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

SUBMISSION TO THE SENATE EDUCATION AND EMPLOYMENT COMMITTEE

NOVEMBER | 2022

ABOUT AREEA

AREEA is Australia's resources and energy industry group and has provided a unified voice for employers on workforce and other industry matters for more than 102 years.

AREEA's membership spans the entire resources and energy industry supply chain, including exploration, construction, commercial blasting, mining, hydrocarbons, maritime, smelting and refining, transport and energy, as well as suppliers to these sectors.

AREEA works to ensure Australia's resources and energy industry is an attractive and competitive place to invest and do business, employ people and contribute to our national well-being and living standards.

AREEA members across the resources and energy industry are responsible for a significant level of Australian employment, with an estimated 10% of our national workforce, or 1.1 million Australians, employed directly and indirectly as a result of the resources industry.

First published in 2022 by

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1. EXECUTIVE SUMMARY

1. Australian Resources and Energy Employer Association (AREEA) is the national employer association for Australia's mining, oil and gas and all servicing and contracting sectors.

2. AREEA is the largest and most diversified representative of the resources and energy industry and is also the sector's industrial relations (IR) specialist group. AREEA is a member of the National Workplace Relations Consultative Committee (NWRCC), Council on Industrial Legislation (COIL) and has had a significant role in all IR developments and reforms since Australia's federation.

3. The resources and energy industry provides direct and indirect employment for more than 1 million Australians. It pays the highest wages of any sector and is delivering record federal and state taxes, royalties, and job-creating major project investment.

4. In recent decades the success and contribution of the industry (detailed Appendix A) has been driven by employers and employees working together, utilising a broad range of employment arrangements including 'all staff' direct engagement multiple times above award conditions, and enterprise agreements.

5. AREEA's position on the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (hereafter "*Secure Jobs, Better Pay Bill*") is that, considered in whole, the legislation:

   a) Has no links or due consideration to productivity or business success;

   b) Will undermine enterprise-level decisions of employees and employers, and will not lift wages in doing so;

   c) Will encourage increased disputation, including the prospect of strikes across multiple businesses; and

   d) Seeks to increase the power of union bosses often at the expense of employees.

6. To protect the strength of Australia's resources and energy industry, AREEA submits that the Senate should reject the *Secure Jobs, Better Pay Bill* in its current form and recommend it be split into smaller, more management parcels.

7. This would allow the relatively uncontentious parts to be passed into law as soon as practical, and for the many more contested proposals to be properly considered and debated over an appropriate length of time.

This Bill is rushed, must be deferred

8. The *Secure Jobs, Better Pay Bill* has been significantly and unjustifiably expediated. On general principles of government transparency, the Bill must be deferred to allow for proper scrutiny, discussion and debate on the significant impacts it will have on business, employers, employees and the wellbeing of the nation.

9. The Bill is 249 pages long. It contains 29 parts of which almost all could be described as "significant". Amendments introduced to Parliament on 8 November 2022 – just three days from when submissions close and nine days from when this Senate Committee Inquiry is scheduled to hand down its report, numbered 34 pages.

10. For sake of comparison, the former Morrison Government's *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* – which was heavily criticised by Labor and the ACTU for its size and legislative timeline – was 111 pages in size and subject to a three-month long Senate Committee Inquiry process.

11. The Albanese Government's 'IR Omnibus Bill' is more than twice the size of the former Morrison Government's 'IR Omnibus Bill' and has been given around one-third the time for stakeholders, including the Senate, businesses and the wider community, to consider.

12. Providing just five weeks for the Australian Parliament to consider such an enormous and complex bill, that by any measure would re-write fundamental principles of Australia's IR framework, is in AREEA's view an enormous mistake and overreach by the Albanese Government.

13. This should be immediately corrected by deferring its planned passage for at least five months.

For the scrap heap – highly damaging, unjustified policies

14. AREEA notes there are a number of policies in the *Secure Jobs, Better Pay Bill* that the ALP did not communicate prior to the 2022 Federal Election, were not part of the party's 'Secure Jobs' policies and seek to massively upend fundamental principles of Australia's IR system.

15. There appears to be very little justification for these policies aside from propping up an ailing trade union movement that, at last count, was representing less than 10% of private sector employees. Those policies include:

    a) **Multi-employer bargaining**, in particular the 'single interest employer authorisation' stream (Part 21 of the Bill).

    It is AREEA's firm position the Government has no justification for proposing multi-employer bargaining could occur in sectors like the resources industry where a wide range of employment arrangements are in place – including EBAs and 'all staff' direct employment – that accommodate the variety of interests of employers and employees working in highly productive workplaces in the highest paying sector of the economy.

    The single interest authorisation stream will do nothing for productivity or employment. It will only undermine longstanding employment arrangements already in the sector, increase disputation and lift the involvement of unions and the Fair Work Commission in mining and resources workplaces against the will of employees.

    Amendments introduced by the Minister on 9 November do little to allay the impacts of this proposed change. As described by a prominent IR academic, these provisions are "not in a fit state" to be passed[1].

    b) **Forcing bargaining without a 'Majority Support Determination'**

    Part 15 of the Bill ('Initiating Bargaining') would allow unions to force employers to bargain for a replacement enterprise agreement in circumstances where employees have demonstrated no desire for that course of action.

    Allowing unions to force bargaining upon workplaces without first obtaining majority support of the employees who would be covered by that agreement, is an afront to fairness and freedom of association. There is no justification for this policy, and it should be dropped from the Bill.

    c) Expanded arbitration powers for the Fair Work Commission

    AREEA members note and are concerned by various parts of the Bill that seek to provide the FWC expanded powers to arbitrate disputes and effectively set employment terms and conditions for private sector workplaces. Primary this includes Part 18, however there are various technical amendments in other parts of the Bill that would add momentum to this effect.

    The proposal for the FWC, a centralised administrative tribunal, to be more active in arbitrating wage and conditions outcomes, will be a serious concern for the global investment community when assessing the IR risk profiles of various nations competing for capital.

