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Submission on the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022

1. Introduction

The Civil Contractors Federation (CCF) would like to thank the Education and Employment Legislation Committee for the opportunity to provide a submission on the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022.*

CCF wishes to express its disappointment at the incredibly short time frame afforded to the civil construction industry to provide comment on the Bill and at the time of writing this submission further amendments have been introduced by the Government some of which we will also consider without prior knowledge of their contents.

CCF is a peak registered employer organisation under the *Fair Work (Registered Organisations) Act 2009* and its 1,900 members are responsible for the construction and maintenance of Australia's civil infrastructure, including roads, bridges, tunnels, pipelines, drainage, ports and utilities.

In this context, CCF seeks an industrial relations framework that is balanced, fair and supports sustainable operating conditions with minimal industrial disruption thereby maximizing the industry's triple bottom line (i.e., economic, social and environmental) contribution to the Australian economy.

The CCF's in principle policy position is that workplace relations reform should strive to ensure the civil construction industry can continue to contribute strongly to the Australian economy by facilitating productivity improvements, providing fair and equitable working conditions and remuneration to employees, as well as achieving a much greater level of certainty and security for our civil contracting businesses, the people they employ, their families, communities, and the investors (both government and private).

CCF believes that the key features of a productive employment and workplace relations system should be based on the following underlying principles, and it is against these principles we have in the limited time afforded, assessed Secure Jobs, Better Pay.

- The primacy of the relationship between an employer and employee with the parties free to bargain directly with each other without the forced interposition of third parties to achieve the productivity outcomes necessary for a particular workplace. The relationship between the employer and employee and productivity improvements should be the fundamental starting point, and a key feature of enterprise bargaining.

- Genuine freedom of association – we support genuine freedom of association that is the right to join a union or not join a union or an employer association. CCF supports the rights of employees

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to be represented by a union however that choice must be a free one and we oppose legislation that appears to give preferential representative rights to unions whether sought by employees concerned or not.

- Respect for the rule of law by both employers and employees – facilitated by meaningful sanctions, speedy enforcement mechanisms and a strong, industry-specific regulator for unlawful behavior and industrial action – particular issue in the building and construction industry.

- The need for flexibility in our industrial relations landscape– the labour market and economy need as much flexibility as possible, and now is not the time to centralise regulation noting that historically highly centralised systems have relied heavily (in our opinion too heavily) on third party intervention), and the Central Empire should have a clearly defined and limited role and generally only become involved in the case of irreconcilable differences between the parties.

In the limited time available, and in response to the Committees direction to address all or parts of the Bill, CCF has reviewed the Bill and is pleased to provide its input into the following aspects of the Bill:
1. Abolition of the Australian Building and Construction Commission
2. Multi-employer bargaining
3. Risks of expanded industrial action
4. Other matters
5. Conclusion

2. Executive Summary

The CCF submission has been developed against the following summation:
- We have been carved out of the exemption for multi-employer bargaining. The unintended consequences of this Bill to the civil infrastructure industry could be profound. On at least two fronts. Local, State and Federal economies rely very heavily on productive expenditure in the construction of the Nation's critical infrastructure – this Bill may well impact budgets. Further, civil construction businesses are already struggling with increasing inflation, rising costs and supply of materials, critical labour shortages and poor mental health outcomes amongst a range of other operating pressures., This Bill risks worsening productivity, investment, and jobs ;
- It is grossly unfair, and we go so far as to say against the intent of the Fair Work Act, that a union can force an employer to bargain for a replacement Enterprise Agreement to be put in place. The Bill goes further by allowing this to happen even when both the employer and the majority of its employees do not wish to bargain.
- CCF is deeply concerned that the abolishment of the ABCC will have a significant negative impact on our industry without a "like replacement" and as such we continue oppose its abolition.
- Businesses and their workers who have already successfully negotiated single enterprise agreements should continue to be able to do so, and multi-employer bargaining should not be extended to the civil construction sector as it fits within the definition of Building & Construction: as defined in the Building & Construction General On-site Award 2010 (the Award).
- Civil construction supply chains are complex, and the prospect of multi-employer bargaining is significantly detrimental to the realities of supply chains in civil construction as it will lock labour into rigid sectors, and into terms and conditions that will stifle competition and enterprise level innovation.

- Enterprise bargaining is vital to workplaces to determine the framework that best works to regulate working conditions and facilitate productivity improvements overseen by the Fair Work Commission.

