



Submission to the Statutory Review of Casual  
Employment Legislation

5<sup>th</sup> August 2022

## Introduction

1. In 2021 amendments were made to casual employment arrangements by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) (the **FW SAJER Act**). The amendments that came into effect from 27<sup>th</sup> March 2021 made 5 key changes:
  - A clear, legal definition of a casual employee.
  - A right to convert from casual to permanent employment.
  - A new Casual Employment Information Statement.
  - A simpler legal process for casual conversion disputes.
  - A new rule about offsetting casual loading in court disputes about entitlements.<sup>1</sup>
2. Under section 4 of the FW SAJER Act, a review of the operation of the legislative amendments must occur as soon as practicable 12 months after commencement. The review will:
  - consider whether the operation of the amendments made is appropriate and effective in the context of Australia's changing employment and economic conditions
  - identify unintended consequences
  - consider whether any legislative change is necessary to improve the operation of the amendments.<sup>2</sup>
3. KPMG has been engaged by the Attorney-General's Department to undertake stakeholder consultations and analysis and will provide an independent review report to the Minister for Employment and Workplace Relations. As part of the consultation process KPMG invited written submissions from stakeholders with an interest in the review.
4. The CFMMEU (Construction & General Division) (the **CFMEU**) is the primary union covering and organising workers in the building and construction industry. Many of our members are engaged on a casual basis therefore we have a significant interest in the review and welcome the opportunity to make this submission.
5. KPMG set up an electronic portal for the making of written submissions which asks interested stakeholders to provide short responses to approximately eight questions. The CFMEU has used

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<sup>1</sup> <https://www.ag.gov.au/industrial-relations/statutory-review-casual-employment-legislation>

<sup>2</sup> *Ibid*

those questions to frame our response but as we wish to expand in greater detail, we have used this written submission format rather than the portal.

### Coverage and Definitions

6. The first question asked is “do you or your organisation consider the amendments regarding the definition of ‘casual employee’ under the FW SAJER Act are appropriate and effective?”
7. Our response to that question is a resounding No! The amendments are not appropriate as they have reduced the limitations on casual employment and led to reduced provisions in Awards. The new definition has thrown out years of case law on casual employment and introduced a new definition that is only for the benefit of employers. There is no benefit to workers who face being consigned to a permanent casual merry go round.
8. David Peetz, Professor of Employment Relations, Centre for Work, Organisation and Wellbeing, Griffith University, in a recent article for the Conversation<sup>3</sup> appropriately described the changes to the NES in the following way,

*“I’ve drilled into previously unpublished data from the Australian Bureau of Statistics to get a better sense of what “casual employment” means for those employed as such.*

*Overall, what I’ve found suggests the “casual” employment relationship is not about doing work for which employers need flexibility. It’s not about workers doing things that need doing at varying times for short periods.*

*The flexibility is really in employers’ ability to hire and fire, thereby increasing their power. For many casual employees there’s no real flexibility, only permanent insecurity.*

*The federal government’s new bill will not solve this. It will reinforce it.”*

9. The legislation was a further attack on casual employees in the building and construction industry where the length of time they could be employed as a casual under the Award has increased dramatically in the past 12 years. With the passage of the legislation that duration was doubled, if not quadrupled (see comments on casual conversion below).
10. Each of the construction awards have their own particular history in regard to the terms and conditions applying to casual employment. There is a common factor however in that up until the making of the modern awards, the three major awards had a limitation on the duration of casual employment. It was only through the award modernisation proceedings that the awards were changed to include a casual conversion clause.

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<sup>3</sup> <https://theconversation.com/the-truth-about-much-casual-work-its-really-about-permanent-insecurity-151687>

11. The history of the casual clause in the *Building and Construction General On-site Award 2020* can be traced back to some of the first awards made in the industry.

12. In the 1960's the *Carpenters and Joiners Award 1962*, contained the following definition:

*"Casual hand" means an employee engaged by the hour who is or has been employed for a period of less than five days (exclusive of overtime) and who has not been summarily dismissed for misconduct or inefficiency or has not by his own act terminated his employment; provided that a person who is engaged on weekly hiring in any other capacity than a carpenter and who, without interruption in the continuity of his employment, is directed to do carpenter's work, shall not be deemed to be a casual hand within the meaning of this definition.*

13. Up until 2002 there were two casual provisions under the *National Building and Construction Industry Award 2000*. Clause 13.1.2 dealt with casual labour in weekly hire operator classifications which limited engagement as a casual to 2 weeks, and clause 13.2.2 dealt with casual labour in daily hire tradespersons and labourers classifications which limited a casual to employment of less than 5 days.