[1] Andrew Stewart comment in *The Australian* newspaper, article by Ewin Hannan 9/11/22

Splitting the Bill – the 'potentially good' ideas

16. If the Albanese Government is obstinate in its plans to pass some workplace relations changes before the end of 2022, AREEA submits that several relatively non-contentious parts of the *Secure Jobs, Better Pay Bill* could be split off and subject to stand alone legislation.

17. This new Bill could include those changes that most parties agree are positive, well considered ideas for improving Australia's IR system. AREEA submits that those parts are:

    a) Part 16 - Changes to the 'Better Off Overall Test', and Part 17 – Dealing with Agreement Errors; both of which will improve the agreement making process for employers, employees, unions and members of the Fair Work Commission (FWC) who oversee the administration;

    b) Part 8 in relation to Sexual Harassment and Part 9 in relation to anti-discrimination. Whilst there are some technical discussions to be had on these provisions, AREEA would agree with most parties that these are positive amendments in-line with community expectations;

    c) Part 24 in relation to Small Underpayments Claims, and Part 25 in relation to Job Advertisements, both of which address potential unlawful behaviour and protect employees from either deliberate or careless unscrupulous behaviour; and

    d) Those amendments that seek to apply more expert scrutiny and rigour around wages and conditions outcomes for low-paid and often female dominated sectors, such as Part 5 (equal remuneration) Part 6 (Expert Panels) and the pay equity section of Part 4 (Objects of the Act).

'Bad ideas' business knew were coming

18. A further group of amendments contains more contentious IR positions that the Australian Labor Party (ALP) took to the 2022 Federal Election and could at least argue it has somewhat of a mandate for.

19. For various and good reasons, as detailed in this submission, AREEA does not support most of the Albanese Government's so-called "Secure Work" related IR changes.

20. Policies opposed by AREEA include abolishing the ABCC and Registered Organisations Commission; amending the Objects of the Act with ambiguous, undefined terms like "job security"; placing unnecessary limitations on fixed-term contracts (particularly in high paid sectors); and undue restrictions on agreement termination applications.

21. Despite AREEA's rejection of the need for these changes, AREEA recognises the ALP at least clearly communicated its "Secure Work" policies prior to the 2022 Federal Election and the employer community has had some time to consider them.

22. Should the Albanese Government intend to pursue these policies – and AREEA submits there are far more important things to focus on to lift economic output, wages and living standards – they should be separated from the above 'less contentious' changes and put to Parliament at a later time in 2023 or beyond.

23. Given there are widely divergent views on the justification, evidence base and likely impacts of the previously communicated 'Secure Work' policies, these previously communicated policies must also be subject to an appropriately lengthy and rigorous parliamentary inquiry and debate process, and considerable community feedback.

2. PARTS SUPPORTED BY AREEA

24. As aforementioned, the *Secure Jobs, Better Pay Bill* contains several proposed IR changes that could be supported by resources and energy employers. Detailed below are those Parts of the Bill that AREEA would generally support on the proviso that:

    a) The intended and actual effects of these Parts are accurately described in the Bill's Explanatory Memorandum and any unintended consequences that may arise as a result of the changes are dealt with via future reviews and corrective amendments;

    b) AREEA's indicated support is based on assessments of each of the following Parts on their own individual merits, and not as assessed as part of a package of "trade-offs" of pro-union or pro-business changes; and

    c) The principle outlined in Section 2 of this submission – namely that more time is required for the Australian Parliament to hear considered submissions from affected stakeholders and make an informed decision on voting for these changes – still stands.

25. With regard to the above, AREEA provides its indicative support for the following Parts.

PART 16 – Better Off Overall Test

26. The Bill proposes changes to the operation of the Better Off Overall Test (BOOT) that the Department says will "provide greater certainty for employers whilst maintaining employee safeguards".

27. AREEA welcomes that Labor, despite emphatically ruling out support for any BOOT changes under the Morrison Government, now accepts that the BOOT has not been operating in the way it was intended.

28. AREEA members have long reported the application of the BOOT has been a primary cause of uncertainty, risk and frustrations with the Fair Work Act's ('FW Act') bargaining framework. For many employers, the BOOT has been a contributing factor to abandoning agreement making as their preferred industrial strategy and reverted to award-based arrangements.

29. While the BOOT had been intended to provide for a general assessment of an agreement's overall benefits, from around 2016 (and potentially earlier) the application of the BOOT seemingly shifted to become a narrowly focused line-by-line analysis of each provision of the proposed agreement to a corresponding (or loosely related) provision in the Award.

30. This new approach stripped much of the practical, qualitative aspects from BOOT assessments. An equally significant problem was this flawed technical approach was not being applied only to existing and reasonably foreseeable working arrangements, but a seemingly endless range of hypothetical, often highly unlikely scenarios not foreseen by any parties to the agreement at the time it is reached.

31. After much debate, AREEA welcomes a breakthrough in consensus that the BOOT requires practical amendments. Part 16 of the *Secure Jobs, Better Pay Bill* appears to satisfy that.

32. AREEA does, however, submit that further reviews of the BOOT under its proposed new set of application rules should be undertaken, and the Government should be open to further improvements as required.

BOOT improvements must benefit all

33. AREEA was a member of the 2020 Industrial Relations Working Groups, convened by the Attorney General at the time. The then-government brought several key employer groups and unions together in the hope of reaching some consensus about practical industrial relations reforms.

34. During that process AREEA (then known as 'AMMA') opposed a position taken by the ACTU that the BOOT should be more flexibly applied by the FWC to agreement approval applications that were supported by a trade union. The proposal, in effect, would have created 'two streams' for the agreement approval process – a 'fast track' stream for union-backed agreements and a 'slow lane' stream for non-union agreements.

35. Given the context of 2020, AREEA members are sensitive to the possibility that any ALP and union-endorsed amendments to the BOOT, as well as potentially other pre-approval tests applied by the FWC, may be intentioned to resurrect the 'two stream' concept and would see union-endorsed enterprise agreement applications be prioritised over non-union agreements.

36. Thus, AREEA submits that the Government's changes to the BOOT be clear that such improvements are to equally apply to union-endorsed and non-union endorsed agreement applications.

