COMMONWEALTH OF AUSTRALIA

Senate Standing Committee on Education and Employment

Inquiry into corporate avoidance of the *Fair Work Act 2009*

Submissions of the Construction, Forestry, Mining and Energy Union

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PART A: WHO WE ARE AND WHAT WE STAND FOR

1. The CFMEU is the principal union representing workers in construction, coal mining, forestry and building products manufacturing, pulp and paper, furniture manufacture and power generation.

2. The CFMEU is structured into three industry Divisions, which facilitates a significant degree of autonomy and industry focus upon the areas where our membership is concentrated.

3. The CFMEU membership is diverse, with a strong presence in both the major cities and rural and regional Australia. The CFMEU is united however, by the goal of promoting well-paid, secure and safe work in the many workplaces where our members are to be found.

4. As an organisation the CFMEU is determined to pursue these aspirations with the utmost vigour. This has led to strident criticism from some quarters that would have the CFMEU exercise a degree of restraint not expected of the giant multinational corporations that dominate the Australian economy.

5. The average member of the CFMEU is becoming increasingly dismissive of the confidence trick promoted by the boosters of neoliberal economics. This confidence trick is based on the big lie that simply increasing the power and earning capacity of big corporations will lead to increased prosperity for all. In reality, the more room that the big corporations have to move – legally and politically – the more they will tend to take for themselves, with direct impacts on workers, local communities and ultimately, the authority and financial capacity of the Commonwealth.

PART B: CORPORATE AVOIDANCE OF THE FAIR WORK ACT

i. Corporate Avoidance Through Labour Hire

6. Corporate avoidance is particularly evident in the explosion of precarious work arrangements – especially "casual" labour hire – over the last decade. The use of labour hire, "on hire", or "agency" workers has primarily become an avoidance strategy where the legal fiction of a distinct and separate workforce is used to mask gross exploitation and the shifting of legal liability that would otherwise reside with the host employer under the *Fair Work Act 2009* (Cth) ('FW Act').

7. There is nothing particularly subtle or clever about these arrangements – it simply involves the use of legal surrogates to "game" the system of minimum pay rates and bargaining rights established by the FW Act.

8. In later sections of this submission we demonstrate by reference to concrete, real life examples, how these strategies are employed under the existing framework of the FW Act. These avoidance strategies put into doubt the very integrity of the FW Act and strongly suggest that its objects will not be achieved without a determined legislative response.

9. In the final part of this submission we propose some possible legislative responses to restore the integrity of the FW Act. There is nothing radical or disproportionate in these proposals. The aim is simply to promote decent, secure and well-paid jobs by preventing the avoidance of minimum conditions and bargaining rights.

Context To Labour Hire Arrangements

10. The business model of labour hire companies is generally that they employ workers (usually on a casual or a contractual basis), and place those workers in the businesses of other companies with which the labour hire company has a contractual relationship (i.e. host employers). Most labour hire arrangements appear to retain the relationship of employment between the labour hire employee and the labour hire business – whereby an individual worker operates under a contracting agreement with a labour hire business and their services are let out or "rented out" to a client of the labour hire business.

11. In some cases the labour hire employees will work intermittently or for specific periods of time at the premises of the host employer – for example to meet a seasonal or operational fluctuation. In other cases, labour hire employees may be required to work at the host employer's premises for lengthy periods; under the supervision, direction and management of the host employer; integrating with the employees of the host employer; and for all intents and purposes forming part of the host employer's workforce.

12. With the advent of casualisation, contract and labour hire work continues to grow. This in turn has left many workers in precarious positions when it comes to challenging their dismissals from employment. There appears to be a great deal of concern, both in practical terms and in terms of rights and obligations arising under legislation, industrial instruments and contracts of employment when understanding the rights and obligations of labour hire workers.

Dismissing Labour Hire Workers – The Contentions

13. The actions of a host employer – particularly when its managers and supervisors engage in disciplinary action against labour hire employees – can have a direct

and fundamental impact on the rights and obligations between the labour hire company and its employees.

14. Where a labour hire employee is placed with a host employer, the end of the placement will generally not constitute dismissal of the labour hire employee so that the labour hire employee could make an application for an unfair dismissal remedy. This is particularly so where the host employer decides that it no longer requires the services of the labour hire employee and there is no indication that this decision is based on the conduct, capacity or performance of the employee.

15. In such cases the labour hire employee is removed in accordance with the contractual relationship between the labour hire company and the host employer and as provided for in the contract of employment between the labour hire company and the labour hire worker.

16. Where a host employer informs a labour hire employee that he or she is to be removed from site on the basis of conduct, capacity or work performance, the actions of the host employer may be tantamount to dismissal. This is particularly so where managers or supervisors of the host employer have also been involved in the investigation (if any) and disciplining of the labour hire employee.

17. A labour hire employee seeking to contest the host employer's decision to terminate their employment, by making an application for an unfair dismissal remedy, faces considerable difficulty, principally because the host employer is not the employer of the labour hire employee. This gives rise to jurisdictional impediments.

18. Our members have had their employment terminated after having worked on a full time basis for one host employer for a considerable time, often several years. They are often simply told by the labour hire agency that the host employer no longer desires their presence on site. Because of the current prohibitions under

the unfair dismissal regime in the FW Act, these labour hire employees do not have any recourse to challenge their dismissals.

19. The Union has had instances where our labour hire members have been dismissed for performance reasons, but without being accorded procedural fairness (which is extended to non-labour hire workers under s 385 of the FW Act). On other occasions we have had a labour hire member dismissed from his employment on the basis of misconduct by the host employer. The labour hire employer simply acquiesced without challenging the host employer's decision to dismiss the worker.

20. In these situations, the Union initiated unfair dismissal proceedings against the labour hire employers with the matters eventually settling at the Fair Work Commission conciliation conference stage subject to confidential terms of settlement. In these instances, the labour hire employer purported to argue that the labour hire worker had no jurisdiction to bring unfair dismissal proceeding or, alternatively, the labour hire agency was not involved in the dismissal but simply followed host employer's instruction.

21. The Union submits that the legal position of a labour hire employee is significantly more precarious than that of a casual, part time or full time employee employed directly by the host employer.

A Labour Hire Employer <u>Is</u> An Employer

22. We further submit that the contractual relationship between a labour hire company and a host employer cannot be used to defeat the rights of a dismissed labour hire employee seeking a remedy for unfair dismissal. We welcome the recent approach by the Fair Work Commission in finding the termination of a labour hire worker by the labour hire employer was unfair, after the host employer advised the labour hire employer that the worker would be removed from her

usual workplace as a result of alleged misconduct, in circumstances where the worker had not been afforded procedural fairness.[1]

23. In the decision, the Commission upbraided the labour hire employer by noting that labour hire companies cannot use such relationships to abrogate their responsibilities to treat employees fairly. If actions and their consequences for an employee would be found to be unfair when carried out by the labour hire company directly, they do not automatically cease to be unfair because they are carried out by a third party to the employment relationship. If the Commission considers that a dismissal is unfair in all of the circumstances, it can be no defence that the employer was complying with the direction of another entity in effecting the dismissal. To hold otherwise would effectively allow labour hire employers to contract out of legislative provisions dealing with unfair dismissal.

Labour Hire In The Construction Industry

24. Labour hire arrangements are used extensively in commercial construction and shutdown/maintenance work across Australia. For example, every builder in Perth uses labour hire as their exclusive source of labour (for work within the builders' scope of work) or as a source of labour in conjunction with a very small number of directly hired employees. This reliance on labour hire rather than direct engagement is contributing to the erosion and avoidance of the FW Act safety net.

25. The growth of labour hire and its use as a preferred employment model amongst employers is highlighted in the Ibis World Industry Report – Temporary Staff Services in Australia, July 2015. Labour hire is increasingly being used as the preferred employment model by sub-contractors as well as head contractors in the construction industry. One factor is the freedom subcontractors have in sacking or removing labour hire employees from site.

