BCA
Business Council of Australia

Fair Work Amendment (Closing Loopholes) Bill 2023

BCA submission to the Senate Education and Employment Legislation Committee inquiry

September 2023

Contents

Executive Summary

Last week's Employment White Paper identified the Government's vision for a labour market in which

- everyone has the opportunity for secure, fairly-paid work
- people, businesses and communities can be beneficiaries of change and thrive.

It also set out five objectives to contribute to delivering the government's vision and noted that:

> *'real wages growth depends on productivity growth, a dynamic and competitive labour market and effective wage setting institutions'*

None of this is achievable if the government proceeds with the most radical and regressive changes to workplace relations in decades through its Fair Work Amendment (Closing Loopholes) Bill.

The Bill will:

- make the law less certain, and increase workplace complexity and scope for disputation
- reduce productivity, competitiveness, innovation and job security, and thereby make Australia a less desirable place to do business
- reduce take home pay and further increase the costs of living.

In short, the Bill is the wrong step at the wrong time.

The BCA urges the government to go back to the drawing board, properly define the problems it is trying to solve, clearly identify the outcomes it is working towards, and provide evidence justifying any proposals. Any proposed changes should then be subject to thorough and independent cost-benefit analysis and wide public consultation.

The BCA supports the request from the Senate cross-bench to separate a number of positive measures and bring them forward for earlier consideration.

1. Overview

The Business Council of Australia (**BCA**) welcomes the opportunity to provide this submission to the Senate Education and Employment Legislation Committee (**Committee**) inquiry into the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Bill).

Who we are

The BCA represents Australia's largest employers which employ more than a million Australians.

The BCA works to ensure Australia is economically strong to support a fair, free, and inclusive society. Achieving this requires successful, well-run businesses that create meaningful jobs and inclusive work environments which reflect and are accountable to the broader Australian community.

Our vision for Australian workplaces

The BCA wants Australians to have safe, high-paying, sustainable jobs that reward people for their hard work, skills, and experience. Australians deserve a workplace relations system that lets them earn more and gives them access to new opportunities.

As detailed in the BCA's recent Seize the Moment paper, the key principles that should shape our workplace system are:

- workplaces must be agile, flexible, and efficient so more Australians can be better matched to higher-paying jobs
- workers must be able to choose how they work rather than having a framework imposed on them which doesn't reflect the needs and desires of the modern workforce
- the workplace relations system must allow companies to adapt and innovate to remain globally competitive, and support confidence to invest, do business and create jobs in Australia
- workers must be protected from unsafe work practices and exploitation
- wage-setting mechanisms must be aligned with and support productivity, including through voluntary and mutually empowering enterprise bargaining
- how we regulate work must not prevent the adoption of new technologies and new ways of doing business, particularly where they deliver improved outcomes for customers (in price, quality, service and safety), employees (flexibility, opportunity, lifestyle and pay), companies, and the broader economy
- businesses must be supported in responding to changing consumer demand and expectations and be able to scale as required to leverage opportunities and compete globally.

The challenges we face

Economic growth continues to slow and has gone backwards the past two quarters in per capita terms. Household spending growth has slowed dramatically and is going backwards in per capita terms, and inflation remains high. Business investment remains near 30-year lows as a share of GDP, there is more investment flowing out of Australia than into Australia, productivity has been falling for three consecutive quarters, and a quarter of NSW businesses plan to cut staff over the next three months. At the same time, other jurisdictions are actively competing for investment.

In short, Australians are facing rising cost of living challenges and our collective focus must be on reducing impediments to doing business and driving new investment.

The Bill is the wrong step at the wrong time

The BCA acknowledges the government's vision of full employment where 'everyone who wants a job is able to find one' as detailed in its Employment White Paper released on 25 September 2023. We also welcome the government's confirmation that productivity growth must be the key driver of improvements in living standards over the long term.

However, neither of these objectives can be achieved if these workplace relations changes proceed.

Indeed, the Bill will drive uncertainty into our workplace relations system, stifle productivity, restrict innovation, limit the ability of workers to choose their own ways of working, and return to an outdated system of centralised wage setting and decision making.

The Bill:

- seeks to make changes that have not been properly evidenced or backed by proven problems or inadequacies in the existing Fair Work Act 2009 (FW Act)
- will add more legal complexity, with unclear and subjective criteria for determining who is an employee
- increases the complexity associated with common forms of employment and engagement, including by injecting risk and cost into the assessment of who is and who is not a casual worker
- will impact the vast majority of small and large Australian businesses, including those employing the nation's 2.7 million casual workers
- will reduce work opportunities and take-home pay for Australians wanting casual work, including parents, carers, students, and others relying on the flexibility casual work provides
- would import inflexibility, confusion, and additional cost into the use of labour hire and other services, reducing investment confidence
- imposes outdated and inflexible ways of working on gig workers, which will drive up living costs
- will increase the costs of road transport and thereby the costs of living, negatively impacting a wide range of industries and jobs, rural, regional and urban communities, owner driver families, and potentially all those involved in transport supply chains
- creates uncertainty through key elements of the reforms being determined through regulation-making rather than being included in the Bill
- will lead to more workplace conflict (and associated cost) with numerous new pathways to disputation and arbitration in the Fair Work Commission (FWC)
- will exacerbate Australia's poor productivity performance, by replacing workplace harmony and cooperation with increased conflict and disputation
- significantly increases the powers and privileges of unions, despite union membership of just eight per cent in the private sector[1], and no evidence that existing powers, protections and privileges for unions are insufficient
- has not been subject to proper consultation, with some key changes not raised either in policy announcements or departmental consultations.

Put simply, the Bill is confusing and complex and will lead to the most significant changes in Australian workplace relations law in decades.

These are not modest or limited changes; they are a radical shake up which will impact on every aspect of employment relationships and the scope of employment regulation by, for example, changing the fundamental definition of who is an employer and employee.