A better BOOT is not a tradeable commodity

37. While AREEA and its members would welcome simplification of the BOOT, it is AREEA's view that changes to the BOOT should not be viewed by the Senate as a "big ticket item" for employers in this legislation, given the FWC's own internal performance has dramatically improved and made BOOT inefficiencies largely "yesterday's problem".

38. In mid-2019, significant public focus on improving the BOOT was appropriate given a number of high-profile contentious decisions to reject new agreements on technical BOOT-related grounds. Further, the FWC's median timeframe for approving new enterprise agreement applications had blown out to 76 days, well exceeding the Commission's 32-day target.

39. This was an issue AREEA highlighted as unacceptable to business, employees and trade unions, by shining a spotlight on this unacceptable performance by the FWC. This in part led to technical changes together with a massively improved agreement approval performance by the FWC.

40. In June 2022, AREEA was delighted to see the FWC's records showed the median approval time for 'all agreement applications' over the previous year was just 15 days. For agreements not requiring undertakings, this was just 12 days.

41. This agreement approval performance is far superior to the 21-day timeframe that AREEA and other business groups advocated for inclusion in the former government's package of Fair Work reforms.

42. In summary, AREEA's view is the changes to the BOOT included in the *Secure Jobs, Better Wages Bill,* while welcome, should not be held up in lights as a major pro-employer reform.

43. Any improvements made to the BOOT should not be positioned as a tradable commodity for other changes to the enterprise bargaining system such as those advocated by the union movement (multi-employer bargaining, increased FWC intervention etc).

44. The reality is any productivity gains achieved by minor improvements to the single enterprise agreement making system, such as the BOOT and other approval processes, would be offset in a nanosecond by the adverse impacts of introducing multi-employer bargaining and greater union / FWC interventions in high-paid, productive sectors.

PART 17 – Dealing with Agreement Errors

45. AREEA understands Part 17 of the *Secure Jobs, Better Pay Bill* seeks to remove unnecessary complexity in the agreement-making process. It would achieve this by amending the FW Act to simplify the process for correcting any obvious errors, defects or irregularities in enterprise agreements, and other measures.

46. AREEA's view is this amendment would be a welcome continuation of the trend for successive governments (firstly Minister Cash under the Coalition, and now Mr Burke under the ALP) to provide greater discretion to the FWC to correct procedural errors in agreement making, where those errors are deemed to have no material impact on the bargained outcomes or clearly demonstrated desires of the parties.

47. Should this be the intention, AREEA supports this proposed change.

PART 8 – Sexual Harassment

48. The *Secure Jobs, Better Pay Bill* would legislate a prohibition on sexual harassment in the FW Act. AREEA understands this policy is part of the Albanese Government's commitment to fully implement all 55 recommendations of the *Respect@Work: Sexual Harassment National Inquiry Report (2020) Report*.

49. AREEA also notes this policy is related to other legislative amendments proposed in the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022.*

50. AREEA's view is this amendment would add to the raft of other legislative and regulatory developments that is seeing sexual harassment become a far more proactive issue that employers must manage in the workplace.

51. AREEA members are fully committed to this important movement and are embracing new responsibilities to both prevent and more proactively respond and deal with sexual harassment and other anti-social behaviours in the workplace.

52. What may be of some concern is the new dispute resolution process proposed by this Bill. This process would the FWC to deal with disputes through conciliation or mediation. Where a dispute cannot be resolved in this way, and the parties agree, the FWC would be able to settle the dispute and make orders, including for compensation.

53. AREEA will remain agnostic on the merits of an FWC-led process here, particularly given the Australian Human Rights Commission, at a federal level, and the various state and territory WHS bodies, either already are or will soon have similar compliance and enforcement roles in this space.

54. The FWC also has an existing role, being the current stop sexual harassment order jurisdiction of the Act, that would be merged into the new prohibition should this Bill pass into law.

55. In principle AREEA supports this amendment, however, will be observing with interest the cross-over between various regulators seeking to address this issue in the workplace, including state WHS regulators, the AHRC, other anti-discrimination agencies and also the FWC.

56. Ideally, these regulators should work together in a coordinated approach and avoid creating overlapping / duplicative processes for the sake of regulatory burden alone.

PART 9 – Anti Discrimination

57. The *Secure Jobs, Better Pay Bill* proposes amending the FW Act to include gender identity, intersex status and breastfeeding in the list of protected attributes. This would flow through to several parts of the Act, including provisions dealing with discriminatory terms in agreements and awards and the general protections.

58. AREEA understands these changes would allow individuals who experience discrimination on the basis of gender identity, intersex status or breastfeeding, to pursue discrimination complaints through the FWC.

59. Given the above listed attributes are already protected in other Commonwealth and state/territory anti-discrimination law (as well as open to be subject of adverse action claims), and subject of potential complaints and investigations through the Australian Human Rights Commission's new jurisdiction, AREEA is unsure of the need to explicitly state these attributes as protected within the FW Act.

60. However at the same time, adding these attributed to the FW Act will have little practical impact on AREEA members and thus it is not opposed.

PART 24 – Small Underpayment Claims

61. The *Secure Jobs, Better Pay Bill* proposes to amend small claims court procedures to assist workers in recovering their unpaid work entitlements and to reduce the cost and complexity of proceedings for all parties.

62. AREEA does not oppose this change. It is AREEA's view the intended outcome of providing a low-cost, faster and more informal means of resolving claims under the FW Act, would be achieved. It is not a concern or issue raised by AREEA members, as such claims are very rare in the resources and energy sector.

PART 25 – Job Advertisements

63. AREEA also supports Part 25 of the Bill which seeks to prohibit the advertisement of a job with a pay rate that would breach the FW Act.

64. AREEA is not aware of any resources and energy sector members advertising jobs with a pay rate of less than legal entitlements. It is appropriate that employers understand such practices will soon be unlawful.

3. MAJOR CONCERNS / PARTS OPPOSED

MULTI-EMPLOYER BARGAINING (Parts 21, 20, 23)

65. AREEA is fundamentally opposed to multi-employer and industry bargaining.

66. Since the early 1990s agreements reached at the individual enterprise level have been fundamental to underpinning workplace relations and national productivity growth.