[1] *Kool v Adecco Industrial Pty Ltd T/A Adecco* [2016] FWC 925

26. Builders and sub-contractors also benefit from the engagement of workers on below-Award wages. They are able to take advantage of the exploitation of workers without being held directly responsible for workers being paid less than the terms and conditions of the relevant industrial instrument.

27. Labour hire has eroded workers' job security and the FW Act safety net in the following ways:

    1. Traditionally, construction workers employed by builders have been employed as weekly or daily hire employees. With few exceptions, labour hire workers are now employed as casual workers without the benefits of sick leave, annual leave or redundancy pay.
    2. Labour hire employees are reluctant to raise concerns about breaches of occupational health and safety standards or about being underpaid. Labour hire employees who do complain are removed from sites either on the instruction of the host builder or on the initiative of the employer. There is little capacity for the union to address the unfair dismissal of labour hire workers due to the tenuous contractual relationship of the employee, labour hire firm and host builder and the generally 'casual' nature of the employment relationship.

28. Further to this, a key benefit for builders using labour hire companies is their capacity to engage workers at below Award rates of pay.

29. Builders are using labour hire companies so they can claim to have 'clean hands' when issues arise about the underpayment of workers on their projects. Most site and project managers are aware that the labour hire workers on their projects are being paid rates and conditions less than the Award. Contract managers and senior construction managers engaged by builders are also aware that the labour hire companies they engage are incapable of paying workers in accordance with the building and construction industry Award due to the low charge-out rates.

30. The problems associated with labour hire engagement can be highlighted by the following examples.

31. Finbar – the largest developer of residential apartments in Perth (with 34% of the market) is a good example of the proliferation of both labour hire (and sham contracting – see below) arrangements. Nearly all workers on these sites are employed by labour hire companies or on sham contract arrangements. The Request Group is the largest labour hire supplier. Their principal source of employment is backpackers, most of whom are employed on below Award wages (about $23 per hour for all hours worked).

32. On ADCO's Port Coogee Village Shopping Centre project in Perth young workers engaged through the labour hire firm Reliance Recruitment in 2016 were paid a flat hourly rate for all hours worked without regard to award allowances or penalty rates. The CFMEU obtained payslips from workers on this project and, based on the number of hours worked by these workers, estimated that they were being underpaid by up to $600 per week under these arrangements.

33. In 2016 the labour hire firm Network Recruitment Group paid young workers on a student visa a flat hourly rate for hours worked which was significantly less than the amount paid to other workers performing the same labouring work on the same site and in breach of the terms of the relevant award. These workers were told by the company that they were forbidden from discussing their pay rate with other employees.

34. A U.S. based renewable energy company, First Solar, was engaged by AGL to install 1.3 million solar panels in Nyngan, NSW. This was a major project worth over $400,000,000. The project is carried out under the auspices of the Australian Renewable Energy Agency (ARENA) and was funded by the federal government. First Solar subcontracted the construction phase to a Joint Venture called WBHO Australia/Probuild. The Joint Venture directly hired some casual labour but

subcontracted the majority of construction work to 3 labour hire companies – Protech, Skilled and MG Recruit – a total of 120 workers. All workers were engaged as casuals.

35. During 2014 the employees worked 10-11 hour days, with a 3 week on/1 week off, drive in - drive out roster at the base award rate. Although many workers had to travel up to 12 hours each way to reach the project, there was no travel allowance paid for travelling to the job. Other major industrial breaches on the site included the failure to meet rest time/crib time and living away from home requirements in accordance with the safety net award.

36. Through conciliation proceedings in the FWC, the CFMEU recovered significant amounts in back-pay. Other entitlements, including superannuation, are still owed to many workers. The CFMEU then attempted to negotiate an enterprise bargaining agreement in accordance with the FW Act for these workers. WBHO/Probuild then changed the scope of works, finalising contracts with the labour hire entities engaging resident Australian workers, and significantly increasing the numbers of employees working on temporary work visas through a different labour hire company. In December 2014, at the peak of disputation over safety and work rights, the Joint Venture alerted resident workers that they would be making redundancies. When the workers came back to site after the Christmas break they say they found up to 30 visa employees on site. They advised that additional employees were brought in to replace 15 resident workers who had been given an hour's notice to leave their jobs. By around February 2015, most of the resident construction workforce had been demobilised. The number of visa workers was then increased to around sixty.

ii. "Sham" Subcontracting

37. The practice of sham subcontracting – treating workers who are at law employees, as independent contractors – is another obvious form of FW Act avoidance.

38. These arrangements are designed to avoid not just the safety net provisions of the FW Act and the award system, but the industrial system more generally. In fact, these arrangements go even further. By attempting to disguise an employment relationship as a commercial contract, employers are also seeking to remove their workers from other legal regulatory regimes that depend on employment status for their operation. For example, the application of taxation laws - such as the obligation to remit PAYG payments, pay payroll tax or utilise an ABN or the alienation of personal income rules - as well as the coverage of workers compensation and occupational health and safety laws and superannuation guarantee provisions, can all be thrown into question by the use of sham contracting arrangements.

39. The prevalence of sham sub-contracting remains a matter of ongoing concern to the CFMEU. The problem has been concentrated in the construction industry for many years but has expanded into almost every corner of the economy. In 2011 the CFMEU estimated that almost $2.5 billion per annum was being lost to the public coffers in the construction industry alone due to the practice of "sham" sub-contracting.[2] Even a 2012 FWBC report recognised that as many as one in eight self-described 'contractors' could be misclassified.[3]

40. An example of this practice is when, in 2016, Darwin-based concreting company JGA Concreting Pty Ltd, required a number of its concreting employees to obtain ABNs and work on a "sub-contract" basis even though the substance of the working arrangements continued to be that of employer/employee.

41. Further, the company has ceased remitting PAYG tax payments for these workers, is not making superannuation contributions and no longer takes account of the ABN workers for payroll tax purposes. One long term employee has

[2] 'Race to the Bottom' CFMEU Report 2011.

[3] 'Working Arrangements in the Building and Construction Industry - Further research resulting from the 2011 Sham Contracting Inquiry' https://www.fwbc.gov.au/sites/g/files/net666/f/FWBC_Working%20arrangements%20in%20building%20and%20construction_research%20report_D..._0.pdf

complained that no superannuation contributions have ever been paid for him over many years employment with the company.

42. Semi-skilled concreting and labouring duties are ordinarily incapable of being carried out on a legitimate sub-contract basis as the work requires the direction and control associated with an employment relationship and is non-delegable.

43. The use of sham contracting as a method of avoiding the FW Act and other laws is made easier by inadequacies in the current laws, including the FW Act itself, which apply to these kinds of arrangements.

44. The FW Act prohibits misrepresentations in relation to sham contracting and the dismissal of employees to re-engage them as independent contractors to perform the same or similar work (see Part 3-1 Division 6). Section 357 is infringed through the making of a representation. The CFMEU has advocated for many years for a "strict liability" type provision that provides for a civil penalty in circumstances where a person who is an employee at law is treated by the employer as an independent contractor. However, as the Act stands, the mere fact that an employment relationship exists but the employee is nonetheless treated as a contractor, does not establish a breach of the section. Whilst the High Court has recently determined that it is immaterial that the misrepresentation was as to the relationship between the employee and the employer or a labour hire company, the misrepresentation requirement is still central to the operation of the section.