Time has been insufficient to adequately review the original Bill, let alone the Amendment issued on the 9 November. In short, CCF does not support the passing of this Bill until unintended consequences have been carefully explored and fully considered.

3. Industry Overview

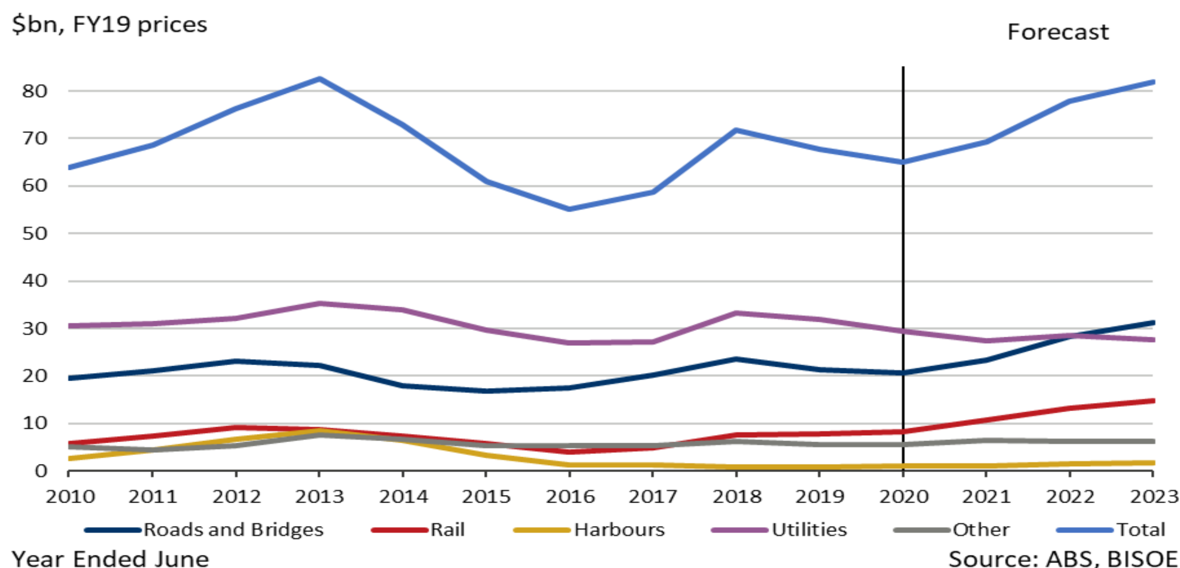
The Australian civil infrastructure industry is a significant contributor to the Australian economy comprising 3.8% of GDP[1] on average over the past 3 years with significant multipliers on investment.

For every $1 million invested in the Australian heavy and civil engineering industry[2]:

- 7.2 workers are employed in the construction and related industries
- $2.95m of output is contributed to the economy, and
- $1.3m is contributed to Australian GDP

After civil construction[3] rose to elevated levels through the early 2010's, activity weakened over subsequent years with the notable exception of a cycle in roads and utilities work around FY18. While the broader Australian economy is recovering from the pandemic, raising investment in civil infrastructure may be instrumental in sustaining growth in jobs given its multiplier effect.

Figure 1: Total Civil Construction by Sector, Australia



[1] *Rebuilding Australia – A Plan for a Civil Infrastructure Led Recovery, 2021*

[2] *The latest input-output data does not allow for analysis at a higher granularity than 'heavy and civil construction,' and the multipliers therefore account for a $1million investment spread across the civil construction sectors (including mining and heavy industry) based on the relative weightings of expenditure in the year the input-output table is sourced from (FY18).*

[3] *Defined as roads and bridges construction, rail construction, harbours construction, utilities construction, and other engineering construction.*