As to costings, the Government's current cost-benefit assessment of the Bill:

- is flawed, misses key data, and is limited in scope
- relies heavily on findings of previous inquiries and reviews that did not specifically address the measures in the current Bill, or the cumulative effect of these measures in addition to various changes made by the Fair Work Legislation Amendment (Secure Job, Better Pay) Act 2022 (Cth) (**SJBP Act**).

By the government's own admission, measures in the Bill are likely to lead to higher prices for consumers at a time of intense cost-of-living pressures on Australian households.[2]

Furthermore, the Bill is subject to 13 different start dates and deadlines, some with retrospective application applying to conduct occurring before the Bill has even been scrutinised or debated in Parliament.

Given such substantial concerns, the BCA submits the Bill is unworkable in its current form, and should not be passed, even with substantial amendment.

There are, however, some important measures that should not have been packaged up into an omnibus Bill, which should be dealt with separately and passed expediently. These are set out in our key recommendations below.

2. Key recommendations

1. The Bill is unworkable and should not proceed.
2. The Committee should recommend that the government go back to the drawing board and undertake the following:
    - define the precise problems which are to be solved, with due consideration to any unintended consequences from making broad ranging reforms and how the proposed reforms interact with each other, including with the previously passed SJBP Act
    - provide open, transparent and public consultation
    - undertake a thorough cost benefit analysis which looks at the entirety of the Bill in the context of its administrative impact for business, increased costs to consumers, and lost productivity
    - provide independent evidence of so-called loopholes, the extent to which the proposed amendments would resolve them, and whether the proposed amendments are the most practical and effective approaches to support positive, productive, and harmonious workplace relations.
3. The government should accept the request from the Senate crossbench to separate the following measures from the Bill and bring them forward for earlier consideration:[3]
    - amendment of the Asbestos Safety and Eradication Agency Act 2013 to deal with silica related diseases (Sch 2)
    - introducing a presumption that employment was a significant contributor to post traumatic stress disorder (PTSD) developed by first responders (Sch 3)
    - enhancing protections from discrimination for workers who experience family and domestic violence (Sch 1, Part 8)
    - changes to the small business redundancy exemption in insolvency situations for the purpose of the Fair Entitlements Guarantee Scheme (Sch 1, Part 2)
    - criminal penalties for intentional wage underpayments subject to ensuring:

- criminal sanctions should only apply to the most serious forms of clear, deliberate / intentional, and systematic conduct
- safe harbour provisions (through entering into Cooperation Agreements with the Fair Work Ombudsman (FWO), work as intended, encourage employer disclosure and transparency, and ensure that where an employer self-identifies inadvertent underpayments and immediately agrees to resolve and expeditiously back pay, and there is no disagreement remaining, no penalty is applied.

3. Casuals

Why casual work is important

Casual employment plays an essential role in the composition of Australia's workforce and exists for the benefits of both employees and employers. The percentage of people employed as casual workers has been stable for the past 20 years at around 22 per cent. Casual employment enables employers to:

- meet short term, temporary, unpredictable, or variable labour requirements
- make changes quickly to respond to business demands
- manage the risk of changes in business demand either to increase or decrease labour requirements, and therefore protect the sustainability of the business.

It enables employees to:

- have control and flexibility in their work arrangements to meet their personal needs, such as study or care commitments, particularly in their early years in first time employment
- have higher rates of pay – on average a 25 per cent increase in lieu of other entitlements
- have a path to long term employment
- change jobs quickly to maximise potential earnings, particularly in periods of low unemployment or in industries with high vacancy rates
- attain their first position in the workforce.

BCA position

The BCA does not support the amendments proposed in Schedule 1, Part 1 of the Bill on casual employment. No valid or reliable case for change for these amendments has been advanced.

The amendments in Sch 1, Part 1 should not proceed as:

- the current FW Act definition of casual employment is clear, well understood and protects employers and employees in contrast with the proposed changes, which would see a return to a high level of complexity and uncertainty in determining who is a casual worker
- they will result in increased risk for business with the effect of reducing casual jobs, as employers may seek to mitigate against vagueness and uncertainty by hiring fewer people, and driving potentially higher costs
- the existing conversion provisions protect against unwanted extended casual work
- they will limit the ability of business to hire people when they need them and so hold back business growth
- the High has Court clarified the law – it should not be overridden.

For the reasons set out below, the amendments to casual employment contained in the Bill increase complexity and will lead to increased uncertainty and significant legal risk for employers seeking to engage casuals who may perform a regular pattern of work.

The BCA considers that this will lead to fewer casual roles being offered to employees who want them, which will in turn lead to lower pay for workers who lose the casual loading, and less flexibility available to employees who don't want the mutual obligations that are triggered by permanent engagement. The BCA is concerned that this will impact all those relying on casual employment and regular casual shifts, including students, parents, carers, and those with a disability.

Regular patterns of work to fit around employees' responsibilities and commitments risk discouraging hiring cohorts that require flexibility, including parents, carers, and students.

Taken in conjunction with restrictions to maximum and fixed term employment created by last year's SJBP Act, this will lead to a significant impediment on employers being able to adopt flexible employment practices and to offer employment where they do not have certainty as to ongoing requirements.

3.1 Uncertain definition of who can be a casual employee

This new definition takes the focus off what is agreed by an employer and employee at the commencement of their relationship and directs the Court's focus to "*the real substance, practical reality and true nature of the employment relationship.*"

These changes seek to undo the recent High Court decision in *WorkPac Pty Ltd v Rossato* [2021] HCA 23, and reverse clear and workable amendments to the FW Act that only commenced in 2021. Indeed, the Bill would reintroduce confusion, complexity and legal risk with a three page, and difficult to apply, testing methodology to determine if work is allowed to be casual, with at least 12 different criteria to be considered.

The new proposed definition in s 15A of the Bill, requires employers to ascertain whether the terms of employment they have offered to each individual worker are "*characterised by an absence of a firm advance commitment to continuing and indefinite work*", having regard not to the promise included in an offer of employment, but rather to "*mutual understandings or expectations*" which may be inferred from their conduct despite their intentions and agreement.

