42] ibid., sections 3(b) and 3(d).
[43] ibid., section 3(c).
[44] Ibid., sections 42, 44, 133. Certain outworkers are treated as employees (see Fair Work Act Part 6-4A, Division 2), but generally statutory entitlements to minimum wages and working conditions are confined to workers classified as employees according to common law tests.
[45] *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 275 CLR 175, [63]–[66], [127], [184]. See also *Workpac Pty Ltd v Rossato* (2021) 392 ALR 39; [2021]HCA 23, [98].
[46] See *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 275 CLR 175 and *ZG Operations Australia Pty Ltd v Jamsek* (2022) 275 CLR 254, and also *EFEX Group Pty Ltd v Bennett* (2024) FCAFC 35. For a discussion of these cases see Stewart et al. (2023).

Kingdom[47] and New Zealand.[48] Fair Work Act section 15AA now requires a decision maker (whether a court or a tribunal) to take account of the "real substance, practical reality and true nature of the relationship," and not merely the terms of the contract, when determining a worker's status for the purposes of Fair Work Act entitlements.[49]

While this provision means that the 2022 High Court majority decisions in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*[50] and *ZG Operations Australia Pty Ltd v Jamsek* are no longer sound authority on the question of what kind of evidence can be adduced to characterise a relationship, they remain good law on the common law tests to be applied.[51] It is still a question of whether the parties can be shown (by evidence of both the terms of their contract and proof of their conduct in performing it) to be in a relationship whereby one (the employee) is subservient to the other's business. That question can be answered by considering a range of factors, commonly referred to as the "multifactorial" or "multiple indicia" test.[52]

In the contemporary labour market, the factors in the multiple indicia test are manipulable.[53] In Australia it is a straightforward matter for a hirer to engage a worker on the basis that the worker is engaged through a partnership or company structure (Australian law permits single shareholder, sole director companies[54]), provides their own equipment, and manages their own working hours. There is no requirement that the worker must have their own discrete business, servicing their own clients, in order to be an independent contractor.[55] It is sufficient that the hirer can establish that the hirer does not control, and has not subsumed the worker into their own business. Consequently, in Australia a relatively high proportion of labour market participants are contractors who do not hire employees of their own. According to the 2016 Australian census, 9 per cent of the Australian workforce was engaged as independent contractors (Gilfillan, 2018a). Of these, 826,900 owned incorporated enterprises, but 338,400 did not employ anyone else in the business, and 1,193,100 operated unincorporated enterprises, 949,600 with no employees (Australian Bureau of Statistics, 2016). In all, 1,288 million independent contractors were sole traders with no employees of their own. These workers have effectively contracted out of the protections of the Fair Work system.

As a concession to those who support the freedom of workers to elect to be treated as contractors rather than employees, even if the reality of their engagement would meet the common law test for employment, the new Fair Work Act provisions allow high income workers to opt out of the application of section 15AA. Fair Work Act

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[47] See *Autoclenz Ltd v Belcher* [2011] UKSC 41; [2011] 4 All ER 745; *Uber BV and Ors v Aslam and Ors* [2021] UKSC 5.

[48] The Employment Relations Act 2000 (NZ) section 6 requires courts to regard the real nature of relationships and not merely the terms of a contract.

[49] Fair Work Act 2009 (Cth) section 15AA.

[50] (2022) 275 CLR 175.

[51] (2022) 275 CLR 254.

[52] The factors set out and applied in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 and *Hollis v Vabu Ltd* (2001) 207 CLR 21 continue to apply.

[53] For a useful critique of recent case law demonstrating this point, see Sutherland (2022).

[54] See Corporations Act 2001 (Cth) section 114 (a company needs only one member) and section 201A(1) (minimum number of directors in a proprietary company is one).