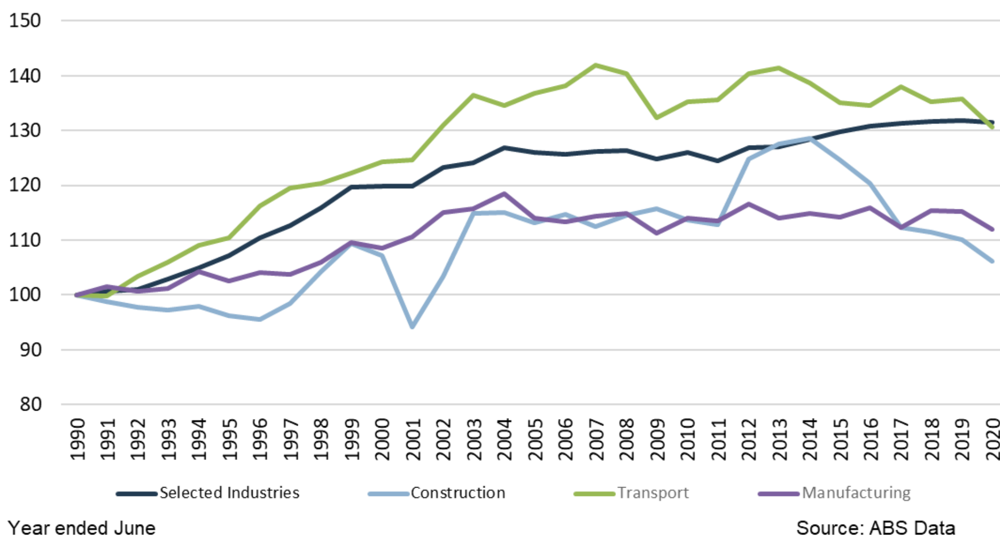
Historical data of civil construction is sourced from the Australian Bureau of Statistics' (ABS) *Engineering Construction Activity* quarterly release (Cat. No. 8762.0).

One of the key problems facing the construction industry is worsening productivity. Poor industry financial outcomes together with difficult procurement and contractual conditions is impacting how industry and government work together to achieve efficiency outcomes, as shown in Figure 2 below.

Falling productivity, by definition, means that more labour and capital is required to achieve a given level of output. This not only reduces capacity and capability, but increases costs in delivering infrastructure. The low profitability / low productivity spiral impacts not just the financial sustainability of civil contracting businesses but also non-financial goals, including work/life balance, mental health, training and upskilling, and innovation itself (which is required for productivity growth).

Poor productivity growth results in infrastructure being more expensive to plan and deliver. For governments and private project owners this threatens value for money in infrastructure delivery and deteriorates community expectations of infrastructure access, quality, and the price of patronage.

Figure 2: Multifactor Productivity Indexes by Industry, 1990-2020, FY1990=100[4]



The construction industry has lagged well behind all other sectors in terms of multifactor productivity growth since 1990. Construction productivity has grown just 0.2% per annum compared to 1.0% per annum for other industries (excluding manufacturing) and 0.5% per annum for manufacturing. Historically, short lived productivity gains have been difficult to sustain. Productivity in the construction industry today stands at levels seen in the late 1990s.

There is not supporting data to suggest that pattern bargaining will improve the productivity of the construction industry.

[4] ABS (2020), Estimates of Industry Multifactor Productivity, 2019-20, Cat. No. 5260

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4. Civil Contractors Federation Response to Specific Aspects of the Bill

4.1 Multi-Employer Bargaining

The civil construction industry has, in the Amendment, expressly but inexplicably been carved out of the exemption for the Building and Construction industry:

- This places upon our industry a terrible burden it cannot carry: SMEs have little power to resist being commercial driven into multi-employer bargains on large projects; and
- It may well introduce extraordinary IR problems: we have a single Award covering most of the Building and Construction, but now we have a piece of competing legislation.

As advised in the introduction, CCF believes freedom of choice is at the cornerstone of a fair and effective bargaining system. We support:

- genuine freedom of association, i.e., the right to join or not to join a union, and the rights of employees to be represented by a union.
- opposes employers, employees and independent contractors being subjected to coercion and discrimination because of the choices they have made about union membership and the types of unions they have formed an agreement with.

Secure Jobs, Better Pay, through its multi-employer bargaining provisions, represents a significant shift from individual enterprise level bargaining to industry bargaining with significantly increased union involvement and requirements to participate in the FWC arbitrations.

Secure Jobs, Better Pay, expands the options for multi-employer bargaining and proposes three streams:

- Stream 1 – Supported Bargaining
- Stream 2 – Single Interest Employer authorisations
- Stream 3 – Cooperative Bargaining Scheme

4.1.1 Supported Bargaining

Supported bargaining is intended to overhaul the low-paid bargaining stream – this requires a party to apply for a "supported bargaining authorisation" and from there the Fair Work Commission (FWC) will be compelled to issue a supported bargaining authorisation if it is satisfied that it is appropriate to do so having regard to a range of factors including whether employers have clear identifiable interests, that some employees are represented by a union.

