The Hon Tony Burke MP
Minister for Employment and Workplace Relations
Minister for the Arts
Leader of the House

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

By email: scrutiny.sen@aph.gov.au

Dear Chair

Thank you for your correspondence of 9 November 2023 regarding the Senate Standing Committee for the Scrutiny of Bills' consideration of the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Bill).

The Committee has asked for additional information on issues relating to the Bill, and the provisions it amends, which is enclosed at Attachment A.

I trust this information is of assistance.

Yours sincerely

TONY BURKE

28/11/2023

Encl.

Attachment A

Exemption from disallowance

1.9 The committee therefore requests the minister's advice as to the appropriateness and necessity of the exemptions from disallowance for legislative instruments made under proposed subsections 202(5), 205(3), 737(1) and 768BK(1A).

1. The exemptions from disallowance for legislative instruments made under proposed subsections 202(5), 205(3), 737(1) and 768BK(1A) of the *Fair Work Act 2009* are appropriate and necessary because providing for disallowance would create significant commercial uncertainty for parties to relevant enterprise agreements.

Context for model terms

2. Proposed subsections 202(5), 205(3), 737(1) and 768BK(1A) would require the Fair Work Commission (FWC) to determine model flexibility, consultation and dispute settlement terms for enterprise agreements and the model dispute settlement term for copied State instruments. Currently, these model terms are set by the *Fair Work Regulations 2009*.
3. If an enterprise agreement contains a flexibility or consultation term that does not meet the requirements of the Fair Work Act, the model flexibility term or consultation term is taken to be a term of the agreement. Where an agreement does not contain a dispute settlement term which complies with the Fair Work Act, the model dispute settlement term may be incorporated via an undertaking pursuant to section 190 of the Fair Work Act. Where a copied State instrument does not include a compliant dispute settlement term, the model dispute settlement term for copied State instruments is taken to be a term of the instrument.
4. Proposed subsections 202(6), 205(4), 737(2) and 768BK(3) set out the factors that the FWC would be required to take into account when determining the model terms. Broadly, these are:
    a. consistency with comparable terms in modern awards
    b. best practice workplace relations
    c. whether all persons and bodies have had a reasonable opportunity to be heard
    d. the requirements of the Fair Work Act in relation to each term, and
    e. the object of the Fair Work Act and of the relevant Part of the Fair Work Act.

Appropriateness and necessity

5. The model terms determined by the FWC will apply in relation to enterprise agreements where the request for employees to vote to approve the agreement is made on or after commencement, and by that vote the agreement is approved. This is to ensure that when an enterprise agreement is voted on, those voting are aware of the relevant model terms which may be included if the terms in their enterprise agreement are not compliant. If the model terms determined by the FWC were disallowed, it is unclear what would take the place of these model terms in enterprise agreements and copied State instruments which include them. This is likely to cause commercial uncertainty for the parties to a proposed agreement, including employers who would be unsure of their obligations under the enterprise agreement or copied State instrument. Contravention of a term of an enterprise agreement is a civil remedy provision under the Fair Work Act.
6. The FWC is the independent workplace relations tribunal responsible for approving enterprise agreements and dealing with disputes arising under enterprise agreements. With its expert and independent knowledge, the FWC is ideally placed to determine best

practice workplace relations and the model terms more broadly, and ensure their ongoing relevancy.

7. The FWC is already responsible for issuing and varying comparable model terms in modern awards. Proposed subsections 202(6), 205(4), 737(2) and 768BK(3) require the model terms determined by the FWC to be broadly consistent with existing model terms for modern awards. The Bill would require the FWC to consider that the model terms are consistent with existing standards. Making terms in the different industrial instruments consistent should assist the community in meeting the requirements in model terms, regardless of which type of industrial instrument they are included in.
8. The FWC's discretion in issuing the model terms is appropriately limited by the factors the FWC must take into account when determining the model terms. These factors form part of the Bill and will be subject to Parliamentary scrutiny. Additionally, the FWC is required to consider whether all persons and bodies have had a reasonable opportunity to be heard and make submissions, ensuring public consultation in the determination of model terms. The process for making model terms will involve extensive scrutiny and the opportunity for public submissions.
9. Model terms do not adversely affect individuals. Model terms only apply where the corresponding term agreed in an enterprise agreement does not meet the requirements of the Fair Work Act or where a copied State instrument does not contain a dispute settlement term. As a result, they are relevant in limited circumstances, and where they apply they ensure a safety net of entitlements for employees where the corresponding term agreed in an enterprise agreement is determined to be insufficient or noncompliant.

