Fair Work Legislation Amendment (Closing the Loopholes) Bill 2023

Chamber of Commerce and Industry WA Submission

4 October, 2023

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Introduction

CCIWA is the peak body advancing trade and commerce in Western Australia. With around 7,500 members, our membership spans every sector of the economy, every size of business, and every region across our great state. Our vision is for Western Australia to be the best place to live and do business.

CCIWA is deeply concerned about many of the changes to Australia's employment and workplace relation laws to be introduced by the *Fair Work Legislation Amendment (Closing Loopholes) Bill* 2023 (**Bill**). Rather than simplifying Australia's complex employment and workplace relations laws, this Bill creates greater complexity, risk, and uncertainty for business. This occurs at the time when our economy is desperately trying to attract foreign investment to capitalise on big global shifts, principally the shift to cleaner technology.

It is CCIWA's view that key elements of the Bill are fundamentally flawed and should be rejected. Notwithstanding this, we have outlined our views below on specific aspects of the Bill, in an effort to secure changes that limit the worst of the damage to WA's economy. We are also supportive of splitting the Bill, as has been put forward by Senate crossbenchers.

CCIWA has conducted a rapid and comprehensive consultation process with its members. This consultation has included three workshops attended by 45 businesses, multiple one-on-one meetings, as well as a survey of the WA business community that received 583 responses. Reflecting our large and broad membership, CCIWA's consultation has spanned businesses of all sizes, sectors, and regions.

These survey results show overwhelming concern amongst survey respondents. This includes 73% of businesses indicating the proposed changes to casual employment would have a 'damaging' or 'extremely damaging effect', while 67% said changes to both labour hire and workplace delegates' rights would also be damaging to their business. For each of these proposed changes, less than 4% said they would positively impact their business (see Table 1).

Businesses operating in the accommodation and food services (71%), agriculture (68%), and real estate services (64%) industries were most concerned with the overall proposed changes, while the Pilbara (62%) and Goldfields-Esperance (62%) regions reported the greatest level of concern across the State. Breaking this down by size, businesses with 15-20 employees (60%) had the greatest proportion of respondents indicate the proposed changes overall would harm their business.

Using these results, CCIWA estimates approximately 17,900 businesses would be at risk of needing to reduce the number of staff they employ if the Bill were to be passed into

law, placing around 64,800 jobs at risk. Approximately 5,300 businesses would further be at risk of having to close due to these changes.[1]

Table 1: Impact on WA businesses, by part of the Bill

Part of the Bill	Impact on business[2]				
	Extremely Damaging	Damaging	No impact	Positive	Extremely positive
Workplace delegates' rights	35.3%	31.9%	24.2%	0.5%	0.5%
Casual employment	34.6%	38.6%	18.2%	3.5%	0.5%
Labour hire	26.1%	40.4%	22.5%	1.6%	0.7%
Road transport industry reforms	11.7%	37.5%	33.2%	1.3%	0.4%
Employee-like forms of work	9.9%	28.6%	43.3%	1.7%	0.7%

Preliminary comments on the process

The consultation over the Bill and its significant reforms of the FW Act and other employment and workplace relations legislation has lacked transparency and detail, impeding analysis and evaluation. The four-week period from the date the Bill was introduced to Federal Parliament on 4 September 2023 to the final date for submissions on 29 September 2023 was far too short, given the Bill's numerous reforms span diverse and complex areas of employment and workplace statutory laws.

Part 1 of the Bill - Casual employment

The proposed changes to casual employment have generated significant concern among WA businesses. A total of 39% of survey respondents indicated these proposed changes would have a damaging impact on their business, while an additional 35% said the changes would be extremely damaging. Only 4% said the changes would have a positive impact, while 5% were unsure how this would affect their business.

Businesses in the agriculture (93%), accommodation and food services (92%), and retail trade (80%) industries indicated they would be most negatively impacted by these changes, all of which rely heavily on casual employment arrangements. Companies operating in the Goldfields-Esperance (78%) and Wheatbelt (78%) region were also more

[1] CCIWA took a conservative approach to producing these estimates. First, the estimate was calculated using the proportion of respondents who indicated they would be 'extremely damaged' by the casual employment part of the Bill multiplied by employing business count data from the Australian Bureau of Statistics. (CCIWA took a conservative approach by excluding businesses that reported the Bill would be 'damaging' only.) This was then multiplied by the proportion of businesses who indicated they would employ fewer staff due to the change in legislation (of those who would be 'extremely damaged'). Any scope for overlap and double counting was removed by only using the portion of businesses that indicated the changes to casual employment would be extremely damaging. Casual employment was selected as it had the most wide-ranging impacts on business.