This stream was previously and sensibly limited to existing low-paid sectors that lacked enterprise agreements such as aged care and early childhood education. Of concern to CCF is that *Secure Jobs, Better Pay* proposes to allow unions to make an application to force other employers to be subject to a supported bargaining agreement once it has been approved by the FWC (with or without consent of that employer or its employees - i.e. no vote required) and in a first, unions are given protection to take industrial action in support of their claims.

Importantly, this proposed change by Government attempts to address historical undervaluation of certain works. The recent decision of the Fair Work Commission in Application to vary or revoke a modern award - Aged Care Award 2010, Nurses Award 2020 and Social, Community, Home Care and Disability Services Industry Award 2010 [2022] FWCFB 200 shows that these are matters that can be addressed under the current legislative

framework via the award mechanism. Combined with the proposed changes in Part 5 of the Bill (e.g. to s302 of the Act) there does not appear to be a substantial policy rationale for adding a further, complicated process given the mechanisms that exist to address this at the industry level where all employers would be affected, not just those who happen to be 'roped-in', and where the productivity benefits of enterprise-level bargaining would remain (based on the award, as amended via this mechanism).

4.1.2 Single Interest Employer Authorisations

Bill amendments introduced by the Government on 9 November 2022 confirm that the General Building and Construction industry is excluded, however, that exclusion does not apply to 'civil constriction'.

The CCF strongly opposes this amendment and seeks the coverage of the exclusion to include 'the industry' of general building and construction, civil construction and metal and engineering construction, in all cases undertaken on-site as defined in paragraph 4.3 of the Building and Construction General On-site Award 2020. To not include civil construction under exemption introduces regulatory discrimination within the building and construction industry, confusion amongst employers and employees, and a possible conflict in definition and coverage between two federal laws of the land (i.e. the Bill and the Building and Construction General On-site Award 2020) both of which operate within the same industrial relations regulatory and enforcement regime.

Under single interest employer authorisations, the application for an authorisation can for example be initiated by a union and has the effect of compelling an employer to bargain with other employers on an industry basis. The employers who are the subject of the application must have 'common interests'. The new amendments substitute "single interest employers" with "related employers" and provide a definition of "related employers", thus it seems that this consideration is not an issue any longer.

This is the most concerning and contentious of the expanded multi-employer bargaining avenues. There appears to be limited circumstances for an employer to abstain from finding themselves effectively "roped in", and once an employer does find themselves "roped in" there is an inability to exit without consent of employees or unions, and as with the supported bargaining stream, enterprise agreements made subject to single interest employer authorisations will be liable to have employers (and employees) added to them on application of a union.

To this end, we strongly call for the lifting of the threshold of when business is exempt – 15 people is demonstrably too small and more time is needed to assess an appropriate threshold that is both workable and reflective of market conditions.

Further, what is *"clearly identifiable common interests"* in the situation where multi-employers industrial action is allowed? Further clarification is required on how this will be interpreted and applied.
Importantly, if terms are imposed at industry level, there is the very real risk that the nuances within the broader industry will be lost, with the effect that businesses will become pigeon-holed into specific work, and lose the ability to compete for other works and/or to innovate with their own workers to create a competitive advantage by adopting 'win-win' trade-offs that work for that business' specific circumstances (and protected by the BOOT).

4.1.3 Cooperative Bargaining Scheme

The cooperative bargaining scheme is the current multi-enterprise agreement stream that is entirely voluntary without industrial action. The CCF is uncertain if the aim of this section of the Bill is to lay the foundation for a

pattern bargaining scheme by allowing employee representatives to target employers that are most likely to agree to favourable employment conditions, a situation opposed by the CCF.

CCF Position – Multi-Employer Bargaining

CCF opposes multi-employer bargaining and the introduction of legislation that appears to mandate automatic union representation.

The Bill should exclude civil construction from the multi-employer bargaining as defined in paragraph 4.3 (b) of the Building and Construction General On-site Award 2020.

The civil construction is a unique industry in comparison to other building and construction industries in regard to the distribution of a bargaining power amongst employers. The civil construction has a small number of large companies with very strong bargaining power and a huge number of small business employers without any real bargaining power which creates a perfect environment via pattern bargaining for abuse of small businesses and consequently their elimination from the market.

With the abolishment of the ABCC the gravity of situation will reach its climax to the full detriment of the largest sector of civil industry if they are not excluded from the multi-employer bargaining.