[55] See the Fair Work Commission's finding in *Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd trading as Uber Eats* [2020] FWCFB 1698, [69].

sections 15AB and 15AC provide that a worker who is earning above a contractor high income threshold (initially set at $A175,000) can provide a written notice to the hirer to opt out of the application of section 15AA, meaning that the terms of their written contract will be conclusive for the purpose of characterising their relationship, even if the practical reality of their engagement belies the terms of that formal contract. To put this threshold into context, the minimum wage in Australia in 2024 was approximately $A47,600 per annum,[56] and the average salary was approximately $A100,000 per annum.[57]

The opt out provisions are a further example of the tendency for Australian industrial regulation to permit waiver of employment entitlements by higher income earners. High income earners are taken to be capable of negotiating their own arrangements, and managing their own protection from potential exploitation. An opt-out notice given under section 15AB can be revoked with immediate effect, should the high income contractor change their mind, meaning that the section 15AA interpretation provision will again apply to determine whether they are in fact employees, taking into account the real substance and practical reality of the relationship. It would appear that this provision — as yet untested in any litigation — ensures that the choice of whether to be classified as a contractor on the basis of contract terms only, is one that is exercisable only by the worker, and not the hirer.

B. Casual Employees

Even where a hirer cannot, or chooses not to, relinquish the level of control over the worker that would constitute employment, it is a relatively straightforward matter to engage workers as casual employees, with no commitment to continuing engagement, no paid leave entitlements, and more limited protection from wrongful dismissal. For the best part of a century, casual work was recognised in industrial awards as a category of employment whereby the employer and employee made no binding commitment to ongoing work. The common law defined casual work to be employment in which there was no advance commitment to continued engagement, and yet in practice many so-called casuals worked regular and systematic hours for many years (O'Donnell 2004; Owens, 2001). In 2017, a test case undertaken by the FWC observed that many casual employees worked regular rosters over a long term.[58] Evidence before the Commission revealed that 28 per cent of casuals had worked regular rosters in the same job for more than three years, and 60 per cent had done so for more than six months.[59]

There is a long history of disputation in Australia over casual work and how it should be defined, culminating in an important High Court decision in 2021, *Workpac Pty Ltd v Rossato* (for an explanation of this history see Stewart et al., 2021).[60] While this litigation was on foot, a conservative government inserted a definition into the Fair Work Act (section 15A) to provide that a casual employment relationship is characterised by

[56] From 1 July 2024 the minimum wage in Australia was set at $A915.90 per week, or $A24.10 per hour. See Annual Wage Review 2023–24 Decision [2024] FWCFB 3500.
[57] Estimated at $A1,924.60 per week in May 2024: Australian Bureau of Statistics (2024).
[58] *Re 4 Yearly Review of Modern Awards – Casual and Part-time Employment* (2017) 269 IR 125, [85].
[59] ibid, [115].
[60] (2020) 378 ALR 585.

"an absence of a firm advance commitment to continuing and indefinite work."[61] The definition originally provided that decision-makers must consider only the terms of the contract entered into by the parties at the time of engagement to determine whether there was any on-going commitment to continuing work.[62] No regard could be paid to subsequent conduct in the performance of the work, so it was possible for a person working for years on regular rosters to be treated as a casual, so long as the initial engagement stipulated that the engagement would be temporary.

In 2024, the Australian Labor Party government enacted an amendment to section 15A, to take effect from 26 August 2024, which parallels the new law on employee status in requiring decision-makers to regard the "real substance, practical reality and true nature of the employment relationship" rather than formal contract terms, and this may be inferred from subsequent conduct of the parties.[63] At the time of writing it was too early to judge whether this new definition would affect the overall numbers of casual employees in Australia. Prior to the COVID-19 pandemic (which distorted labour force participation statistics, because many casual staff lost their jobs), 25 per cent of the employed workforce in Australia were engaged as casuals, without paid leave entitlements (Gilfillan, 2018b). By the end of 2022, 23.5 per cent were engaged as casuals (Australian Bureau of Statistics, 2022).