Retrospective application

1.16 The committee requests the minister's detailed advice regarding why it is necessary and appropriate for the anti-avoidance provisions in proposed part 2-7A in schedule 1 to the bill to apply retrospectively.

10. Division 4 of proposed Part 2-7A of the Fair Work Act (contained in Part 6 of Schedule 1 to the Bill) contains the anti-avoidance provisions that prohibit a person from arranging their affairs in order to avoid a regulated labour hire arrangement order. The provisions would apply on and after the day on which the Bill was introduced in Parliament. Of these:
    a. Section 306S applies to prohibit a person from entering into a scheme for the sole or dominant purpose of preventing the FWC from making a regulated labour arrangement order
    b. Section 306T applies to prohibit an employer from engaging a series of employees for short term periods, in order to avoid paying them the protected rate of pay under a regulated labour hire arrangement order
    c. Section 306U applies to prohibit a regulated host from entering into a number of short-term contracts with an employer (in effect, a labour hire provider), in order to avoid that employer having to pay the protected rate of pay to its employees in accordance with a regulated labour hire arrangement order, and
    d. Section 306V applies to prohibit an employer from dismissing an employee and engaging an independent contractor to do the same work, in order to avoid paying the employee the protected rate of pay under a regulated labour hire arrangement order.
11. Section 306S would prohibit an employer from changing or manipulating their operations with the sole or dominant purpose of preventing the FWC from making a regulated labour hire arrangement order under the Part. This anti-avoidance provision is not predicated on a person (such as a host or labour hire employer) becoming covered by a regulated labour

hire arrangement order at a later date, or being covered by such an order at the time the contravening conduct occurs.

12. Sections 306T–V operate slightly differently, insofar as:
    a. they prevent an employer from engaging in the prescribed conduct where the purpose, or one of the purposes, of doing so was to avoid an obligation to pay the protected rate of pay to an employee (rather than this needing to be the sole or dominant purpose of the conduct, as required by section 306S), and
    b. an employer can only be found to have contravened one these provisions once they become covered by a regulated labour hire arrangement order.
13. Read together with the application and transitional provisions at Part 18 of Schedule 1 to the Bill, it is clear the Government intends for conduct described in sections 306T–V (in addition to section 306S) to be prohibited from the date of introduction. However, the contravention of such a provision will only crystallise once an order covers the employer. For example, a contravention of section 306V may arise if:
    a. after the date of introduction but before becoming covered by an order, a labour hire employer dismisses an employee and engages another person as an independent contractor to perform the same or similar work for a host, for the purpose of avoiding a future obligation to pay the protected rate of pay; and
    b. at a later date, the employer becomes covered by an order in relation to work being performed for that host, but the employer is not required to pay the protected rate of pay because one or more relevant workers are independent contractors (who are not captured by this measure) as a result of the actions described in paragraph 13(a) above.
14. It is necessary and appropriate for these sections to apply from the date of introduction so that businesses are prevented from altering their operations with the purpose of avoiding Part 2-7A when it commences. If the provisions did not apply from the date of introduction, there is a real risk that businesses who are intent on avoiding Part 2-7A could arrange their affairs in order to undermine the policy intent of this measure. This would render the proposed provisions ineffective at addressing current business practices that have given rise to the issue the Government is seeking to address – that is, the undercutting of agreed rates of pay in enterprise agreements by the use of labour hire.
15. The operation of these provisions from the date of introduction also helps protects the integrity of the measure. The provisions of the Bill are publicly available, which provides parties who intend to avoid the provisions an opportunity to seek and implement advice on how they can restructure their operations to avoid paying labour hire employees a protected rate of pay.
16. The application of these anti-avoidance provisions from the date specified will also have a general deterrent effect on those businesses who may seek to engage in the avoidance behaviour that is prohibited by Division 4.

