Senate Education and Employment References Committee

Inquiry into the incidence of, and trends in, Corporate Avoidance of the Fair Work Act 2009

Submission of the Australian Manufacturing Workers' Union (AMWU)

COVER SHEET

About the Australian Manufacturing Workers' Union

The Australian Manufacturing Workers' Union (AMWU) is registered as the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union". The AMWU represents members working across major sectors of the Australian economy, including in the manufacturing sectors of vehicle building and parts supply, engineering, printing and paper products and food manufacture. Our members are engaged in maintenance services work across all industry sectors. We cover many employees throughout the resources sector, mining, aviation, aerospace and building and construction industries. We also cover members in the technical and supervisory occupations across diverse industries including food technology and construction. The AMWU has members at all skills and classifications from entry level to Professionals holding degrees.

The AMWU's purpose is to improve member's entitlements and conditions at work, including supporting wage increases, reasonable and social hours of work and protecting minimum award standards. In its history the union has campaigned for many employee entitlements that are now a feature of Australian workplaces, including occupational health and safety protections, annual leave, long service leave, paid public holidays, parental leave, penalty and overtime rates and loadings, and superannuation.

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1. Executive Summary

1. Decisions of the Fair Work Commission and the Courts which interpret the *Fair Work Act* 2009 (the Act) have resulted in the objects and intentions of the Act being evaded by corporations.

2. The purpose of allowing collective bargaining is to equalise the power imbalance between employers and employees in negotiations about wages and conditions. The way that the Act is currently being interpreted means that Agreements are being negotiated with groups of employees which do not have equal bargaining power with their employer, such as short term casual employees with no unfair dismissal protection or the personal resources to launch General Protections actions.

3. **Recommendation:** The Senate amend the Fair Work Act 2009 to ensure that Agreements can only be made with employees who:

    a. Have been employed for a minimum period of 6 months on a regular and systematic basis prior to bargaining commencing; and

    b. remain employed over the entire period of bargaining; and

    c. remain employed during the access and approval processes.

4. Agreements are being made which have the potential to cover a wide range of employees across a wide range of classifications, occupations and geographical area. However, the employees who negotiated the agreement may only be from a very small cohort. Indeed, they may no longer be employed at the time that the Agreement is applied at a new or expanded site.

5. **Recommendation:** The Senate amend the *Fair Work Act* 2009 to make it a requirement that Enterprise Agreements which are approved by the FWC:

    a. Must have been negotiated by bargaining representatives who collectively represent the range of employees who are proposed to be covered by the agreement; and

    b. Must have had a process for voting for or against the Agreement which provided the opportunity for the same range of employees proposed to be covered by the Agreement to exercise a vote in that process.

6. Businesses are increasingly using outsourcing to obtain employees for their business who work on site and for all intents and purposes are employees of the business, except for their technical legal status as employees of a labour hire / contractor employer. This is preventing employees from accessing a fair share of the profits from good and services which they are a part of producing.

7. Businesses are also using ongoing outsourcing arrangements which turnover contractors to cut employee service and accrual of entitlements linked to service such as long service leave and redundancy.

8. **Recommendation:** That the Senate amend the Fair Work Act 2009, to establish a new regime for bargaining and compliance which allows any person who performs work to come together collectively with other workers to bargain and seek compliance from businesses who receive the benefit of that collective work.

9. Businesses also are avoiding responsibility for ensuring casual employees who work on their plant and equipment day in and day out gain access to casual conversion after 6 months of regular employment because they engage the casual employees through a labour hire firm / contractor.

10. **Recommendation:** That the Senate amend the Fair Work Act 2009, to establish a regime for labour hire / contractors that:

    a. Requires labour hire arrangements to include a requirement that host employers will offer employment to labour hire employees who are placed in the workplace on an ongoing basis (for example, once they reach six months of regular employment placed with the host); and

    b. Ensures that when contracts for labour hire or service agreements end, that the employees' entitlements and conditions at a workplace are not reduced when the new labour hire employer / contractor takes over the contract.

11. Host employers are avoiding responsibility for ensuring employees who work on their plant and equipment day in and day out are paid the appropriate minimum entitlements because they engage the employees through a labour hire firm / contractor.

12. **Recommendation:** That the Senate amend the Fair Work Act 2009 to require the labour hire employer / contractor as well as the host employer/primary user of the service contract to assume responsibility for ensuring the minimum workplace entitlements and conditions of employees working for their business are being paid by the employer.

13. Contractors are being exempt from paying redundancy entitlements because their so-called "business model" of providing services through a contract for service means that their terminations of employees at the end of those service contracts is "ordinary and customary turnover of labour."

14. **Recommendation:** The Senate amend the Fair Work Act 2009 to remove the exclusion for "ordinary and customary turnover of labour" from Redundancy entitlements in the NES.

15. **Pre**-Fair Work Act instruments are continuing to undermine the Modern Award Safety Net.

16. **Recommendation:** The Senate amend the Act to terminate, on a specified date, all pre-Fair Work Act instruments that are less beneficial for employees when compared to the relevant Modern Award and NES that would otherwise apply.

17. Companies are terminating enterprise agreements where employees want the Agreement to continue to provide conditions above the Modern Award safety net.

18. **Recommendation**: The Senate Amend the Fair Work Act 2009 to ensure that:

    a. Agreements cannot be terminated where employees are opposed to the Agreement being terminated; and

    b. Where Agreements are terminated, the terminated Agreement becomes the minimum safety net for that particular site if it is superior than the relevant Modern Award that would otherwise apply

19. The Fair Work Commission administrative arm is not releasing documents which were a part of public hearings. This denial of access is in direct contradiction with the decision of the Full Bench of the Fair Work Commission about the principle of "open justice."

20. **Recommendation:** The Senate Committee request from the Fair Work Commission the unredacted versions of the documents for the case in this submissions and others of interest to the Committee which have already been a part of public hearings or public eHearings.

21. **Recommendation:** The Senate seek confirmation from the Fair Work Commission administrative arm about the reasons for its denial of access to documents which were a part of public hearings – which is contrary to the decision of the Fair Work Commission Full Bench.

1. Introduction

22. The Australian Manufacturing Workers' Union (AMWU) makes the following Submissions to the Senate Education and Employment References Committee inquiry into the incidence of, and trends in, corporate avoidance of the *Fair Work Act* 2009.

23. The AMWU supports the submissions of the Australian Council of Trade Unions (ACTU) and of the AMWU Western Australian Branch.

24. The avoidance of the *Fair Work Act* 2009 (the Act), should be looked at from the perspective of what the purpose of the Act should be, rather than whether employers are avoiding the Act as it is currently interpreted by the Courts or by the Fair Work Commission.