The Bill should stipulate the primacy of single enterprise agreements.

The expansion of multi-employer bargaining has the real potential to create harm and disruption to civil contracting business, supply chains, workers, and communities that benefit from this infrastructure. We oppose such an expansion, as in our view, the provisions have the effect of:

- Disempowering employers and employees to reach agreements at enterprise level; with the effect that enterprise level innovation would be stifled.
- Facilitate industry-wide bargaining and the single-interest stream is an issue in terms of how wide it is intended to extend.
    - We ask could it apply to bargaining up and down a supply chain under an umbrella of “common interest” if is covered by a definition “related employers”?
    - The breadth and reach of these provisions desperately require clarification.
- There does not appear to be a clear “opt out” for employers and employees who don’t want to be part of the multi-employer bargaining regime.
- They enable industrial action in pursuit of multi-employer bargaining including industry-wide industrial action.
- At very least the legislation should include a specific requirement that multi-employer bargaining is not available in any industry or to any employer in which the Fair Work Commission determines it has a history of enterprise bargaining including the civil construction industry.

CCF’s membership comprises a range of contractors from the very large contractors to single operators. While some of the larger contractors have enterprise agreements that have been negotiated with employees and unions, the norm is that most of our contractor employers negotiate directly with their employees. Yet, the multi-employer bargaining provisions appear to give preferential representative and bargaining rights to unions whether sought by employees concerned or not.

The dangers inherent in the new multi-employer bargaining provisions are that they appear to facilitate a "one size fits all" pattern dealing approach to bargaining which threatens to stifle productivity, competitiveness, and innovation. This is particularly the case for smaller businesses who, by virtue of their size, face higher per unit costs on matters such as overheads than larger businesses, who spread these costs over a bigger workforce. The imposition of a 'one size fits all' approach necessarily benefits larger businesses at the expense of smaller businesses, recognizing that pattern bargaining imposes terms and conditions across the industry regardless of the circumstances of individual employers and employees.

Our industry, with its low levels of productivity, needs more than ever to be empowered to drive productivity at the individual enterprise level, and not be taken back to a 'one size fits all' approach.
The only party that would appear to benefit from the Multi-Employer Bargaining provisions as they are currently cast would be unions. The proposals without sensible amendment would be incredibly harmful for our civil contracting businesses, workers, the broader community, and the economy.

4.2 Abolition of the Australian Building and Construction Commission (ABCC)

The ABCC was originally established in 2005 as the building industry watchdog on the recommendation of the Cole Royal Commission which found that unlawfulness on building sites across Australia was hurting the economy.

The Explanatory Memorandum of the Bill confirms the abolition of the Australian Building and Construction Commission (ABCC) stating: "*This would ensure that workers in the building and construction industry have the same rights as other workers in relation to enforcement of the FW Act."*

The CCF contends that this statement effectively ignores the findings of four Royal Commissions: The Winneke Royal commission 1982, The Gyles Royal commission, 1992, The Cole Royal Commission, 2003 and the Heydon Royal Commission 2015, all of which found that in the building and construction industry there was a fundamental lack of respect for the law with physical violence and threatening behavior observed.

The findings and recommendations from these Royal commissions indicate that the building and construction industry is not like other industries – it requires the oversight of a dedicated, strong, and independent regulator to guard against illegal industrial activities beyond that which is experienced in other sectors.

According to the Australian Building and Construction Commission *Security of Payment 3-year Activity Report,* the following facts demonstrate the ABCC has been apolitical and proven extremely effective as an industry watchdog overseeing the behaviour of both unions and employers on construction sites and contributing effectively to industry viability:

1. Between 1 July 2019 and 30 June 2022, the ABCC received reports from contractors in which contractors reported **9,133** separate instances of delayed or unpaid payment claims.
2. The delayed or unpaid payment claims reported to the ABCC total **$873 million**.
3. Of the matters reported to the ABCC, the ABCC identified 'potential issues' in 58% of cases and achieved

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voluntary rectification in 97.4% of cases. [5]

Retention of the ABCC is paramount until the Government can demonstrate an alternative and effective regulatory framework will deliver an equal if not more robust compliance and enforcement regime. The abolition of the ABCC without a 'like replacement' runs the risk of increased industrial disputation, conflict, coercion, unlawful behaviour, and sites being brought to a halt due to industrial action as per the findings of previous Royal Commissions.