14. In 2002 the *National Building and Construction Industry Award 2000* was varied by consent. This consent variation increased the casual loading to 25%, specified what the casual loading was paid for (13.4.1), introduced the requirement for the casual to be advised in writing on a number of issues related to the engagement including the actual or likely hours of work (13.4.2), and allowed for all casuals to be employed for up to 6 weeks (13.4.3).

15. The casual employment clause in the *National Building and Construction Industry Award 2000* remained unaltered until the making of the modern award. In the decision releasing the exposure drafts for stage 2 the AIRC Full Bench (AIRC FB) stated,

*"[40] We have removed, from each award, restrictions on the maximum duration of casual employment, replacing them with a casual conversion clause. In respect of the Plumbing and Fire Sprinklers Modern Award, we have also included provision for part-time employment."*

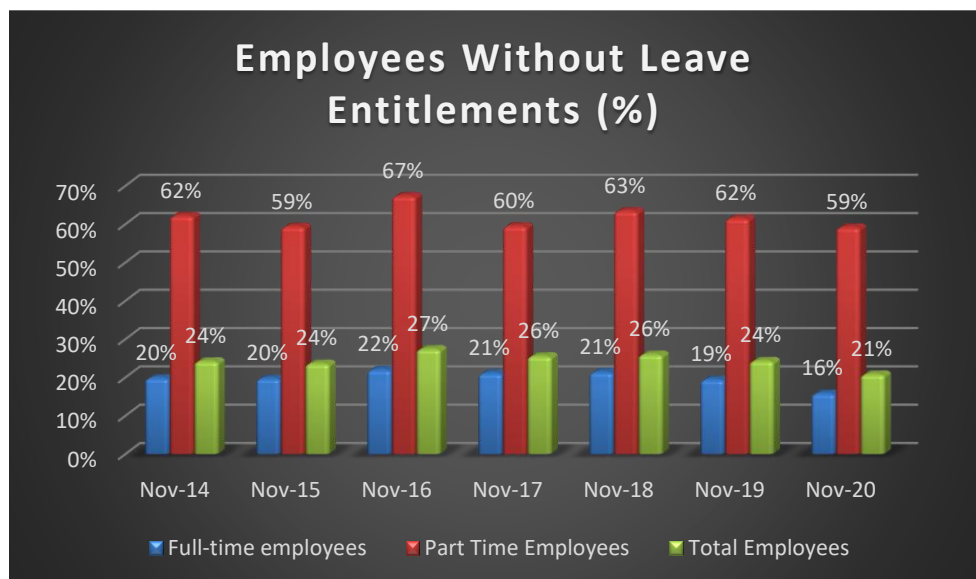
The AIRC FB did not provide any reasons as to why the limitation clauses were removed.

16. The Award clause was further amended in 2021 to make it consistent with the FW SAJER Act.

17. What this history shows is that in the building and construction industry casual employment has gone from being employed for less than 5 days to now being employed for up to 12 months, if not more. Casual employees have received no real benefit from the decisions of tribunals,

courts and legislators, and there is no protection for those of our community who enjoy no stability, no security and generally little favour in our industrial relations landscape. It's time that casual workers be assured a right to improve their lives and finally get a fair go. The starting point should be with the definition of a casual which should be reviewed to be more advantageous to employees, and the legislation changed so that awards are allowed to set limitations on the duration of casual employment appropriate for their industries.