1.17 The committee's consideration of this matter would be assisted if the advice contained information regarding whether there will be a detrimental effect for any individuals, and if so the extent of that detriment and the number of individuals.

17. Employers will only be exposed to liability under these provisions if they engage in the prohibited conduct for the purpose of avoiding the operation of new Part 2-7A.
18. While employers who engage in prohibited conduct may be exposed to a civil penalty, the department considers that the application of these provisions from the day of introduction is appropriate. This is because Part 2-7A is concerned with protecting rates of pay that have been agreed between employers and employees.
19. If the anti-avoidance provisions did not apply from the day of introduction, there is a risk that parties who are aware of Part 2-7A will engage in conduct with the purpose of

subverting the operation of these provisions, which would in turn have a detrimental impact on vulnerable employees. This would be inconsistent with the policy intent of Part 2-7A. Considering the risk to bargained rates of pay that arises from the use of labour hire by some business, the general deterrent effect of the anti-avoidance provisions is appropriate and justified.

20. It is important that the state of the law be clear, and that persons potentially affected by laws know what those laws are before they come into effect. However, due to the nature of these provisions – which are tied to the purpose of a person's conduct being to subvert the operation of these provisions – it follows that a person who is unaware of these provisions is unable to seek to avoid them purposefully. We consider this mitigates concerns the Committee may have about the parties to whom these provisions are likely to impact.
21. Businesses that may be affected by the operation of the new Part 2-7A once it comes into force will likely become aware of its effect – for instance, because:
    a. they are required to respond to an application made to the FWC by an employee or union seeking a regulated labour hire arrangement order (noting business will be given an opportunity to engage in that application before any pay obligations apply), or
    b. business accessing guidance and education material prepared and made available by the FWC and Fair Work Ombudsman about how Part 2-7A applies and the obligations it imposes on business.
22. Further, the proposed anti-avoidance provisions do not prevent businesses from making decisions about their structure or operations, for genuine reasons. These proposed anti-avoidance provisions will only be enlivened where the purpose of action taken is to avoid a regulated labour hire arrangement order made by the FWC. Where a business's purpose inform decisions is unrelated to avoiding obligations arising under Part 2-7A, that business will not be impacted by these provisions. For this reason, the potential adverse impact of these provisions on many businesses – those who make decisions for genuine reasons – is expected to be minimal.

Significant penalties / Strict liability offence / Absolute liability offence

1.30 The committee therefore requests the minister's advice as to:

- **why it is necessary and appropriate to impose absolute liability on the offence of wage theft in proposed subsection 327A(1) of the Fair Work Act 2009 noting that the offence carries a criminal penalty of up to 10 years imprisonment; and**
- **why it is necessary and appropriate to impose strict liability on the offence of industrial manslaughter in proposed subsection 30A(1) of the Work Health and Safety Act 2011 noting that the offence carries a criminal penalty of up to 25 years imprisonment.**
- **The committee's consideration of this information would be assisted if the response made reference to the Attorney-General's Department's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.**

Wage theft

23. Absolute liability would not be imposed on the entire wage theft offence.[1] Rather, it would only apply to two out of four elements of the offence, namely:
    a. the employer is required to pay an amount to, or on behalf of, or for the benefit of,

[1] See also paragraphs [186]–[188] of the Explanatory Memorandum.

an employee under the Fair Work Act, fair work instrument or transitional instrument (327A(1)(a)), and

b. the required amount is not a superannuation contribution or an amount covered by proposed subsection 327A(2) (327A(1)(b)).