45. The use of the section to counteract the spread of sham subcontracting arrangements is also significantly limited by the 'reckless' defence in s 357(2). The decision in *Construction, Forestry, Mining and Energy Union v Nubrick Pty Ltd* [2009] FMCA 981 demonstrates the breadth of this defence and the ease with which employers can extract themselves from liability under this section. The 2012 review of the operation of the FW Act concluded that "*the current defence*

does not fit within a legislative scheme designed to be fair for working Australians".[4]

46. It is noteworthy that Parliament has recently endorsed a more comprehensive and effective approach to the problem of sham contracting in the construction industry in the new *Code for the Tendering and Performance of Building Work 2016* (the new Code), particularly in relation to construction projects funded by the Commonwealth. Section 11B of the new Code prohibits outright the engagement or proposed engagement of employees under a contract for services and extends the prohibition to entities which are interposed between the employer and employee. The CFMEU supports the inclusion of those provisions in the FW Act.

47. Ineffective taxation laws, including the "alienation of personal services income" (APSI) provisions, are contributing to the sham contracting problem. These rules were introduced ostensibly to reign in revenue lost through the use of companies, partnerships and trusts to disguise income generated by the personal exertions of individual taxpayers. The use of these legal forms allows reduced or deferred tax liabilities through income splitting and work-related deductions not available to employees, and the retention of income in the entity to take advantage of lower tax rates.

48. Alienation of personal services income is not confined to the IT sector or white collar areas such as consulting engineers. In industries like construction, it is common for people to use a $2 company to provide their services, concreting, plasterboard work and the like, in what is essentially an employee-like fashion. Many businesses refuse to engage workers unless they have a company structure in place. Whilst not everyone engaging in sham contracting will have a company set up to disguise the reality of the arrangement, it is clear that the ineffective APSI tax laws and the administration of them are doing very little to

[4] '*Towards More Productive and Equitable Workplaces – An Evaluation of the Fair Work Legislation*' June 2012 page 243.

discourage these sorts of practices. A thoroughgoing review of these laws is required to deal with the sham contracting problem.

iii. The Insolvency/Phoenixing Problem

49. Lost employee entitlements through corporate insolvencies, including the deliberate "phoenixing" of corporate entities, is a further example of the avoidance of entitlements arising under the FW Act. Whilst many insolvency events arise in the ordinary course of business, there is no doubt that many directors and shareholders are misusing the limited liability conferred by the corporate form to systematically avoid creditors, including employees.

50. In 2015 the CFMEU prepared a report on the effects of corporate insolvencies in the construction industry for the Senate Economics References Committee.[5] The report showed that in the last ten years, more than one in five of all insolvency events had occurred in the construction industry.

51. Using the data on the reports filed by administrators with ASIC following an insolvency event, the CFMEU report concluded that a median amount of almost $137 million of employee entitlements was lost in the construction industry alone for 2013-14. Amongst these, the single largest category of entitlement was superannuation which represented about $63 million (or about 46%) of the total of employee benefits lost. Of all the administrators reports lodged for the industry, 37% reported amounts for unpaid superannuation contributions.

[5] Insolvency in the Australian Construction Industry, CFMEU, 1 May 2015. http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Insolvency_construction/Submissions

52. The CFMEU report noted that the figures relating to superannuation lost due to corporate insolvency were particularly concerning given that the major industry superannuation fund generally required monthly as opposed the more common quarterly contributions for other industries. In that case, it is likely that industries with quarterly contribution regimes would fare even worse.

53. 'Phoenix' companies are also a major problem. A 2012 PwC Report[6] estimated that the total cost to employees, business and government revenue to be between $1.8 and $3.2 billion per annum in round terms. Lost superannuation was excluded from these estimates. Given the figures cited above, this is a significant omission.

54. "Proxy' directors", who are friends or family members of the individual owner of the business which has previously been wound up with a number of outstanding debts, are another common feature of "phoenix companies".

Phoenixing Examples

Toms Cranes Pty Ltd – Western Australia

55. Toms Cranes Pty Ltd was owned by The Trustee for the Crane Hire Trust. The company went into liquidation in 2015 owing employees a significant amount of redundancy, superannuation and accrued leave. The cranes appear to have been leased by a related entity of the company which went into receivership. Shortly after Toms Cranes Pty Ltd went into external administration, the niece of the Director of Toms Cranes started up a new company, Tower Crane Company which is owned by Millstream Financial Pty Ltd. The same director has been involved in similar arrangements over the last 30 years.

Bendigo Hospital, Victoria

[6] Phoenix Activity – Sizing the Problem and Matching Solutions PwC 2012

56. In early 2016 a large number of construction workers employed by Asset Interiors Pty Ltd, many of them vulnerable foreign working visa holders, worked for approximately 10 weeks without receiving any payment from their employer for wages and other entitlements on this publicly funded major construction project. This non-payment involved significant and multiple contraventions of the industrial instrument which applied to these workers. The company subsequently went into administration/liquidation leaving significant amounts unpaid as accrued employee entitlements and various commercial debts.

57. We understand that notwithstanding these contraventions of industrial laws, one or more of the directors of this company continue to trade in the industry through a different corporate entity.

A1 Scaffolding Group Pty Ltd, New South Wales

58. The CFMEU has obtained judgments against A1 Scaffolding Group Pty Ltd and a number of individual respondents connected with the company. Amongst other things, the decisions confirm underpayment of entitlements and non-compliance with the terms of the Building and Construction General On-Site Award 2010 (and the Long Service Leave Act 1955 (NSW)) by the company and named individual respondents and provide for the payment of compensation to an employee and substantial penalties by the company and its directors as a consequence of those contraventions.

59. Further, companies related to this particular corporate entity and/or connected to one or more individual office holders of this company have previously left substantial unpaid employee entitlements behind before re-establishing themselves in the industry under a different corporate guise.

60. Despite the efforts of the union to enforce the Court's orders, the individuals concerned have not complied and have evaded all efforts to contact them to recover the outstanding amounts.

iv. Corporate Avoidance Of The Statutory Safety Net

61. One of the fundamental features of the FW Act is the establishment of a set of minimum rates and conditions for all employees in the federal workplace relations system. This statutory safety net is made up of the National Employment Standards contained in Part 2-2 of the FW Act and the rates and conditions prescribed by the various Modern Awards made under that Act. Together, these elements establish a floor below which employment standards are not supposed to fall, whether employees engage in enterprise bargaining and are covered by an agreement, or not.

62. However there is a growing body of evidence showing that through different means, this safety net is being ignored, abused and systematically eroded by Australian employers.

63. In its simplest form, employers are disregarding the safety net established by the FW Act by not paying the full amounts due in accordance with their statutory and award obligations. Wage rates, overtime/penalty rates, allowances, superannuation contributions, accrued entitlements such as annual leave, long service leave, and redundancy payments are consistently underpaid or not paid at all. The construction industry is particularly prone to these problems.

64. Underpayment or non-payment of basic minimum wage entitlements is a serious problem. There has been a number of high profile cases referred to in media reports, including 7-Eleven, Pizza Hut, Australian Disability Enterprises and sub-contractors to the retail giant, Myer. In 2015 the Fair Work Ombudsman stated that the construction industry ranked second behind the hospitality industry for the number of underpayment complaints. The FWO said one in ten complaints came from visa holders.

The Statutory Safety Net And Enterprise Bargaining

65. There is a growing practice of exploiting loopholes in the bargaining provisions of the FW Act to undermine the safety net established by that Act.

Voting Cohorts

66. In *CFMEU v. John Holland Pty Ltd*[7] the Full Court of the Federal Court rejected an appeal against a decision to approve an enterprise agreement made by a small employee voting cohort (3 workers) which had the capacity to cover a very wide range and number of employees who were to be employed by the company in the future. The Court observed that *"the presently employed members … will act from self-interest, rather than from any particular concern for the interests of future employees" and that "the potential for manipulation of the agreement-making procedures is, accordingly, a real one"*.[8] The Court went on to say that it did not exclude the possibility that it may not be fair for an enterprise agreement made with three existing employees to cover a wide range of other classifications and jobs in which they may have no conceivable interest, or that the group thereby constituted may not be fairly chosen.[9] Nonetheless, it endorsed the view that there was no capacity for the Commission to withhold approval of an agreement on the basis that it would undermine collective bargaining.