25. The current interpretation of the Act and the subsequent regulatory regime that follows from that interpretation will allow for corporate avoidance of basic principles for fairness at work. In effect, employers are gaming the system.

26. The Submissions will address the following matters:

    a. Loopholes are preventing Collective Bargaining from equalizing the power imbalance between employers and employees in negotiations;

    b. Labour Hire Arrangements are allowing Host Employers to avoid taking responsibility for employees who are engaged at their workplace and are effectively within the control of the employer;

    c. Businesses that use labour hire are avoiding Redundancy entitlements ;

    d. Labour Hire agencies are not properly classifying employees;

    e. Employers are terminating Agreements which are superior to the Modern Award Safety net and doing this as a preliminary to "bargaining" to fundamentally change the bargaining position of the parties;

    f. Pre-Fair Work Act Enterprise Agreements Detrimental to employees which still have ongoing effect;

    g. The Fair Work Commission is refusing public access to documents which were part of public hearings.

2. Loopholes are preventing Collective Bargaining from equalising the power imbalance between employers and employees in negotiations

27. It is a basic principle of the Act that it allows for collective bargaining. Collective bargaining as a concept has the inherent intention of increasing the bargaining power for employees. It is generally recognised that when employees come together, they are in a stronger bargaining position than when they attempt to bargain alone. Without access to collective bargaining, employees bargaining alone are unlikely to be able to bargain on an equal footing with their employer (this is obviously not applicable to high net worth individuals). The objects of the Act go further in promoting collective bargaining.[1]

28. Some employers have a preference to bargain with individual employees, because they will have the stronger bargaining position. This preference is evidenced by their support for statutory individual agreements, which were widely known as AWAs, and which were a cornerstone of WorkChoices. It is apparent, given their preference for individual bargaining that these employers will try at every opportunity to minimise the opportunities for collective bargaining to improve the bargaining positions of employees. Now that AWAs are no longer allowed under the Act, employer interests have been searching for opportunities to bargain with employees in circumstances when they are in the weakest bargaining position.

29. Through various decisions of Australian Courts and the Fair Work Commission, the regulatory framework provided by the Act is no longer promoting collective bargaining as it was intended to operate.

30. Casual employees who do not have the same bargaining power as permanent employees are being used by employers to rubber stamp unfair Collective Agreements that may go on to apply to permanent employees.

a. Case Study: McDermott Australia Pty Ltd v AWU, AMWU [2016] FWCFB 2222

31. In this case, the FWC Full Bench decided that casuals could vote on and approve an agreement even though they were in a period where they were not performing work. The employer negotiated a collective agreement with 36 casual employees during a period where there was "no campaign being undertaken by McDermott."[2] The casual employees were not performing any work and there appeared to be no permanent employees engaged.

32. While this particular agreement offers salaries in excess of $190,000 per year with no sick leave, annual leave, it is the effect of the Fair Work Commission Full Bench decision and its interpretation of the Act, which should be the focus of the Committee.

[1] Section 3(f) Fair Work Act 2009
[2] Paragraph [26] [2016] FWCFB 2222

33. It cannot be the intention of the Act to allow for employers to engage a group of new casuals on the promise of future work and then purport to "bargain" with those employees for a collective Agreement. Casual employees have no job security and are clearly in a weaker bargaining position as compared to the employer. Even the promise of future work is dependent on their compliance with the employer's wishes. It is important to note that unfair dismissal protection is only afforded to casuals who have been engaged in regular and systematic work for at least six month.

34. The FWC Full Bench looked at sections 180, 181(1), 182(1) and 186 of the Act. Those section provide the framework for determining whether employees have "genuinely agreed" to the making of an enterprise agreement.

35. Division 4 of Part 2-4 of the Act provides for the approval of enterprise agreements. An agreement must be approved by the employees to whom it will apply, in the manner specified by the Act.

Section 181(1) provides that:

"An employer that will be covered by a proposed enterprise agreement may request the **employees employed at the time** who will be covered by the agreement to approve the agreement by voting for it."(emphasis added)

36. The procedure available to an employer under s.181(1) is subject to ss.180(1-4), which states:

"180 (1) Before an employer requests under subsection 181(1) that employees approve a proposed enterprise agreement by voting for the agreement, the employer must comply with the requirements set out in this section.

(2) The employer must take all reasonable steps to ensure that:

(a) during the access period for the agreement, the **employees (the relevant employees) employed at the time** who will be covered by the agreement are given a copy of the following materials:

(i) the written text of the agreement;

(ii) any other material incorporated by reference in the agreement; or

(b) the relevant employees have access, throughout the access period for the agreement, to a copy of those materials.

(3) The employer must take all reasonable steps to notify the relevant employees of the following by the start of the access period for the agreement:

(a) the time and place at which the vote will occur;

(b) the voting method that will be used.

(4) The access period for a proposed enterprise agreement is the 7-day period ending immediately before the start of the voting process referred to in subsection 181(1)." (emphasis added)

37. Section 182(1) of the Act provides:

"If the employees of the employer, or each employer, that will be covered by a proposed single-enterprise agreement that is not a greenfields agreement have been asked to approve the agreement under subsection 181(1), the agreement is made when a majority of those employees who cast a valid vote approve the agreement."

38. Section 186(2)(a) states as follows:

"The FWC must be satisfied that:

(a) if the agreement is not a greenfields agreement — the agreement has been genuinely agreed to by the employees covered by the agreement…"

39. What constitutes genuine agreement by the employees covered by an agreement, as required by s.186(2)(a), is the subject of s.188 which reads in part:

"An enterprise agreement has been genuinely agreed to by the employees covered by the agreement if the FWC is satisfied that:

(a) …

(b) the agreement was made in accordance with whichever of subsection 182(1) or (2) applies (those subsections deal with the making of different kinds of enterprise agreements by employee vote); and

… ."

40. The FWC Full Bench considered that the words "employees employed at the time" referred to in the Act, include any casuals who were on the payroll and engaged to perform casual work. The Full Bench also reasoned that it would have resulted in disenfranchisement to not allow the casual employees a vote on an agreement that might regulate their terms and conditions of employment. The FWC Full Bench did not consider that there was anything unusual about a business choosing not to engage any permanent employees for the four years the enterprise agreement was to operate.

41. It is important to note that in this particular case, the issue came to a head only because there were unions involved in the process. There are examples that have been uncovered where employers bargain with a small group of employees without Unions to provide their experience and knowledge (these are further discussed below).

Why is this case study relevant to the Committee?