[2] For each part of the Bill, businesses were asked what impact this would have on their business. Numbers may not add to 100% as this excludes businesses that responded 'unsure'.

likely to be negatively impacted, reflecting the high level of agricultural activity that occurs in these regions.

In response to these changes, 56% of businesses said they would stop engaging casual employees, while 36% said they would need to reduce staff from their current levels. Almost one quarter of WA businesses said they would need to scale down (24%), with 7% saying they would face the possibility of having to close their business.

Table 2: Impact of proposed changes to casual employment on WA businesses, by industry[3].

Industry	Damaging[4]	No impact	Positive
Agriculture	93.3%	6.7%	0.0%
Accommodation & Food Services	92.3%	7.7%	0.0%
Retail Trade	80.0%	6.7%	6.7%
Professional Services	78.6%	14.3%	0.0%
Wholesale Trade	77.8%	11.1%	11.1%
Total	**73.2%**	**18.2%**	**4.1%**

The reforms to casual employment were also raised by businesses in our three workshops. Employers operating in the education sector, for example, shared their concerns about how the changes to casual employment will damage the operating budgets of schools in WA, which depend on different kinds of financial assistance, such as State or Commonwealth Government funding. Many schools operating across WA require casual employees for provision of educational services during specific periods, (ie particular semesters). The proposed changes to casual employment described in this part of the Bill will increase costs for schools, which operate as businesses, and make it harder for them to remain cost-effective and competitive. In addition, it will increase the administrative burden of managing their workforce. Fees would also need to increase, exacerbating cost-of-living pressures.

CCIWA contends there is no compelling reason to change the comprehensive definition of "casual employee" in section 15A of the FW Act. This part of the Bill creates, essentially, an extensive new FW Act regime for casual employment, which is complex

[3] Respondents were presented the following information and asked the following question: The Federal Government is changing the definition of 'casual employment'. The current definition, which is defined solely by reference to the terms of the employment contract, will be replaced with a definition that also considers the "real substance, practical reality and true nature" of the employment relationship. The change in definition may effectively stop employers engaging casuals who regularly work the same days, even where the casual has chosen to work those days because of their own availability. Casuals will also be provided a right to apply to convert from casual to permanent every six months. Penalties of up to $939,000 for a business and $93,900 for an individual could apply for a breach of these provisions. What impact would this have on your business?

[4] 'Damaging' includes businesses that responded either 'damaging' or extremely damaging'. 'Positive' includes businesses that responded either 'positive' or 'extremely positive'. Numbers may not add to 100% as this excludes businesses that responded 'unsure'.

and unnecessary, and will increase the administrative burden for employers and harm business productivity.

The Government has explained that the Bill's new definition of "casual employee" will insert into the FW Act a new objective definition of "casual employee" to determine when an employee can be classified as a casual employee. The Bill's proposed new definition of "casual employee" comprises two parts or components: first, a "general rule"; second, "indicia that apply for purposes of the general rule".

CCIWA contends the definition of "casual employee" currently provided in the FW Act is more than sufficient. A casual employee already has a statutory pathway under the FW Act to convert to full-time or part-time employment. The FW Act specifies that a casual employee who has worked for an employer for at least 12 months and has, during at least the last 6 months of that time, worked a regular pattern of hours on an ongoing basis may be entitled to be offered, or request, conversion to full-time employment or part-time employment.

Under the Bill's proposed new definition of "casual employee", the first step is to apply the new "general rule" for determining whether an employee is a casual employee. This involves enquiring whether "the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work".

The second step involves considering the "indicia" that apply. These indicia add complexity to what should be a relatively simple and straightforward legal test for determining whether someone is a casual employee. The question "whether the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work" is to be assessed, amongst other things, "on the basis of the real substance, practical reality and true nature of the employment relationship." This component of the Bill's new definition of a casual employee is vague and imprecise, and it will create uncertainty for businesses. While this component of the definition requiring an assessment of the true nature of the employment relationship is consistent with the common law approach before the Australian High Court's decision in *WorkPac Pty Ltd v Rossato*[5] (**Workpac v Rossato**), it introduces unnecessary complexity to the statutory definition of casual employee.