67. Although in the John Holland case it was not argued that the agreement in question contained sub-standard rates and conditions, cases have followed where a small and unrepresentative (even employer-interested) group has voted to approve sub-standard base-line agreements which have subsequently applied to many more employees who have had no say in its terms and no capacity to engage in bargaining to change it.

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[7] (2015) 228 FCR 297
[8] At [33]
[9] At [83]

68. In Western Australia a major crane operation company, Boom Logistics Pty Ltd, engaged a small number of employees, through a subsidiary company which had not previously employed crane operators, to vote up an Australia-wide agreement to cover FIFO crane operators who would ordinarily have been covered by CFMEU endorsed agreements with far superior rates of pay and conditions. In May 2015 a further agreement was approved for a "new" Boom Logistics shutdown division after having been voted-on by just three employees, two of whom were supervisors for the company who were never going to be paid at the rates provided for in the agreement.

69. Despite the FW Act requirements in relation to bargaining and agreement approval, there are also examples of employees not receiving notices of employee representation rights or a copy of the proposed agreement, or in some cases, not even being given an opportunity to vote on an agreement, let alone be involved in a negotiation process.

Approval Processes and False Statutory Declarations

70. In the case of the Exclusive Commercial (WA) Pty Ltd Enterprise Agreement 2015, the "employee representative" who signed the Agreement on behalf of employees was a supervisor who was not covered by the Agreement. Furthermore, none of the employees who were covered recalled seeing either a copy of the Notice of Representational Rights or a copy of the agreement and were not aware that it had been approved by FWC.

71. Some agreements contain no wage increase at all during the nominal term (up to four years) meaning the standards will fall even further behind as award rates are adjusted over time by the Commission during annual wage review proceedings. Many other agreements have been approved by the FWC which, on close scrutiny, are unlikely to result in employees being "better-off-overall". Examples of such agreements include:

- BLD Group Pty Ltd Enterprise Agreement 2014;

- Exclusive Commercial (WA) Pty Ltd Enterprise Agreement 2015;
- Wroxton & Co (WA) Pty Ltd Employee Enterprise Agreement 2015;
- Palace Cleaning Services Enterprise Agreement 2015;
- Tuss Concrete Pty Ltd Enterprise Agreement 2009;
- SVG Construction WA Pty Ltd Enterprise Agreement;
- All Brook Holdings Pty Ltd 2016 Enterprise Agreement

72. In vetting proposed agreements, the FWC places reliance upon employer statutory declarations attesting to compliance with the mandatory steps in the agreement-making process. These declarations also address the "better-off-overall" test including by requiring employers to attest to whether the proposed agreement contains any terms that are less beneficial than the underpinning award. The problem of false employer statutory declarations in support of agreements is a significant one.

73. In the recent matter of *Perth Access Scaffolding Pty Ltd*,[10] the Commission cited a long list of matters in the proposed agreement which would have been detrimental to employees by comparison with the relevant award and concluded that it was "satisfied that the detriments under the Agreement when compared to the Award far outweigh the benefits."[11]

> *"..in this case the Agreement does not provide any significant terms or conditions which advantage employees when compared to the Award. The matters which disadvantage employees are both numerous and substantial."*[12]

74. In spite of this, a director, Mr. Di Iusto signed an F17 statutory declaration that the agreement did not contain any terms that were less beneficial than equivalent terms and conditions in the Award. The Commission concluded:

[10] [2016] FWC 8042
[11] At [4]
[12] At [14]

'I am therefore satisfied that Mr Di Iusto told employees what he told the Fair Work Commission (FWC) and that is that there were no terms in the Agreement that are less beneficial than equivalent terms and conditions in the Award.

'..in this case the omissions are so obvious and so extensive that I cannot be satisfied, in the absence of probative evidence to the contrary, that employees were properly informed of the effect of the Agreement. I am not satisfied that the Agreement was genuinely agreed to for this reason. As a consequence the requirements of Section 186 are not met and I cannot approve the Agreement.'[13]

v. Unpaid Superannuation

75. Every year the CFMEU recovers millions of dollars of unpaid entitlements, including superannuation, for its members through direct negotiation or court proceedings. Even though employer non-compliance has been a persistent problem in the construction industry, the industry 'regulator', the former Fair Work Building Industry Inspectorate, now ABCC, abdicated its statutory responsibility to enforce the statutory safety net for workers arguing that it did not regard award and agreement enforcement for employees as part of its "core business".

76. Across the economy, the non-payment of superannuation contributions alone is denying employees a significant proportion of their lawful entitlements. This in turn puts a strain on public funds which are required to supplement retirement income. In November 2016, a combined CBUS/Industry Super Australia report put the figure for unpaid employee superannuation entitlements for the single year of 2013-14 at $3.6 billion.

[13] At [10-11]

77. Insolvency and delayed compliance intervention are major factors for lost employee entitlements. For example, in 2014-15 around $210 million of existing superannuation guarantee charge debt was lost due to employers entering insolvency processes.

78. In the recent period, the amount of superannuation guarantee charge actually collected by the ATO represented only approximately half the amount it raised in liabilities. In 2013–14, $844 million in SG charge was raised, and $395 million was collected.[14] In 2014-15 the amounts were $734.8 million and $379.2 million respectively.[15] In both cases, well over one half of the total amounts raised were raised by employee-notified complaints as opposed to proactive processes undertaken by the ATO or voluntary employer lodgement. Millions more are not paid but go undetected.

[14] ATO Audit Report Auditor General Report No.39 2014–15 June 2015 at paragraph 18, though according to the ATO's most recent annual report the total amount raised for that year was $742.7 million.
[15] ATO Annual Report 2014-15, Table 2.18

PART C CASE STUDIES IN CORPORATE AVOIDANCE OF THE FAIR WORK ACT

Case Studies From The Coal Mining Industry

79. The Australian coal mining industry directly accounts for approximately 44,000 employees.[16] Whilst the coal mining industry is small by reference to the size of its workforce, its contribution to the Australian economy, especially during the boom period from approximately 2004 to 2012 was very significant.[17]

80. The coal mining industry is characterised by a very heavy concentration of large companies, with the top four operators - BMA, Glencore, Rio Tinto and Anglo American accounting for 48% of all revenue generated in the industry.[18] In fact, the coal mining industry is the private sector industry in Australia in which large corporations account for the largest share of all firms.[19] This is a point of some significance when one considers the recent exponential growth in the use of labour hire contractors in the coal mining industry.

81. The coal mining industry is also characterised by a historical boom and bust cycle, with recent downturns occurring in the early 1980s, the late 1990s and most recently, from 2012 and continuing. Aside from the cyclical nature of the industry, there is also considerable speculation over whether the industry is in the process of long-term structural decline due to changing energy usage patterns.[20]

82. Historically, employees in the Australian coal mining industry have been well paid compared to the economy wide average and have been principally employed

[16] Peetz, David *Employment in the Australian Black Coal Mining Industry* at page 23.
[17] Ibid at page 5.
[18] Ibid, Peetz at page 14.
[19] Ibid.
[20] International Energy Agency, *World Energy Outlook* (2015) Paris.

directly by the mine operators. However, the relatively high wages of coal miners has been no barrier to very high profitability of the industry with real revenue per employee averaging $1.36m per employee between the years 2006 and 2014.[21]

83. The prevalence of contracting and use of labour hire in the coal mining industry has been relatively low until the commencement of the 21st century, and appears to have rapidly increased since the industry downturn that commenced in 2012. A recent survey of 2,700 coal miners found that of those who had been made redundant in the period since July 2013 and had subsequently re-entered the coal mining workforce, only 26% had obtained work with the mine operator, whereas prior to redundancy, 62% worked for the mine operator.[22] Moreover, 72% of respondents reported that they were "worse off" in relation to their current wages and conditions than in their previous employment.[23]