With the proposed abolition of the ABCC the provision for higher penalties and wider reasons for penalties have been removed. It is important to note the High Court decision of Australian Building and Construction Commissioner v. Pattinson & Anor, where the court held that courts must impose penalties that adequately deter offenders. In this case Pattinson was a CFMEU shop steward, along with 2 others who was found to be in contravention of s.349(1) of the FW Act. The high court found that the CFMEU was treating penalties as a cost of doing business and the court should impose the maximum to deter this. Now with reduced penalties the CFMEU and others could and will treat any penalties, if imposed, as a cost of doing business. Effectively proving subsequent Royal Commission findings of blatant disregard for the law.

An infrastructure sector embroiled in industrial disputation has the possibility of threatening the quantum of private sector investment whose collective sum total represents approximately 50% of Australia's total annual investment pipeline, or around $40 billion per annum. CCF contends this unintended consequence is live and a likely probability that will have catastrophic ramifications for displacing workers.

CCF supports the retention of the ABCC, so it asks for the following clarification from Government:

- further detail and reassurance on how the proposed alternative regulatory framework of the Fair Work Ombudsman (FWO) will deliver an equal if not more robust compliance and enforcement regime than the ABCC, including all the existing functions of the ABCC?
- how will the FWO manage the additional regulatory burden transferred to it from the ABCC including financial and human resource capability?
- what additional level of funding and resources have been afforded to the FWO and is this enough?
- similarly, in light of the role of the Registered Organisations Commissioner and the Registered Organisations Commission being transferred to the FWO, it will need to be adequately funded and resourced to ensure the requirements under the *Registered Organisations Act* are fully supported.
- what level of human and financial resource capability is being transferred to the ABCC from ROC?

CCF Position - Retention of the Australian Building and Construction Commission

- CCF supports an effective compliance and enforcement body that overseas industry-specific regulation and therefore supports the retention of the ABCC in the absence of an alternative and equally effective regulatory authority.
- CCF welcomes the National Construction Industry Forum (NCIF) however believes that this forum is not an adequate replacement of the ABCC functions and powers.

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[5] Australian Building and Construction Commission Security of Payment 3-year Activity Report, between 1 July 2019 and 30 June 2022:

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- While CCF supports cooperation and consultative mechanisms, it is not appropriate to have persons who are the subject of investigation (whether employee, employer or registered organisation) being intertwined within the organization. Investigation and prosecution decisions must be conducted independently of those parties.

5.0 Risks of Expanded Industrial Action

Since 1993 when enterprise bargaining was first introduced by the Keating Labor Government, the federal workplace relations legislation has recognised the importance of bargaining taking place at the enterprise level.

CCF concurs with the interim findings by the Productivity Commissions latest interim report – *"removing restrictions on protected industrial action and bargaining orders would pose significant risk to productivity and real wages if it led to wider industrial action, with impacts on the broader economy. In the extreme multi-employer agreements could morph into industry-wide agreements undermining competition across industries, weakening the growth prospects of the most productive enterprises in any industry… Stoppages do not just reduce the output and productivity of the businesses affected, but have flow-on effects through disrupted supply chains.[6]"*

We see that the Productivity Commission reinforces alarm about multi-employer bargaining being extended on an industry / sector basis and will translate to increased industrial action and costs being heaped on an already stressed and fragile supply chains.

Disturbingly, the proposed multi-employer bargaining provisions in both supported and single interest streams have the potential to enable unions to organise protected strikes across hundreds of workplaces and therefor add further to declining productivity in the sector.

6.0 Other Matters of Note

6.1 Fixed Term Contracts

This Bill has the potential to impose undue restrictions on the civil construction industry in relation to fixed term contracts. Many companies run a project-based model where the job security of the workforce depends on the company winning further projects. Many of these projects extend beyond two years. Fixed term contracts provide for this. It also provides a clear understanding to the employee when their employment will end. These contracts are often extended due to project delays. An unintended consequence of the provision is that more of the workforce could be forced into labour hire.

To avoid this issue, the legislation should at least include a reasonability test – that is, that a fixed-term contract in excess of two years would not contravene the Act where there are reasonable business grounds for doing so.