This part of the Bill dealing with casual employment is apparently intended to close the purported "forced permanent casual worker loophole", but the Bill's proposed new definition of "casual employee" may, essentially in practice, stop casuals from working regular patterns of work. It means that a worker whose employment is characterised by "a regular pattern of work" may not be a genuine casual employee. Employers and businesses may be forced, in response to the Bill, to avoid casual employment practices, and to stop offering casual employees regular hours. Under the Bill's proposed new definition, someone who works, for example, the same hours across the same days per

[5] *WorkPac Pty Ltd v Rossato* [2021] HCA 23.

week, each week, is likely to be re-classified as a permanent part-time employee because of the regularity of those hours worked. It will mean that a worker who requests and works "regular" hours each week – for instance, to fit in with their class timetable during the university semester – may be a part-time employee working on a permanent basis, rather than a casual employee.

This will be problematic for businesses that require genuine casual employees. Workers who depend on 25% loading and flexibility, rather than statutory entitlements to annual leave, will be harmed by the Bill's reforms. These legislative changes to casual employment will also increase the administrative burden on businesses. In its roundtables, CCIWA heard from some businesses that they would be forced to increase their prices as a result, exacerbating the current cost-of-living crisis.

CCIWA contends this part of the Bill dealing with casual employment should be amended to ensure that if a worker requests regular hours of work they can remain a casual employee, rather than being deemed a permanent part-time or full-time employee.

The new definition of casual employee in this part of the Bill means that workers with a regular pattern of work may be able to successfully contend they are not genuine casuals. The possibility of employer liability for back pay claims for misclassifying permanent part-time or full-time workers should be clearly and explicitly ruled out to prevent legal claims, including class actions, against employers. That an employer may be penalised for misclassifying a permanent part-time or full-time employee by inappropriately treating them as a casual, and subsequently liable for a pecuniary penalty of up to $93,900, an excessive amount, could have far reaching consequences across the WA economy.

Part 6 of the Bill – "Closing the labour hire loophole"

WA businesses have indicated the proposed changes to labour hire arrangements are likely to substantially compromise their operations. A total of 40% of survey respondents indicated this part of the Bill would have a damaging impact on their business, with an additional 26% stating this impact would be extremely negative. Meanwhile 22% indicated it would have no impact, while only 2% said it would impact them positively – 9% said they were unsure how it would affect them.

Businesses in the accommodation and food services (85%), mining and resources (84%) and real estate services (80%) industries had the greatest proportion of businesses indicating they would be negatively impacted by the proposed changes to labour hire arrangements. This is particularly significant for the resources industry, where 83% of businesses previously indicated they use labour hire[6]. Businesses in the Pilbara (79%) and Goldfields-Esperance (78%) regions also indicated these changes would have a substantial negative impact on business, reflecting the significant contribution

[6] Data taken from another CCIWA survey conducted in May 2023.

resources companies make to the prosperity of these regions. Large companies (those with at least 200 employees) also indicated they will be most heavily impacted, with 75% saying the changes would be damaging. Significantly, 41% of companies with 15-20 employees said these changes would be extremely damaging, greater than any other business size.

A total of 49% of WA businesses signalled they would be forced to reduce their staff levels in response to this change, while 27% said it would reduce their ability to tender for projects. Meanwhile 23% said they would be forced to scale down their business, while 6% said they may need to close their business as a result.

Table 3: Impact of proposed changes to labour hire on WA businesses, by industry[7].

Industry	Damaging[8]	No impact	Positive
Accommodation & Food Services	84.6%	15.4%	0.0%
Mining and Resources	83.6%	9.8%	0.0%
Real Estate Services	80.0%	20.0%	0.0%
Agriculture	73.3%	20.0%	0.0%
Manufacturing	71.6%	18.9%	4.1%
Total	**66.5%**	**22.5%**	**2.3%**

This part of the Bill relates to regulated labour hire arrangement orders. It provides that the Fair Work Commission (**FWC**) can make regulated labour hire arrangement orders and sets out the obligations of employers and regulated hosts covered by those orders. It deals with alternative protected rate of pay orders by the FWC, disputes about the operation of this part of the Bill, anti-avoidance, and requirements that the FWC make written guidelines in relation to this part of the Bill.