84. The reason for this appears to be that the major mine operators have responded to the downturn in coal prices that commenced in 2012 with an aggressive cost cutting approach that has involved significant redundancies, combined with an increased use of labour hire workers in the place of permanent employees. At the same time, the large corporations have increased output so as to cushion the loss of earnings from lower coal prices.[24]

85. It is in this context that the major mine operators have dramatically increased the proportion of labour hire as a surrogate for cutting the wages and conditions of their own direct employees. That is, the major mining corporations have hollowed out their own workforces via retrenchments,[25] whilst at the same time increasing the proportion of contract labour on their mine sites, performing identical work to

[21] IbisWorld, *Black CoalMining in Australia*, IBISWorld Industry Report B0601. Melbourne: IBISWorld, 2016.
[22] Essential Research *Research on Redundancies in the Black Coal Mining Industry* June 2016 at page 16.
[23] Ibid, at page 19.
[24] However, this approach has been criticised by some major players in the industry as ill-advised as it simply created more downward pressure on prices. Saunders, Amanda "Glencore's Peter Freyberg Defends Coal" *Sydney Morning Herald*, 4 June 2015.
[25] Ibid, Peetz at pages 46 to 51.

direct employees. The calculation is clearly that the mining companies can achieve indirectly what they can't achieve directly.

86. In turn, the employment model adopted by the labour hire contractors precludes any meaningful possibility of employees making use of the bargaining provisions of the FW Act to obtain a fair wages outcome. The labour hire model is discussed in relation to the three case studies listed below.

87. At the heart of this contrived labour hire arrangement is a purported enterprise agreement" made under the FW Act, that is based on a "permanent-casual" model of engagement. Employees under these enterprise agreements are guaranteed little more than the minimum award rate of pay. Control over rosters, hours of work and periods of engagement remains the sole prerogative of the labour hire employer.

88. These "agreements" are usually made with a small number of employees – as few as two or three – typically in the minimum period provided for in the FW Act, and without any genuine bargaining. The employees involved are normally new casual employees, and by definition, have no protection from unfair dismissal.

Case Study 1: The One Key Resources Group

89. The One Key Resources Group ('One Key') has within the space of a few years risen from virtual obscurity, to become one of the major suppliers of labour hire in the Australian coal mining industry.

90. The industrial relations model adopted by One Key encapsulates the "race to the bottom" that has developed amongst labour hire providers in the coal mining industry, because One Key's success has largely been based on its achievement of a rock-bottom enterprise agreement made under the FW Act.

91. These enterprise agreements have allowed One Key to undercut other existing labour hire operators that provided for higher wages in their enterprise agreements and thereby increase its market share. In turn, the model adopted by One Key has encouraged new competitors into the market to adopt the same approach[26] and has also resulted in more established labour hire operators divesting themselves of pre-existing enterprise agreements (and workforces) by the establishment of new companies with lower wages than the pre-existing entity.

92. In all of this, the obvious winners are the major multinational corporations that control the Australian coal mining industry and the opportunistic middlemen whose profits are solely based on a portion of the charge-out rate of the workers they provide.

93. One Key was founded by Queensland businessman Grant Weschel in 2011. One Key comprised the ultimate holding company One Key Holdings Pty Ltd and ten significant subsidiaries.[27] In May 2016, the One Key business was sold to United Kingdom based company Fircroft Engineering Services Holdings Ltd.[28] Notably, Queensland Rugby League legend Darren Lockyer has been closely associated with One Key as its public face and appears to maintain a financial interest in the Fircroft group of companies.[29]

94. In August 2012, One Key managed to obtain approval for its first enterprise agreement under the FW Act. The enterprise agreement is known as the *One Key Group Collective Agreement* ('Group Agreement'). The representative of One Key in seeking approval for the enterprise agreement was controversial industrial

[26] For example, just recently there was lodged with the FWC a proposed enterprise agreement known as the *AWX Pty Ltd (Black Coal Mining) Enterprise Agreement 2016*. This proposed agreement provides for a rate of pay equal to $1 per week over the award minimum rate. This is the third attempt by this same company to obtain approval for an enterprise agreement. On both prior occasions they were forced to withdraw their applications after the CFMEU managed to convince the FWC that the applications had failed to meet various statutory requirements.

[27] Australian Securities and Investment Commission, Document ID 029554937, Form 388, "Copy of Financial Statements and Reports" for 2014/15.

[28] Australian Securities and Investment Commission, Document No. 7E7984512, Form 484, "Change to Company Details".

[29] Dow Jones "family tree" for Fircroft Engineering Services Holdings Pty Ltd.

relations consultant Grace Collier.[30] Despite failing to comply with a number of formal requirements such as providing a properly witnessed copy of the proposed enterprise agreement and failing to provide a properly executed employer statutory declaration,[31] Commissioner Cambridge exercised his discretion to allow those documents to be re-filed.[32] As a consequence, the Group Agreement was approved with undertakings on 7 August 2012.

95. The Group Agreement is said to apply to One Key Resources Pty Ltd and seven other related companies.

96. According to the employer F17 form that accompanied the application for approval to (then) Fair Work Australia, the Group Agreement was meant to apply in respect of **every** modern award. In describing the terms and conditions of employment under the agreement, the relevant clauses contain the following statement:

> Depending on which Client you are placed with, your terms and conditions of employment will be regulated by the relevant Award as amended from time to time. Save and except the following;
>
> (a) If there is a Casual Conversion Clause in the Award you are covered by then it does not apply to your employment with us. Instead, a 1 % loading on your base rate will apply to your wage from the time that the Casual Conversion Clause would have applied to your employment had it not been over ridden by this Agreement.
>
> (b) The Group will assess the market conditions and may need to pay you a higher rate of pay or more attractive terms for an Assignment. This will be called a "Market Arrangement" and will be detailed in your Letter of Offer. This arrangement will be received by you in satisfaction of any and all entitlements/penalties and allowances which might otherwise apply to you under this Agreement. This may include flat or rolled up hourly rates.

[30] Schneiders, Ben "Bra recordings cloud picket dispute" *The Age*, 13 February 2013.
[31] Email from Carreen Dew, Associate to Commissioner Cambridge to Grace Collier dated 28 June 2012, sent at 11.20am.
[32] Decision of Commissioner Cambridge re *One Key Group Collective Agreement*, [2012] FWAA 6690, 7 August 2012.

> Please be assured that the total payment to you will not be less than you would have received under this Agreement.

97. In other words, the One Key Group Collective Agreement **provides for nothing more than the minimum award rate of pay**, with the minor exception that if an award applies that has a casual conversion clause, employees will be "compensated" with 1% allowance in lieu of permanent employment. The legal effect of this clause is that the employer has the right to decide, at its absolute discretion, what, if any, additional payment is made to an employee above the bare legal minimum award rate.

98. What marks this arrangement as grossly unfair and contrary to the intended operation of the FW Act is that **One Key uses the mechanism of an enterprise agreement to legally preclude collective bargaining by employees for increased wages and conditions above the minimum award rate**. In other words, contrary to providing for enhanced conditions for employees, the Group Agreement locks in the safety net award as the only legal minimum available for the four-year term of the enterprise agreement.

99. In gaming the system to obtain the Group Agreement, One Key obtained a huge tendering advantage over other competitors who had in place an enterprise agreement that contained rates of pay that more closely resembled market rates of pay. For example, if a competitor's enterprise agreement provided for a minimum rate for a mine production worker of, for example, $33 per hour, One Key could structure their charge-out rate to undercut the competitor based on a lower hourly rate anywhere in a range between the award minimum of $23.75 and the competitor's rate of $33.