18. To understand the impact of the changes to casual employment in the building and construction industry the following information is provided.
19. There has been a significant growth of casual employment in the building and construction industry since the introduction of the casual conversion provisions into the construction awards. The ABS provide statistics on types of employment<sup>4</sup> and since 2014 have included, on a quarterly basis, a breakdown of employees with leave entitlements and employees without leave entitlements (an accepted proxy for casual employment) by industry. The industry breakdown is based on the ANZIC industry division<sup>5</sup> of the main job.
20. The following graph compiled by the CFMEU uses the figures from the November quarters each year to show the level of casual employment in the construction industry:



21. What the ABS figures show is that since 2014 and up to the start of the Covid-19 crisis in March 2020 the level of casual employment for full-time employees has ranged between 18-22% and

<sup>4</sup> 6291.0.55.001 - EQ05 - Employed persons by Industry division (ANZSIC) and Status in employment of main job, February 1991 onwards

<sup>5</sup> <https://www.abs.gov.au/ausstats/abs@.nsf/mf/1292.0>

for part-time employees ranged between 57-69%, giving a total range for all employees of 23 - 27%. This is significantly high for an industry in which daily hire is still a predominant form of employment.

22. A related matter is the growth in labour hire in the industry and the manipulation of the system by large corporations which have increased the casual temporary employment of employees with no leave entitlements. According to the recent Australasian Centre for Corporate Responsibility (ACCR) report “*Labour Hire & Contracting Across the ASX100*”,

*“Labour hire and contracting is no longer just used to manage short-term and seasonal fluctuations. As this report highlights, in some sectors, labour hire has been used to substitute large sections of the permanent workforce.” (p.3)*

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#### **CONTEMPORARY LABOUR HIRE ARRANGEMENTS IN AUSTRALIA**

*Triangular or intermediary working arrangements are not a recent innovation and have existed since at least the 1950s. However, the use of labour hire has grown rapidly since the 1990s. This growth has been accompanied by a transformation of the role of labour hire employment in the labour market, from a model that predominantly involved the use of “short term, supplementary or ‘top up’ labour” to one that “increasingly takes in a variety of work arrangements which may extend through to longer-term supplementation of the workforce or substitution of permanent workers.....*

*The contemporary labour hire industry includes many different types of labour hire agencies, spanning from large, multinational corporations with thousands of staff (e.g. CIMIC), through medium-sized and mid-tier labour hire providers, to operators consisting of an individual (or a few individuals) “with a van and mobile phone”. Different types of labour hire agencies are often specific to individual sectors and represent a diverse range of risks to host companies and investors.” (p.11)*

*“The COVID-19 crisis has highlighted the risks to individual workers, communities and businesses of a significant percentage of workers having no access to paid sick leave. Many workers without sick leave cannot afford to self-isolate, or to take other necessary precautions to protect themselves and others.”(p.15)*

#### **Labour hire in the construction sector**

*The Australian construction industry is highly fragmented and characterised by short term contracting, informal employment practices, and layers of subcontracting. Many contract and labour hire firms in the construction industry are small-scale, and provide services to primary building contractors, property developers and building and infrastructure owners.....*

*As with the mining industry, the construction industry heavily relies upon labour hire, with host companies contracting out a range of activities from the provision of labour, to the management of independent contractors, and even the contracting out of core operations .....*

*Having fast and flexible access to a casual workforce is attractive to companies wanting to manage the volatility of the industry, by shifting workers onto project-based employment to manage fluctuations in demand. Labour hire and subcontracting arrangements in the construction industry share many similarities to those in the mining sector. They range from the provision of casual/temporary supplementary labour, short-term contractors, long-term contractors, and contract service providers contracted to run whole segments of a project.*

*However, there is a significant difference between the commercial construction and mining sector — the proliferation of two illegitimate and illegal subcontracting practices: phoenixing and sham contracting .....*

*In the construction industry, phoenix companies are often labour hire providers and or subcontractors. Highlighting the scale of this problem in the construction industry the Australian Tax Office (ATO) found that of 19,800 potential phoenix groups, 72% contained at least one building or construction entity. (p.28)*

23. The growth in casual employment and labour hire is also reflected in the increasing number of enterprise agreements, filed by labour hire companies for approval by the Fair Work Commission, that are intended to apply in the building and construction industry. Many of these agreements contain wage rates that are a few cents per hour above the award. The extent to which unscrupulous employers attempt to have approved agreements that clearly fail the Better Off Overall Test show how easily casual employees can be exploited. That so many enterprise agreements for labour hire companies require undertakings (in many cases due to the intervention of the CFMEU) is a sad indictment on the industry.

## Casual Conversion

24. Under this heading two questions are asked:

*“Do you or your organisation consider the amendments regarding casual conversion are appropriate and effective?”*

*Do you or your organisation consider that there should be a different approach to casual conversion for employees of small business employers?”*

Our response is a resounding no to both questions.