67. AREEA holds significant concerns that multi-employer / industry bargaining campaigns targeted at major resources and energy project operators and/or within critical supply chains could see nationally significant projects ground to a halt through coordinated strike action.

68. This could in-turn massively impact the sector's enormous export revenues, forego federal and state-level taxes and royalties, and see employees with no connection to those supply chain operators stood down until such issues are resolved.

69. In a press release dated 27 October 2022, AREEA Chief Executive Steve Knott AM made the following comments summarising AREEA's views on the inclusion of multi-employer bargaining in this Bill:

> *"The ALP and ACTU are attempting to usher in a new era for Australian industrial relations, one where employers will be compelled into multi-employer bargaining campaigns, strikes will take place across entire industries and the Fair Work Commission will have an increased intervention role in all workplace disputes," Mr Knott said.*
>
> *"This is a throwback to the bad old days of widespread union-led strikes and unproductive centralised wages and conditions fixing by an out-of-touch national IR tribunal. Such an outcome would create very real barriers for Australian resources and energy employers attempting to secure new major project investment capital."*

70. AREEA accepts the ALP may have some form of justification to pursue two of the three streams – namely 'supported bargaining' (Part 20) and 'cooperative workplaces' (Part 23) as those streams at least fit the Government's narrative of seeking to address wage stagnation in low-paid sectors and allowing small businesses to bargain collectively on consent.

71. AREEA does not agree that multi-employer bargaining is required to achieve the above policy aims – for instance the most immediate method for increasing wages in low-paid sectors is for the FWC to provide a substantive increase to those sectors in its Annual Wage Review decision, which it did in 2022.

72. Notwithstanding that view, this is a separate debate to what the Albanese Government is proposing with the third stream, namely 'Single Interest Employer Authorisation', or Part 21 of the Bill.

73. It is AREEA's position the Government has no justification for allowing multi-employer bargaining to occur in sectors like the resources and energy industry and its wide array of servicing contractor sectors.

74. This industry utilises a broad range of employment arrangements – including EBAs and 'all staff' direct employment. Such arrangements accommodate the variety of interests and requirements of employers and employees, and they facilitate highly productive, mutually rewarding employment in the highest paid (by far) sector of the Australian labour market.

75. In summary, the single interest authorisation stream contained in the Bill will do nothing for productivity or employment. It risks undermining longstanding employment arrangements already in the sector, increase disputation and lift the involvement of unions and the Fair Work Commission in mining and resources workplaces against the will of employees.

76. In support of this argument, AREEA also wishes to correct an assertion repeatedly made by Minister for Employment and Workplace Relations, Tony Burke, being that the majority of resources sector workplaces are covered by an in-term enterprise agreement and thus would not be impacted by this new multi-employer bargaining stream.

77. This is entirely incorrect. Less than half of resource sector workplaces are covered by an in-term enterprise agreement. Many resources and energy sector workplaces have 'all staff' common law arrangements in place, underpinned by Modern Awards, however paying well above award terms.

78. Unions have attempted to organise those workplaces for many years however it has proven extremely difficult to convince employees of the need to join unions and negotiate an enterprise agreement when the average wage in the resources sector is circa $2700 per week – roughly 250% the award conditions of around $1100 per week.

79. With this in mind and considering the policy intentions of the Albanese Government (lifting wages in low-paid sectors; supporting small business on consent) would be easily achieved by the other two streams of multi-employer bargaining (supported bargaining; cooperative workplaces) the only conclusion left for AREEA's to draw is the 'single interest authorisation' stream is designed as a "catch all" for other sectors.

80. That includes those that are high paid, highly productive and where unions have had a difficult time in re-unionising the workforce. Namely, the resources and energy sector.

Multi-employer bargaining undermines the Awards system

81. With respect to the three streams of multi-employer bargaining proposed by this legislation, AREEA raises a more general point about the role of the Modern Awards system.

82. In AREEA's view the proposed legislation risks a situation whereby Modern Awards become entirely redundant. This would be a potential outcome of the various proposed streams of multi-employer bargaining lifting minimum rates of pay across industries to well above award conditions.

83. This is highly conceivable given the Government's narrative around the need to introduce muti-employer bargaining centres around purported slow wages growth. Assessed as a whole, it is reasonable to conclude the *Secure Jobs, Better Bill* seeks to move as many award-reliant employees onto agreements as possible. It seeks to achieve this by strengthening the powers of union officials to compel employers to bargain – be in via single enterprise or proposed new multi-employer bargaining – and by tacitly threatening employers that if they do not have an in-term enterprise agreement in place they may be exposed to an industry approach.

84. AREEA cautions the Senate not to wave through IR provisions that may have a substantial impact on the legitimacy of the Awards system. It was through the FWC's Annual Wages Review decision of 2022 which over one million workers will receive a wage increase this year of between 4.6%. and 5.2% - not the enterprise agreement system.

85. Moreover, the Awards system is regularly reviewed to provide an appropriate set of minimum terms and conditions. It would be damaging for the economy if the effective minimum rates for entire industries was lifted well above Award conditions to such a level that business itself in Australia may become untenable for many organisations.

86. The unknowns around unintended consequences of this Bill adds more weight behind calls to defer it and allow for proper scrutiny and debate.

PART 15 – Initiating Bargaining

87. AREEA also holds significant concerns over Part 15 of the Bill regarding initiating bargaining.

88. This amendment would remove the need for unions to obtain a majority support determination of employees in a workplace, before initiating bargaining with the employer to replace an expired enterprise agreement.

89. As described by the DEWR Fact Sheet on this part of the Bill:

    a) *Currently under the FW Act, a majority support determination must be sought by an employee bargaining representative to require an employer to bargain for a replacement enterprise agreement.*

    The Secure Jobs, Better Pay Bill proposes removing the requirement for employee bargaining representatives, such as a union, to obtain a majority support determination to initiate bargaining if the proposed agreement would replace an earlier single-enterprise agreement that had passed its nominal expiry date and no more than five years had passed since the nominal expiry date.