Key (although not solely determinative) to this definition, will be whether an employee has worked a regular pattern of work, which the Bill provides can be found to exist, despite the roster worked by the employee not being "*absolutely uniform*" and including fluctuation, variation over time, and absences for illness, injury, and recreation.

It is also worthwhile noting that some existing workplace arrangements, that may be perceived as regular, are outcomes of requests by unions to provide employees greater certainty. For example, the Shop, Distributive and Allied Employees' Association is currently pressing that rosters, including for casuals, are to be made available four weeks in advance, despite casual employees being engaged by the hour.

The BCA opposes this inclusion of an assessment of the post contractual conduct of employers and employees in the definition of who is a casual employee. This removes the certainty and clarity provided to employers and employees by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) (SAJER Act). This Act also provided casual employees with a clear pathway to permanent employment.

The 2021 amendments (the status quo) were subject to a statutory review in October 2022.[4] The review made findings that included a recommendation that *consideration* be given to including post-contractual conduct as part of the statutory definition of a casual employee. However, the review was unable to make further conclusions about the appropriateness of the definition.

Importantly, the review, which appears to be a substantial underpinning for the changes in the Bill, found that "*the statutory definition* [of a casual employee in s 15A of the FW Act] *has achieved its desired outcome of providing certainty through characterising the nature of employment at the formation of the employment relationship*" and did not recommend any changes or improvements.

3.2 Ongoing assessments, new civil remedy, prosecution risk

Employers who misrepresent employment as being casual when it is in fact permanent according to the new and inherently uncertain and changeable multi-factor definition referred to above are at risk of breaching the new misrepresentation provision in the Bill (drafted in similar terms to the amended penalty provision for sham contracting).

The BCA disputes the Department's assertion there will be no ongoing obligation on employers to monitor a casual employee's status against the new definition. This appears incorrect given the obligations imposed in the Bill and the potential consequences of misclassification. This will be an additional cost, requiring substantial additional resources, particularly for large employers.

Among other reasons, employers will need to monitor casual employees' working patterns because:

- a court could determine that an employee does not meet the definition of being a "casual employee" even though no conversion event has ever occurred. In addition to being liable for unpaid entitlements in this scenario (subject to a statutory right of offset), the employer could also be liable under the new sham contracting-type provisions for misrepresenting the nature of the employment relationship
- employers are required to assess an employee's status and consult and respond within 21 days of a request to change status under the Bill, which may be made without notice after 6 months of employment for most casual employees (discussed in further detail below). This will require employers to have an ongoing awareness of each casual's working patterns and arrangements to respond within the statutory time limit. This is particularly difficult in large organisations with thousands of casual workers, spread across hundreds of sites.

In short, it appears likely that employers will need to have regard to the new multi-factoral test for casual employment both at the outset of the employment relationship and on an ongoing basis.

If employers get it wrong (and the foundation for their assessment is determined not to be reasonable having regard to the size of their business and anything else a Court determines is reasonable to regard), they can be subject to civil penalties for misrepresentation, pursuant to s 359A of the Bill. The penalty for breach of this provision is 300 penalty units, which as at September 2023, could result in a maximum penalty for a natural person of $93,900 and for a body corporate of $469,500.[5]

3.3 Casual conversion pathway – risk for employers

The Bill introduces a new employee-initiated notification process whereby an employee can assert that they are no longer a casual employee. If they no longer meet that definition, an employer is obliged to recognise their employment as permanent, unless substantial changes would be required to their terms and conditions in order to comply with an award or enterprise agreement (or a conversion would not comply with public sector recruitment laws).

This new process will sit alongside the existing conversion regime which was inserted into the FW Act in 2021. The existing conversion provisions provide an appropriate and well understood pathway to permanent employment for those employees who would like to convert from causal employment to full or part time employment.

However, the new employee-initiated process is not consistent with the current conversion regime. Unlike the existing conversion framework (the continued value of which would become contestable given the new employee-initiated process), there will be no reasonable business grounds to refuse conversion. This means employers will not be able to resist an employee request for conversion even where it is foreseeable that in the next 12 months:

- the employee's position will cease to exist
- the hours of work that the employee is required to perform will be significantly reduced
- there will be a significant change to either or both the days or times the employee is required to work which cannot be accommodated within the employee's availability.

Employees will be able to make a notification from six months' employment if they work for large businesses and 12 months for small businesses.

Having two conversion pathways that apply different tests will be administratively costly and confusing both for employers and employees.

The Bill also allows for disputes about conversion to be arbitrated by the FWC. The FWC can order that an employee appointed as a casual be treated as a part-time or full-time employee (s 66MA). This further centralises decision making, taking it away from the local business. It is an example of increased FWC powers to override commercial decision making.

3.4 The regulatory impact assessment of these provisions is flawed

The regulatory impact statement (**RIS**) in the Explanatory Memorandum to the Bill is flawed and based on incorrect assumptions and data. In addition to the matters highlighted above, these include:

- no fresh review of the actual measures proposed in the Bill has been undertaken. Rather, the Department of Employment and Workplace Relations (**Department**) asserts that various reports of the Senate Select Committee on Job Security, and the statutory review of the 2021 casual amendments should be treated as equivalent to a proper impact assessment process. As noted above, the review of the 2021 casual amendments did not recommend any changes or improvements to the definition of who may be a casual employee in s 15A of the FW Act
- the Senate job security inquiry was not unanimous in its conclusions
- submissions were made to the Senate Select Committee on Job Security with the following terms of reference, which did not consider the specific provisions proposed in the Bill:

> *"that a select committee, to be known as the Select Committee on Job Security, be established to inquire into and report on the impact of insecure or precarious employment on the economy, wages, social cohesion and workplace rights and conditions, with particular reference to:*
>
> *a. the extent and nature of insecure or precarious employment in Australia*
> *b. the risks of insecure or precarious work exposed or exacerbated by the COVID-19 crisis*
> *c. workplace and consumer trends and the associated impact on employment arrangements in sectors of the economy including the 'gig' and 'on-demand' economy*
> *d. the aspirations of Australians including income and housing security, and dignity in retirement*
> *e. the effectiveness, application and enforcement of existing laws, regulations, the industrial relations system and other relevant policies*
> *f. accident compensation schemes, payroll, federal and state and territory taxes*

g. *the interaction of government agencies and procurement policies with insecure work and the 'on-demand' economy*
h. *any related matters."*

- evidence relied upon to support the government's proposals in the Bill has been derived from small sample surveys, and was subject to acknowledged data limitations[6]
- the evidence referred to from the review of the casuals changes in the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 does not support the measures included in the Bill, including arguments that (a) there had been no discernible increase of conversion rates following the inclusion of statutory conversion rights through the SAJER Act, and that (b) just 26 per cent of long-term casual employees would prefer permanent employment
- Further, while relying on the fact that the conversion rights created by the SAJER Act had not led to a shift in casual conversion rates as support for further government intervention by way of the Bill, the Department has stated that success of its measures *"will not be measured by a particular conversion rate."*[7] This is a peculiar double standard.

4. Employee like – gig economy

Context

The Bill would allow the FWC to make orders setting standards for non-employed workers in the gig economy and those whose work is facilitated through platforms and websites (and potentially extending more broadly into other forms of independent contracting). These orders will impose employment derived requirements on commercial contracts, encompassing payment terms, deductions, working time, and record keeping. Commercial matters are also subject to such orders, such as insurance and cost recovery.

Workers should be neither exploited nor exposed to dangerous working conditions. However, the Bill, in attempting to address these concerns in the gig economy, goes beyond the scope of any of the issues, with potentially wide ranging consequences for those working in the gig economy.

BCA position

The BCA considers that reforms should enhance choice and flexibility which is highly valued by Australian workers, particularly in the gig economy, and not push them into inflexible and intractable models of engagement that do not fit with this model of work.

Consumers must also be considered. Tech platforms are highly valued by consumers as they match services to demand.

Reforms in this area must therefore be founded on the following principles:

- Australian workplaces must be flexible and efficient so that workers can be better matched to higher paying jobs
- the workplace relations system must allow companies to adapt and innovate
- reforms should not remove the ability to adopt new technologies and new ways of doing businesses, particularly where they deliver improved outcomes for customers and respond to consumer needs
- reforms should not reduce the flexibility and opportunities to participate in paid work that platform work provides
- reforms should not be used as a vehicle to expand union influence. Freedom of association is already available to many gig workers

- workers must be protected from unsafe work practices and exploitation
- any minimum standards should be part of a simple and accessible system that is contained in legislation to the extent possible, rather than at the broad discretion of an employment tribunal.

The BCA does not consider the employee like regulation measures contained in Schedule 1, Part 16 of the Bill achieve these aims.

Issues the BCA and its members have identified with the employee like measures in the Bill include but are not limited to:

- unclear definitions: the broad and non-specific definitions of 'employee like' and 'digital labour platform' mean that these measures could be extended to a range of independent contractors not identified as requiring regulation, including tradespeople and other professionals engaged via marketplace apps such as Airtasker

  While Minister Burke has previously stated that no one using a platform at Airtasker could possibly satisfy the definition of 'employee like'[8] it is clear that Airtasker could be caught as a digital labour platform, and that certain workers engaged via that platform could be classified as "employee like" as defined in the Bill. Further, Minister Burke has since conceded there is no '*magical exemption*' for them[9]
- vague scope and potential impact: the proposals in the Bill have the potential to impact any worker who meets just one of the indicia of being "employee like" (including as yet unseen characteristics which may be prescribed by Regulation (s 15P(1)(d)(iv)) and who is engaged via an online application, system or website. There is also a lack of clarity as to whether gig workers who perform road transport work will be covered by the provisions relating to employee like regulated workers or regulated road transport contractors
- too much complexity: the Bill will impose a level of complexity that will create accessibility issues in understanding and exercising rights under the new legislation for unrepresented workers. For example, the non-exhaustive list of measures for inclusion in minimum standards orders means these orders for independent contractors can prescribe more benefits and entitlements than modern awards can for employees (which are subject to an exhaustive list of permitted content)
- undermining the digital platform business model: there is no clear exclusion to prevent the FWC from making assessments that workers simply accessing an application or "being online", constitutes work which should attract payment. This constitutes a significant threat to the existing business model used by major digital platforms, and to the flexibility and autonomy which is highly valued by gig workers.[10] This concern is exacerbated by ambiguity as to who bears responsibility when workers access work through multiple platforms
- deactivation risk: there is no clarity as to what will amount to serious misconduct justifying deactivation from an application or platform
- more litigation and disputation: there will be a significant increased burden on the FWC to deal with the potential volume of disputation arising out of new rights in respect employee like deactivation disputes, road transport contractor disputes and unfair contracts terms.

If the employee-like measures are implemented as proposed in the Bill, it will lead to:

- the FWC having powers and obligations to regulate gig work that are broader than those which apply to direct employment
- the removal or dilution of the capacity of workers to set their own working hours and have the ability to move between apps to manage their work and increase their income

- an uneven playing field between digital platforms and non-digital platforms in sectors where both traditional and tech-enabled operators co-exist.

The measures will also lead to increased costs for platforms and vendors, which in turn will lead to increased costs for consumers. While exact amounts are unknown due to the wide discretion available to the FWC in setting minimum standards, increased costs will arise from at least the following:

- how "working time" is defined by the FWC in minimum standards. If for example working time is defined as "five-minute increments" this could lead to rounding up of work time which is currently counted to the minute on some applications
- the potential for the imposition of penalty rates, allowances, public holiday payments and other employment-like award benefits (outside of overtime) for gig-workers that could apply irrespective of their choice to work non-standard working times
- additional resources being required to be engaged to deal with the advocacy process involved with setting minimum standards orders, and disputation arising out of a high number of potential applications for unfair deactivation disputes
- increased record keeping and other administrative requirements
- changes to systems and applications that are necessary to incorporate requirements of Minimum Standards Orders
- Legal advice, training and education to understand and implement the complex new changes.