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[6] Productivity Commission: *5-year Productivity Inquiry: A more productive labour market Interim Report 2022* https://www.pc.gov.au/inquiries/current/productivity/interim6-labour/productivity-interim6-labour.pdf

6.2 Sexual Harassment Orders

There appears to be an overlapping of the Human Rights Commission functions and the Fair Work Commission functions in relation to sexual harassment claims. It is unclear where claimants should go. Jurisdiction responsibility must be clearly defined in the Bill.

6.3 Job security and gender equity

The Bill prohibits pay secrecy clauses in employment contracts, with civil penalties for breaches, and protection of the rights of employees to share pay information with other employees (including of other employers), including what they are paid, and how their pay is calculated. The Bill purports to regulate a common law concept, however, it is unclear whether this is possible. It raises the question what if one shares an entire contract of employment?

6.4 Better Off Overall Test (BOOT)

The Bill proposes:

- to give the FWC the right to amend a proposed Enterprise Agreement to address a BOOT issue before approving it (unconstrained by any need to seek the agreement, or even the views, of the parties covered by the EA or to avoid making a substantial change to what they agreed);
- to clarify that the BOOT requires a global assessment of whether each employee is better or worse off compared to the modern award, having regard to patterns or kinds of work that are reasonably foreseeable at the test time;
- to impose a requirement on the FWC to give primary consideration to a common view held by parties covered by a proposed EA, about whether it passes the BOOT.

A party to an existing EA could ask the FWC to reconsider whether the EA still meets the BOOT, after the EA commences operation. If the FWC is concerned that there is a BOOT issue, it may be resolved by the employer giving undertakings or exercising its new power to amend the EA.

While CCF welcomes changes to the BOOT that will reduce the current unworkable process, this poses three key issues of concern to CCF that should be answered in full in the legislation :

1. how the FWC can approve an agreement without an actual agreement from the parties?
2. there is no definition of a global assessment?
3. unless there is a limitation to where there are ‘substantial changes’, reconsideration of an existing EBA may become a never-ending process?

6.5 Intractable bargaining declarations

CCF is concerned that the proposed expanded capacity of the Fair Work Commission to arbitrate the content of workplace agreements will only encourage unions to make unreasonable demands and risk taking us back to a system of centralized setting of wages and conditions. Presently, the Fair Work Commission cannot step in and make determinations on terms to be included in proposed enterprise agreements except where one party has engaged in serious and sustained contraventions of bargaining orders already made. Where this occurs, the FWC makes a “serious breach declaration” following which it may step in to resolve for itself, any outstanding matters.

Secure Jobs, Better Pay proposes to significantly lower this bar by replacing a need for a "serious breach declaration" with an "intractable bargaining declaration" once this declaration has been obtained, following a post declaration negotiation period for a specified time, a Full Bench of the FWC may determine for itself by issuing an "intractable bargaining workplace determination."

CCF believe these provisions may well see a significant increase in the FWC involving itself in protracted bargaining disputes and could potentially be abused by more militant bargaining parties.

While it could be desirable to have an arbitration in this regard, there is no definition as to how serious a bargaining dispute must be for such declaration to be made?

6.6 Amending processes for initiating bargaining and enterprise agreement approvals

It appears that if a union was not covered by a previous EBA it can still initiate bargaining as the explanatory memorandum states: *"Where the qualifying conditions are met, the amendments would enable an employee, via a bargaining representative, to initiate bargaining for an agreement simply by making a written request to the employer."*

It is not clear from the Bill that it would be at an employee's request. This will have an effect of unions' inflamed claims to threaten employers to participate in the FWC proceedings. Unrepresented small employers would not have resources to resolve the matters before the FWC.

6.7 Banning a person from coverage by an enterprise agreement

CCF notes a new section 178C would be inserted into the Fair Work Act to enable the Fair Work Commission to make orders which effectively ban a person from coverage by an enterprise agreement if the Fair Work Commission is satisfied of that the person who is to be excluded has a record of repeatedly not complying with the Fair Work Act that is relevant to the agreement such that it makes it inappropriate for the excluded person to be a bargaining representative for a proposed agreement, or for the excluded person to apply for a proposed variation of an existing agreement.

The possibly of an exclusion order is intended to incentivise persons to reform their behaviour and improve compliance with the Fair Work Act. CCF asks would this in effect really exclude unions who have a record of repeatedly not complying with the Act, and how much legal cost would go to have such proceedings. This is particularly so in the absence of an effective regulator, such as the ABCC, to ensure ongoing compliance.