25. The casual conversion provisions have done nothing to improve the working lives of casual workers and the new provisions are totally ineffective in the building and construction industry.

26. The grounds on which an employer can refuse a request are set out in s.66H of the FW Act (which forms part of the National Employment Standards (the **NES**)):

### **66H Refusals of requests**

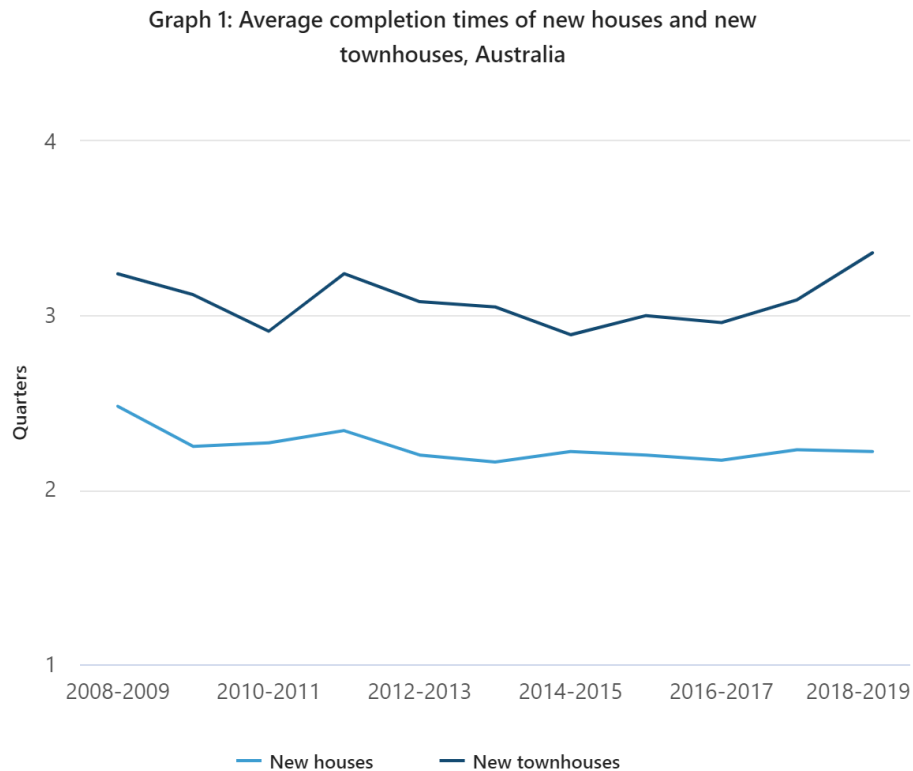
- (1) The employer must not refuse the request unless:
  - (a) the employer has consulted the employee; and
  - (b) there are reasonable grounds to refuse the request; and
  - (c) the reasonable grounds are based on facts that are known, or reasonably foreseeable, at the time of refusing the request.
- (2) Without limiting paragraph (1)(b), reasonable grounds for refusing the request include the following:
  - (a) it would require a significant adjustment to the employee’s hours of work in order for the employee to be employed as a full-time employee or part-time employee;
  - (b) the employee’s position will cease to exist in the period of 12 months after giving the request;
  - (c) the hours of work which the employee is required to perform will be significantly reduced in the period of 12 months after giving the request;
  - (d) there will be a significant change in either or both of the following in the period of 12 months after giving the request:
    - (i) the days on which the employee’s hours of work are required to be performed;
    - (ii) the times at which the employee’s hours of work are required to be performed;which cannot be accommodated within the days or times the employee is available to work during that period;
  - (e) granting the request would not comply with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory.



- (3) If the employer refuses the request, the written response under section 66G must include details of the reasons for the refusal.

27. There is nothing in the NES entitlement that requires the employer to make a genuine attempt to reach agreement or that restricts an employer from engaging and re-engaging a casual employee to avoid casual conversion. Moreover, the NES provision gives employers signposts on how they can avoid casual conversion.