Why casual employment has been so widely accepted in Australia perhaps needs some explanation. In Australia, casual employees effectively "cash out" the paid leave entitlements due to permanent employees by way of a 25 per cent loading on minimum rates of pay. The 25 percent loading makes casual hourly rates attractive, especially to young workers, but they do forfeit any entitlement to paid leave if they are ill or suffer some other emergency. Permanent staff are entitled to a minimum of 10 days paid personal/carers' leave each year.[64] Casuals cannot take paid recreation leave, which generally amounts to four weeks of leave per year for full-time permanent staff, and five weeks for shift workers.[65] They are not entitled to paid time off on the (roughly) 11 public holidays held each year.[66] They are not entitled to notice if the employer decides to terminate their employment contract,[67] nor severance pay if their position is made redundant.[68] It is perhaps a peculiarity of the Australian system that it accepts the notion of a pay loading to buy out all forms of leave for casual employees, at the same time as limiting the opportunities for cashing out of leave entitlements by permanent staff (as explained above).

As noted above, although close to one quarter of the employed labour force in Australia is engaged casually, these workers are not all working intermittent, short shifts. It remains to be seen whether the legislative changes coming into effect late in 2024 will alter labour market practices around the engagement of casuals.

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[61] Fair Work Act 2009 (Cth) section 15A.
[62] See Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Cth). For an explanation of this amending statute's treatment of casual engagement see Stewart et al. (2021).
[63] Fair Work Act 2009 (Cth) section 15A(2)(a), and 15A(3)(a), inserted by the Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024 (Cth) Schedule 1, Part 1.
[64] Fair Work Act 2009 (Cth) sections 95-101.
[65] ibid., sections 86-94.
[66] ibid., sections 114-116.
[67] ibid., section 117.
[68] ibid., section 119.

At the time of writing, it was also too early to judge whether the enhancement of employees' rights to request conversion from casual employment to permanent employment would have a significant impact. Unions agitated for many years for the inclusion of entitlements in awards allowing casual employees to convert to permanent status. From 2021, there have also been statutory entitlements to request conversion, although these are hemmed around with many qualifications.[69] It has been observed that the inclusion of casual conversion rights in many modern awards in 2017 did not result in high levels of conversion, possibly because many long term casuals have become accustomed to receiving the 25 per cent wage loading applicable to casual engagement, and have no appetite to accept a significant pay cut, even in exchange for the paid leave entitlements available to permanent employees (Stewart et al., 2021, p. 149). The evident propensity of many of the most low-paid workers to cash out entitlements to greater long-term security illustrates the risks inherent in allowing individuals to waive entitlements. Extra cash in the short term can trap employees into precarious jobs without career prospects. This was noted in *State of New South Wales v Amery*, a case involving a discrimination claim brought by women in the state education system.[70] It was recognised in that case that temporary or casual teacher status confined incumbents to lower pay scales, regardless of years of service, while permanent employees were entitled to advance through pay scales with progressive years of experience. Over time, the benefit of the casual loading can be outweighed by the many benefits attendant upon long service in permanent employment. For example, in Australia, ten years' continuous service with the same employer attracts an entitlement to (approximately) three months' of paid "long service leave."[71]

C. Labour Hire

The widespread use of labour hire in Australia has facilitated the contracting out of the application of union-negotiated enterprise bargains, and sometimes even the NES if workers are engaged as contractors. Labour hire permits a host employer to contract with a labour hire agency for the supply of labour.[72] The labour hire agency will enter into contracts with workers — either as independent contractors or as casual employees — and post them to work with the host. Under Australian law, the workers, if employees at all, will be the employees of the labour hire agency with whom they have their direct contractual relationship.[73] They will not be employees of the host, so will not generally be entitled to participate in collective bargaining directly with the host.[74] This is why it is not uncommon for host employers to escape the obligation to pay the wages and

[69] ibid., sections 66A–66MA.
[70] (2006) 151 IR 431.
[71] Fair Work Act 2009 (Cth) section 113. The provisions relating to long service leave are complex and entitlements vary depending upon State laws and enterprise agreements.
[72] For a thorough study of labour hire in Australia see Forsyth (2016).
[73] See *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 275 CLR 175, 39. See also *Drake Personnel Ltd v Commissioner of State Revenue* (2000) 2 VR 365; *Staff Aid Services v Bianchi* (2004) 133 IR 29.
[74] This is because most enterprise bargaining is at "single business" level. Amendments to the system permitting some kinds of multiple enterprise agreements were enacted by the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth) that may allow unions to bargain across a number of enterprises that share a common interest. These provisions have not been used extensively yet, so are not considered here. See Stewart et al. (2024) chapter 14 for a detailed explanation of the contemporary bargaining system in Australia.