This part of the Bill is, apparently, designed to prevent an employer from avoiding its obligations under an operational enterprise agreement by using labour hire workers to undercut the rate of pay specified in that agreement. There is simply no valid argument that its impact could be so limited in nature. This part of the Bill will create a complex new FW Act regime regulating the labour hire industry, which will hinder and impede the ability of businesses to source and manage their workforce on a cost-effective and competitive basis.

[7] Respondents were presented the following information and asked the following question: The Federal Government's changes will give the Fair Work Commission the power to require labour hire employees to be paid the same full rate of pay as permanent employees under enterprise agreements. Full rate of pay includes bonuses, overtime and allowances. Despite Government assurances, service contractors are not expressly excluded from the laws. What impact would the government's change have on your business?

[8] 'Damaging' includes businesses that responded either 'damaging' or extremely damaging'. 'Positive' includes businesses that responded either 'positive' or 'extremely positive'. Numbers may not add to 100% as this excludes businesses that responded 'unsure'.

CCIWA opposes, in principle, this part of the Bill dealing with labour hire. CCIWA contends the ideas underpinning the reforms in this part of the Bill are flawed. The idea that labour hire workers supplied by an employer (ie a labour hire provider) are exploited and should be remunerated according to the terms of a separate or different host employer's operational enterprise agreement for its directly engaged employees is wrong. Employers must retain their managerial prerogative and discretion to manage their own workforce according to their own business' requirements in accordance with the current FW Act and other employment and workplace laws.

Notably, the use of labour hire and specialist services contracting is an integral feature of WA's mining and agricultural industries. As such, this reform threatens WA's competitiveness right when it is seeking to attract capital in response to the global green energy shift.

The impact of this provision will spread much further throughout the WA economy. Labour hire businesses operate and supply labour hire workers in sectors of the WA economy like community care, aged care, and disability care. Currently, labour hire workers who are employed by an employer, which is a labour hire business, and who provide community care services, for example, may be remunerated under the Social, Community, Home Care and Disability Award.[9] If the FWC is given the power to make a "regulated labour hire arrangement order" in respect of such workers under the proposed section 306E described in this part of the Bill, their employers, which may be smaller and medium sized labour hire businesses, may be adversely impacted by increased costs, making it harder for them to remain competitive and to continue to operate. This provision therefore threatens the very ability of our economy to care for society's most vulnerable.

The exceptions described in this part of the Bill are inadequate. This part of the Bill should include exceptions for technical or specialist services contracting. The Bill's supposed exemption for service contracting is not, in fact, an adequate exemption. Technical and specialist service contracting needs to be, expressly and clearly, exempt from this part of the Bill regulating labour hire. The proposed new section 306E establishes that, if submissions are made, the FWC needs to consider matters such as "whether the provision of the work is or will be wholly or principally for the provision of a service, rather than supply of labour, to the regulated host".[10] The FWC will have the power to make an order if it is satisfied that it is fair and reasonable to make the order. These proposed new provisions do not go far enough to protect employers that contract to provide technical or specialist services. These specialist services are essential for industries and sectors vital to WA's economy, such as mining, construction, and major infrastructure projects.

[9] Social, Community, Home Care and Disability Award 2020 [MA000100].

[10] See: section 306E(8)(b) of the Bill.

Part 7 – Workplace delegates' rights

Our survey results show just over two thirds (67%) of WA businesses view the proposed changes to delegates' rights as damaging, with 35% reporting this will be extremely damaging. Around one quarter (24%) said this would have no impact, while only 1% said this change would have a positive impact on their business.

Of particular concern is the impact this would have on the agriculture (90%), education and training (80%), and health care and social assistance (80%) sectors, with the majority of businesses in these industries stating that these changes would be damaging.

More than half (51%) of businesses surveyed would reduce the number of staff they employ if these changes were to occur, while 37% said they would need to scale down their business. A total of 31% said they would have a reduced ability to tender for projects, with 15% stating they would risk having to close their business in response.

Table 4: Impact of proposed changes to workplace delegates' rights on WA businesses, by industry[11].

Industry	Damaging[12]	No impact	Positive
Agriculture	90.0%	10.0%	0.0%
Education & Training	80.0%	0.0%	0.0%
Health Care & Social Assistance	80.0%	0.0%	0.0%
Manufacturing	73.2%	17.1%	2.4%
Resources	72.2%	22.2%	0.0%
Total	**67.1%**	**24.2%**	**1.0%**

CCIWA opposes the part of the Bill dealing with delegates' rights. This part of the Bill will create new rights for union officials employed in workplaces. The Bill requires a modern award to include a "delegates' rights term" for workplace delegates covered by the award. It requires enterprise agreements to include a "delegates' rights term" for workplace delegates to whom the agreement applies.

