Chamber of Commerce and Industry WA

Secure Jobs Better Pay Review - Submission

29 November 2024

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Introduction

The Chamber of Commerce and Industry WA (CCIWA) is a member-based organisation with over 7,000 members, spanning every sector of the economy, every size of business, and every region across our state. We are committed to developing public policy options that make WA the best place to live and do business.

We appreciate the opportunity to participate in the review of the *Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022* (*Secure Jobs Better Pay Act),* however, we do consider it premature, given the ink has hardly dried on the legislation.

At the time of its introduction, CCIWA held deep concerns about the proposed changes and our concerns remain. Australia's workplace relations system should encourage and support job creation, deliver flexibility for both employers and employees, promote productivity and economic growth, and remain simple and practical. That makes Australia an attractive place to do business.

However, since 2022, the Federal Government has pursued an agenda that undermines growth and productivity, a precondition for real wages growth, workforce productivity and improved living standards.

Some of these changes, specifically related to enterprise bargaining, represent a significant and retrograde step back to the rigid and inflexible policies of the 1970s and 1980s. Consequently, we now have an environment where it is substantially more legalistic and complex for business, especially small businesses, to navigate relationships with employees.

To this end, we have proposed a suite of recommendations throughout this paper that would help minimise the economic harm and unintended consequences caused by these changes.

In what follows, we begin by charting the historical context, which demonstrates the linkages between real wages growth, productivity and industrial relations frameworks. We then explore the current context, which outlines our key areas of concern with the IR changes. We conclude by making some remarks about the premature nature of this review, and where reform is warranted.

The Historical Context

The most damaging aspects of the *Secure Jobs Better Pay Act* were those related to bargaining, both changes to single enterprise bargaining as well as the expansion of multi-employer bargaining.

The Federal Government moved to implement sweeping changes to the bargaining framework on the basis that these changes would provide productive workplaces. To determine whether the changes introduced by the *Secure Jobs Better Pay Act* have met their legislative intent, it is important to reflect on the evolution and history of enterprise bargaining in this country.

In this regard, there are two defining moments: firstly, the period between 1991 and 2009; and secondly, the period between 2010 and 2022. Both periods will be discussed in turn.

1991 - 2009: Enterprise bargaining came into effect

A watershed moment for enterprise bargaining occurred in the 1990s, first with the introduction of the *National Wage Case April 1991* (1991 National Wage Case), and then with the passing of the *Industrial Relations Reform Act 1993* (Cth).[1] This case, and the new legislation, together with calls from the Australian Council of Trade Unions (ACTU), led to the devolution of the wage fixing system in Australia, and subsequently enshrined the concept of enterprise bargaining into the industrial relations system. [2]

At the time, the Prime Minister, Hon. Paul Keating MP said of the changes:

> *"Under the workplace bargaining system we have adopted and which we will entrench this year, employees themselves are for the first time in our history able to create the circumstances of their own prosperity."*[3]

These changes were highly significant, enabling enterprises, alongside their employees, to chart their own pathways. Even with the introduction of individual agreements through Australian Workplace Agreements (AWA's) in 1996, enterprise bargaining continued to be a central aspect driving productive workplaces.[4]

Over the proceeding twenty years, Australian employees experienced real wages growth. In fact, between the period 1998 to 2009, there was only one year where real wages growth was negative, which is widely linked to the introduction of the Goods Services Tax (GST). Instead, there was a near 12.5 per cent cumulative real wages growth over this period **[Figure 1].** Australia also saw a significant rise in labour productivity, with an annual labour productivity growth rate of 1.7 per cent over the same period **[Figure 2].**

While we acknowledge there are a myriad of factors impacting real wages growth and labour productivity[5], a harmonious, conducive and balanced workplace relations framework - as Australia had during this period - must be considered one of the many factors promoting productivity and thus, real wages growth. International experience further confirms this connection.[6]

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[1] *National Wage Case, Reasons for Decision*, (1991) AIRC 1991 36 IR

[2] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 October 1993, 2777, (Laurie Brereton, Minister for Industrial Relations and Minister assisting the Prime Minister for Public Service Matters)