conditions set by union-negotiated enterprise bargains to all of the workers providing labour to their enterprises. Some (perhaps many) of the workers supplying labour will be engaged by labour hire agencies. This tactic has been recognised as a source of inequality in labour markets, and a contributor to wage stagnation at a time when economists around the globe have recognised the broader economic risks of a declining share of Gross Domestic Product going to wages. Consequently, the Albanese Australian Labor Party government has introduced measures to enable employees of labour hire agencies to claim equivalent wages and conditions to those enjoyed by the host's directly employed staff who are doing the same jobs.[75] The provisions are hemmed around with qualifications, and will not apply to any labour hire arrangement with an agency that provides a "service," and not merely warm bodies to do the work.[76] Nevertheless, the new provisions provide some constraints on labour engagement practices that are designed only for the purpose of escaping the obligation to observe enterprise bargains. As such, they purport to limit the scope for host employers to contract out of otherwise applicable labour standards.[77]

IV. CONTRACTING OUT AT THE POINT OF ENFORCEMENT

The above discussion has focused on the scope available in Australian labour law for parties to waive entitlements absolutely, or *ex ante*. There is also a risk that rights will be waived *ex post* at the point of enforcement, because of decisions embedded in Australian legislation concerning the "best" approach to dispute resolution in matters related to work relationships. Many basic entitlements arise from modern awards. All modern awards include a mandatory dispute resolution clause that encourages disputes to be settled at the level of the workplace, and this leaves large scope for compromise of rights, in a manner invisible to scrutiny. Local dispute settlement is not mandatory. Employees always have the option to escalate a dispute, sometimes to arbitration by the FWC (if the employer agrees to submit to arbitration), and ultimately to litigation in the federal court system should the employee choose to do so; but the requirement to attempt local dispute resolution first, and the costs and delays involved in litigation, often render this option untenable for the ordinary worker. This reality perhaps explains the deliberate encouragement of alternative dispute resolution measures in Australia.[78]

The FWC's jurisdiction to deal with sexual harassment disputes, introduced in 2022, provides an illustration of the approach apparently preferred by legislators.[79] Under Fair Work Act section 527R, the FWC must first hold a conference to attempt to

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[75] The measures, labelled "Same Job Same Pay" measures, were enacted in the Fair Work Legislation Amendment (Closing Loopholes) Act 2023 (Cth) in December 2023, to take effect from 1 November 2024.
[76] See Fair Work Act 2009 (Cth) Part 2-7A "Regulated labour hire arrangement orders".
[77] A number of applications under this legislation had been made, but not yet resolved, at the time of writing, so no attempt has been made here to assess the effectiveness of these new provisions.
[78] A National Alternative Dispute Resolution Advisory Council was established by the Attorney-General's department in 1995, and operated until 2013, to promote alternative dispute resolution in federal matters. Now, the Civil Dispute Resolution Act 2011 (Cth) section 3 obliges parties to take "genuine steps to resolve disputes before certain civil proceedings are instituted." Proceedings under the Fair Work Act 2009 (Cth) are excluded from these requirements, but only because the Fair Work Act itself stipulates that parties must first attempt conciliation before pursuing litigation in proceedings brought under the Act. See for example Fair Work Act 2009 (Cth) section 368.
[79] See Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (No 79 of 2022).

resolve the dispute. If those attempts are unsuccessful, the Commission must issue a certificate to that effect, stating an opinion on the applicant's prospects of success should the matter proceed (by mutual consent) to arbitration by the FWC under section 527S, or, if the parties cannot agree to arbitration, to litigation in the Federal Court under section 527T.[80] A court application cannot be made without first obtaining the Commission's certificate, indicating that the initial conciliation conference is a compulsory step in the process.[81]