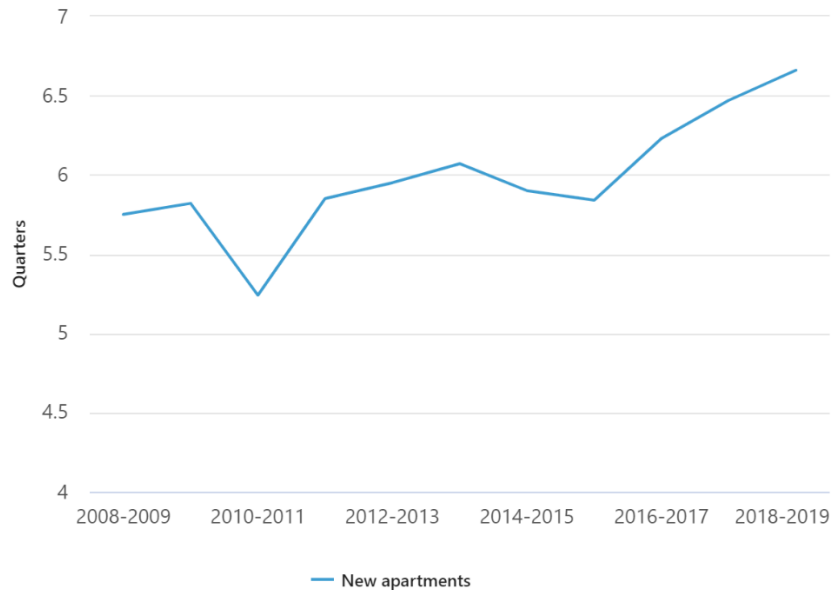
28. It is well recognised that employment in the building and construction is mainly organised on a project-by-project basis. The ABS provides information on the average completion times for new houses, townhouses and flats, units or apartments from 2008-09 to 2018-19.<sup>6</sup> The following graphs are taken from the ABS article:



Source: Australian Bureau of Statistics, Average dwelling completion times 9/10/2019

<sup>6</sup> <https://www.abs.gov.au/articles/average-dwelling-completion-times>

Graph 2: Average completion times of new flats, units or apartments, Australia



Source: Australian Bureau of Statistics, Average dwelling completion times 9/10/2019

29. According to the ABS:

- Average completion times for houses remained fairly steady over the period, varying between 2.16 quarters (six months and two weeks) and 2.48 quarters (seven months and two weeks) to complete. Average completion times for townhouses were slightly more volatile over the same period, varying between 2.89 quarters (eight months and three weeks) and 3.36 quarters (ten months).
- Average completion times for flats, units or apartments have increased, particularly over the past three years, from 5.84 quarters (17 months and two weeks) in 2015-16 to 6.66 quarters (19 months and four weeks) in 2018-19. This is in line with an increase in the number of apartments approved, particularly from late 2014 onwards (see Building Approvals, Australia (cat. no. 8731.0)).

30. Statistical information on commercial projects is harder to find. But generally multi-storey buildings under 30 storeys and civil construction projects under \$400m are also completed in less than 2 years. The following table gives examples of projects<sup>7</sup> that would be completed in under 2 years:

<sup>7</sup> The information was sourced from BCI Australia <https://www.bciaustralia.com/>

<b>Project</b>	<b>Estimated Cost</b>	<b>Start Date for construction</b>	<b>Estimated Completion Date</b>
WIND FARM (SAPPHIRE WIND FARM)	\$588m	January 2017	3 <sup>rd</sup> quarter 2018
ROADS (2) - duplication   ROADWORKS - safety improvements (FLEURIEU CONNECTIONS - MAIN SOUTH RD & VICTOR HARBOR RD)	\$560m	4 <sup>th</sup> quarter 2021	2023
RAIL LINE - duplication (HURSTBRIDGE RAIL LINE - STAGE 2)	\$547m	May 2021	December 2022
TRANSMISSION LINE (PROJECT ENERGY CONNECT - BUNDEY & ROBERTSTOWN SUBSTATION)	\$520m	2 <sup>nd</sup> quarter 2022	2 <sup>nd</sup> quarter 2024
INTERSECTION   ROUNDABOUT   ROADWORKS - upgrade (BLACK SPOT PROGRAMME 2020 / 2021 - SOUTHERN DOWNS)	\$506m	December 2019	June 2021
PIPELINE (BROKEN HILL WATER PIPELINE)	\$467m	January 2018	January 2019
APARTMENTS (429)   SHOPS   SCHOOL   MEDICAL CENTRE   CHILDCARE CENTRE - 2 towers - 18 storey (SKY VILLAGE)	\$450m	October 2021	1 <sup>st</sup> quarter 2023
MEDICINAL CANNABIS PROPAGATION & PROCESSING FACILITY - single storey (ASTERION INTENSIVE HORTICULTURE & RURAL INDUSTRY)	\$450m	August 2021	May 2023
HOTEL (125 rooms)   CIVIC CENTRE   LIBRARY - up to 23 storey (LIVERPOOL CIVIC PLACE & UNIVERSITY OF WOLLONGONG CAMPUS)	\$400m	2 <sup>nd</sup> quarter 2022	2 <sup>nd</sup> quarter 2023
OFFICES   SHOPS (6) - 2 buildings – 27 & 33 storey (PARRAMATTA SQUARE STAGES 4 & 6 (4PS & 6PS))	\$395m	November 2017	November 2019
APARTMENTS (240)   SHOPS   RESTAURANT   CAFE   OFFICE - 9 buildings - 6 to 11 storey (VICTORIA & VINE)	\$350m	April 2020	4 <sup>th</sup> quarter 2021