[3] Hon. Paul Keating MP, 'Speech to the Institute of Directors Luncheon' (Speech, Melbourne 21 April 1993)

[4] Australian Government, Office of Impact Analysis (2022), *Enterprise Bargaining outcomes from the Australian Jobs and Skills Summit Regulation Impact Statement*, page11, Chart 2

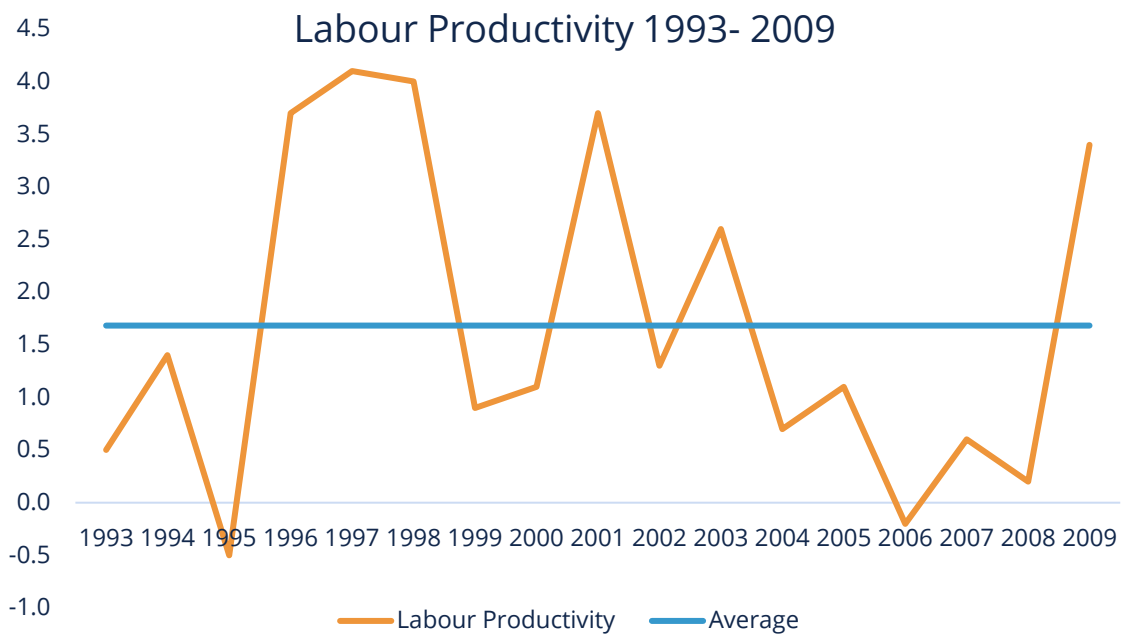
[5] Australian Government, Productivity Commission (2015) *Productivity Commission Inquiry report into Workplace Relations Framework: Overview*, Page 9

[6] See for example, Garnero, Andrea, Alexandre Georgieff and Alexander Hijzen (2024), *"The role of labour market policies in broadly shared productivity growth"*, in OECD, Reviving Broadly Shared Productivity Growth in Spain, OECD Publishing, Paris.

Figure 1: Cumulative Real Wages Growth 1998 to 2009

Source: ABS[7]

Figure 2: Labour Productivity Growth 1993 to 2009



Source: ABS[8]

[7] CCIWA Analysis on Australian Bureau of Statistics (September 2024) 'Table 1 & 2. CPI: All Groups, Index Numbers and Percentage Changes' and 'Table 1. Total hourly rates of pay excluding bonuses: sector, original, seasonally adjusted and trend'

[8] Australian Bureau of Statistics (June 2024) 'Table 1. Key national accounts aggregates' [1997-2009], Australian National Accounts: National Income, Expenditure and Product.

2010 – 2022: Bargaining declines and real wage growth slows

From 2009, a new industrial relations system was introduced through the passage of the *Fair Work Act 2009,* which included a new Better Off Over All Test ('BOOT') and the modernisation of awards. This was underpinned by the desire of the Government at the time to promote productivity through single enterprise bargaining.[9]

However, despite this being the primary aim of the new IR reforms, over this period, there was, in fact, a reduction in agreement making overall.[10] This has been attributed to a multitude of factors, including, for example, the modernisation of awards, and more significantly, the changes to the BOOT.[11]

In the 2015 Review into the Workplace Relations Framework, the Productivity Commission also found that the new BOOT made it substantially more difficult to apply. This discouraged innovation and resulted in businesses retaining inefficient practices due to concerns they would fail the new test for enterprise agreements.[12] This led to a reluctance by business to support agreement making throughout this period.