The government should therefore go back to consultation and work with industry and affected workers to implement minimum standards that are simple, clear and easy to understand and comply with.

5. Road transport industry

The Bill proposes to allow the FWC to set additional expanded standards for the road transport industry broader in scope and application than the existing modern award system, which already provides a clear safety net for road transport employees and a foundation for bargaining. The amendments would see the FWC issue new road transport orders regulating payment times, deductions, working time, insurance, consultation with unions, union representation, rights for shop stewards, and cost recovery. It is also proposed that these extend beyond employers and employee relationships, into contract driver arrangements and further still into supply / contract chains.

BCA position

The BCA has identified the following key problems with the Bill in regard to road transport:

- failure to define the problem: These provisions represent a solution in search of a problem, particularly in view of the comprehensive road transport and heavy vehicle safety laws that already exist. The model is also very similar to the previously failed Road Safety Transport Remuneration Tribunal (RSRT)
- increasing the cost of living: As occurred through the failed RSRT, the Bill will lead to additional costs for consumers through decreasing competition and increased cost requirements in the supply chain. By raising rates and potentially imposing hours and conditions through road transport orders, small industry participants may find it more difficult and uneconomic to operate
- open-ended regulation making powers: The Bill incorporates a regulation making power to make provision for and in relation to *"matters relating to the road transport industry contractual chain or road transport industry contractual chain participants"* (s 40J) empowering the FWC to make orders that

confer obligations on contractual chain participants, who so far are comprised of any employer, employee, constitutional corporation, road transport contractor or, road transport business who satisfy criteria set out in unseen Regulations (s 40H) This is a poor outcome because open ended regulation making means the parliament is not actually considering how this new regulation will operate, but rather only the bare bones of the system with substantive detail impacting on businesses and workers left until later. It also means that those with an interest in this area cannot assess practicality, impact, equity or fairness because clarity on settings rests in the hands of the Minister to make regulations at some unspecified point in future

- not covering the field: existing and overlapping road transport contractor regulations in NSW and Victoria will continue to apply in addition to these new provisions. This risks creating ambiguity and an additional regulatory burden through replicated, overlapping or inconsistent obligations.

6. Independent contractors – definition of an employee

The proposed changes provide for current independent contractors to potentially be classified as employees.

If passed, these changes will:

- create confusion as to who is a contractor and who needs to be treated as an employee
- add to costs given independent contractors will likely gain additional benefits as employees
- increase risk for small businesses that would not have the capacity to add more employees.

BCA position

The proposed change to the definition of who is an employee proposed in new s 15AA in Schedule 1, Part 15 of the Bill would be a seismic change to Australia's workplace relations framework.

The BCA considers that the amendments in Sch 1, Part 15 should not proceed as:

- the changes were not called for and no case has been made for them
- the existing law confirmed in two High Court decisions in 2022 already provides a straightforward and reliable delineation between employment and independent contracting
- there will be an increasing need and cost associated with requiring further legal advice to administer these complex changes
- In addition to the employee like measures outlined above, another cohort of workers who have freely sought or otherwise agreed to engagement as independent contractors – including tradies – may now be classified as employees for the purposes of the FW Act (only).

6.1 Replacing legal certainty with imprecision

This is another example of the government seeking to undermine recent High Court decisions from two *cases: CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.

In those cases, the High Court determined that the question of whether a worker is an employee or contractor is *"to be determined by reference to the rights and duties created by the written agreement which comprehensively regulated that relationship."*

That is, the terms of a contract between the parties are determinative of the relationship unless the contract was a sham, or otherwise displaced by the conduct between the parties.

However, it is clear that freedom to contract is a principle sought to be undone by a number of the measures in the Bill, including the change to who is an employee and employer, the change to the definition of casual employee, and previous changes to fixed term and maximum term employment made by the SJSP Act.

The FW Act does not contain a comprehensive definition that delineates between who is an 'employee' versus an 'independent contractor'; it does not need one and has never attempted one. Rather, the FW Act refers to the term "employee" having its "*ordinary meaning*" (see s 15 for example), which in turn relies on the judge-made common law, a framework in which the High Court has ultimate authority.

Various concepts in legislation have their ordinary meanings, or those arising from case law, and are not separately defined in particular pieces of legislation. This has been the case with the employment relationship in Australia for a century or more.

The amendment proposed in s 15AA of the Bill would reverse the effect of the High Court decisions in *Personnel Contracting* and *Jamseck*, and align to the vague and imprecise language in the new proposed definition of a casual employee, by requiring an inquiry into "*the real substance, practical reality and true nature of the relationship*" between the worker and their principal or employer, having regard to "*the totality of the relationship*" including "*how the contract is performed in practice*".

The *Explanatory Memorandum* states that the intention of this provision is to facilitate a return to a multi-factoral test for employment, that is derived from old common law decisions in cases such as *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1 and *Hollis v Vabu* [2001] HCA 44. Where a dispute arises as to whether a worker is at law a contractor or employee, it will require the Court to consider a range of indicia of the relationship, including:

- the level of control exercised over the performance of work
- the method of remuneration
- whether the worker can delegate or subcontract the performance of work
- whether the contractor is building goodwill in a business of their own
- access to the employer or principal's facilities, and requirements to use the engager's livery and uniforms
- taxation and insurance matters
- the place of work
- the skill required for the performance of work.

This would take a currently certain and clear situation and render it contestable and disputable in far more situations, in an area as fundamental and impactful as which workers are or are not employees, and become subject to, for example, National Employment standards and Fair Work instruments.