Complaints of discrimination brought to the Australian Human Rights Commission (AHRC) must also first go through a process of conciliation, in an attempt to resolve the dispute before an aggrieved party can take a claim to the Federal Court.[82] A plaintiff who wishes to pursue the claim in the Federal Court must generally seek the court's leave under the Australian Human Rights Commission Act 1986 (Cth) section 46PO(3A)(a), unless the AHRC has already indicated when terminating the original complaint that the matter raises matters of public importance, or has no reasonable prospect of resolution by conciliation (probably because the alleged perpetrator of the discriminatory conduct refuses to participate).[83] So in discrimination complaints also, the first compulsory step is an attempt to resolve the matter by confidential agreement. Discrimination scholars have often criticized the system for its lack of transparency, on the basis that the lack of publicly available information on the fact or quantum of settlements makes it difficult to establish precedents in the field (Allen & Orifici, 2023). On the other hand, the individual complainants have every reason to want to avoid drawn out, expensive, and distressing legal disputes, when they have already suffered personal trauma. In general, it appears that the Australian system has preferred encouragement of settlement over the establishment of legal precedent in many kinds of workplace matters.

It is common practice for employers seeking to settle claims with departing employees to require them to sign deeds of settlement prior to receiving payment of severance amounts. If an employee subsequently seeks to litigate a claim against the employer, the deed will be scrutinized to determine whether it has been effective to preclude any further claim by the employee. Case law in Australia suggests that there is no clear answer to the question of whether labour rights can be waived at the point of settlement of a claim, except perhaps in the case of workers' compensation claims, where legislation specifically provides that rights cannot be compromised in any circumstances.[84] On the one hand, it has been stated with considerable authority that "rights under industrial legislation and awards subsist notwithstanding any agreement

[80] The separation of powers under the Australian Constitution means that the FWC (as an administrative body) cannot compulsorily determine legal rights. It may act as an arbitrator by consent of the parties, but only a federal court exercising judicial power can determine legal rights and impose sanctions. See Sawer, (1961) and Wheeler (1996) for an explanation of this doctrine, known as the Boilermakers Doctrine, from *R v Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254 (High Court of Australia); (1957) 95 CLR 529 (Privy Council).

[81] Fair Work Act 2009 (Cth) section 527T(1)(a).

[82] See Australian Human Rights Commission Act 1986 (Cth), sections 46PD–46PF.

[83] ibid., sections 46PH(1)(h) and 46PH(1B)(b).

[84] See Workplace Injury Management and Workers Compensation Act 1998 (NSW) section 234.

to the contrary."[85] In *Qantas Airways Ltd v Gubbins* it was decided that victims of discriminatory acts prohibited by statutes should not be free to bargain away their right to relief from the courts in advance, but they were free to accept a compromise of a claim when settling a dispute prior to hearing.[86] The reason for allowing compromise of claims in the context of settlement is explained in *Wardman v Macquarie Bank Ltd* as benefitting the claimant by receiving guaranteed compensation, and avoiding the costs of litigation and the risk of an uncertain result.[87] The fact that the Fair Work Act creates a "no costs" jurisdiction supports this argument.[88] Even successful plaintiffs will not usually be able to make any claim against the defendant for costs, so the pursuit of a claim will inevitably be costly for an individual litigant unsupported by a union willing to cover the costs of litigation. And indeed in *Leach v Commonwealth of Australia* it was held that a broadly worded release signed to settle an unfair dismissal claim was also effective to preclude the plaintiff from bringing a later sexual harassment claim, although it could not prevent her bringing a workers' compensation claim.[89] On the whole, the approach of the Fair Work system is to encourage informal dispute resolution, and to support early settlement of claims. Inevitably, this will mean that some claimants do end up waiving an entitlement to complete compensation in vindication of their rights.

V. CONCLUDING OBSERVATIONS

The range of statutory entitlements afforded to employees in Australia confirms a commitment to the protection of employees (if not all workers) from exploitation. Certainly, that range of rights has expanded considerably since the time that Foenander (1959) was writing in praise of the protections guaranteed by the mandatory system of industrial awards established by the Conciliation and Arbitration Commission of the time. Post 1996, however, the mantra of freedom of contract and enhanced flexibility in working arrangements, has influenced the approach to standard setting, and encouraged the creation of many avenues for employers to avoid the standard rules by making enterprise level agreements with groups of employees, and even individual arrangements with single employees.