6.8 Bargaining and Workplace Relationships

In addition to CCF's comments in relation to multi-employer bargaining at 4.2, CCF provides the following observations, and seeks clarification in relation to additional key issues:

- Multi-enterprise agreements will be replaced with 'cooperative workplace agreements' (CWAs). One or more employers could become covered by a CWA that is already in operation, but protected industrial action would not be available in support of a CWA. CWA bargaining is entirely voluntary whilst conciliation and arbitration are by consent before the FWC.

CCF asks whether this provides excessive power to the FWC and seeks clarification on the process of selection of the employers which is unclear?

- The low-paid bargaining stream will be renamed the supported bargaining stream. Access to industrial action in multi-employer bargaining will be limited to the low-paid bargaining stream but only after participating in a compulsory conference period. This stream would provide a simpler way for workers in sectors such as low-paid occupations, government-funded industries, and female-dominated sectors, as well as employees with a disability, employees who are culturally and linguistically diverse and First Nations employees who may be employed in such sectors to negotiate one pay deal across multiple employers.

- CCF notes low-paid bargaining was applicable to an easy identifiable group of employees (by 2/3 median wage), now it appears to have a very vague and ambiguous application: "The FWC would consider the prevailing pay and conditions in the relevant industry". Also an employee organisation may apply to the FWC for variation of a supported bargaining agreement to cover additional employers and their employees, if a majority of those employees want to be covered by the agreement.

CCF seeks clarification on what criteria are to be added or be excluded?

The Bill proposes to tremendously but unnecessary increase the FWC powers to arbitrate and to impose arbitrations before the FWC as the means of resolving a significant number of the matters that could be clearly and unambiguously regulated by the legislation. This constant involvement in arbitrations will put too onerous burden on small to medium size employers.

Enterprise bargaining has stalled because the BOOT is unworkable in practice. Sensible changes to the BOOT should be sufficient to reinvigorate the enterprise bargaining system. This could be done quickly and its effectiveness measured without undertaking radical changes to workplace relations system, much of which was not part of the policy framework at the election, in an extremely rushed manner.

6.9 Providing a framework for flexible work

The Bill would add an avenue to deal with non-compliance thus if an employer does not approve a request in writing in 21 days, or rejects the request, the matter can be referred to the FWC for resolution, including by arbitration.

Imposing arbitration on an employer as the means of resolving a work place dispute when it is not a major workplace issue will put too onerous burden on small to medium size employers.

Importantly, if the goal is to enable employers and employees to reach agreement on flexible arrangements that suit their needs, the legislation does nothing to assist these negotiations outside of the extremely rigid award conditions. For example, most if not all awards provide rigid rules about part-time engagements including that any work outside of agreed hours be paid at overtime rates. This drastically reduces the ability for an employer to agree to flexible arrangements that suit an employee's ever-changing caring needs without being exposed to prosecution and hefty fines. Similarly, the *Building and Construction General Onsite Award 2020* contains highly

prescriptive hours of work provisions that makes anything other than working eight hours per day, five days per week, difficult.

6.10 Size of a Small Business for the Purposes of the Bill

We strongly call for the lifting of the threshold of when business is exempt from multi-employer bargaining.

7.0 Conclusion

CCF thanks the Education and Employment Legislation Committee for the opportunity to provide a submission on the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022.

The time frame for response to such an important Bill - a Bill that risks significant unintended consequences for our industry if not all industries in Australia - is simply too short. Feedback from our Members is that, the more they grasp the consequences of what is inside this significant piece of legislation, the more unanswered questions they have.

Our recommendation therefore is clear - this Bill needs further discussion and should not be passed without thorough consideration and exploration of the unintended consequences. **In particular we strongly recommend the deletion of 23B(1)(b)(i) , which excludes civil construction work from the meaning of general building and construction work. This dangerous, unwarranted and inexplicable exclusion may have grave consequences for the civil construction sector.**

CCF looks forward to working with the Parliament to ensure the avoidance of any unintended consequences from the Bill that that may impact negatively on all stakeholders involved in Australia's civil infrastructure industry. Any reform should result in improving the livelihoods of thousands of civil construction companies and their workers.

CCF would welcome the opportunity to appear before the Committee to discuss any aspect of this submission.

All inquiries regarding this submission should be forwarded to Mr. Christopher Melham, Chief Executive Officer, Civil Contractors Federation (National) on (02) 6273 8312 or chrismelham@civilcontractors.com

Date: 11th November 2022