90. The practical effect is unions could force any employer to bargain for a replacement enterprise agreement without requiring employees at that workplace to demonstrate their support for that course of action.

91. This policy would have biggest impact at workplaces where employees are perfectly happy to allow for their enterprise agreement to expire. As is the case in many areas of the resources sector, enterprise agreements often become irrelevant once market pay rates exceed them, and employees see little need to disrupt their employment relationship by pursuing a replacement.

92. Handing unions powers to force employers to bargain even where their employees do not support that course of action, would be an affront to principles of employee choice and freedom. It would lock employers and employees into the enterprise bargaining system perpetually; making it impossible for them to exit the bargaining system even if all parties to the employment relationship wish to do so.

93. As with the multi-employer bargaining provisions, there appears little justification or purpose for this amendment outside of providing a 'step up' for unions to insert themselves into workplaces that have long left them behind.

AMENDMENT 58 – Repealing s271A in relation to Greenfields Agmts

94. AREEA has identified an inclusion in the 34-page set of amendments to the *Secure Jobs, Better Pay Bill* introduced by Minister Burke on 9 November 2022 (pg. 11, document ZD197) that raises a significant issue for the resources and energy industry.

95. This amendment seeks to repeal section 271A of the FW Act and has been described as a "technical" change in relation to bargaining disputes. The except of the amendments document is as follows:

> (58) Schedule 1, item 551, page 177 (lines 26 to 28), omit the item, substitute:
>
> **551 Section 271A**
>
> Repeal the section.
>
> ***[technical: bargaining disputes]***

96. While the Minister may have expected this 'technical amendment' could be added to the Bill relatively unnoticed, the reality is this amendment would have a significant impact on the

bargaining dynamic for ‘greenfields agreements’ most commonly utilised for the construction of new multi-billion-dollar major resources and energy projects.

97. At present, under the FW Act’s Greenfields Agreement provisions, if an employer cannot come to terms with a union in relation to a proposed greenfields agreement after six months of bargaining, the employer can apply to the FWC for approval of the agreement on its own merits. This is an important safeguard to prevent unions “holding out” on agreeing to greenfields terms in order to ratchet up pressure on an employer to meet their demands in order to commence construction of their project.

98. Multiple reviews of the Fair Work legislation had identified this as a common tactic for more militant unions when negotiating greenfields agreements, such as the Construction, Forestry, Mining, Maritime and Energy Union (CFMMEU). The six-month bargaining window, followed by ability for an employer to have the FWC assess their proposed employment terms independently and on their own merits, meant in practice unions would be encouraged to bargain in good faith towards reaching sensible agreement terms efficiently.

99. By removing s271A, which the *Secure Jobs, Better Pay Bill* seeks to do, any unresolved greenfields agreement negotiations at the six-month mark would be thrown into an FWC-led “bargaining related workplace determination”. Instead of being able to lodge an agreement to be assessed on its merits by the FWC, an employer seeking to make a greenfields agreement with a union would face the prospect of an arbitrated outcome.

100. Should this section be repealed, it will again become a common bargaining tactic for unions to stall and delay greenfields agreements for at least six months, in order to get their claims before a Full Bench of the FWC for arbitration. This would blow-out the timing of IR arrangements for new proposed major resources projects at a time they can least afford – being the pre-construction phase – and lead to uncommercial terms and conditions.

101. Australia’s resources and energy industry has more than $500 billion in its major project investment pipeline. Should the nation be able to convert a significant portion of this to realised investment, the benefits would include over 100,000 new high-paid jobs.

102. Given the enormous benefits of new major projects, AREEA is bewildered as to why the Albanese Government would seek to make the IR framework for investors more risky and more uncertain. This in turn will prove a deterrent to many project proponents, leading to Australia missing out of job-creating project opportunities.

103. AREEA submits that amendment 50 to the *Secure Jobs, Better Pay Bill* must be abandoned. There are well evidenced reasons why Greenfields Agreements have unique processes for resolving bargaining disputes. Those processes are overwhelmingly in the national interest.

PART 12 – Terminating Expired Agreements

104. Part 12 of the *Secure Jobs, Better Pay Bill* gives effect to the longstanding policy of the ALP that employers should not be able to unilaterally apply to the FWC to terminate an expired enterprise agreement.

105. AREEA has long argued there are many legitimate reasons for an employer to seek to terminate an expired enterprise agreement, including (but not limited to) longstanding protracted bargaining disputes where unions are demonstrating intransigence in support of unsustainable claims.

106. It is also clearly the case that the ALP’s longstanding position on this policy issue is not grounded in facts.

107. The ability for employers to apply to the FWC to terminate an expired agreement. This has been characterised by Minister Burke in many media appearances as a “rort”; an apparent loophole that provides employers with unfair leverage in enterprise bargaining. Nothing could be further from the truth.

108. Recent research revealed the FWC terminated 95 enterprise agreements across the three years of 2020-2022 (to date), of which 97% (92 applications) were not contested by any party. Of the three applications that were contested by unions, two had no employees working under them and in the third, the FWC was satisfied the employees would not lose any entitlements. Looking further back, the FWC's own analysis from five years ago showed less than 3% of agreement termination applications during 2015-2016 were contested.[2]

109. This is indicative of the broader reality regarding terminating agreements. Namely, very rarely are applications made where they are opposed, and when they are, very rarely are they approved.

110. AREEA submits that the resources and energy industry is not a big user of the ability to apply for termination of workplace agreements. However, where this function is required, it is important.

111. The highly cyclical and globally exposed nature of resources and energy markets mean the competitive pressures facing an employer can be vastly different from one bargaining period to the next. In those types of circumstances, the option to have expired, unsustainable agreements reviewed and potentially terminated by the independent umpire keeps projects open and saves jobs.

112. AREEA does acknowledge that, despite taking a hard line on this issue in recent years, the Bill does leave the door open for terminations where the expired agreement is presenting a significant risk to business viability.

113. Should this Part of the Bill pass into law, in AREEA's view the proposed new criteria in which employers may still make such applications, whilst more stringent than the current system, would still allow for some applications to be approved where the case can be clearly made.