The High Court provided added clarity on who is and is not an employee in its decisions, providing certainty for businesses and workers alike. This should not be reversed.

6.2 An employee for the FW Act but a contractor for everything else?

The new proposed test will not apply to some sole traders, partnerships or non-trading corporations who can only qualify as national system employers due to a referral of legislative powers in certain States in which they work. This creates further uncertainty and complexity in administering any changes. This runs counter to seeking simplicity and harmonisation in creating a national system.

Those organisations and businesses will still be subject to the common law test described by the High Court in *Jamseck* and *Personnel Contracting*. So too will other workplace laws that rely on the common law meaning of independent contracting and employment, such as tax and superannuation (subject to deeming provisions in those laws). This will lead to further inconsistency and confusion depending on the structure of an organisation or business, and the purpose for which the relationship is being considered.

The effect will be amplified for small businesses. It could also lead to the highly undesirable situation where the same worker could be considered an employee for the purpose of the FW Act but an independent contractor for the purpose of the common law and other Commonwealth legislation.

7. Same Job Same Pay / Labour hire

Labour hire is a legitimate resourcing model which many businesses use to access essential labour, including to meet fluctuating demands, and to acquire skills and expertise that they may not have within their own workforce. Access to labour hire can be critical to a business' capacities to rapidly respond to changing circumstances.

The proposed Same Job Same Pay (SJSP) changes, the impact of which extend beyond labour hire, will:

- lead to increased costs for business which will flow through to consumers in higher cost of living
- exacerbate existing poor productivity, locking in higher labour costs without increasing productivity
- reduce the use of enterprise bargaining, despite this being the most effective way to deliver wages growth
- create confusion over how much workers should be paid and their conditions, with labour hire workers in some cases earning more than host workers.

BCA position

The BCA considers that the amendments in Sch 1, Part 6 are unworkable and should not proceed for the following reasons:

- the provisions are untargeted: The provisions proposed in Part 6 of the Bill, due to their breadth and complexity, do not appear targeted at any specific problem or alleged loophole. To the extent the measure is purported to address labour hire, no definition of 'labour hire' has been included in the Bill. This means the measures can apply to any employer who directly or indirectly supplies one or more of their employees to a host business (s 306E(1) of the Bill and [558] of the Explanatory Memorandum)

  Moreover, labour hire employees are already required to be employed under the same FW Act requirements as direct employees. These include the National Employment Standards and Modern Awards. Many labour hire providers have in-term enterprise agreements, negotiated with unions and approved by their employees and the FWC, providing above award rates of pay. Enterprise agreements have been made directly with labour hire companies in construction, mining, water supply, nursing, and hospitals

- **flexibility and predictability will be compromised**: Employees of labour hire companies have access to a flexible employment model. Labour hire enables businesses to be agile and competitive by allowing a business to supplement a directly employed workforce at peak times. Further hampering this flexibility that allows business to adapt runs counter to the need to enhance productivity. These changes will undermine the legitimate needs of both employers and employees to have employment arrangements that meet their respective needs
- **contrary to the Minister's statements, service contractors are captured**: the coverage of the provisions is not limited only to labour hire workers, and nor does it exclude work performed by employees of expert or service contractors. Whether a supplier meets the multi-factor test for a contract that is "wholly or principally for the provision of a service, rather than the supply of labour" is only a matter the FWC is to have regard to in assessing whether it is "fair and reasonable in all the circumstances" to make a "regulated labour hire arrangement order", if submissions are made on that point, along with "any other matter the FWC considers relevant" (s 306E). That is at odds with the clear statement at paragraph [589] of the Explanatory Memorandum that "The Part does not intend to regulate contracting for specialised services"
- **there is inadequate time for businesses to prepare for such complex changes:** While a protected rate of pay order may not commence until 1 November 2024:
  - all of the other substantive provisions in this part (relating to the same job same pay measure) apply from the day after the Act receives royal assent
  - anti-avoidance provisions which have retrospective effect, applying to conduct engaged in, or a scheme entered into, begun or carried out from 4 September 2023 (Bill Introduction Day)
- **the changes incorporate significant scope for gaming the system**: Applicants for regulated labour hire arrangement orders will have the ability to identify any enterprise agreement and an alternative rate of pay through the FWC, outside of that which directly applies – enabling them to find the most favourable agreement within a corporate structure. This extends to enterprise agreements of a host which would not cover a labour hire employee had they been employed directly and enterprise agreements applying to related bodies corporate of the host (S 306M). This provision is not subject to the same "fair and reasonable" test as the substantive obligation

  The *Explanatory Memorandum* states that "*Such an application could also arise where the rate of pay specified under the alternative covered employment instrument more fairly compensates for work of the type to be performed under the regulated labour hire arrangement*" (i.e., the employee could get paid more under a different non-applicable agreement). This will enable applicants to go on a 'shopping expedition' across a business to find the enterprise agreement they prefer, rather than that which is actually closely related to the work to be undertaken
- **'same pay' will require the payment of bonus and incentives**: Bonuses and incentives provided to host employees by their employer will need to be extended to labour hire workers (by reference to the full rate of pay in s 306F of the Bill, which in turn is defined in s 18 of the FW Act) which will make it complex to administer and drive up costs or result in employers moving away from the provision of such benefits altogether
- **scope for commercial decision making is reduced**: The Bill provides that so called "internal labour hire" will be drawn into the scope of the scheme, undermining the ability of businesses to make commercial decisions about their operating structures. The expression 'internal labour hire' is a relatively new and contested concept. Not only does the concept represent a contradiction in terms, but it appears to be a selective and erroneous interpretation of longstanding business arrangements