There are a few issues that arise from this part of the Bill. First, the Bill gives the FWC new powers, which are unfettered. Second, this part of the Bill gives unions the right to unilaterally determine the number of delegates in any workplace and the amount of

[11] Respondents were presented the following information and asked the following question: The Federal Government plans to give union officials employed in workplaces ("shop stewards" or "union delegates") new rights under the Fair Work Act (for which employers will face significant penalties for hindering, obstructing or preventing), including the right to represent the industrial interests of union and non-union members, the right to communicate with union and non-union members (including to recruit new members), the right to access workplace facilities to carry out this work and the right to paid time off to undertake union delegate training.

[12] 'Damaging' includes businesses that responded either 'damaging' or extremely damaging'. 'Positive' includes businesses that responded either 'positive' or 'extremely positive'. Numbers may not add to 100% as this excludes businesses that responded 'unsure'.

time required for their training, which will be disruptive for businesses and may harm business productivity. Third, this part of the Bill will give union officials new rights and protections and it will mean that union officials have greater rights than non-union affiliated employees who have exercised their right to freedom of association and decided not to join a trade union. Fourth, the Bill's proposed protections for union officials will completely disregard the reasons or motivations behind actions taken by employers, who may ultimately be penalised by the courts.

Providing workplace delegates even greater powers to disrupt businesses will distract them from growing and diversifying the WA economy. Businesses operating in certain sectors, such as aged care, may be damaged if workplace delegates prioritise their industrial interests to the detriment of their employment. In instances where a delegate's employment involves the provision of care-related services, for example, in community or residential care settings, it may be vulnerable members of WA's community that are impacted. Reviewing the delegates' performance and conduct in the workplace will be challenging for employers. The general protections provisions in Part 3-1 of the FW Act prohibit an employer from taking adverse action against an employee because of a workplace right.

The education and child-care sectors are especially concerned about the impact of this part of the Bill on their educator-child ratios. Businesses operating family day care centres, for instance, must comply with requirements about educator-child ratios specified in the *Education and Care Services National Regulations* 2012 (WA). If employees providing care in the workplace alternate between a dual focus comprising care of a child or children, on the one hand, and industrial interests, on the other, it is potentially disruptive for the business and may impede the provision of quality care services. It may also mean, significantly, that businesses need to employ or engage an additional number of educators to make up for gaps in care in the educational setting while employees are preoccupied with their union delegate responsibilities and roles. The changes introduced by this part of the Bill may make it harder and more expensive for businesses to operate on a cost-effective and efficient basis within the applicable regulatory requirements. If these costs are passed on to the consumer, and childcare fees are increased, it will detrimentally impact accessibility and affordability for children and families in WA.

Part 10 – Exemption certificates for suspected underpayment

CCIWA opposes Part 10 of the Bill dealing with exemption certificates. This part of the Bill will amend provisions in the FW Act, such as section 519 (Exemption certificates), to the unnecessary detriment of employers. This part of the Bill is apparently designed to improve access to representation for members by enhancing entry rights and protections for entry permit holders exercising entry under Part 3-4 (Right of entry) of the FW Act, but the proposed changes will be disruptive and detrimental for businesses.

CCIWA contends the right of entry provisions in the FW Act are more than adequate. There is no need to change section 487 (Gaining entry notice or exemption certificate) of

the FW Act. These provisions deal with the rights of officials who hold entry permits to enter premises for purposes related to their representative role under the FW Act and under State and Territory work health and safety legislation. There is no need for the changes to the FW Act proposed by this part of the Bill to further improve working conditions by enhancing access to representation for members. There is no justification for giving officials urgent entry to the workplace without notice where there is no threat of destruction, concealment, or alteration of evidence. Officials should be required to give employers notice of their entry to premises.

Part 11 – Penalties for civil remedy provisions

CCIWA does not oppose the part of the Bill dealing with civil penalties. CCIWA is, however, concerned about the increase in penalties from $18,780 to $93,900 for contraventions and from $187,800 to $939,000 for serious contraventions. The proposed increases in pecuniary penalties introduced by this part of the Bill are significant. We note there is no evidence to suggest that increasing civil penalty provisions in the FW Act will increase compliance with the FW Act. The changes introduced by the Bill should address the underlying cause of underpayments in Australia, namely the overcomplexity of the federal employment and workplace relations system (particularly awards), rather than increasing penalties and replacing the "knowledge" requirement with "recklessness" for serious contraventions.