114. In AREEA's view, clear and objective metrics should be established to assess the merits of future termination applications. The FWC will be tasked with assessing an employer's argument that operating under an expired enterprise agreement would risk business viability.

115. In exercising this duty, clear objective metrics would provide for a consistent 'test' of the merits of such applications, and appropriately exclude subjective and unhelpful information such as the views of uninformed parties with no 'skin in the game' in terms of potential business closure.

PART 13 – Sunsetting 'Zombie Agreements'

116. In its justification for Part 13 of the Bill, the Albanese Government has argued that unlike enterprise agreements made from 2010, so-called "zombie agreements" were not required to be compared against modern awards. This, in-turn, leaves them more likely to have less beneficial terms and conditions than modern awards.

117. This may be the case in other sectors of the economy, but where pre-FW Act instruments are still in place in the resources and energy industry, they have successfully been left in place due to the typically high levels of remuneration and flexibility offered to employees.

118. Thus, whilst AREEA opposes automatic sunsetting of pre-FW instruments on principle, the Bill does offer the handful of AREEA members with pre-FW Act instruments still in place (such as 1990's Enterprise Flexibility Agreements) an option to apply to the FWC for continuation of those agreements, provided they can demonstrate employees are better off than the award.

119. This will provide allow for those employers which may have been expecting all pre-FW Act instruments would be abolished irrespective of how much better off employees were, an alternative pathway forward to retailing those agreements.

[2]Stephen Smith, Principal of Actus Workplace Lawyers, research paper released publicly on 19 August 2022

120. Therefore, should Part 13 pass into law, the ability for employers to make applications to the FWC on the basis employees are clearly "better off", must be retained and administered in an efficient and objective manner.

PART 18 – Bargaining Disputes

121. The *Secure Jobs, Better Pay Bill* would amend the FW Act to empower the FWC with new powers to resolve "intractable bargaining disputes".

122. AREEA is very concerned with this proposed amendment. Despite the Department arguing "there would continue to be a high bar for access to arbitration for intractable bargaining disputes", the making of an "intractable bargaining determination" sounds very much like arbitration dressed up as "FWC assistance".

123. Under such a system, unions will be incentivised to hold firm on unsustainable claims knowing after a certain period of time the FWC would arbitrate an outcome.

124. AREEA's submits that Part 18 of the Bill should be carved out of the Bill. Too many unintended consequences, damaging to business, would result.

125. Rather, the Government should appropriately consult with business and union representatives on alternative ways to bring a resolution to intractable bargaining disputes. This may include tests of the reasonableness of claims and positions of parties, consideration of market conditions and enterprise competitive pressures and comparable industry bargained outcomes.

126. In a global capital market, investors will be extremely nervous to fund major resources and energy projects in Australia under the prospect of any dispute between employers and unions ending up before the FWC for essentially an arbitrated outcome.

127. AREEA submits Part 18 sends a very dangerous message to the international investment community about how much intervention a government agency should have in determining IR outcomes for private sector projects and businesses.

PART 19 – Industrial Action

128. Part 19 of the *Secure Jobs, Better Pay Bill* would provide employees with a longer period in which to commence industrial action from the date of ballot declaration.

129. AREEA is concerned by this proposal and rejects the justification for its inclusion.

130. Under the FW Act, protection industrial action must start within 30 days of declaration of the results of a ballot (unless extended by the FWC). This amendment would effectively triple that timeline to three months.

131. The Department (DEWR) argues this change would "remove a perverse incentive for employees to take immediate industrial action."

132. AREEA does not agree with this assessment. Rather, the practical effect would be employees (or employee representatives i.e. unions) could organise a ballot for industrial action early in the bargaining process, potentially well before any real intention of taking industrial action, knowing that a successful ballot would see bargaining meetings for a three-month period taking place under the constant shadow of the threat of industrial action.

133. This proposal would only further skew the bargaining dynamic in favour of employees / unions. AREEA firmly rejects this would disincentive industrial action. Rather, it would have the opposite effect, and incentivise unions / employees to conduct PABO's earlier in the bargaining process, potentially before meaningful discussions about mutually rewarding outcomes that might be reached.

PART 10 – Fixed Term Contracts

134. The *Secure Jobs, Better Pay Bill* proposes limiting the use of fixed term contracts for the same role beyond two years (including renewals) or two consecutive contracts - whichever is shorter.

135. There are many situations in the resources and energy industry where consecutive fixed-term contracts extending beyond two years are appropriate. This includes, for example, major project construction work which is typically very highly paid and sees work associated closely with project schedules that may extend beyond two years but have a very clear end date.

136. Further, there has been little detail or consideration released about how this policy might intersect with temporary skilled migration visas. Typically, the resources sector would only sponsor temporary visa holders for high-paid project work with a clear completion / closing date. Such arrangements should be exempted from this policy to avoid unnecessary complications and productivity impacts.

137. AREEA understands the key target for this reform are other lower-paid sectors where fixed-term contracts are commonly used. AREEA's submits that a high-income exemption for this policy, one that that would effectively exempt high-paid arrangements within the resources and energy sector, is appropriate and sensible here.

PART 3 – Abolition of the Australian Building and Construction Commission

138. AREEA has been a longstanding supporter of the ABCC and its necessary work to hold militant unions, most notably the CFMMEU, to account for persistent recidivist lawbreaking.

139. It is AREEA's view the ABCC should not be abolished. Doing so is nothing more than a gift to the "worst corporate offender in Australia's history", as often described by the Federal Court.

140. AREEA does however accept that the "horse has bolted" on this policy. The ALP has long opposed the ABCC and, in the view of any respectable political commentator, was always going to abolish the regulator as soon as it won office. Demonstrating this, in July 2022 the Albanese Government cut funding to the ABCC making the regulator nothing more than an empty shell of an agency.

141. AREEA does, however, implore that the new role of the Fair Work Ombudsman to take up regulation of building and construction sector unlawful industrial behaviour, must be taken seriously and applied with rigour.

142. Unlike the last time the ALP abolished the ABCC and moved its functions within the Fair Work jurisdiction, in 2022 it must not be replaced with a "toothless tiger" regulator in name only.