- perverse outcomes may arise with respect to payment: The Bill affords no clarity for labour hire providers who have their own enterprise agreements, as to how protected rate of pay orders will interact with those agreements. This could lead to a perverse situation where a labour hire employer may have bargained lower base rates of pay in return for better leave, severance, insurance and non-monetary benefits, and it's now required to provide its employees with both the benefits of those better conditions and the higher full rate of pay (including penalties, loadings, incentives and bonuses) from the host's enterprise agreement (or other enterprise agreement they are ordered to comply with). It could also result in a labour hire worker earning well above the host employees, which is counter to the supposed 'loophole' this Bill is meant to be addressing
- bargaining opportunities will be reduced: The Bill will undermine bargaining between:
  - hosts and their employees, as hosts may be reluctant to negotiate incentives, bonuses and other conditions with their direct workforce if they now need to be provided to employees of labour hire providers as well
  - labour hire employers and their employees, if their negotiated enterprise agreements can simply be trumped by protected rate of pay orders pertaining to host agreements
- reduced scope for tailored solutions: The Bill will force labour hire businesses to apply new EAs of the "host" entity to their staff, notwithstanding that the business and the staff have had no input into that EA and have negotiated their own EAs. This removes the ability of the business and employers to determine their own arrangements to meet their specific needs
- sending investment offshore: It is likely that the Bill will drive new investment elsewhere instead of Australia and jobs being offshored due to the inability to ramp up workforces in industries with major peak demands
- a lawyers' picnic: The changes will increase disputation arising from the contestable FWC application process and new dispute avenues.

Driving up costs at a time they can be least afforded

These changes will lead to significant costs for businesses which use any other mode of labour engagement in addition to direct hire, including subcontracting. These costs will ultimately be passed on to consumers.

BHP has conservatively estimated that its costs from this measure alone will be $1.3 billion per year, an amount it estimates as equivalent to 5000 jobs.[11] This impact has now been clarified to be 'light on' with the actual impact to be higher.[12] It will also likely increase costs for numerous other industries including farming, agriculture and food production, construction, resources, transport, health care, education and more.

Considering the areas impacted, this risks potential increases in the costs of living when there are already more than enough cost drivers making the lives of Australians more difficult.

8. Union Officials and Delegates

BCA position

Business supports the rights of Australians to join and be represented by unions, or to choose not to, and the need for both union officials and employees acting as shop stewards or delegates to be protected in their work.

Australian unions already have world leading powers and protections in representing employees, including rights of entry onto employer premises and protections for employees acting as union delegates.

The BCA considers that the amendments in Sch 1, Parts 7 and 10 should not proceed because:

- increased union powers to enter workplaces without notice and increased employer obligations to union delegates on site have not been the subject of consultation
- there is no evidence of a need for change - where unions have membership and employee support, employers work with them
- union officials already have entry rights and delegates have protections – there is no loophole
- the exercise of an expanded right of entry without notification will create more disputes and harm workplace relations
- employers must subsidise shop stewards, creating additional, unspecified costs
- union delegates will have powers other staff do not, creating division and disharmony in workplaces
- there would be an increased risk of union demarcation disputes threatening productivity and workplace harmony
- union membership has declined, driven by changing worker priorities and preferences. Membership has fallen to just eight per cent of private sector employees.

While some workplaces are unionised, most employees and most workplaces have no union presence, or only a minority of employees as union members. These proposed changes indicate that the interests of the union movement, which represents a small minority of Australian employees, are being prioritised.

Taken together, such changes risk increasing disputation and taking Australia back to a workplace relations framework characterised by conflict. This is against a backdrop in which ABS data already reveals that the number of industrial disputes in June quarter 2023 is the highest since September 2016[13], and further major strike action is pending.[14]

8.1 Right of Entry

The Bill seeks to make three key changes to union rights of entry:

- expanding the circumstances in which unions can come onto worksites without prior notice. Union officials will be able to seek an exemption from the requirement to give 24 hours' notice of entry to a work site where they seek to investigate underpayments, without needing to prove any risk of destruction of evidence (the current requirement for zero notice entry)
- watering down existing checks and balances against the misuse of entry powers, including where union officials misrepresent facts, or disclose sensitive information. Existing sanctions which see the FWC revoke or suspend entry permits will be replaced with a primacy on the lesser sanction of 'imposing conditions on' a union official's permit
- expanding powers for unions to seek penalties against employers, not just for refusing entry or hindering a union official, but also for a new catch-all of "otherwise acting in an improper manner".

The BCA has identified the following concerns with the proposals:

- the government is seeking to legislate for problems that do not exist. Any union wanting to enter a workplace to represent a member, or attract members, already has a straightforward and well understood mechanism to do so through the entry permits held by its officials, and the obligations on employers already included in the FW Act

- Whilst union entry can be contentious, particularly where an employer has no prior notice, the existing framework regularises and clarifies rights and obligations for both unions and employers. The existing framework already ensures union entry is as regularised, rule based, equitable, practical, and transparent as possible – calming and regulating what can be inherently difficult and tense situations
- the FWC can already deal with disputes regarding entry and can determine whether a request from either union or employer is reasonable and order the other party to comply[15]
- the FWC's data[16] on entry disputes does not reveal any problems or 'overuse' of s 508 and 510 against unions and their officials for exercising right of entry

	2018-19	2019-20	2020-21	2021-22
Applications to deal with entry disputes (s 505)	31	38	28	24
Application to restrict rights if organisation or official has misused permit rights (s 508)	2	-	-	-
Applications to revoke permits (s 510)	3	1	4	14

- entry without prior notice is already possible where necessary to prevent employers destroying evidence. It is proposed that unions be able to come into workplaces without prior notice in more circumstances, based only on having a suspicion of underpayment without any evidence or likelihood of document destruction. This risks entry without prior notice (zero notice entry) becoming the new norm, and an industrial tool that unions can use against employers. Entry without prior notice needs to remain an exception to be applied only where necessary to protect against evidence being destroyed
- there is already a reverse onus and substantial penalties for failures to keep or the destruction of employee time and wage records
- zero notice entry is far more likely to be contentious and create disputes, to see employers unintentionally breach their duties, or lead to the police being called
- if employers do not have an opportunity to obtain advice on what they must do and not do prior to a union official coming on site, they are inevitably going to make more mistakes, leading to more disputes and opening up more employers to penalties
- more entry disputes would be the opposite of the cooperative workplace relations the FW Act is intended to deliver and which the government has said it is seeking to achieve
- watering down existing checks and balances against misuse of right of entry risks being perceived by union officials as a greenlight for misusing entry powers
- there will likely be more threats of unions pursuing fines, more disputes taken to the FWC and even more instances of police involvement than there are at present.