Part 14 of the Bill - "Wage Theft"

This part of the Bill proposes a new criminal offence for wage theft, making it an offence for a national system employer to fail to pay certain amounts to, on behalf of, or for the benefit of, a national system employee. The Government has explained that the proposed new criminal offence for wage theft applies to intentional conduct. The reality is the proposed new section 327A (Offence – failing to pay certain amounts as required) is complex and two different fault elements are specified.[13] Under the proposed new section 327A(3) absolute liability applies to paragraphs (1)(a) and (b), whereas the fault element for paragraphs (1)(c) and (d) is intention. CCIWA considers absolute liability is inappropriate for this new offence of wage theft under section 327A(3)(a) and (b) and that the fault element for these paragraphs should be intention.

The intentional act should be tied directly to the underpayment. What should be relevant is if there is a direct intention to underpay. The current wording of the Bill is such that there needs to be conduct and that conduct then results in a failure to pay. There could, for example, be a situation where a business is found to have breached this section because it engaged in deliberate conduct to, say, shift to a new payroll system and the payroll system then fails and this results in a "failure to pay the required amount".

It is also worth emphasising that the underlying cause of underpayments in Australia is the complexity of the industrial relations system. There is no evidence to suggest that

[13] See: section 327A(3) of the Bill.

the Bill's proposed reforms will improve compliance with the workplace relations system. This part of the Bill should also be amended to override all criminal offences for wage theft at the state and territory level.

Part 15 of the Bill - Definition of employment

CCIWA opposes the part of the Bill that will change the definition of "employee". This part of the Bill will introduce into the FW Act a new section 15AA dealing with determining the ordinary meanings of "employee" and "employer".

Currently, the FW Act distinguishes between an "employee" working under a contract of service and an "independent contractor" working under a contract for services. Workers who are independent contractors are not "employees" under the FW Act.

The Government has explained that this part of the Bill is a response to the decisions of the High Court of Australia in *CFMMEU v Personnel Contracting Pty Ltd*[14](**CFMMEU v Personnel**) and *ZG Operations Australia Pty Ltd v Jamsek*[15] (**ZG Operations v Jamsek**). These two High Court decisions involved the nature of the employment relationship and the distinction between an employee and an independent contractor.

For decades, since the Australian High Court cases of *Stevens v Broadribb Sawmilling Co Pty Ltd*[16] (**Stevens v Broadribb**) and *Hollis v Vabu Pty Ltd*[17] (**Hollis v Vabu**), the Australian High Court applied a "multi-factor" or "multi-factorial" test to determine the characterisation of a relationship as either one of employment or one of principal and independent contractor. This test involved the Court considering the "totality of the relationship between the parties" to determine whether a worker was an employee or an independent contractor.

This multi-factor test was recently rejected by the High Court in the case of WorkPac v Rossato in the context of casual employment. In Workpac v Rossato, the High Court considered the nature of casual employment in the context of statutory entitlements in the FW Act and an enterprise agreement.

In CFMMEU v Personnel, the Australian High Court pointed out that Justice Lee of the Federal Court of Australia found the "multifactorial" test for determining whether a worker is an employee or independent contractor to be problematic. In *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*[18], Justice Lee commented that the multifactorial test was distinctly "amorphous" in its application, "necessarily impressionist", and thereby an "inevitably productive of inconsistency".

CCIWA contends the proposed definition of employment should be amended to give sole consideration, or at minimum, primacy to the terms of the employment contract.

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[14] *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1.
[15] *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.
[16] *Stevens v Broadribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.
[17] *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21.
[18] *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 654-655 [74]-[76].

The Bill's proposed definition of "employee" will be problematic for business because it is imprecise. It involves looking beyond the employment contract to consider the "real substance, practical reality and true nature" of the relationship. It will create uncertainty, rather than clarity, about the nature of the employer-employee relationship and when a worker is an employee.

The Bill's statutory test will create uncertainty for businesses who engage independent contractors because it does not adequately distinguish and separate independent contracting arrangements from employment relationships. The terms of a contract for an independent contracting arrangement should not be overridden by a court or tribunal considering abstract, imprecise, and ambiguous matters.