While we acknowledge the difficulty in linking conclusively real wages growth and labour productivity with the workplace relations framework, it is interesting to note that both real wages growth and labour productivity growth slowed significantly during this period. We would contend that the industrial relations framework during this period was less conducive to enterprise bargaining than the previous period.

As shown in **Figure 3**, while real wages growth increased, it trended significantly lower than it did in the previous period. Similarly, as shown in **Figure 4**, labour productivity growth also fell from an average of 1.7 per cent in the previous period to an average of 0.8 per cent over this period.

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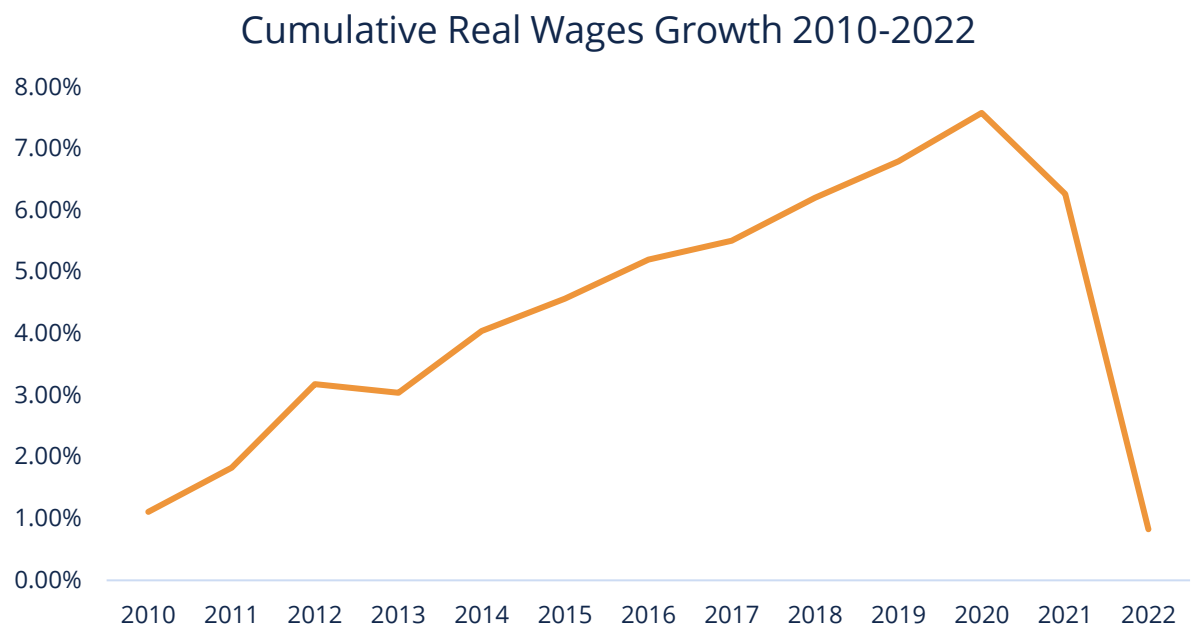
[9] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2008, 11190 (Julia Gillard MP, Minister for Employment and Workplace Relations),

[10] Australian Government, Office of Impact Analysis (2022), *Enterprise Bargaining outcomes from the Australian Jobs and Skills Summit Regulation Impact Statement*, page 11, Chart 2

[11] Examples of this are comments from former ACTU Chief Bill Kelty on the complexity of bargaining. Example being AFR (2022), Kelty and Keating's big fix for enterprise bargaining, 5 September 2022; Australian Government, Office of Impact Analysis (2022), *Enterprise Bargaining outcomes from the Australian Jobs and Skills Summit Regulation Impact Statement,*

[12] Australian Government, Productivity Commission (2015) *Productivity Commission Inquiry report into Workplace Relations Framework: vol.2*, Page 695