24. Absolute liability would not apply to the other two elements of the wage theft offence:
    a. the employer engages in conduct (327A(1)(c), or
    b. the conduct results in a failure to pay the required amount to, on behalf of, or for the benefit of, the employee in full on or before the day when the required amount is due for payment (327A(1)(d)).
25. For these two elements (327A(1)(c) and (d)), it would be necessary to prove intention – i.e. the prosecution would need to prove beyond reasonable doubt that the defendant:
    a. intentionally engaged in the relevant conduct, and
    b. intended that their conduct would result in a failure to pay the required amount to, on behalf of, or for the benefit of, the employee in full on or before the day when the required amount is due for payment.
26. A detailed justification for applying absolute liability to two out of the four elements of the wage theft offence was provided in the Statement of Compatibility with Human Rights for the Bill.[2]
27. It is necessary and appropriate to impose absolute liability on paragraphs 327A(1)(a) and 327A(1)(b) of the wage theft offence because:
    a. Both paragraphs refer to objective facts that are preconditions to the office, and
    b. Paragraph 327A(1)(b) refers to a jurisdictional fact, and
    c. The absolute liability measures are proportionate in that they only apply to two elements of the offence (for the reasons given above and discussed at greater length below) and not to the offence as a whole.
28. Paragraphs 327A(1)(a) and (b) are preconditions for the wage theft offence and the state of mind of the defendant is not relevant, as these elements are objective facts that do not relate to the defendant's culpability. The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the Guide) states that absolute liability may be acceptable in these circumstances (at pages 23 and 24).
29. Further, Alert Digest 2 of 2010 indicates that the Committee considers it appropriate to apply absolute liability to offence elements that are objective facts 'established by reference to an objective standard that does not relate to culpability' (at page 27). It is therefore consistent with both the Guide and previous decisions of the Committee to apply absolute liability to paragraphs 327A(1)(a) and (b).
30. Paragraph 327A(1)(b) is a jurisdictional element that does not relate to the substance of the offence, but marks a boundary between matters that are within the scope of the offence and those that are not. The Guide states that absolute liability should apply to jurisdictional elements (at page 23. See also page 21).
31. The Committee's Report 6 of 2002, entitled Application of Absolute and Strict Liability Offences in Commonwealth Legislation (which is referred to in the Guide at page 24) also states that absolute liability should apply to 'elements of offences relating only to jurisdiction' (at page 259).
32. Further, the Guide states that Alert Digest 2 of 2010 provides some useful examples of what the Scrutiny of Bills Committee has previously considered are appropriate uses of absolute liability. Alert Digest 2 of 2010 refers to elements of offences that are 'jurisdictional elements that do not relate to the substance of the offence' (at page 27) and states that the Committee considers these to be appropriate uses of absolute liability provisions that are consistent with the provisions of the Guide.
33. As paragraph 327A(1)(b) can be said to be a jurisdictional element that does not relate to

[2] See paragraphs [185]–[191] of the Explanatory Memorandum.

the substance of the offence, it is therefore consistent with the Guide, with the Committee's Report 6 of 2002, and with previous decisions of the Committee (as set out in Alert Digest 2 of 2010), to apply absolute liability to this element.

Industrial manslaughter

34. Strict liability would not be imposed on the entire industrial manslaughter offence.[3] Rather, it would only apply to three elements of the offence.

Paragraphs 30(1)(a) and 30(1)(b)

35. The elements in new paragraphs 30A(1)(a) and 30A(1)(b) would apply strict liability because they are threshold elements requiring a factual assessment to determine whether the offence applies to a person. In this way, they are analogous to 'jurisdictional elements' in that they do not go to the substance of the offence (see footnote 19 to the Guide). The Guide (at page 23) provides that applying strict liability to a particular physical element of an offence may be justified if that element is jurisdictional.
36. The Committee's Scrutiny Digest 2 of 2010 offers examples of justified applications of strict or absolute liability to physical elements of an offence. One such element prescribes that it is an offence for an Australian to engage in certain conduct outside Australia. In that example, applying absolute liability to whether the conduct was engaged in outside Australia is justified because the element is jurisdictional. Paragraphs 30(1)(a) and 30(1)(b) would serve a similar purpose.
37. Paragraph 30A(1)(a) would require that a person is a person conducting a business or undertaking (PCBU) or an officer of a PCBU within the meaning of the *Work Health and Safety Act 2011* (WHS Act). Paragraph 30A(1)(b) would require that the person has a health and safety duty under the WHS Act. Both would operate to ensure the offence only captures persons subject to the Commonwealth work health and safety jurisdiction, linking the offence to the Commonwealth jurisdiction.