The risks associated with unequal bargaining power between employers and employees are now managed largely through affording process rights to employees and their representatives. Agreements waiving the standard terms of awards must be "genuinely agreed" after employees have been given a certain amount of time to consider, and proper explanation of, proposals. A statutory body — the FWC — is charged with the responsibility of supervising the process of collective agreement making, and must be satisfied that agreements leave employees "Better Off Overall" before they can be implemented. While individual flexibility arrangements are not scrutinized in advance, employees can escape an inconvenient agreement relatively easily if they choose to do so. This approach is certainly a concession to the rhetoric

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[85] *Josephson v Walker* (1914) 18 CLR 691, 700, cited with approval in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 421 (Brennan CJ, Dawson and Toohey JJ) and more recently in *Wardman v Macquarie Bank Limited* [2023] FCAFC 13.

[86] (1992) 28 NSWLR 26.

[87] [2023] FCAFC 13, [199]-[205].

[88] See Fair Work Act 2009 (Cth) section 570. Costs will only be awarded against a party who has commenced or continued with a proceeding vexatiously or unreasonably.

[89] [2021] FCA 158.

regularly espoused by Australian business leaders, who assert that employment security overall is enhanced where employers can establish employment practices tailored to improve the productivity of their enterprises and hence their capacity to hire and retain staff.

Whether the system has in fact been successful in supporting that approach remains a matter of debate. In recent times, a frightening number of high-profile underpayment cases, involving major companies with thousands of employees, suggests that the flexibility obtained through the system may leave employees uncertain of their entitlements, and is more often engaged to favour employers. Some of the employers caught up in these scandals have deliberately evaded obligations, but many claim to have merely made errors in managing their payrolls, claiming an onerous level of complexity in the Fair Work system, with its layers of regulation. Many of these errors have been discovered by the Fair Work Ombudsman charged with educating labour market participants about workplace rights, and pursuing claims in egregious cases (Hardy, 2020, 2024; Hardy & Howe, 2009, 2017).

There are also many cases where workers have been denied employment rights because they have agreed to be engaged as independent contractors. Or they have been found to have forfeited the rights associated with permanent employment, by agreeing to an apparently casual employment contract. Measures to address these "loopholes" in the system have been enacted, but it is too early to assess their effectiveness.

In the end it is a question of balancing competing objectives: maintaining decent labour standards, while accommodating the kind of flexibility demanded by changing labour markets. Loopholes are extensively exploited, because demands for flexibility are strong, and not always only from the employer lobby. In higher income brackets, some workers agree to be engaged as contractors because they are ignorant of the valuable employment benefits they are surrendering (such as paid leave entitlements, and employer superannuation contributions) in exchange for the apparent tax benefits of being an independent contractor.[90] Even lowly paid workers have sometimes swallowed the rhetoric of "being your own boss." Platforms engaging gig workers as supposedly self-employed contractors claim to be able to point to surveys indicating that a significant proportion of the workers signing up to the platforms value the freedom and flexibility that this form of work permits (Rawling & Riley Munton, 2022, pp. 17–18). In the near future, the FWC will be able to set mandatory minimum standards for non-employed digital platform workers (assuming no reversal of recent reforms by any new government) (Rawling, 2024). This is a contemporary Australian example of the "more nuanced, tailored solutions" to the problem of worker classification identified by Davidov (2020, p. 499). Legislators are attempting to accommodate flexibility, but in a manner that supports the maintenance of decent minimum labour standards across the whole labour market. In Australia, the form of regulation preferred for achieving that objective is not to set hard legislated standards, but to empower the FWC to make instruments tailored for the needs of particular occupations and enterprises, and to supervise the processes of agreement-making to preclude exploitative practices. And when it comes to enforcement, a similarly tailored solution is preferred — dispute resolution at the local level is encouraged, as are settlements of claims,

[90] See for example the circumstances of the workers in *ZG Operations Australia Pty Ltd v Jamsek* (2022) 275 CLR 254.

notwithstanding that parties may be arguing over statutory rights that cannot be waived in advance.

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