Figure 3: Cumulative Real Wages Growth 2010-2022



Source: ABS[13]

Figure 4: Labour Productivity Growth 1993-2023

Source: ABS[14]

[13] CCIWA Analysis on Australian Bureau of Statistics (September 2024) 'Table 1 & 2. CPI: All Groups, Index Numbers and Percentage Changes' and 'Table 1. Total hourly rates of pay excluding bonuses: sector, original, seasonally adjusted and trend'

[14] Australian Bureau of Statistics (June 2024) 'Table 1. Key national accounts aggregates' [1993-2022], Australian National Accounts: National Income, Expenditure and Product.

The Current Context

Labour Productivity and Real Wages Growth

Since 2022, the Federal Government has introduced four tranches of reform. While we are unable to suggest a direct relationship between the industrial relations framework on the one hand, and real wages growth and labour productivity on the other, there is more than enough evidence to suggest the former creates the optimal conditions for the latter. After all, one of the key objects of the *Fair Work Act 2009* is to "*promote productivity and economic growth for Australia's future economic prosperity*".[15]

In 2018, a report from the World Economic Forum noted that employers and employees should collaborate and work together, harmoniously, to drive business improvements at the enterprise level. Once widespread improvements occur at the enterprise level, this translates into improved economic performance across the economy.[16]

Unfortunately, many of the changes instituted by the Federal Labor Government from 2022 are likely to shift workplaces away from a more harmonious and collaborative arrangement toward adversity and contestation – the antithesis of productivity and economic growth.

Both the Productivity Commission and the Office of Impact Analysis suggest that productivity is highly correlated with real wages growth.[17] If the Federal Labor Government is committed to driving real wages growth and improving living standards of Australians, then this must be predicated on improving labour productivity.

However, over the past two years, labour productivity continues a downward trend. Similarly, real wages growth is also trending negative. We are deeply concerned that the suite of reforms introduced from 2022 were not predicated on improving labour productivity, and therefore real wages growth. In fact, there are provisions, which greatly shift the balance away from the interests of the employer and will likely worsen productivity.

Given one of the key objectives of the *Fair Work Act* is to promote productivity and economic growth, the industrial relations system must be tested against the following criteria: driving jobs and wages growth; boosting productivity and strengthening the economy, all the while ensuring employees' rights. [18]

As many of the new and damaging provisions have not been adequately tested, it is entirely appropriate that the entire workplace relations framework be reviewed once again by the Productivity Commission, since the last review was initiated a decade ago. This would ensure that the industrial relations framework is tested against the key criteria identified above and is aligned with the key objective of the Act.

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[15] Section3(a) of the *Fair Work Act 2009* (Cth)

[16] Australian Government, Attorney-General's Department (2019), *Cooperative Workplaces – How can Australia capture productivity improvements from more harmonious workplace relations*. Page 2

[17] Australian Government, Productivity Commission (2023) *Productivity growth and wages – a forensic look*, Page 1-2

[18] Australian Government (2019). *Cooperative Workplaces – How can Australia capture productivity improvements from more harmonious workplace relations*

Recommendation

Productivity Commission Review

The Review Panel should recommend that the Productivity Commission review the *Fair Work Act 2009*, and employment related legislation (long service leave, and super) with specific term of references focused on how best to improve labour productivity.

The Productivity Commission Review should hand down its report by the end of December 2026.

Multi-employer Bargaining

Multi-employer bargaining is clearly inimical to productivity enhancing innovations and changes to efficient work practices at the enterprise level. The is because multi-employer agreements will force competing businesses into the same employment conditions with no consideration of the differences of each individual business, stripping away one of the key motivating forces for such improvements — competition.

Further, forcing businesses to adopt one-size-fits-all terms and conditions will endanger business viability and increase unemployment — all this is the antithesis of an environment that will lead to sustainable wages growth.