100. In October 2015, a new One Key company known as One Key Workforce Pty Ltd, managed to obtain the approval of a new enterprise agreement known as the *RECS (QLD) Pty Ltd Agreement 2015* ('RECS Agreement'). Although the title implies that the RECS Agreement applies only in Queensland, its approved scope

is not confined to any one State. The RECS Agreement is said to apply to employees covered by 11 modern awards, one of which is the *Black Coal Mining Industry Award 2010*. The minimum terms and conditions of employment provided by the RECS Agreement are those contained in the relevant award, with one difference. That is, **the RECS Agreement provides for a 'BOOT allowance' of 0.1% of the relevant award hourly rate for ordinary hours only**.

101. In other words, in satisfaction of the Better Off Overall Test contained in the FW Act, the RECS Agreement provides for **a measly allowance of 2 cents an hour, and then, for ordinary hours only**. One can scarcely conceive of a more cynical approach to meeting minimum legislative requirements pertaining to the making of an enterprise agreement.

102. However, the cynicism of One Key in relation to gaming the enterprise agreement system does not end there. This is because the RECS Agreement was made with only three employees, one of whom does not appear to have been employed at the relevant time by One Key Workforce Pty Ltd. Not surprisingly, within weeks of the making of the RECS Agreement, the number of employees engaged under the agreement has expanded exponentially. The CFMEU estimates that there are now in excess of 472 employees engaged under the RECS Agreement on mine sites across New South Wales and Queensland.[33]

103. The CFMEU has commenced legal action against One Key in the Federal Court Australia. As of the date of this submission, that application has not been determined.

[33] Affidavit of Michael Keith Weise, sworn/affirmed on 20/01/2017 and filed with the Federal Court in matter NSD2058/2016.

Case Study 2: Civil, Energy and Mining Services Pty Ltd ('CEM')

104. The case of CEM demonstrates the depths which some labour hire operators will plumb in order to secure a foothold in the market. It is also a case that highlights some significant failures in the systems used by the Fair Work Commission to vet enterprise agreements against the relevant statutory criteria.

105. CEM was a company set up to provide labour to a number of coal mines in the Western and Northern coal districts of New South Wales. Its sole director and company secretary was Chris Ellery of Mudgee.[34] At the time of lodging what purported to be an enterprise agreement made under the FW Act, CEM had about 16 coal mine workers employed at the Wilpinjong mine operated by Peabody Resources near the town of Mudgee.[35]

106. Although the CFMEU had members employed by CEM, the union was unaware of the making of the purported agreement, for reasons that will become clear.

107. On 14 May 2014, Senior Deputy President Hamberger of the Fair Work Commission approved the *CEM Services Pty Ltd – Enterprise Agreement 2014* ('CEM Agreement').[36] The application for approval of the agreement had been lodged on 7 May 2014 and therefore between lodgment and approval of the agreement, a mere five working days had elapsed. The CFMEU was unaware of the agreement until it had been placed on the Fair Work Commission website as having been approved, notwithstanding that the union had a significant number of members employed by the company.

[34] Veda Company Search, request number 150226-W1151-02UZ7. Veda File Number: 810111014.
[35] Affidavit of Robert John Calov, referred to in the decision of the Fair Work Commission in *Re Civil, Energy & Mining Services Pty Ltd T/A CEM Services Pty Ltd* [2014] FWC 3951.
[36] [2014] FWCA 3145.

108. The CEM Agreement was expressed as applying to "…*employees that work in the black coal industry and whose duties are directly connected with the day to day operation of a black coal mine*". The agreement was not limited geographically to any one State, although the Employer's F17 Statutory Declaration stated that it was confined to New South Wales. This was just of one of a myriad of misrepresentations or outright lies that accompanied the application for approval.

109. Amongst the other misrepresentations contained in the Employer F17 Statutory Declaration were the following:

1. The Employer Statutory Declaration stated that there were no terms and conditions in the CEM Agreement that were less beneficial than the *Black Coal Mining Industry Award 2010*. When in fact, the **CEM Agreement radically reduced weekend penalty rates by defining weekend work as being paid at the ordinary single time rate**. The CEM Agreement also reduced the minimum term of engagement for casual employees from four hours to two and reduced the rate of overtime penalty rates, by increasing the number of hours during which time and a half would apply.

2. The Employer Statutory Declaration also stated that all employees of the company voted to approve the enterprise agreement, when if fact, **the only persons to vote on the agreement were seven administrative office staff**. Incredibly, the company actually excluded its existing coal miner employees from participation in the making of the agreement, even though they were permanently based at the nearby Wilpinjong mine near Mudgee and the agreement was explicitly a coal mining industry agreement.

3. The Employer Statutory Declaration also stated that the employer had taken reasonable steps to explain the agreement to employees to be covered by the agreement and to provide the standard notice of employee

representational rights, when in fact **the 16 mine workers at the Wilpinjong mine had no knowledge whatsoever of the purported agreement making process.**

4. The Employer Declaration also stated that the **employee bargaining representative for the CEM Agreement was Ms Gail Engelbrecht**. However, as a result of evidence that was adduced at Fair Work Commission proceedings initiated by the CFMEU, it transpired that **Ms Engelbrecht was in fact the company's Human Resources Manager**![37] Not only that, but the person who signed the enterprise agreement on behalf of employees was a Mr John Thorley, a managerial employee who attended the Fair Work Commission as the company's advocate.

110. The exposure by the CFMEU of the corrupt approach of the company to obtaining approval for the CEM Agreement ultimately proved fatal to the company's efforts and the agreement was quashed on appeal with costs awarded to the union.[38]

111. The case of CEM certainly demonstrates the level of dishonesty that some labour hire operators will resort to in order to obtain the type of enterprise agreement that will provide them with a competitive advantage. What the case also demonstrates is that without the mandated involvement of a union in the approval process, the only safeguard against these dodgy arrangements is the Fair Work Commission's own processes, which rely heavily upon the veracity of the information contained in the F17 Employer Statutory Declaration.

112. It is sobering to consider what would have happened if the CFMEU had not become aware of the CEM Agreement and acted immediately to have the agreement overturned on appeal. First, it is clear that the employer would have

[37] Affidavit of Robert John Calov sworn on 4 June 2014, at paragraphs [28] and [29].
[38] In the event, the union only obtained one part payment of the costs agreed with CEM, as the company was voluntarily wound up in December 2014.

had (at least presumptively) a legally binding and enforceable enterprise agreement that significantly under-cut the *Black Coal Mining Industry Award 2010*. This means that workers employed under the agreement would have been required, for instance, to work shifts over the weekend at their single time rate of pay. Similarly, casual employees under the CEM Agreement would only have a guaranteed minimum engagement of 2 hours, as opposed to the minimum Award provision of 4 hours, and so on.

113. It is worthwhile for the Senate Committee to also ponder the question of what remedies a worker under an enterprise agreement like the CEM Agreement would have, if they discovered that they were worse off than the Award after the agreement was approved by the FWC.

114. First, it is clear that the employees could not bargain for improvements in wages or conditions, as the FW Act provides that an enterprise agreement is effectively "closed" for its nominal term, a period of up to 4 years.[39]

115. Second, an affected employee could not seek to prosecute the employer for underpayments relative to the Award, as enterprise agreements displace a modern award until they are terminated.[40]

116. Third, there would be a major difficulty in appealing the decision to approve the enterprise agreement to a Full Bench of the Fair Work Commission, assuming that the 21-day appeal period had elapsed, as out of time appeals can only be accepted by leave of the FWC. [41]

117. Fourth, the employees might conceivably seek judicial review of the making of the sub-standard agreement in the Federal Court of Australia, however, such an

[39] FW Act, Part 2-4.
[40] FW Act, s57.
[41] Fair Work Commission Rules, subrule 56(2).

application requires significant legal expertise and is therefore expensive and probably out of the reach of workers not represented by a well resourced union.[42]

118. In short, it is quite conceivable that a sub-standard enterprise agreement, approved as a result of fraudulent misrepresentation by the employer, could continue in operation for an indefinite period.