42. The first particular circumstance of concern is one where an employer can avoid entering into Greenfield's Agreement by engaging casuals who have no unfair dismissal protection and then begin bargaining with those casuals for an agreement. The principle of collective bargaining to improve the bargaining position of employees is not achieved where those employees have no protection from unfair dismissal (which the FWC can provide remedies for, without the need to go to court).

43. It is true that casuals do have General Protections provisions which according to the words of the Act protect them from any adverse action because of their involvement in bargaining.[3] However, the General Protections generally require enforcement in the courts.[4] The current Federal Circuit Court (in Sydney) has indicated that following court directed mediation that it can take between 12 to 18 months before a General Protections matter can be heard by that court. Putting aside from these extended time periods for court hearings, it is unlikely that a casual employee would spend time seeking legal advice to pursue a former employer in court in addition to looking for employment.

44. Given that this decision means the Act apparently allows for agreements to be made with casuals who do not have protection from unfair dismissal, it would be appropriate to place requirements in the Act about who can be engaged in bargaining. Requirements can be placed on the kinds of employees who may be involved in bargaining to ensure that they have the necessary bargaining power and engagement with the enterprise to effectively engage in bargaining and are not used as a rubber stamp for the employer's preferred Agreement. Placing a requirement on employees having a minimum engagement period of regular and systematic work would ensure that they are protected from Unfair Dismissal. These requirements would also ensure that the employees have a steady secure stream of income from the employer they bargaining with.

45. **Recommendation:** The Senate amend the Fair Work Act 2009 to ensure that Agreements can only be made with employees who:

    a. Have been employed for a minimum period of 6 months on a regular and systematic basis prior to bargaining commencing; and

    b. remain employed over the entire period of bargaining; and

    c. remain employed during the access and approval processes.

b. Case Study: Catalyst Services Enterprise Agreement 2014 [2014] FWCA 9445 (CUB Dispute Agreement)

46. This case involved the approval by the FWC of an agreement which purported to cover only three employees who were all casuals.[5] This is a high profile

[3] S.340 of the Act

[4] Unless all the parties agree to allow the FWC to arbitrate

[5] Form 17 (F17) Employer's statutory declaration in supports of an application for approval of an enterprise agreement, which was lodged by the employer with the FWC indicated at question 2.10 that three employees "will be

agreement which was a relevant industrial instrument in the recent Carlton United Breweries (CUB) dispute.

47. While the company which is named in the Agreement is "Catalyst Recruitment Systems Pty Ltd", the company named Programmed was purporting to use the Agreement to hire its employees who were to work at CUB. Catalyst Recruitment Systems Pty Ltd is still registered with ACN 050 243 251 and an office in Burswood, Western Australia.[6]

48. An ABC report uncovered other facts surrounding the approval of the Agreement which would be of concern to the Committee.[7] The ABC report uncovered that the employee who signed the agreement had been employed for all of three weeks, only working six days during that three week period.

49. Looking at the employer's statutory declaration (Form 17 (F17), which is a standard form in the FWC) accompanying the application for the FWC to approve the agreement, there seems to be a very small window in which the employee who signed the Agreement could have engaged in bargaining, which seems to corroborate the ABC report.

50. The F17 indicates there was 5 weeks during the period of bargaining through to when ballots were posted out. The F17 indicates that bargaining commenced on 13 October 2014 when the employer distributed the Notice of Employee Representational Rights. The actual ballot documentation was sent in the post on 10 November. The date that voting closed was 17 November 2014. This is a period of five weeks, meaning the employee who signed the Agreement reported in the ABC report was not present for the entire period of bargaining through to the close of the vote.

51. The FWC has redacted the date which the Agreement was signed, meaning it is not possible to identify whether the employee who signed the Agreement was present for any of the bargaining for this agreement. The AMWU submits that such a redaction is not in the public interest. The Committee should demand an unredacted copy of this instrument. In any event, if the employee had potential to be present for bargaining, the ABC report indicates that he "did not know what the company did and knew nothing about the agreement he signed."[8]

52. This example highlights the counter point to the FWC Full Bench's concern in Case Study: McDermott Australia Pty Ltd v AWU, AMWU [2016] FWCFB 2222 that not allowing casuals to vote would be disenfranchising them. We know that the agreement in this case study then went on to attempt to cover the permanent

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covered by the agreement." Further at question 4.3 of the F17, the employer indicates that all three are casual employees. The AMWU has attempted to obtain an unredacted version of the F17 Employer Statutory Declaration to obtain the figure of how many employees cast a valid vote from the FWC without success. Presently the issue is still before an officer of the FWC for resolution. The AMWU will provide an update to the Committee when a decision is made by the FWC.

[6] ASIC Website company search https://connectonline.asic.gov.au/RegistrySearch/faces/landing/recentSearch.jspx?recentSearchId=0&_adf.ctrl-state=117lbys0jc_28

[7] http://www.abc.net.au/news/2016-08-26/carlton-united-breweries-worker-dispute-exclusive-details/7785170

[8] http://www.abc.net.au/news/2016-08-26/carlton-united-breweries-worker-dispute-exclusive-details/7785170

employees who were to work at CUB and possibly many other locations where Catalyst/Programmed provides its services. The Programmed website indicates that it employs some 20,000 employees across a wide range of industries.[9]

53. Three issues arising from the approval of this agreement will be addressed:

    a. Only three casuals were involved in the making of the agreement;

    b. The breadth of occupations and types of work which the agreement purported to cover were not represented in the form of bargaining representatives during negotiations or present during the vote to approve the Agreement;

    c. Labour Hire Agreements do not have any productivity connection with the workplace where the employees are working;

54. The first issue can be resolved by adopting the recommendation in Case Study: McDermott Australia Pty Ltd v AWU, AMWU [2016] FWCFB 2222.

55. The second issue can be addressed by placing limitations on the scope of the Agreement's application to be limited to the occupations which are represented by bargaining representatives in negotiations and in voting for or against the proposed agreement. By placing this type of requirement, then if an employer wants to make an agreement to cover trades assistants, tradespeople and technical officers, then employees in all these classifications should be involved in bargaining and in voting for or against the proposed agreement. Unions who have coverage of such employees would be automatically assumed to have bargained on behalf of the interests of those employee classifications.

56. This is important because it is unlikely that those not employed, nor likely to be employed, in classifications to which they neither aspire nor are qualified to undertake, would have an interest in the bargaining outcome for such work.