143. Nearly $70 million worth of additional public funding has been provided to the FWO to exercise this role. Nothing less than the same level of policing and prosecution of CFMMEU thuggery would represent a significant failure in this space, to the detriment of one of Australia's most important industries.

4. COMMENTS ON OTHER PARTS OF THE BILL

PART 14 – Agreement Approval

144. AREEA agrees with the government's assessment that the current pre-approval requirements for enterprise agreements are prescriptive and complex, which can have significant consequences for employers and employees where an agreement has been reached but cannot be approved because of a procedural error during the course of the bargaining process.

145. This has been a matter in which AREEA has lobbied for change over many years. Improvements to this part of the FW Act were attempted by the Morrison Government in 2020/2021 however were heavily resisted by the ALP then in Opposition and the union movement at the time.

146. At face value, AREEA's view is that the Bill's intent to replace the current pre-approval steps and genuine agreement requirements with a single, broad 'genuine agreement' requirement would encourage bargaining and reduce approval times.

147. However, AREEA submits that the Senate should be cautious in welcoming an overhaul in this space until the FWC publishes its 'statement of principles', which will be closely scrutinised by the employer community.

148. This will include to ensure they do not place emphasis on agreements that may have been explained to employees by unions to the detriment of workplaces where unions did not play a role in explaining the agreement.

PART 11 – Flexible Work

149. The *Secure Jobs, Better Pay Bill* proposes to strengthen the right for employees to request flexible working arrangements. It argues these changes would "assist eligible employees to negotiate workplace flexibilities that suit both them and their employer".

150. While this amendment may be significant at a whole-of-economy level, AREEA's preliminary assessment (noting limited time has been provided to allow for wide consultation with members), is that this will have limited practical impacts on resources and energy sector operations. Namely, this is due to the comparably rigid nature of operational rosters and fly-in, fly-out work arrangements, typically provide clear boundaries as to whether flexibility requests can be accommodated or not.

151. Most of AREEA's members have strong flexibility practices where possible – such as corporate offices and operational sites that can facilitate such arrangements. Where flexibility is refused there are typically clear business grounds for doing so. Should the intent of Part 11 allow for clear business grounds to be accepted, the proposed changes should, in theory at least, not impact the resources industry unduly.

PART 4 – Objects of The Fair Work Act

Summary

152. The *Secure Jobs, Better Pay Bill* proposes embedding the principles of job security and gender equity in the FWC's decision-making processes.

153. AREEA holds concerns about what inserting these ambiguous terms into the Objects of the Act would mean in practice. There is an argument these amendments would be largely symbolic and make little difference to how some members of the FWC are already considering these social issues in their decision making.

154. However, this view would discount that decisions made on these principles are largely yet to be tested in higher authorities including the Federal Court or potentially the High Court. It is one thing for a single member of the FWC to make decisions with job security and/or gender equity in mind, and quite another for such principles to be enshrined in law for the consideration of Courts when such matters arise in appeals and other judicial matters.

155. AREEA's most significant concern with Part 4 relates to the term "Job Security", which could mean almost anything, as a new Object of the Act. There are far less concerns about inserting "gender equity" into the Act, given this is a fundamental principle of employment in the sector and employers are already ensuring this outcome at the enterprise level.

PART 1 & 2 – Abolition of the Registered Organisation Commission

156. The *Secure Jobs, Better Pay Bill* proposes to abolish the Registered Organisations Commission and transfer its regulatory functions to the General Manager of the FWC.

157. AREEA has historically been agnostic on the need for a separate body to regulate registered organisations such as trade unions. There is an argument that the ROC has had little impact on, for example, the militancy and persistent lawbreaking of some unions like the CFMMEU.

158. From a public funds' efficiency viewpoint, transferring the ROC functions and powers to the FWC would mean there is a single body with regulatory responsibilities for registered organisations.

159. AREEA will be observing with interest how this new regulatory arrangement operates and will reserve its right to advocate in future for the return of a stand-alone regulator like the ROC, should the new FWC functions be inadequate in ensuring a high standard of transparency and governance within Registered Organisations.

160. For the record, AREEA is not a registered organisation under the *Registered Organisations Act*, but rather is a public company limited by guarantee. This status means AREEA is regulated by the Australian Securities and Investment Commission (ASIC) to the much higher standards of governance required by the *Corporations Act 2001.* AREEA's position is all trade unions and employer groups could and should be regulated by ASIC instead of a watered down 'special rules' jurisdiction for industrial relations organisations.

PART 7 – Pay Secrecy

161. The *Secure Jobs, Better Pay Bill* proposes prohibiting pay secrecy clauses in employment contracts, to "improve transparency and protect employees from adverse action" if they exercise their right to disclose (or not disclose) their remuneration.

162. AREEA does not express a view on this policy at present, however will monitor this policy development closely.

163. Given other developments including the "same job, same pay" policy under active consideration by the Government for further tranches of workplace reforms, AREEA has some concerns about where this 'pay secrecy' policy may lead.

164. In AREEA's view, it is not beyond the realms of possibility that this policy may be the first step towards future changes that allow for employees or their representatives to make applications to reveal the pay of other employees (such as employees wanting transparency on management pay or colleagues at the 'same level' as them in the workplace).

165. AREEA submits that 'pay secrecy' should not translate in future to rights for anyone in the workplace to demand to know the pay of someone else.

PART 5 – Equal Remuneration

166. The *Secure Jobs, Better Pay Bill* proposes to reform the equal remuneration provisions in the FW Act to help guide the way the FWC considers equal remuneration cases and gender-based assumptions in work value cases.

167. AREEA does not believe this amendment will have a substantive impact on resources and energy businesses, where internal pay equity audits are commonplace, and wages are the highest by average in the country.

PART 6 – Expert Panels

168. The Bill proposes establishing two new Expert Panels in the FWC – one for Pay Equity and one for the Care and Community Sector – to hear wage-related matters and help address low wages and challenging workplace conditions faced in that sector.

169. This proposal is positioned as to ensure pay equity claims and relevant award variation applications were considered by FWC members with knowledge and experience in those areas.