119. It is also reasonable to suggest that the case of the CEM Agreement is not an isolated example. It is not alarmist to ask how many other companies have deliberately misrepresented their compliance with statutory requirements in order to obtain approval for an enterprise agreement under the FW Act? Similarly, it is not unreasonable to ask how many enterprise agreements are currently in circulation that have been obtained on the basis of the statements contained in the Employer F17 Statutory Declaration, without any proper scrutiny of the actual terms and conditions of the purported enterprise agreement?

120. Clearly, there is a strong financial incentive for labour hire operators to go as low as possible in terms of the industrial agreements that apply to their employees as their profit margin is built entirely upon a percentage of the charge-out rate provided to the host employer. Reducing employee wages does not, as might be thought, necessarily reduce profit margins for labour hire companies. This is because the lower the charge-out rate, the greater the likelihood of a higher market share for a lower tender labour hire operator. Or to put it differently, it is more profitable to make $5 per hour off the labour of a thousand workers, than $10 an hour off the labour of one hundred. The key metric to labour hire operators is the number of employees on assignment on host employer's work sites.

121. The CEM case study is a strong argument in favour of periodic random audits of approved enterprise agreements applying to labour hire companies by the Fair

[42] See for example, *Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 4)* [2012] FCA 894.

Work Ombudsman. These audits should investigate the approval process leading to the making of an enterprise agreement and should also test the claims contained in the F17 Employer Statutory Declaration against the actual terms and conditions of the enterprise agreement. Where fraudulent claims are discovered, the perpetrators should be referred to the Commonwealth Director of Public Prosecutions and proceedings should also be commenced in the Federal Court of Australia to have the agreements declared void, *ab initio*.

Case Study 3: Skene v Workpac

122. The case of *Skene and Workpac Pty Ltd* [2015] FCCA 3035 is an example of the practice of labour hire companies employing persons as "casuals" but for extended, continuous periods of time, giving rise to the inherently contradictory term "permanent casuals".

123. Paul Skene worked as a FIFO Haul Truck Operator, first at Anglo Dawson mine, then for a longer period at the Clermont Mine during the period it was operated by Rio Tinto. In total, he worked for 2.5 years for Workpac and was told that his first three months would be probationary and then he would be made permanent.

124. Whilst employed as a FIFO operator, Skene was subject to the mine operator's supervision and rosters which were set 12 months in advance. He worked 7 days on, 7 days off, on a continual basis, and he lived in the company camp and was flown to and from the mine at the employer's expense. He was paid a flat dollar amount of $50 per hour, which was increased to $55 per hour after a few months of employment at Clermont.

125. Rio Tinto terminated his assignment at Clermont in April 2012 as a result of a workplace incident involving a number of other Workpac employees. He received no annual leave payment, or personal payout.

126. Consequently the CFMEU made a claim in the Federal Circuit Court on Skene's behalf that he should have been accruing annual leave, paid out at termination, due to the true nature of his employment as a permanent employee. This claim was made under both the Workpac enterprise agreement and the National Employment Standards contained in the FW Act.

127. In his judgement, Jarret J rejected the claim in relation to the Workpac agreement, but accepted the claim in relation to the FW Act, finding that Skene was *other than a casual employee* for the purposes of s 86 of the FW Act and thus not exempt from the annual leave provisions of the Act. The reason for the different findings between the agreement and the Act is that there are two separate lines of authority on the meaning of casual employee. One relates to the interpretation of casual employees under awards and enterprise agreements, and the other to the interpretation of the FW Act. The first does not allow going beyond the label of "casual" to analyse the true nature of the employment relationship.[43] However the second allows consideration, amongst others, of the manner in which the parties describe themselves.[44]

128. This case highlights the need for a consistent definition of "casual" in the FW Act that is consistent with common law principles.

Case Study From The Construction Industry

Case Study 4: Underpayment And Exploitation Of Foreign Nationals

129. From January 2015, the NSW branch of the CFMEU Construction and General Division campaigned to ensure that 13 Chinese and 28 Filipino nationals who

[43] The main cases are *FWO v Devine Marine Group* [2014] FCA 1365 and *Telum Civil (QLD) Pty Ltd v CFMEU* [2013] FWCFB 2434

[44] The primary cases referred to are *Reed v Blue Line Cruises Ltd* (1996) 73 IR 420 and *Williams v MacMahon Mining Services Pty Ltd* [2010] FCA 1321

were underpaid and exploited whilst working on mechanical construction projects in regional NSW received their lawful entitlements in full.

130. Initially, union members and Nowra locals alerted the CFMEU to the working conditions of 16 Filipino (457 visa workers) and 13 Chinese nationals (400 visa workers) at the Manildra Group Feed Mill Construction Project at Bomaderry, NSW. The union was told of safety concerns arising from poor or non-existent English language skills of foreign nationals and various sub-standard safety practices. All 29 workers were accommodated in two dwellings on one block. There was only one bathroom and toilet per lodging. Wage underpayments and other breaches and irregularities included:

- Unauthorised deductions made from the Filipino workers' wages to pay for accommodation, food and transport.
- Filipino workers being paid only $1,040.00 dollars per week (before deductions) for a 10-12 hour day, 7 day working week. The resulting hourly rate amounted to as little as $3.70 per hour, depending on the amount of overtime worked.
- Chinese nationals worked the same hours but received no pay. It was understood they were to be paid annually and in Chinese currency.
- Workers granted only one Sunday off per month.

131. The union contacted a director of Chia Tung Australia Pty Ltd (CTA), and was told that the company did not employ the workers at Manildra Starches Bomaderry, who were instead employed by Chia Tung Development Corporation Ltd (CTDC) a Taiwan based company and related entity to CTA.

132. On 27 January 2015 a local Narrabri Filipina woman contacted the CFMEU saying Filipino workers in Narrabri had been thrown out on the street in the middle of the night, and were going to be rushed out of the country. CFMEU officials attend at Narrabri and found:

- 10 Filipino workers on 457 visas were engaged on a Pellet Mill construction project by Chia Tung. They are engaged on the same arrangements as workers in Bomaderry.
- Workers had been housed in deplorable circumstances – shipping containers - on the Nutrimix site, several miles from town
- As a result of union activity in Bomaderry, on 26 January, a fax was sent by the employer to the Nutrimix Mill terminating the employment of 8 of the 10 Filipino workers engaged on site. The purported grounds for termination were a lack of skills and poor safety.
- After receiving the fax, the mill owner's son, at 1a.m. on the night of Australia Day (i.e. 1 am on 27 January), called the police and evicted workers, taking them to a motel in Narrabri
- Workers were threatened and directed to catch a minibus to Melbourne the next day to be flown out of the country

133. The CFMEU has since liaised with the FWO to attempt to rectify the award breaches, underpayments and other employment-related issues. In the result:

- Back-pay has been paid to 13 Chinese and 29 Filipino nationals by Chia Tung in accordance with enforceable undertakings of 30 March 2015 in an amount of $873,044.49 gross for approximately 13 weeks' pay, not including superannuation entitlements. (The CFMEU has since recovered further back-pay – total back pay now in the order of $1 million).
- FWO has advised they have no power to consider or follow-up on superannuation payments owed to affected employees
- FWO has advised they have no power to consider or ensure correct remittances are paid to the Australian Taxation Office
- CFMEU has questioned the appropriateness of visas used, as well as the enforcement of market rates of pay. FWO say they have no jurisdiction in

this regard and point to the Department of Immigration and Border Protection as the responsible Department.

- CFMEU officials Dave Kelly and Dave Curtain were contacted by the Fair Work Building and Construction (FWBC) seeking to investigate their alleged illegal site entry at Bomaderry where the problems were initially uncovered.
- FWBC has since dropped the investigations into the two CFMEU officials
- No action is being taken against Chia Tung Development Corporation or the three Mill companies

PART D

WHAT PARLIAMENT CAN DO TO PROMOTE SECURE EMPLOYMENT

134. There are a number of measures that Parliament can adopt to strengthen the protections in the FW Act and to promote secure employment. In most cases these proposals do no more than restore the integrity of the FW Act in the context of the avoidance strategies described in this submission.