57. **Recommendation:** The Senate amend the *Fair Work Act* 2009 to make it a requirement that Enterprise Agreements which are approved by the FWC:

    a. Must have been negotiated with bargaining representatives who collectively represent the range of employees who are proposed to be covered by the agreement; and

    b. Must have had a process for voting for or against the Agreement which provided the opportunity for the same range of employees proposed to be covered by the Agreement to exercise a vote in that process.

[9] https://programmed.com.au/industries/manufacturing/

Businesses use of outsourcing is preventing employees from being able to bargain for a fair share of the profits from the goods and services they are a part of producing

58. The case study also raises the real problem that "labour hire" or contractor companies are preventing the Act from fulfilling its objective of "achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations…"[10]

59. The shift towards enterprise bargaining and away from industry bargaining was instituted by the Keating Labor Government. The dominant assumption behind the Act giving primacy to enterprise bargaining, is that it more effectively ties wage increases to productivity increases at the enterprise level, and therefore across the economy. The AMWU has never agreed with these underlying assumptions of this policy objective, however that is the current objective of the Act.

60. The term "labour hire" will be used in this context, although there are a range of services on the continuum between short term labour hire to full contractor arrangements where a company such as Programmed may take on complete responsibility for maintenance functions as part of a service contract. There are many variations on these arrangements, from short term contracts to complete "partnering" arrangements where the subsidiary employer's employees are indistinguishable from those of the principal employer in role, function, and sometimes dress. This submission is not concerned with labour hire firms who provide employees to fill ad hoc short term needs. This submission is concerned with those long term employees who are placed in a workplace on an ongoing basis for more than a year. In all instances involving these long term employees, the analysis is the same.

61. Given the Act's objective of productivity and fairness, it is necessary to look at whether long term employees of labour hire/contractor businesses who are placed long term within a "host employer" are preventing the Act from achieving this objective. They are generating goods and/or services for the "host" company and it is the wealth generated by the host company which these employees should have fair access to through enterprise level collective bargaining.

62. Businesses are increasingly using outsourcing to obtain employees for their business who work on site and for all intents and purposes are employees of the business, except for their technical legal status as employees of a labour hire / contractor employer. This is preventing employees from accessing a fair share of the profits from good and services which they are a part of producing.

63. The employees of the labour hire firm conducting the business of payroll and administration, which is arguably the exclusive domain of the labour hire firm, are generating services for the labour hire firm. However, this work should be contrasted with and seen as different to the work done by employees of the labour hire / contractor firm who are placed long term within a "host employer".

[10] Section 3(f) of the Act

The payroll and administration employees are the employees generating real productivity for the labour hire employer, because their functions are the exclusive domain of the labour hire employer. The same cannot be said of labour hire maintenance employees who are placed long term for example in the CUB generating work for CUB.

64. In this present example, it is clear that the long term employees who are maintenance trades people performing work for the host employer (CUB) are generating productivity increases for the host employer. They are generating productivity increases for the host employer by minimising machine breakdowns, and potentially developing new processes for the machinery. Yet, under the Act, they must bargain with the labour hire firm. The labour hire firm has limited ability to extract a fair bargain for the employees from the host employer because it is focused on competing with other labour hire/contractors which drives down the labour hire market price. This means there is no connection between the employees and the wealth generated by the goods and services they are involved in producing.

65. Labour hire companies are becoming a vehicle through which companies can break the connection between productivity and wage increases and place employees within the silo of the so-called "labour hire industry." Within this silo of "labour hire" the work they perform and the productivity increases they achieve for the business are no longer connected to their wage increases. Their "host employer" is insulated by the "labour hire employer" from any pressure to increase wages. The only avenue for employees is to seek employment in higher paying industries or bring pressure on the employer outside of the Act's bargaining framework. The issue of skilled labour moving into other industries or occupations is a significant concern for the ongoing sustainability of manufacturing in Australia.

66. This also has implications for skill formation and retention. Through the impact of labour hire, employers "contract out' the need to employ and train apprentices and other trainees. Principal employers fail to train, and because most labour hire companies have only short-term employment opportunities (usually much less than the nominal four years that it takes to train an apprentice) their incentive to engage apprentices is very limited. This vicious circle results in ever-diminishing apprentice and trainee numbers, and a consequent deskilling of the Australian workforce. The deskilling of the workforce reduces the capacity of the economy to achieve growth through productivity increases.

67. In this particular case example, the employees who would have worked at CUB (the host employer) and employed by Programmed (the labour hire employer) had their wages effectively cut, simply because there was a change in the labour hire employer who would technically be their employer under the Act. They would still be performing the same work for CUB.

68. These issues with labour hire arrangements arise because the current system follows the "employer" and "employee" relationship which centres around the

contract of employment.[11] "Host employer" corporations are engaging long term employees through these labour hire employers to shield the "host employer" from wage claims based on work performed for the "host employer." They shift the risk to the labour hire company, and often ultimately to the employee him/ herself.

69. It is unfair for the Act to allow the avoidance of the basic principle that employees should be able to bargain for fair wages with the employer for whom they are generating profit making or value adding goods and services.

70. The basis of "labour hire" is the outsourcing of recruitment, HR and administrative functions, where the employer does not have any or is unable to obtain these. It is legitimate for labour hire firms to sell those particular services associated with payroll, compliance and HR administration. However, the Act should not allow for this circumvention of enterprise bargaining by directing ***long term employees*** of a "host employer" to bargain with the "labour hire employer." The legal fiction of a "labour hire employer" is allowing the "host employer" to escape bargaining with employees who perform work for them on an ongoing permanent basis.

71. This unfairness is compounded by the influence of the "labour hire" market, where labour hire employers are under competitive pressure to reduce the amount for which they are prepared to provide the labour, even though they may not have the labour which they are purporting to be providing. This particular example at CUB is the norm in many long term labour hire arrangements, where the incoming labour hire employer attempts to hire all or a significant proportion of the outgoing labour hire employer's employees.

72. In order to prevent host employers' from evading their obligations through the use of labour hire contractors and obstruct employees from negotiating with the business which they are generating wealth for, the Act should allow for employees to bargain with their host employer where they are placed long term in the service of the host employer.

73. This proposal is not a novel idea. There are currently exemptions within Competition Law that allow for businesses to negotiate and act collectively against another business taking into account the market power of the business against which they are wishing to collectively negotiate with. This would be no different in ensuring that employees can access collective bargaining and ensure that the bargaining is directed at the appropriate business who is the ultimate decision maker of how much is available to pay the relevant work area, contract or supply chain.