A contract for services for an independent contracting arrangement is inherently different in nature and character to a contract of service for an employment relationship. An employment relationship involving a "contract of service" and an independent contracting relationship involving a "contract for services" should remain distinguishable under the FW Act. This Bill's new definition will change this legal position, and the reform introduced by this part of the Bill will apply retrospectively to all existing independent contractor arrangements.

Part 16 of the Bill – Provisions relating to regulated workers

There are several problems with this part of the Bill, which creates special provisions for the road transport industry, establishes a new definition of 'employee-like' and covers unfair contract terms.

(a) Road Transport Industry

When asked about the impact of changes to the road transport industry, around half (49%) of WA businesses indicated this would have a detrimental impact – 12% stated this would be extremely damaging. Only 2% stated this would have a positive impact on their business.

Unsurprisingly, concern around this part of the Bill is greatest in the transport, postal and warehousing industry, with 67% of businesses in the sector suggesting the proposed changes would be damaging. Businesses in the retail trade and wholesale trade sectors also showed greater concern, with the same proportion reporting the changes as being damaging. Small businesses (those with 1-15 employees) also indicated they were more likely to be negatively impacted, with 15% reporting the changes would be extremely damaging – around double the proportion of larger business.

These changes would see around one quarter (26%) of businesses need to reduce their staff levels, while a similar proportion (25%) believe they would have a reduced ability to tender for projects. Additionally, 21% would need to scale down their business, while 13% would need to increase the price they charge customers – an impact the Government is already aware of, having noted this in its Regulatory Impact Statement.

Table 5: Impact of proposed changes to the road transport industry on WA businesses, by industry[19].

Industry	Damaging[20]	No impact	Positive
Wholesale Trade	66.7%	22.2%	11.1%
Retail Trade	66.7%	6.7%	6.7%
Transport	66.7%	22.2%	0.0%
Manufacturing	57.5%	28.8%	1.4%
Construction	55.3%	27.6%	2.6%
Total	**49.2%**	**33.2%**	**1.7%**

This part of the Bill creates an Expert Panel for the road transport industry, which will need to have regard to the road transport objective, and a Road Transport Advisory Group (**RTAG**). The RTAG will include representatives from the road transport industry. It provides for regulations in relation to the road transport industry contractual chain. This part of the Bill also gives the President of the FWC the power to make a determination that certain matters be dealt with by an Expert Panel created for the purpose of making an "employee-like" worker minimum standards order.

CCIWA opposes this part of the Bill that will give the FWC new powers relating to the road transport industry. There is no need to create an industry specific new jurisdiction in the FWC to deal with the road transport industry. These changes will, effectively, create a new arm of the FWC which will, essentially, replicate the Road Safety and Remuneration Tribunal (**RSRT**). The RSRT set pay and conditions for drivers in the road transport industry, but it was abolished and ceased to operate on 21 April 2016 because it was found by the Australian Small Business and Family Enterprise Ombudsman to have had grave social consequences for small businesses in the industry. In addition, two further independent reports found the RSRT was unable to increase road safety. Mirroring the RSRT, the new arm of the FWC will set minimum standards for independent contractors in the road transport industry, handing over broad regulatory powers over an entire supply chain to a tribunal that is designed to deal with employment matters.

This part of the Bill regulating the road transport industry should be amended. The Bill's approach should be more consistent with how modern awards operate. Road transport minimum orders should be permitted to include only terms about payment, record

[19] Respondents were presented the following information and asked the following question: The Federal Government will empower the Fair Work Commission to set minimum rates and working conditions for owner-drivers in the road transport industry. The Minister will also have broad, discretionary powers to enable the Fair Work Commission to impose obligations on industry supply chain participants. The Government's Regulatory Impact Statement noted that "as road transport is a derived cost for many types of goods, there may be flow-on impacts to other goods and services in other industries". What impact would this have on your business?

[20] 'Damaging' includes businesses that responded either 'damaging' or extremely damaging'. 'Positive' includes businesses that responded either 'positive' or 'extremely positive'. Numbers may not add to 100% as this excludes businesses that responded 'unsure'.

keeping, and insurance. The scope and content of the "road transport industry contractual chain orders" should not be left to the Minister via regulation.

(b) Employee-Like

Results from the survey find almost two in five (38%) WA businesses are concerned they will be adversely impacted by the proposed changes to employee-like forms of work, with one in 10 (10%) anticipating the change to be extremely damaging. A total of 43% believe the change will have no impact on their business, while only 2% see this as having a positive impact.