135. The following suggestions are not ranked in any particular order of importance but reflect practical legislative responses to key issues that need to be addressed to promote secure employment.

i. Include a definition of casual employee in the FW Act that is consistent with common law principles

136. The case study of *Skene v Workpac* highlights the pervasiveness of the so-called "permanent casual". The term of course is an oxymoron: an employee cannot be both a de facto "permanent", but a de jure "casual" at the same time. The idea is

both a nonsense and a rort that is designed to evade the legal obligations pertaining to permanent employment that arise from the National Employment Standards, modern awards and enterprise agreements.

137. The case of *Skene v Workpac* also highlights a significant regulatory failure in that the FW Act allows awards and enterprise agreements to contain a different definition of casual to that which the common law (and common sense) would permit. In other words, widespread formulations such as "*a casual is a person engaged and paid as such*" are open to abuse and do not reflect the reality of the employment arrangements of many thousands of casual employees and their employers. In many cases, the only distinguishing indicia from other permanent employees is the label "casual" and a loading paid in lieu of annual leave, sick leave and other entitlements.

138. One simple response to this unacceptable abuse of the notion of casual would be to insert a new definition of "casual employee" in the main definitions of the FW Act (s12) consistent with its original common law meaning, being a person engaged on a contract of employment that terminates at the end of each engagement and which involves intermittent and irregular work hours. Moreover, the modern award and enterprise agreement provisions of the FW Act should also be varied to prohibit the inclusion of an enterprise agreement or award definition of casual that is inconsistent with the FW Act definition. This would therefore serve to eliminate the dichotomy identified by Jarrett J, in *Skene v Workpac.*

ii. Create new rights for "embedded" labour hire employees

139. One of the most striking characteristics associated with the growth of outsourcing and labour hire contracting arrangements is the extent to which the employees of contractors are embedded in the workforce of the host employer for extended periods of time. In many cases, the work performed by labour hire employees is

indistinguishable from that performed by direct employees and they mostly work under the same supervision, occupy the same rosters, have to comply with the same company policies and even have to seek leave opportunities in line with the host employer's leave policy. In fact, it appears that in many, if not most cases, the sole reason for the existence of these embedded labour hire employees is to avoid the payment of wages and entitlements to these employees that would be payable to a direct employee.

140. The CFMEU submits that this is a fundamentally unfair model of employment and is one of the reasons for wage stagnation and growing economic inequality.

141. Parliament can discourage this two-class system of employment by pushing aside the legal veil that permits the exploitation of these employees. In general terms, these measures involve conferring upon these embedded labour hire employees a capacity to access the benefits of permanent employment that continue to reside with the host employer's workforce. It should be stressed however, that the target of these proposals is not short term or supplementary labour hire, or even long-term contracts involving the application of specialised skill and capital. Rather, the target group is labour hire employees who would, but for the interpolation of their de jure employment with a labour hire company, be employees of the host employer.

142. The type of measures that would assist in reducing the exploitation of embedded labour hire employees would include:

    1. Amend Division 2 – *Protection From Unfair* Dismissal, s 382(a) of the FW Act to provide the right for an embedded labour hire employee who is removed from a host employer's workplace for alleged conduct issues, to access effective unfair dismissal protections. The remedies should be available against both the legal employer and the host employer. At present, an embedded labour hire employee can be effectively dismissed

by a host employer without any reason given, or valid reason for termination.

2. Alternatively, legislatively specify that a labour hire agency is an employer and not merely a conduit in this tripartite relationship. This would require the labour hire agency to follow the process under s 387 of the FW Act in order to effect a procedurally fair dismissal.

3. Create a provision that would allow an embedded labour hire employee to seek an equal pay order from the Fair Work Commission that would require the labour hire employer and the host employer to jointly ensure that the employee is paid the equivalent ordinary hours rate as an employee of the host performing the same or similar work.

4. Allow embedded labour hire employees to be treated the same as employees of the host employer for the purposes of bargaining. This would mean that such employees could bargain collectively with employers of the host employer and ultimately be covered by the same enterprise agreement.

5. Develop a Labour Hire Fair Dismissal Code analogous to the current Small Business Unfair Dismissal Code. A labour hire employer will be required to provide evidence of compliance with the Code if the labour hire employee makes a claim for unfair dismissal to the Fair Work Commission, including evidence that a warning and an opportunity to respond to any reasons for dismissal have been given (except in cases of summary dismissal).

6. Fund the Fair Work Ombudsman to provide specific education material and training sessions to labour hire organisations about their obligations regarding dismissal of employees.

iii. Remove the impediments preventing unions effectively bargaining for embedded labour hire employees

143. In addition to the current types of enterprise agreement, add the category of "site enterprise agreements". These being multi-employer enterprise agreements based on a geographical site controlled by a principal operator/contractor. These enterprise agreements can be comprehensive agreements in the same way as single employer agreements or greenfield agreements. To facilitate the making of site enterprise agreements, the rules relating to pattern bargaining would not apply. Access to good faith bargaining and protected action to be granted to employees of the principal and employees of the contractors in pursuit of a site enterprise agreement. Provisions to recognise a single bargaining unit consisting of more than one bargaining representative when established in respect to a site enterprise agreement.

iv. Allow for Site Minimum Rate Agreements where existing single company enterprise agreements exist

144. Where existing company specific EA's are in place, the employees on a multi-employer site should be entitled to bargain for an agreement that establishes minimum site rates only that supplement the minimum rates contained in a modern award.

v. Provide that an existing enterprise agreement also covers and applies to "embedded labour hire employees"

145. The new provision would amend the coverage rules in respect of enterprise agreements to provide that an embedded labour hire employee would be in receipt of the minimum rates of pay and conditions of employment applying to the equivalent (or reasonably comparable) classification under the principal employer's enterprise agreement. This provision would apply notwithstanding any

contrary provision in an enterprise agreement applying to the labour hire employee and his or her employer. There would also be a general coverage rule that where there was an inconsistency in a provision between a provision of a labour hire enterprise agreement and that of the principal, the conflict would be resolved on the basis of what is the more beneficial provision for the employee, with any dispute resolved by the FWC.

vi. Prevent the certification of enterprise agreements involving probationary employees or a majority of casual employees

146. Insert a new test regarding the approval of enterprise agreements that provides that the FWC shall not approve an enterprise agreement in circumstances where:

1. The majority of employees do not qualify for unfair dismissal protection as defined in the FW Act (6 months or 12 months depending on size of the employer) and/or;

2. The majority of employees are classified as casual employees by their employer.

147. The FWC shall have the power to refuse an agreement that has the above characteristics or, alternatively, may declare that the Agreement can only be approved if it meets the criteria currently applying for Greenfield agreements (i.e. union involvement, etc).

vii. Remove the operational reasons defence in unfair dismissal laws

148. Remove the general defence of “operational reasons” that currently exists in unfair dismissal laws that allows employers to make employees redundant in order to replace them with cheaper contract labour. Insert a new onus on the employer to prove that the redundancies were not instituted because it wished to

utilise cheaper contract labour to perform the work previously undertaken by direct employees.

viii. Strengthen Adverse Action provisions by making it absolutely clear that the termination of an employee to engage cheaper contract labour is unlawful

149. The general protection from dismissal on the basis that the employee enjoys the "benefit of an industrial instrument" has been comprehensively read down to the point that it is effectively useless. The provisions should be amended to ensure that an employer who dismisses an employee bears the onus of showing that the employee was not dismissed because of the actual attributes of the industrial instrument (i.e. superior rates of pay and conditions of employment), rather than the narrow legal idea that the dismissal must be because of the very existence of the industrial instrument.