74. Another way to prevent the long term misuse of labour hire employees by host employers is to provide for an automatic entitlement to convert to the employment of the host employer, by requiring host employers to include in all

[11] *C v Commonwealth* [2015] FCAFC 113, the Full Court of the Federal Court, in confirming that a member of the Australian Defence Force was not an employee because "no civil contract is entered into by the appointment of an officer, member etc of the Defence Force," confirmed that it is the civil contract of employment which creates the employer and employee relationship regulated by the Act.

labour hire service agreements an agreement that they will offer employment to any labour hire employees who are placed at their workplace for a period of time (for example, once they reach six months of regular employment placed with the host). There would need to be associated protections such as those provided to casuals under casual conversion clauses.

c. Case Study: Esso Longford Plant and Non-Destructive Testing

75. The AMWU also has been involved in a matter which did not go before the Fair Work Commission but which affected AMWU members and which contained similar facts to what occurred at CUB.

76. Esso had a contract with ALS for the provision of non-destructive testing (NDT) services at the Longford plant.

77. As the end of this contract approached, Esso held a tender process for the work rather than just renewing ALS's contract. Another company Oceaneering bid for the work. Esso accepted Oceaneering's bid.

78. The NDT workers who had previously been employed by ALS have been offered jobs by Oceaneering on significantly reduced pay and conditions to continue doing the same work but employed by Oceaneering instead of ALS.

79. This is another clear example of the way in which corporations are using contractors to avoid the intent of there being certain obligations of employers and minimum rights and entitlements for employees. The separation of these long term employees from Esso who is benefiting and profiting from their work, disconnects them from the profits they are helping to generate through their work. Instead, these employees become limited to bargaining with the contractor employer, who is constrained by competitive forces of having to tender against other contractors.

80. At the same time there is a risk that employees may also lose various entitlements because their service may not be recognised if they switch from one contractor to another contractor (despite still working for the same host). Without recognition of service, employees lose access to specific entitlements which are based on length of service such as long service leave, accrued personal leave, redundancy and notice of termination.

81. The AMWU also supports the recommendation proposed by the ETU in submission 184 regarding the amendments to the transfer of business provisions.

82. **Recommendation:** That the Senate amend the Fair Work Act 2009, to establish a new regime for bargaining and compliance which allows any person who performs work to come together collectively with other workers to bargain and seek compliance from businesses who receive the benefit of that collective work.

83. **Recommendation:** That the Senate amend the Fair Work Act 2009, to establish a regime for labour hire / contractors that:

a. Requires labour hire arrangements to include a requirement that host employers will offer employment to labour hire employees who are placed in the workplace on an ongoing basis (for example, once they reach six months of regular employment placed with the host); and

b. Ensures that when contracts for labour hire or service agreements end, that the employees' entitlements and conditions at a workplace are not reduced when the new labour hire employer / contractor takes over the contract.

d. Case Study: UGL Resources (Contracting) Pty Ltd; OM Contracting Maintenance Enterprise Agreement 2015 [2015] FWCA 2850

84. UGL Resources (Contracting) Pty Ltd negotiated an enterprise agreement titled OM Contracting Maintenance Enterprise Agreement 2015 which was to cover four employees. The F17 employer's statutory declaration obtained by the AMWU from the FWC indicates the employer's answers to the following questions:

a. 2.10 Number of employees to be covered by the agreement? ***4***

b. 3.5 Does the Agreement contain any terms that are less beneficial than equivalent terms and conditions in the reference instrument(s) listed in questions 3.1 and 3.2 and/or does the agreement confer any entitlements that are not conferred by those reference instruments? ***No***

85. For this file, before providing the FWC file to the AMWU, the FWC has redacted the information about whether any employees are casual at question 4.3.

86. The wage rates are higher than what the Modern Award provides for. The Trade rate for a mechanical fitter under this enterprise agreement Grade 5 is $937.57, while the Modern Award wage rate for C10 which is the equivalent base trade rate is $783.30.

87. The Agreement purports to cover all employees who are employed by United Group Resources (Contracting) Pty Ltd in the classifications across Australia.

88. The Agreement excludes the operation of the Award and does not incorporate any Modern Award terms.

89. The employer describes themselves as operating in the "Industrial Construction and Maintenance Services."

Lack of Union Weakens the Safety net

90. The agreement was not negotiated with any union. There was only one employee bargaining representative.

91. The employer provided a statutory declaration stating that there were no less beneficial conditions when the proposed Agreement was compared to the Modern Award. When the proposed Agreement was examined by the FWC, it was identified that there were some conditions which may be less beneficial, particularly for casuals in relation to minimum hour engagements and for apprentices in relation to their wage rates.

92. In response to these concerns raised by the FWC, the employer provided undertakings to provide those entitlements in the *Manufacturing and Associated Industries and Occupations Award* 2010 which may be more beneficial.

93. The process that follows demonstrates the dangers of unions being left out of the bargaining process. Once the employer had provided the undertaking, they also provided a hand written note which they apparently received from the employee representative. The hand written note says:

"I ANDREW GREENWOOD ON BEHALF OF UGL EMPLOYEES GIVE THE PRESCRIBE UNDERTAKING TO BE CARRIED OUT IN REGARDS TO 2015 EA. [SIGNED]"

94. Attaching the hand written note by email to the FWC, the employer wrote the following email.

"*Morning Yota*

The Bargaining Rep for the Employees in relation to the OM Contracting Maintenance enterprise Agreement 2015 has sent this attached handwritten note this morning. We did not assist him in preparing this but simply asked him to write confirming his acceptance or non-acceptance of the Undertakings. His note indicates that He is making the Undertakings on behalf of the employees which I hope does not confuse the issue. The employees are currently in the field working and written communication is a little difficult.

I trust that the Deputy President will take from his handwritten note that he has read the Undertakings and has no issue with them being provided as part of the Application process. Indeed he has adopted them as if he were making the Undertakings.

Please let me know if you require anything further.

Kind regards

Terry Elliot (National Industrial Relations Manager)"

95. It's clear from the handwritten note that the employee bargaining representative does not fully understand what he is agreeing to or being asked to agree to. Without union involvement, employee representatives may, as in this example not have sufficient industrial relations experience to ensure the safety net floor

provided by the Modern Awards applicable protects employee terms and conditions, particularly those terms and conditions for casuals and apprentices.

96. Following the Agreement being approved, the Union has received inquiries from members about certain other conditions which appear to be worse off than under the Award. In particular, the Agreement provides at clause 3.1.3(v) that casuals who work overtime are not paid their overtime based on their casual rate of pay, they are paid overtime based on the rate of pay for permanent employees.

97. Another concern raised by union members is that they are unable to decline overtime work or engage in any action with the intention of banning overtime worked. Clause 5.4.16 of the Agreement indicate that employees cannot engage in any overtime ban or refuse to work overtime.