Paragraph 30A(1)(d)

38. The application of fault to paragraph 30A(1)(d), which would require the person's conduct to breach the health and safety duty, would undermine deterrence. For the reasons set out below there are legitimate grounds for penalising persons lacking 'fault' in respect of that element and those grounds are necessary and appropriate.
39. Subsection 12F(2) of the WHS Act provides that strict liability applies to each physical element of each offence under the WHS Act, unless otherwise stated. The majority of offences under the WHS Act and *Work Health and Safety Regulations 2011* are wholly strict liability offences, including the Category 2 and Category 3 duty offences. Work health and safety offences, including the proposed industrial manslaughter offence, arise in a context where a defendant can reasonably be expected, because of their professional involvement, to be aware of their duties and obligations to their workers and the wider public. Work health and safety offences also relate to public health and breaches can and do have devasting consequences.
40. Work health and safety duties are breached when a duty holder falls short of the requisite standard of care. In this case, the industrial manslaughter offence would apply where a PCBU has failed to ensure the safety of workers so far as is reasonably practicable, or in the case of an officer where the person has failed to exercise due diligence to ensure the PCBU meets its obligations. While the degree of risk and the duty holder's state of mind in relation to that risk is relevant to establishing which offence is applicable, whether the duty holder appreciated that their conduct fell short of the objective standard is irrelevant

[3] See also paragraphs [284]–[285] of the Explanatory Memorandum.

under the existing duty of care offences. Given the seriousness of the industrial manslaughter offence, it would be inappropriate to allow for the acquittal of an accused on the basis that they did not appreciate that the conduct constituted a breach of the relevant duty.

41. Proving breaches of work health and safety duties can also be complex and involve evidence of multiple decisions made at different levels of the organisation. Requiring the prosecution to prove that a duty holder had a requisite state of mind in relation to breaching the relevant duty would hinder effective prosecution. This in turn would undermine deterrence.
42. Paragraph 30A(1)(d) also interacts closely with other offence elements requiring fault (specifically the requirement to *intentionally* engage in the conduct (paragraph 30A(1)(c)) and the requirement that the person was *reckless or negligent* as to whether the conduct would cause the death (paragraph 30A(1)(f)). It is therefore necessary and appropriate that a fault element is not separately applied to this element of the offence.

Abrogation of privilege against self-incrimination

1.35 In light of the above, the committee requests the minister's advice as to why it is necessary and appropriate for proposed subsection 713(4) to remove use immunity, and for proposed subsection 713A(2) to remove derivate use immunity, in relation to employee pay slips and records.

1.36 The committee's consideration of this information would be assisted if the response made reference to the Attorney-General's Department's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.

43. A detailed justification for abrogating the privilege against self-incrimination was provided in the Statement of Compatibility with Human Rights for the Bill.[4] Proposed subsections 713(4) and 713A(2) would provide that the use and derivative use immunities conferred under subsections 713(2) and (3) and 713A do not apply to two specific classes of documents:
    a. employee records that are required to be made and kept under section 535 of the Fair Work Act, and
    b. pay slips that have been created in relation to an employee as required under section 536 of the Fair Work Act.[5]
44. It is necessary, appropriate and proportionate to disapply use and derivative use immunities in relation to these employee records and pay slips for the following reasons:[6]
    a. These records and pay slips are required to be kept or produced under the Fair Work Act in order to comply with the Fair Work Act. If an employer is lawfully required to produce and keep (or issue) these documents and records, then it is not reasonable to prevent their use in evidence.
    b. These records are often central to establishing that an underpayment has occurred in civil proceedings and it is expected that they would have similar value in proceedings for the new wage theft offence. If not disapplied, the immunities conferred by subsections 713(2) and (3) and section 713A would prevent these records from being used in criminal proceedings, significantly impairing the ability of Fair Work Inspectors to effectively investigate, and refer for prosecution, the new wage theft offence.
        i. The Guide states (at page 95) that it may be appropriate to override the

[4] See paragraphs [192]–[200] of the Explanatory Memorandum.
[5] See also paragraphs [192]–[200] of the Explanatory Memorandum.
[6] See also paragraphs [926]–[928] of the Explanatory Memorandum.

privilege against self-incrimination where its use could seriously undermine the effectiveness of a regulatory scheme and prevent the collection of evidence.