UNITS (576)   SHOPS / OFFICES (31) - 6 buildings - up to 12 storey (ASPEN VILLAGE)	\$150m	January 2021	1 <sup>st</sup> quarter 2022
APARTMENTS (240)   RESTAURANTS (9)   SUPERMARKET   OFFICE   SHOPS (6) - 3 buildings - 5 to 24 storey (ONE SUBIACO)	\$126m	September 2020	September 2022
ENABLING WORKS for ROAD   ROUNDABOUT & INTERSECTION - upgrade (BADGERYS CREEK RD AREA & AEROTROPOLIS ENABLING WORKS)	\$50m	November 2021	November 2022
MULTI-STOREY CAR PARK (1,503 spaces) for HOSPITAL - 8 storey (THE PRINCE CHARLES HOSPITAL)	\$45m	2 <sup>nd</sup> quarter 2022	April 2024

31. As identified in paragraph 26 above, one of the grounds for refusing a request under s.66H of the FW Act in s.66H(2)(b) is:

(b) the employee's position will cease to exist in the period of 12 months after giving the request;

32. The practical effect of this provision is that even if a casual employee meets the eligibility requirement of 12 months employment, with at least the last 6 months being worked with a regular pattern of hours on an ongoing basis, the employer can still refuse conversion if the position will cease to exist in the following 12 months. The NES provision essentially has increased the period of casual employment before an employee can convert to fulltime or part-time employment to 2 years!

33. Based on the average duration of construction projects identified above, construction workers engaged on a casual basis will have little to no chance of ever converting to full-time or part-time employment under the NES provision.

34. In regard to the issue of small business, there should be no different approach to casual conversion for employees of small business employers. In the building and construction industry there are over 395,000 businesses and 1.2 million workers. The overwhelming majority of businesses meet the definition of a small business (i.e. less than 15 employees). There is no justification for treating casual employees differently just because they are employed by a small business. Further diminishing the rights of workers who continue to battle the erosion of job security in an already fraught and unpredictable industry, where the next week's pay can be shut off at a moment's notice, is totally unacceptable.

### **Set-off Entitlements**

35. Under this heading the question asked is “*Do you or your organisation consider the amendments regarding set-off of casual loading are appropriate and effective?*”
36. Our response is no. In reality the set-off provision will have no practical work to do given the change in the definition of casual.

### **Casual Employee Information Statement**

37. Under this heading the question asked is “*Do you or your organisation consider the Casual Employee Information Statement is appropriate and effective?*”
38. Our response to this question is a qualified no. Whilst providing information to employees on their rights is important, the timing of providing such information is critical. Yes it should be provided on engagement, but it should also be provided again at the time that any such rights come into play.
39. There is a question as to whether or not the Statement has any practical utility. We would argue that an employee being given a piece of paper on commencement of employment about a possible future benefit that might, or might not, arise in 12 months is not a material benefit, but a perfunctory exercise in futility in circumstances where the labour force is already destabilised such that many workers cannot think beyond their next week’s pay check, let alone in 12 months’ time.

### **Additional Matters**

40. Under this heading the question asked is “*Do you wish to raise any other matters for the independent review to consider?*”
41. Our answer to this question is no.
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