98. There are also a range of allowances from the Modern Award which do not appear to be included in the Agreement and which the FWC has not enquired about. Given the broad ranging nature of the contractor's described industry and locations of work, there may be a significant number of allowances which might be applicable to work at any particular time.

Full Time Casual Employment being used

99. Another aspect of the agreement of note in examining the undertakings is that the employer claims that there is no need for part-time work under the agreement. In response to the FWC concerns that it was unclear whether the Agreement was to be used to employ part-time employees as there didn't appear to be any provisions for part-time work hours, the employer wrote the following in an email submissions:

"*Yes, that is correct the agreement does not deal with part time employees, as it has not been the intention of the parties to include them. The work that is done under the proposed agreement is mostly project-related and can involve remote locations where part time employment is impractical. On this basis part time employment has not been included and the Company has been prepared to ensure that permanent full time (weekly hire) has been available for all employees and that casual labour would just then be used to supplement that.*"

100. The F17 has been redacted, so it is unclear how many of the four employees are in fact permanent or casual.

FWC Better Off Overall Assessment is not fail proof

101. While the Fair Work Commission was able to identify some terms which may be less favourable, the FWC did not identify that there was an inconsistency between the consultation clause requirements and the hours of work clause. There is a requirement at s.205(1A) which requires that for any change to the employees' regular roster or hours of work, the consultation clause in the Agreement must require the employer:

(a) To provide information to the employees about the change; and

(b) To invite the employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities); and

(c) To consider any views given the by the employees about the impact of the change.

102. The Consultation clause in the Agreement does provide for this process at clause 1.8.2. However, the hours of work and rostering clauses provide that the employer is only required to give 48 hours notice of any change. It is not clear how this consultation is to occur within the 48 hours notice period. The Modern Award consultation clause requires that the employer consult before making decision. This makes it clear that the notice period only commences once the employer has made a decision.

103. In this Agreement, there is no requirement to consult before making a decision, meaning that the clause could require the employer only to consult within the 48 hours which would be difficult, judging by the employer's correspondence in relation to the employee bargaining representatives response to the undertakings.

Hours of work

104. While the Agreement does pay more than the Award, the employer's submissions attached to the undertakings indicate that some of the work the company is aware will be performed by employees who are to be covered by the agreement appears to be fly in fly out (FIFO). There does not appear to be any rostering arrangements identified in the Agreement for FIFO, although there is Living Away From Home Allowance. A few other clauses seem to create a grey area, where the employer can dictate with minimal notice the actual hours of work and rostering arrangements for employment.

105. Clause 5.2.1 Ordinary Hours

"*The Ordinary Hours shall be thirty-eight (38) per week over 4 weeks. Roster may be organised on the following bases:*

(a) 38 hours within a work cycle not exceeding seven consecutive days; or

…

(e) such other roster as may meet the needs of the client."

106. Clause 5.2.4 Ordinary Hours

"*The Company may vary the hours of work and shift rosters (including FIFO roster) to meet operational requirements. The Company may transfer an Employee to or from day work or shift work rosters, and from one shift panel to another. Employees shall be provided with forty-eight (48) hours' notice (unless a shorter period is agreed with the Employee) from the Company of a variation of the hours of work and shift rosters or a transfer between such rosters*."

Labour Hire Arrangements Avoid Industry Standards

107. These type of labour hire agency / contractor agreements allow employers in particular industries to avoid the standard terms and conditions of employment which exist in a particular industry.

108. For example, the AMWU is aware that this agreement was used to engage employees who worked in the Oil Refining and Manufacturing Industry, where the standard hours of work are 35 hours per week.[12] The Oil Refining and Manufacturing Award 2010 was not used by the FWC for the purposes of the BOOT test.

109. The Oil Refining and Manufacturing Award 2010 does include the standard labour hire clause in its coverage clause at 4.7:

"4.7 This award covers any employer which supplies labour on an on-hire basis in the industry set out in clause 4.1 in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry. This subclause operates subject to the exclusions from coverage in this award."

110. However, the exclusions in the Award create a delineation between directly employed employees and those doing the same work who are employed by employers who are not in the industry.

"4.3 The award does not cover:

…

(b) employees engaged in commissioning, servicing, ***maintaining (including mechanical, electrical, fabricating or engineering and preparatory work),*** modifying, upgrading, or repairing ***facilities, plant and equipment other than when performed by employees of a refinery operator***;

…" (emphasis added)

111. We can see here that there is an inherent bias in the Modern Award System towards maintenance labour hire / contractors who are allowed to circumvent the industry standards, which include a 35 hour week.

112. The AMWU understands that the Agreement has applied to full time employees working under the "maintenance contract" between UGL the Viva Geelong Refinery.

[12] https://www.fwc.gov.au/documents/documents/modern_awards/award/ma000072/default.htm Oil Refining and manufacturing Award 2010 provides for 35 hour week at clause 10.1 of the Award.

e. Case Study: WorkPac Construction Pty Ltd; Engineering Services Agreement 2016 [2016] FWCA 1383

113. This agreement[13] is an example of an agreement made without union involvement, where conditions that the employer said were "agreed" by employees were clearly below the Modern Award. The employer rolled up allowances into the hourly rate, and tried to present the argument that employees would be better off. This was remedied by the Commission which sought undertakings from the company. The undertaking which were provided to the FWC contained completely new wage rates from what was originally in the agreement which was apparently agreed to by employees.

114. The case file reveals another concerning characteristic of this group of employees who were asked to "agree" to the employer's proposed enterprise agreement. The F17 reveals that the employer claimed that the enterprise was going to cover only 12 employees. However, we know that Workpac has provided labour hire requiring more than 12 employees.

115. The F17 also reveals that all 12 of these employees were casual employees.

116. The number of employees who actually voted in the ballot to approve the enterprise agreement is redacted by the Fair Work Commission.

117. The bargaining power of 12 casuals without job security as compared to the employer should be of concern to the Senate Committee. These types of agreements highlight the way in which companies are using labour hire companies to minimise employee bargaining power and quarantine the business from strong employee claims for a fair share of the profits from their work.

f. Case Study: Innofield Services Pty Ltd; Innofield Services Pty Ltd Enterprise Agreement 2016 [2016] FWCA 1834

118. This is another agreement which was made with only a handful of employees.

119. The employer's F17 reveals that the employer answered the Agreement was to cover 5 employees.

120. It was also intended to cover all employees employed by the company in classifications in the agreement across Australia.