Businesses in the transport (56%), accommodation and food services (54%) and real estate services indicated they would be most damaged if these changes were to occur. In addition, businesses operating in the Wheatbelt (56%) and Goldfields-Esperance (44%) regions had the greatest proportion of respondents report these changes would be damaging, as did small businesses (1-15 employees), where 46% indicated the impact would be damaging.

Table 6: Impact of proposed changes to employee-like forms of work on WA businesses, by industry[21].

Industry	Damaging[22]	No impact	Positive
Transport, Postal & Warehousing	56%	33%	0%
Accommodation & Food Services	54%	31%	0%
Real Estate Services	53%	47%	0%
Retail Trade	47%	27%	7%
Education & Training	44%	56%	0%
Total	**38%**	**43%**	**2%**

The proposed definition of "employee-like" is too broad. CCIWA opposes the part of the Bill dealing with "employee-like" work, which is apparently designed to close a loophole in Federal employment and workplace relations legislation.

The Minister for Workplace Relations noted in responses to questions at the National Press Club that this would result in higher prices for consumers. Notably, if there are higher prices for food delivery, there will also be higher prices for aged care and disability services, given these sorts of services will also fall under the new rules.

[21] Respondents were presented the following information and asked the following question: The Federal Government will ensure that independent contractors using a digital platform (such as a website or an app) are entitled to seek some of the same minimum standards as permanent employees. Examples of workers using digital platforms that may fall under the changes include rideshare and food delivery drivers, disability and aged care support workers, and tradespeople. The Federal IR Minister has acknowledged that these changes will create additional costs for consumers and businesses, including down the supply chain. What impact would this have on your business?

[22] 'Damaging' includes businesses that responded either 'damaging' or extremely damaging'. 'Positive' includes businesses that responded either 'positive' or 'extremely positive'. Numbers may not add to 100% as this excludes businesses that responded 'unsure'.

The idea that independent contractors are workers who need to be better protected from exploitation by the reforms created by this part of the Bill is flawed. Independent contractors should only fall within the scope of the new definition of "employee-like" if they meet all three, rather than just one, of the criteria:

- the independent contractor has low bargaining power;
- the independent contractor receives remuneration at or below the rate of an employee performing comparable work; and
- the independent contractor has a low degree of authority over the performance of the work.

The Bill should specify which types of standards the FWC is authorised to set for independent contractors engaged through digital labour platforms. This approach would be consistent with how modern awards work. The Parliament has previously specified, in section 136 of the FW Act, that modern awards "must only include" certain matters. There is no justification for giving greater powers to the FWC to regulate independent contractors.

(c) Unfair Contract Terms

CCIWA contends that the Bill gives the FWC too much discretion to deal with an "unfair" contract term. This part of the Bill is problematic for several reasons. While the Bill will give the FWC new powers to make orders for unfair contract terms in independent contracting arrangements, the Bill does not include any definition of what will constitute an "unfair contract term". This means the Bill provides inadequate guidance about what will constitute an "unfair contract term".

Many factors can be relevant to an independent contracting relationship, for instance, flexibility and non-monetary benefits. These factors may be relevant to the appraisal of the relationship between the independent contractor and the principal with whom the independent contractor contracts to provide its services. These types of factors may effectively compensate the independent contractor for remuneration lower than other employees performing the same or similar work. The Bill does not adequately recognise this commercial, or practical, reality.

Further, the FWC should remain a tribunal that deals primarily with disputes between employers and employees. The FWC should not be concerned with disputes involving independent contractors.

Concluding remarks

CCIWA is a voice for businesses operating in Western Australia. At CCIWA we believe in good business, and we want the best for communities operating across Western Australia. CCIWA is concerned that the many changes to the FW Act proposed by the Bill will make it harder for businesses to operate and remain profitable, and harm productivity by increasing costs and complexity. One of the common concerns

expressed to us by businesses is the significant increase in administrative requirements created by this Bill, especially in the context of casual employment. The increase in pecuniary penalties which may be imposed in circumstances of, for example, misclassification of employees will be significant for businesses. Small and medium sized enterprises may be severely impacted by the changes proposed by this Bill, especially those involving changes to casual employment. Certain businesses have expressed their opposition to the entire Bill, or to parts of the Bill.

It is in this context that CCIWA urges the Government to reconsider and reassess the proposed amendments to the FW Act and other employment and workplace legislation proposed by the provisions of the Bill.