ii. The Guide also notes (at page 98) that limited immunities have been accepted for other regulators (such as the Australian Securities and Investment Commission, the Australian Competition and Consumer Commission and the Australian Prudential Regulation Authority). This is because of the particular difficulties of corporate regulation and because full use and derivative use immunity would unacceptably fetter the investigation and prosecution of corporate misconduct offences.

iii. If the immunities conferred by subsections 713(2) and (3) and section 713A of the Fair Work Act applied to employee records and pay slips, this would seriously undermine the effectiveness of the FW regulatory scheme and unacceptably fetter the investigation and prosecution of wage theft offences. It is therefore justified to disapply them in these circumstances.

iv. The use and derivative use of self-incriminatory investigation material is necessary to achieve the legitimate objective of facilitating the investigation and prosecution of the wage theft offence.

c. Under proposed subsections 713(4) and 713A(2), the use and derivative use immunities would not apply in respect of two narrow classes of documents that are required by law to be created and preserved. The scope of documents covered by the provisions is narrowed further in that these documents must only be produced in limited circumstances: the documents may only be produced and inspected/copied while a Fair Work Inspector is on the premises or following the provision of a notice under section 712. The narrow scope of the documents covered by proposed subsections 713(4) and 713A(2) would act to some extent as a safeguard against the abrogation of the privilege against self-incrimination.

d. To the extent that the proposed amendments to subsections 713(4) and 713A(2) would limit the rights under Articles 14 and 15 of the *International Covenant on Civil and Political Rights*, they are appropriate as they seek to achieve the legitimate objective of protecting employee entitlements, recovering underpayments and prosecuting criminal non-compliance.

Incorporation of external materials as existing from time to time

1.41 Noting the above comments, the committee requests the minister's advice as to:

- **the type of documents that it is envisaged may be applied, adopted or incorporated by reference under proposed subsection 15S(2);**
- **whether these documents will be made freely available to all persons interested in the law; and**
- **why it is necessary to apply the documents as in force or existing from time to time, rather than when the instrument is first made.**

45. Section 15S would insert a new definition of ‘road transport industry’ into the Fair Work Act. Subsection 15S(1) would provide that road transport industry means the particular industries listed in five modern awards as in force on 1 July 2024, with any modifications prescribed by regulations, or any other industry, prescribed by regulations made under proposed subsection 15S(2).
46. It is envisaged that any additional industry would be prescribed by applying, adapting or incorporating provisions within a modern award or awards in respect of the road transport industry. There are a confined number of modern awards which relate to the road

transport industry. All modern awards are freely and publicly available to access online through the FWC and Fair Work Ombudsman websites: www.fwc.gov.au and www.fairwork.gov.au.

47. I consider it necessary to apply the documents as existing from time to time as the legislation is intended to be future-focused and flexible, and this would enable it to adapt and extend to technological and commercial changes within the road transport industry.

Availability of merits review

1.47 In light of the above, the committee requests the minister's advice as to:

- **the circumstances in which internal merits review of road transport minimum standards orders may not be considered appropriate; and**
- **whether consideration was given to the bill providing that internal merits review must be provided for these decisions.**

1.48 The committee also draws this matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation.

48. I note the Committee's query as to why the bill provides for the establishment of a merits review mechanism through regulations rather than including one on the face of the bill. The Bill would confer an entirely new jurisdiction on the FWC, including the power to make a range of decisions relating to minimum standards orders, and the regulation-making approach would enable a thorough assessment and appropriate targeting of the decisions that are suitable for review (and what shape such review should take). There is no current precedent for internal review of the decisions of an Expert Panel or Full Bench under the Fair Work Act. Nevertheless, I do acknowledge the Committee's concerns and undertake to investigate a potential amendment to the Bill to include a failsafe or internal review mechanism on the face of the legislation.

Significant matters in delegated legislation

1.52 In light of the above, the committee requests the minister's detailed advice as to why it is considered necessary and appropriate to leave the digital labour platform deactivation code, and the road transport industry termination code to delegated legislation, rather than primary legislation.