In a recent address to the Australian Labour Law Association's 2024 Conference, the President of the Fair Work Commission, the Hon Justice Adam Hatcher, noted that despite the laws coming into effect in June 2023, there has not been a substantial number of applications, and just one contested application in the single interest stream for multi-employer bargaining.[19]

Naturally, there is a limited basis for credible quantitative input, which limits the usefulness of this review. Notwithstanding this, concerns continue to be made, including with the shift in approach to bargaining by unions, and with the Full Bench of the FWC's first case on a contested single interest stream (which is currently under judicial review).[20,21]

In relation to the first point, members have noticed bargaining negotiations becoming more adversarial in nature. For example, one business indicated that the 'threat' of initiating multi-employee bargaining had been used to ensure the terms of a proposed single-enterprise bargaining agreement, currently being negotiated for the project, were closely aligned with the employee association's log of claims.

In another example, despite a long history of amicable bargaining with this business, the relevant union refused to participate in bargaining for a new single enterprise agreement 12-months out from the expiry-date. They were holding out for the more

[19] Workplace Express (2024), *Fuss about multi-bargaining overblown: Hatcher*, 11 November 2024

[20] *Association of Professional Engineers, Scientists and Managers, Australia v Great Southern Energy Pty Ltd T/A Delta Coal, Whitehaven Coal Mining Ltd, Peabody Energy Australia Coal Pty Ltd, Ulan Coal Mines Ltd* (2024), FWCFB 253

[21] Until the full decision is made, it is too early to provide comment on the full impact of this important test case.

complicated and resource intensive multi-employer bargaining process, due to begin from 2025.

In the case of the first example, we are concerned that this practice is more widespread and may explain why enterprise bargaining rates have risen substantially, without a commensurate increase in productivity being realised.

While we are yet to see many single-interest employer agreements progress, it is important to reflect on the primary aim of enterprise bargaining. That is, to deliver mutually beneficial agreements between the employer and the employee. This would ensure an ongoing focus on improving bargaining at an enterprise level, and that such bargaining should be optimal to Australia's long term economic and societal interest.

To ensure the bargaining process is focused on productivity, by ensuring the interests of the employee and employer are both optimised, then all streams of multi-employer bargaining must be by consent only.

Recommendation

Multi-employer bargaining by consent only

The Review Panel should recommend that all streams of multi-employer bargaining should be by consent only. This would also allow for employers to pull out and negotiate a single enterprise agreement at any point in this process.

Intractable Bargaining

Since the introduction of the regime, seven declarations of intractable bargaining have been ordered by the FWC.[22] This includes two workplace determinations, both involving the Transport Workers Union and Cleanaway.[23] Another case is currently under judicial review.[24]

As in the case of multi-employer bargaining, there is minimal data on the effectiveness and impact of these provisions within the Act. While not in the scope of the Review, we would encourage the Reviewer Panel to consider the Review of the *Fair Work Act* in 2012, which also considered intractable bargaining prior to its inclusion in the *Fair Work Act* in 2022. In this review, the authors were unable to conclude "*whether bargaining orders from FWA will improve the prospects of agreement in these disputes.*"[25]

Similarly, it is unclear whether the provisions introduced in 2022 have helped, or will help, to any substantial effect, to reduce deadlocks or improve prospects of agreements in these disputes.

[22] Fair Work Commission Document Retrieval for S.234 orders as of 19 November 2024

[23] *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd* (2024), FWCFB 287, and *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd* (2024), FWCFB 305

[24] *United Firefighters' Union of Australia v Fire Rescue Victoria T/A FRV* (2023), FWCFB 180

[25] Australian Government, Department of Education, Employment and Workplace Relations (2012), *Towards more productive and equitable workplaces: an evaluation of the Fair Work Legislation*, page 148

However, what we do know is that with the inclusion of the *'no less favourable* 'term outlined in Section 270A, there can be no win for employers. The one-sided nature of these new intractable bargaining provisions will clearly incentivise unions to hold out for an arbitrated outcome. Once a negotiation reaches arbitration, these provisions will ensure there is no way the union can lose, and no way the employer can win.