170. AREEA does not express a view on whether this change will impact its members.

APPENDIX A: IMPORTANCE OF THE RESOURCES INDUSTRY

1. The resources and energy industry is unarguably one of Australia's most important in delivering economic prosperity, employment opportunities and ongoing government revenues. The sector's success has been critical to Australia's past and is even more critical to its present and future, as the nation looks to the strength of its longstanding primary industries to maintain its world leading living standards during an uncertain global economic environment.

2. Across any measure of economic or employment contribution, the resources and energy industry sits amongst Australia's most consistent high performers:

   a) Directly employs more than 266,000 people in Australia[3], is estimated to support more than 1 million jobs through flow-on effects in allied sectors and regional communities[4].

   b) Delivers $43 billion annually to national and state/territory revenues through taxes and royalties[5].

   c) Accounted for a 9% share of Australian GDP in 2021-22, or $188 billion in dollar terms, making it the largest single industry contributor to the Australian economy[6].

   d) Accounted for 69% of all national export value, or in dollar terms, a record $422 billion in 2021-22, with forecasts of $450 billion for Australia in 2022–23, and $375 billion in 2023–24, despite the turmoil in the global marketplace[7].

3. The sources of income delivered by the resources and energy industry funds federal and state government programs to protect vulnerable people in the community; and helps build roads, schools, hospitals and other public infrastructure.

4. Further, the sustained contribution of resources and energy operators provided Australia with the financial means to deliver some of the world's most generous support schemes and subsidies to its residents and businesses. This included funding for the JobKeeper, JobSeeker and JobMaker subsidy schemes credited for significantly softening the economic and social impact of the pandemic comparative to almost all other countries around the world.

5. All indicators point to growth in resources and energy major project investment as the most significant opportunity for Australia. According to the Federal Department of Industry's *Resources and Energy Major Projects* report, the number of resources and energy major projects in the investment pipeline increased in 2021 by 10% to 367 projects, and the value of those projects increased by 51% to $504 billion[8].

6. AREEA's analysis of the job creating opportunities of these new major projects is that at least 24,000 new operational jobs will be created over the next five years. Factoring in the potential flow-on effects, the total job creation could easily exceed 100,000.

7. The majority of these jobs sit within the highest paying sector of the Australian economy, in terms of averaged take home pay. The average weekly earnings in the 'mining' industry (including oil and gas) is over $2700 per week. This is easily the highest of all sectors and significantly greater than the average all industries income of $1638.

8. In summary, support for the resources and energy industry represents support for more investment, more high-paid jobs, and more national prosperity for all Australians.

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[3] Labour Force, Australia, Detailed (August 2022) ABS
[4] Raynor, V. and Bishop, J. 2013 *Industry Dimensions of the Resource Boom: An Input-Output Analysis*, RBA Research
[5] Royalty and Company Tax Payments, June 2022, Ernst & Young and Minerals Council of Australia,
[6] Resources and Energy Quarterly, September 2022, Office of Chief Economist
[7] Resources and Energy Quarterly, September 2022, Office of Chief Economist
[8] Department of Industry, Science, Energy and Resources, *Resources and energy major projects: 2021* (link)

APPENDIX B: AREEA EMPLOYMENT CHARTER

AREEA's Employment Charter sets the foundation for the Group's IR policy positions and advocacy. It also promotes best practice in employee relations, workplace culture and people management.

The Charter was developed in consultation with the AREEA Board Reference Group – comprising senior employee / workplace relations managers from across AREEA's membership.

This Charter is the standard to which all pre-election IR and related employment policies, and their likely impacts, are assessed. With a longstanding charter holding up to changing political whims, AREEA is able to apply a consistent measure of policies that can be critiqued across the test of time.

The AREEA Employment Charter is as follows.

1. The AREEA Employment Charter has been designed to facilitate the development of world competitive enterprises within Australia. This Charter requires responsible and effective leadership that ensures that employees:

    a) Are productivity engaged;

    b) Feel their work is valued; and

    c) Are treated fairly

2. For the employment relationship to flourish this Charter outlines the required entitlements and accountabilities as follows:

    a) All employees are entitled to:

    - Work in an environment were effective standards of health and safety are in place;
    - Be free from workplace harassment and unlawful discrimination;
    - Have access to appropriate means for internal review of individual concerns or complaints without fear of recrimination; and
    - Not join a union or join a union with the legal capacity to represent their industrial interests.

    b) It is the employer's accountability to:

    - Provide remuneration and conditions of employment that are fair and reflect community and industry standards;
    - Ensure that individual employees have a clear understanding of work requirements and have accurate and timely information about how they are performing in their role with scope for recognition of that performance; and
    - Work with all employees honestly and fairly and promote a shared understanding of business direction and performance through managerial leadership and open communications.

    c) It is the employee's accountability to:

    - Work safely;
    - Act with integrity and honesty; and
    - Perform their duties lawfully and effectively.

3. The legislative framework must facilitate genuine choice for employees and employers as to what form of employment regulation is used in the workplace. It is the role and responsibility of Australia's lawmakers and regulators to provide an industrial relations framework that:

   a) Supports and facilitates the competitiveness of Australian businesses, including the ability to attract job-creating capital from the global investment community;

   b) Sets a clear safety net providing world-class minimum standards and conditions that can be easily understood and adhered to by all;

   c) Provides options for employers and employees to negotiate and engage in employment relationships individually and/or collectively, with or without third party representation, as per the wishes of the participants;

   d) Provides real avenues for individuals to opt-out of collective agreement making processes if they wish to do so; and

   e) Reflects the contemporary nature of work in the 21st century, including that employment comes in multiple and varied forms (i.e. direct employment, labour hire, independent contracting, permanent, part-time and casual), all of which are equally legitimate and mutually inclusive in modern workplaces.

4. The workplace envisaged by AREEA can be realised by a number of pathways.

5. Where the necessary features are in place through the development of the internal systems and the leadership capability of the organisation, then employers and employees should be able to make a free and informed choice to work in an internally regulated environment, with limited external interference or constraint.