121. The union understand that the company has won tenders for maintenance work and has provided employees to perform maintenance work in sections of the Viva Geelong Refinery during maintenance shut down periods.

122. The wages rates are higher than the wage rates in the Modern Award. However, the Employer's F17 indicates that there are a number of conditions which are in the Modern Award which are not included in the Enterprise Agreement.

[13] https://www.fwc.gov.au/documents/documents/agreements/fwa/ae418074.pdf

123. The FWC decided that the Agreement passed the Better Off Overall Test. There doesn't appear to be any consideration in the FWC decision approving the Agreement given to the differences between the Enterprise Agreement and the Modern Award and whether or not the higher wage rates compensate for other conditions from the Modern Award which were left out of the Agreement.

3. Labour Hire Arrangements are allowing Host Employers to avoid taking responsibility for employees who are engaged at their workplace

124. The Case studies above indicate that there is shifting of responsibility and pressure for wage increases from host employers over to labour hire businesses. Employees engaged by labour hire businesses are being advised that because of the "business model" of the labour hire employer, they are unable to provide job security.

125. It also appears that many labour hire firms are engaging employees as casuals on a long term basis. Casuals engaged on a long term basis within labour hire firms have had difficulty enforcing their entitlements for fear of losing their casual jobs. They also feel that they are unable to access casual conversion entitlements under the Modern Awards, because the technical employer the labour hire firm claims to not have ongoing work. While the host employers are not required to convert the employees to permanent employment with them because they are not technically employees of the host employer. The Union has encountered countless examples of labour hire employees who are in this type of predicament.

126. Employees who do not have secure employment and are categorised as casuals are susceptible to being exploited by employers.

127. Another way to ensure host employers cannot avoid responsibility is to more explicitly require host employers to be directly responsible for the wages and conditions of labour hire employees who are placed in their workplace on a long term basis. While there are accessorial liability provisions in the Act, these are not operating effectively to cause host employers to take a more active interest in the wages and conditions of employees who are placed in their business.

128. **Recommendation:** That the Senate amend the Fair Work Act 2009 to require the labour hire employer / contractor as well as the host employer/primary user of the service contract to assume responsibility for ensuring the minimum workplace entitlements and conditions of employees working for their business are being paid by the employer.

4. Labour Hire Employers are avoiding Redundancy entitlements

129. The decision in *Compass Group (Australia) Pty Ltd v National Union of Workers* [2015] FWCFB 8040[14] has determined that the expression "ordinary and

[14] https://www.fwc.gov.au/documents/decisionssigned/html/2015fwcfb8040.htm

customary turnover of labour" applies to the termination of employees by contractors arising from the end of a service contract.

130. The relevant paragraph of the decision reads:

> "[35] In all of the circumstances, it is in our view appropriate to make the findings contended for by Compass*. More specifically, we have concluded that the terminations of employment arose from the loss of the Department of Defence contracts and in the context of Compass' business, this was due to the ordinary and customary turnover of labour*." (emphasis added)

131. There are also other factors in this particular case of relevance, such as the fact that it was common practice for Compass not to pay redundancy on the termination of employment as a result of service contracts ending. There were also terms of the contracts of employment which the FWC relied upon.

132. As a result of this decision, it is concluded by many practitioners that there is now an assumption in the Act that the so-called "business model" of contractors and labour hire companies means that they may be exempt from paying redundancy. That is, where they provide employees to be placed within a business for the term of a service contract, that when that service contract comes to an end they are not obliged to pay redundancy entitlements to those employees.

133. This decision seems to absolve contractors and labour hire companies from maintaining a responsibility to continue to seek work and build and grow their business to support the workforce which they engage. Any other business selling goods or services, if it lost a supply contract, would have an obligation to continue to seek out new business to continue to maintain the volume of services it produces. It is unfair that labour hire and contractors have been able to find a hole in the system which now exempts them from paying their employees Redundancy entitlements simply because of their status as a contractor or labour hire company.

134. This is particularly important for many of the AMWU's members who work for maintenance service contractors and labour hire businesses.

135. **Recommendation:** The Senate amend the Fair Work Act 2009 to remove the exclusion for "ordinary and customary turnover of labour" from Redundancy entitlements in the NES.

5. Labour hire agencies are not properly classifying employees under the Modern Awards

136. Within some Modern Awards, there are entry level classifications, which are supposed to be used only for a limited period of time. After which, the employee must be re-classified to a higher level. For example, in the *Food, Beverage and Tobacco Manufacturing Award* 2010 and *Manufacturing and Associated Industries and Occupations Award* 2010 the first classification is only supposed to be used for the purposes of training.

137. The Food Award provides the following definition:

"B.2.1 Level 1 (78% relativity to the tradesperson)

(a) An employee at Level 1 has less than three months' experience in the industry or enterprise, and does not possess recognised enterprise or industrial or prior learning experience and/or skills sufficient for appointment to Level 2 or above. Provided that the length of service required to advance to Level 2 for a seasonal employee is four weeks and for a casual employee is 152 hours."

138. The manufacturing Award provides the following definition for the lowest level classification:

"B.3.3 Wage Group: C14

(a) Engineering/Manufacturing Employee—Level I

(i) An Engineering/Manufacturing Employee—Level I is an employee who is undertaking up to 38 hours induction training which may include information on the enterprise, conditions of employment, introduction to supervisors and fellow workers, training and career path opportunities, plant layout, work and documentation procedures, occupational health and safety, equal employment opportunity and quality control/assurance.

(ii) An employee at this level performs routine duties essentially of a manual nature and to the level of their training:

a. performs general labouring and cleaning duties;

b. exercises minimal judgement;

c. works under direct supervision;

d. is undertaking structured training so as to enable them to work at the C13 level.

139. It is apparent from these definitions that these classifications are only supposed to be used for training. The union understands that Labour hire businesses are not appropriately advancing employees from this training level classification.

140. The AMWU suggests that the Committee seeks evidence from the Department of Employment as to the numbers of workers classified as entry-level employees under these two awards, and seeks information on their average duration of employment. Anecdotally the AMWU believes that the numbers of workers classified as entry level for longer than 3 months and in some cases years is scandalously high.

6. Employers are being allowed to terminate operating Agreements which are superior to the Modern Award Safety Net

141. The high profile decision in Aurizon established the precedent that the "public interest" test, did not seem to include any consideration about whether the assumption that once an Agreement was made employers could not drive down conditions back towards the Modern Award safety net unilaterally.

142. The AMWU West Australian Branch submissions provided to the committee detail the experience of employees and the community arising out of the Griffin Coal Agreement termination.