This was a significant development, not least, because there was no justifiable basis for the Federal Government to accept the Australian Green's amendment. We note that there were no intractable bargaining arbitration cases undertaken prior to the inclusion of Section 270A; and there was just one intractable bargaining declaration undertaken prior to the assent of Section 270A.[26]

As the Victorian Treasurer and Minister for Industrial Relations, the Hon. Tim Pallas MP stated in his letter to then Minister for Employment and Workplace Relations, Hon. Tony Burke MP:

> *"[Section 270A] ...removes the incentive for unions to reach an agreement as they know that they will be no worse off on a clause-by-clause basis as against a current enterprise agreement. The amendment also seems at odds with how bargaining works – that is, that it's a package and during the course of bargaining trades offs are considered and made."*[27]

To this end, the Review Panel must consider how Section 270A will drive more arbitrated outcomes and on this basis, recommend its removal.

Recommendation

Removal of Section 270A

The Review Panel should recommend the repeal of Section 270A from the intractable bargaining regime, given it creates a substantial incentive for arbitrated outcomes.

Better Off Overall Test (BOOT) changes

We have been a long-term advocate for clarity on the BOOT, ensuring it acts as a global test, rather than applied on a clause-by-clause basis. Despite these changes, however, in practice, there has been continued inconsistency in its application by the Commission.

This has resulted in a significant number of undertakings to agreements, including in instances where those undertakings appeared completely unnecessary. It appears that a granular approach to the BOOT remains, despite the legislated changes suggesting the contrary.

In addition, CCIWA, in the course of the work we do in supporting members in these matters, has also seen the level of undertakings vary considerably between

[26] *United Firefighters' Union of Australia v Fire Rescue Victoria T/A FRV* (2023), FWCFB 180

[27] Vic Government (2024), *Letter from Treasurer, and Minister for Industrial Relations to Minister for Employment and Workplace Relations*, (16 January 2024) - Letter-from-Minister-Pallas-to-The-Hon-Tony-Burke-MP-dated-16.01.24-(1).pdf

Commissioners, even when the agreements may be similar. This creates considerable uncertainty and confusion for employers navigating this space.

To this end, greater clarity is needed to remove the inconsistency and uncertainty that currently surrounds the application of the BOOT provisions.

Recommendation

Ensure greater clarity for BOOT provisions

The Review Panel must acknowledge the complexity that currently surrounds BOOT, and recommend further guidance be provided by the President of the FWC to Commissioners to ensure consistency.

Reconsideration of Enterprise Agreements

The inclusion of provisions to allow for reconsideration of Enterprise Agreements remains a major concern. While we understand the provision has not been used to date, the very existence of the provision creates uncertainty, which is contrary to what drives business investment.

Certainty of terms and conditions are especially critical for the delivery of major, job-creating, projects to ensure their competitiveness in an increasingly cost competitive global environment. Creating the possibility for change to the enterprise agreement will increase the risk premia to investing in Western Australia's economy and threaten its future economic development.

In instances where parties have misled the Commission, or deliberately withheld information related to bargaining, the Commission is already able to set aside an enterprise agreement under current provisions within the Act.

Therefore, on this basis, we recommend the Review Panel repeal this provision to ensure certainty for major projects going forward.

Recommendation

Repeal the reconsideration of agreements provision

The Review Panel should recommend repealing this provision due to the economic uncertainty it creates.

Majority Support Determination (MSD) requirements

We continue to hold deep concerns about the removal of the majority support determination requirements in certain circumstances of enterprise bargaining.

These changes have the potential to force unwilling employers and employees to bargain, potentially on the grounds of one union representing just one employee.

Removing the rights of both employees and employers, in this way, is deeply concerning.

There are many legitimate reasons why employees may not wish to bargain for a new agreement, including that they are happy to remain on the most recent, expired agreement. For instance, an expired agreement may include positive rostering arrangements, around which employees have structured their lives. If bargaining reopens the agreement, then employees put at risk the existing, favourable terms.

And in instances where there are employees wanting to bargain, but employers are not – and vice versa – the former provisions adequately provided for these circumstances.

These provisions are currently playing out in the industrial powerhouse of the nation's economy, the Pilbara. Under these provisions, BHP is being forced into negotiations with unions, which has been a location free of strikes and contestation for many years.

Workers in WA's mining industry are among the best paid and safest in the world, and they have been negotiating directly with their employers for more than a decade.

Back in the 1980s, unions operating on mine sites in the Pilbara would strike over the slightest grievance. This impacted productivity and our State's attractiveness as an investment location.