49. Proposed new sections 536LH and 536LM would set out criteria for the FWC to take into account when determining whether a person's deactivation or termination was unfair. Proposed new sections 536LJ and 536N would empower me, as Minister, to make codes known as the Digital Labour Platform Deactivation Code and the Road Transport Industry Termination Code.
50. The Codes are intended to assist regulated businesses and a regulated workers in understanding their rights and obligations in respect of any actual or proposed deactivation or termination. They would likely contain detailed and specific guidance, drawing on the significant guidance included on the face of the primary legislation as to the elements of unfair termination and deactivation, that will guide consideration of whether a person has been unfairly deactivated or terminated. The Digital Labour Platform Deactivation Code, for example, may deal with issues such as the internal processes of digital labour platform operators, the accessibility of such processes, and the form of communication between workers and platform operators in relation to deactivation. The Road Transport Industry Termination Code would deal with similar issues in relation to road transport. These very detailed and process-related issues, which

may be subject to regular review and amendment, are appropriate to be included in delegated legislation.

51. Additionally, the Codes would relate to industries where the technological and commercial change is frequent (i.e. the gig economy and the road transport industry) which may require immediate or prompt changes to legislation. I consider it necessary and appropriate for both Codes to be in delegated legislation so that they would be able to quickly respond and adapt to any changing industry circumstances.
52. Both Codes would be similar to the pre-existing Small Business Fair Dismissal Code, made under subsection 388(1) of the Fair Work Act, in respect of the unfair dismissal regime for employees.

Fees in delegated legislation

1.60 While the committee notes that the setting of the level of fees is often left to delegated legislation, the committee requests the minister's advice as to whether consideration has been given to providing greater legislative guidance as to how the fee amount (and the method of indexation, if any) is to be determined for fees prescribed as a result of proposed subsections 536LV(1), 536NE(1), and 306R(1).

53. Proposed subsections 536LV(1), 536NE(1) and 306R(1) are modelled off existing and well-established provisions in the Fair Work Act. This approach would ensure consistency and clarity within the Fair Work framework and provides flexibility to ensure fee amounts would remain relevant and appropriate over time (see e.g. sections 367, 373, 395, 527H, 775 and 789FC of the Fair Work Act).

Procedural fairness

1.66 In light of the above, the committee requests the minister's advice as to why it is necessary and appropriate for proposed section 536MC to provide that costs orders can be made against representatives who encouraged claims for unfair deactivation or termination which had no reasonable prospects of success.

54. Proposed section 536MC is modelled off existing and well-established provisions in the Fair Work Act. This approach would ensure consistency and clarity within the Fair Work framework (see e.g. sections 376, 401 and 780).
55. The provision would prevent unscrupulous lawyers or paid agents from escaping the possibility of a costs order if they have acted unreasonably. This would discourage them from wasting resources of other parties and the FWC. It would not prevent lawyers or paid agents from fully pursuing a genuine claim on behalf of a client.
56. The provisions on which proposed section 536MC is modelled operate in relation to existing FWC jurisdictions that are broadly comparable to the proposed jurisdiction in relation to unfair deactivation or termination and are expected to operate in a similar way.
57. The Committee indicates a concern that the provision may have a chilling effect on representatives and their willingness to represent parties in unfair deactivation on unfair termination matters. This should not be the case given the high threshold the FWC is required to be satisfied of in order to make an order for costs. For example, it has been held that:
    a. Encouraging a person to start, continue or respond to a matter requires a positive act by the lawyer or paid agent, not merely an absence of discouragement (*Khammaneechan v Nanakhon Pty Ltd ATF Nanakhon Trading Trust T/A Banana Tree Cafe* [2011] FWA 651 at [22]).
    b. A conclusion that application had no reasonable prospect of success should only

be reached with extreme caution in circumstances where the application is 'manifestly untenable or groundless also lacking in merit or substance as to not be reasonably arguable' (*A Baker v Salva Resources Pty Ltd* [2011] FWAFB 4014 at [10]).

c. A solicitor is reasonably justified in initiating proceedings even in a case where the supporting evidence is weak but arguable (*Stephen Baskin v Friends Resilience Pty Ltd T/A Friends Resilience* [2018] FWC 1536 at [60]).