143. These experiences are becoming more widespread as the concept of the "public interest" is now construed in such a way as to remove any protection for employees in the collective bargaining process. It is the AMWU's submission that the "public interest" is construed narrowly, and exclusively, as the interests of employers and "productivity in the economy." The recent decisions have lost sight of the centrality of collective enterprise bargaining and rights of employees to retain the benefit of bargains they have made as a result of productivity gains at the particular workplaces covered by the bargained agreement.

a. Case Study: Timda Pty Ltd Atex Steel Construction Agreement 2006 Atex Steel Collective Bargaining Agreement 2006 [2016] FWCA 358

144. In this case, the Union had begun seeking to bargain with the employer for agreements to replace the existing agreements. The employer did not wish to bargain and successfully applied to have the agreements terminated. Importantly, a majority of employees did not want the agreement to be terminated.

145. While in this case the employer gave undertaking to retain entitlements superior to the Award for existing employees, it did not give such an undertaking for new employees, who would only have the Modern Award as the floor for entitlements.

146. The decision followed the construction by the FWC in *Aurizon* of what constituted "not contrary to the public interest."

147. It is also relevant that the decision[15] also cited a Federal Court decision in *Toyota*[16] which indicated that parties could not agree that they would not use particular parts of the Act available to them, such as provisions in the Act allowing them to apply for variations to agreements or to terminate agreements. In this case the parties agreed that the Agreement should operate until it was replaced by another agreement. The FWC decided that this type of clause could not operate because there was a provision of the Act which allowed parties to

[15] https://www.fwc.gov.au/documents/decisionssigned/html/2016fwca358.htm
[16] http://www.austlii.edu.au/au/cases/cth/FCAFC/2014/84.html

unilaterally apply for termination of an enterprise agreement once the nominal expiry date had passed.

148. The Federal Court decision means that even if parties agree that they won't terminate or seek to make new claims in the life of an agreement, those terms will have no effect.

149. The Act should not operate to undermine collective bargaining in this way. The onus should be on a party to demonstrate why it is in the public interest that they should be allowed to break an agreement which they entered into freely not to seek any changes or terminate an agreement, regardless of whether there is a mechanism under the Act to terminate the Agreement. In a commercial context, it would be unheard of that a party could unilaterally refuse to comply with a term which they agreed to in the contract.It is also necessary to ensure that employees are not able to lose entitlement gains they have won through bargaining and often through productivity increases at the workplace by being returned to the Modern Award Safety Net, as if they had never been any history of bargaining and entitlement increases in exchange for the performance of work and productivity increases.

150. Recommendation: The Senate Amend the Fair Work Act 2009 to ensure that:

a. Agreements cannot be terminated where employees are opposed to the Agreement being terminated; and

b. Where Agreements are terminated, the terminated Agreement becomes the minimum safety net for that particular site if it is superior than the relevant Modern Award that would otherwise apply

7. Pre-Fair Work Act Enterprise Agreements Detrimental to Employees Still Have Ongoing Effect

151. Some of the last Agreements approved before the Fair Work Act 2009 came into operation are still in operation, which do not list any wages and undermine award penalty rates.

b. Koko Black

152. The Koko Black Pty Ltd Collective Agreement[17] is an agreement that was lodged with the Office of the Employment Advocate. It contains a nominal expiry date of 30th June 2011. The agreement does not contain any wage rates. It also contains very low penalty rates or excludes penalty rates. The agreement excludes the operation of any Award.

[17] https://www.fwc.gov.au/documents/documents/agreements/wpa/caen061094457.pdf

153. Clause 16 provides that "*Overtime will be paid at the employee's standard hourly rate or at the applicable penalty rate as listed in the employee's contract, depending on when the hours are worked*."

154. Clause 17 provides that weekend penalty rates are determined as follows:

> "*Penalty hours and rates for Full Time, Part Time and Casuals will be paid during the hours: Friday after 6pm until 6am Saturday; Saturday after 6pm until 6am Sunday; and Sunday after 6am until 6am Monday.*
>
> *Penalty rates are determined by level, paid above the regular hourly rate, and are as set out below:*
>
> *a. Level 1 to 3 - $2.50 per hour*
>
> *b. Level 4 and above - $3.00 per hour*"

155. **Recommendation:** The Senate amend the Act to terminate, on a specified date, all pre-Fair Work Act instruments that are less beneficial for employees when compared to the relevant Modern Award and NES that would otherwise apply.

8. The Fair Work Commission is refusing public access to documents which were part of public hearings

156. The AMWU has been requesting access from the Fair Work Commission Library to unredacted documents which were part of hearings conducted by the Commission since late 2016. The Fair Work Commission Library has continued to delay a final response to the AMWU about its formal position in relation to the request. The AMWU will continue to wait for the final response and will forward the response to the Committee once it is received.

157. What is clear is that there is an approach of the quasi-judicial members of the Fair Work Commission which is in direct conflict with the approach of the administrative arm of the Fair Work Commission.

158. A Full Bench of the Fair Work Commission in *Construction, Forestry, Mining and Energy Union v Ron Southon Pty Ltd* [2016] FWCFB 8413[18] at paragraphs [23] to [28] identified clearly the principle of open justice. The Full Bench found clearly that the Union or any member of the public should be able to acces the documents which are part of public hearings and not subject to any confidentiality orders.

159. The AMWU has referred this decision to the administrative arm of the Fair Work Commission who have verbally indicated that the documents, despite already been made public in a public hearing, were now subject the Privacy Act.

160. The current status is that the AMWU has requested the position in writing so that the parties can be clear about policy implications of the decision and of any need for changes if necessary. The Fair Work Commission had advised that a response would be forthcoming on Tuesday 21 February 2017.

[18] https://www.fwc.gov.au/documents/decisionssigned/html/2016fwcfb8413.htm

161. Some cases were decided in what the FWC calls eHearings. Which are public hearings for all intents and purposes, and are converted to hearings if any party wishes to be present when the matter is dealt with by the Commission. The Full Bench above indicates that eHearings are Hearings for the purposes of the Act, which defines them as being publicly accessible.

162. There are specific provisions in the Fair Work Act for parties who wish for documents or materials to be kept confidential to seek orders from the Fair Work Commission.

163. **Recommendation:** The Senate Committee request from the Fair Work Commission the unredacted versions of the documents for the case in this submissions and others of interest to the Committee which have already been a part of public hearings or public eHearings.

164. **Recommendation:** The Senate Committee seek confirmation from the Fair Work Commission administrative arm about the reason why the Fair Work Commission administrative arm is refusing access to documents which were a part of public hearings.

End

27 February 2017