Unfortunately, at this stage, there is a lack of data to fully understand the economic impact of these new provisions, however, what we do know is that the Pilbara is already an expensive place to do business.

To this end, we recommend the Review Panel gives due regard to the rights of both employers and employees and recommends the repeal of these provisions.

Recommendation

Repeal the changes to MSD

The Review Panel should recommend the repeal of the provisions that provide employee associations powers to initiate bargaining without majority support determinations.

Fixed-term contract changes

Since the commencement of the changes to fixed term contracts on 6 December 2023, we have identified that one in 10 calls to CCIWA's Employee Relations Helpline have related to changes to fixed-term contracts.[28] A substantial subset of these callers were

[28] CCIWA Internal Data

from the health and social services industry sector, particularly those in receipt of substantial government funding.[29]

Many of these queries have related to the exemptions to the fixed term contract limits, and whether those exemptions would apply to allow contracts to go beyond the two-year limit. Unfortunately, the current drafting makes access to many of these exemptions difficult.

Many of our members in this sector face uncertainty over whether government funding will be renewed and in turn uncertainty over their future staffing needs. The 'no reasonable prospects' provision, once legal advice is provided, tends to indicate that it is near impossible for many employers reliant on government funding to use fixed term contracts, even where there are concerns that funding will not be renewed.

This is a key unintended consequence of this provision, and therefore, the exemption should be amended in the Regulations to allow for greater access to the relevant exemption where funding is tied to a position and has more than 50 per cent chance of not being renewed.

This will help ensure businesses reliant on government funding – and who play a hugely significant role in our community - have the flexibility they need to manage staff in a low-margin, high demand environment.

Recommendation

Expand access to exemptions for government funding

The Review Panel should recommend a change in regulations that account for the unique nature of government-funded positions, by expanding the exemption criteria for fixed term contract limitations.

Health and Safety Representative changes

The changes related to Health and Safety Representative (HSR) assistants not requiring a right of entry permit if they were a union official reflect Recommendation 8 of the 2018 Boland Review.

While this provision has not been used extensively in WA, we would note the recent CFMEU allegations, including concerns of retaliation and threats against those who raise any concerns with respect to compliance of industrial and WHS Laws. This has been shown in the Victorian Government's interim report, which stated:

> *"The Review has heard there is significant reluctance to make complaints from within the industry, both because of fear of reprisal and because people lack confidence that anything will be done."*[30]

[29] Ibid

[30] Victorian Government (2024), *Formal Review into Victorian government Bodies' Engagement with construction companies and construction unions* – Interim report page 5

While there are legislative mechanisms to report misuse of WHS assistant powers, in practice, the fear of reprisal is a significant issue, and we believe this will result in significant underreporting of claims.

To this end, we urge the Review Panel to consider the appropriateness of the HRS changes, given the current allegations of misconduct engulfing the CFMEU and the construction industry broadly.

Recommendation

Repeal of the changes to HSRs assistants

The Review Panel should consider the appropriateness of the changes to allow union officials HSR assistant powers without a right of entry permit, and whether this power should be suspended or repealed.

Concluding Remarks

Many of the amendments made by the *Secure Jobs Better Pay Act,* and raised in this submission, have been introduced without proper justification. They are unwarranted, highly damaging and should be repealed.

In addition, we strongly urge a Productivity Commission Review of the broader employment legislation framework – with a reporting date by December 2026 – to fully understand the economic repercussions of the provisions contained within the legislation and beyond. Given that many of the provisions have only recently been introduced, this review has occurred prematurely, and it would be disingenuous to consider it a full and wholesome review.

Notwithstanding this, the current Statutory Review has provided the first opportunity to scrutinise the Act in a meaningful way, and we have recommended changes that focus on creating productive workplaces and an environment where employers can bargain with their employees in a way that is mutually beneficial.

Many of the concerns raised in this submission are contradictory to the key objects contained in the Act, especially, the need to advance Australia's economic growth and productivity.

In the absence of any strong quantitative data to support this review, we strongly encourage the Review Panel to examine these changes conceptually through this lens. After all, a strong and productive economy provides the best base for rising wages and improved living standards.