8.2 Union Delegates

Union delegates are already strongly protected against threats, retribution, or unfair treatment based on their union activities, such as being dismissed, or denied opportunities for promotion.

Unions and employers can also agree to rights and benefits for shop stewards through enterprise agreements. It is open to unions and employees to seek specific privileges and provision for delegates wherever that is a priority for them.

The Bill seeks to:

- give any employee acting as a shop steward uncapped paid time off for union training[17] (and there can be multiple delegates, of multiple unions in a workplace)
- make employers engage with union shop stewards on any mater they wish to raise[18], even where:
  - the matters are fanciful or unrepresentative of the priorities of a majority of employees onsite
  - the persons concerned in a specific matter do not agree to the shop steward's involvement
- compel employers to not mislead union delegates[19], without any reciprocal duty on the union delegate not to mislead their employer
- create unspecified new rights for delegates to enter virtually any part of a workplace, by not allowing employers to unreasonably hinder or obstruct them[20]. This would apply the powers of union officials exercising right of entry to employees acting as union delegates
- allow unions to demand their delegates be given subsidised access to company intranets[21], office facilities, transport, meeting rooms etc[22]
- insert union delegate terms into all modern awards[23] and agreements[24] as standard, divorcing union delegate rights and benefits from their representativeness and presence in any workplace
- create new general protections for union delegates, exposing employers to costly litigation and adding to uncertainty for employers seeking to manage any misconduct by delegates (including threats, bullying, and abuse)
- replicate these obligations in regard to the gig-economy and road transport contexts, notwithstanding the significant practical and representational problems this seems to raise.

BCA position

The case has not been made out for these changes. They are not backed by any evidence of any identified problem to be solved, or by specific difficulties experienced by delegates which could not be addressed by working with employers or using the enterprise bargaining system.

They cannot be characterised as closing a loophole in the FW Act in any way.

Specific problems are set to include:

- unrepresentative union engagement: There is no guarantee a delegate will enjoy the democratic support of a majority of their peers, or even from a majority of union members onsite. A delegate may be appointed rather than elected, apparently solely at the discretion of the union25, and enjoy substantial benefits such as access to facilities and uncapped paid time off work. This risks causing significant resentment and disputation in workplaces
- uncontrolled powers: There are few limits on these obligations and liabilities, and those that do exist are either vague (i.e. through 'reasonableness') or determined by the union (a union which may be very sparsely supported in a given workplace)
- lack of clarity on new liabilities: It is not clear what will constitute unreasonably failing to deal with a shop steward, exposing employers to fines of up to $469,500
- lack of reciprocal obligations: The obligation for an employer not to mislead a shop steward is not matched by any reciprocal obligation on the shop steward not to mislead their employer
- unlimited involvement in investigations or complaints: It appears employers must deal with union delegates on essentially any matter they seek to become involved in:

- we cannot see any requirement for a union delegate to have the permission of someone involved in a matter before the delegate can seek to also become involved. It appears that delegates can seize on complaints or grievances and seek to become involved regardless of the wishes of those involved
- private or sensitive matters appear no barrier to a union delegate seeking involvement
- we can see no clear barrier to a union delegate seeking to become involved in complaints against themselves or their close friends, perhaps demanding access to names of complainants or witnesses

- **competing unions**: Employers will have no protections against multiple unions asserting shop stewards' rights, nor is there any limit on how many employees can claim to be shop stewards
  - if unions want to contest the representation of a particular workplace, there does not appear to be any power for an employer to appeal to an independent authority, or to seek to work cooperatively with the shop stewards of a particular union, but not a competing union
  - even where there is a long-standing relationship between an employer and union, a majority of employees are members of that union and that union has negotiated generations of agreements, nothing will stop a competing union signing up a single member and seeking all the same delegates rights
- **reversing the onus of proof**: Under proposed s 350B(3) a reverse onus of proof will apply and employers will need to prove the reasonableness of their conduct in dealing with their own staff. This is a recipe for litigation and misuse.
  - employers already find it difficult to respond to misconduct or poor performance by employees who also happen to be shop stewards. Some delegates misperceive their role as an immunity to act as they please

    There are numerous examples of delegates using unacceptable language, abusing other staff[26], inviting physical altercation, bullying and intimidating, and asserting that their delegate role frees them of obligations of respect and courtesy to others
  - in some cases dismissal is upheld[27], but in others dismissal is deemed unfair. This includes cases in which delegates have engaged in drunken abuse, threats of physical altercation and extreme bad language[28]
  - there is a risk that more delegates will think they have a green light to act as they please and that employers will find it even more difficult to protect employees from bullying, harassment, abuse etc by shop stewards
- **training is uncapped and potentially unlimited**: There will be no cap on the number of training courses a shop steward can attend on full pay, or any cap on the number of paid days off work/ There is no control on the training to be accessed through employer paid time off, with the loose descriptor of being 'related' the only condition
  - there does not appear to be any barrier to a delegate self-determining the training they wish to attend
  - whilst there may be a presumption towards this being used for short courses, the amendments do not say that. On its face there seems no barrier to requiring an employer to provide paid time off for an employee to complete a degree full or part time over a period of years, such as a law degree or industrial relations qualification

- **reasonableness no protection**: There will be a qualification of reasonableness for some of the new benefits[29] but this is at large and undetailed.

9. Multi-employer bargaining and BOOT, Franchises

Context

Schedule 1, Part 4 of the Bill proposes a number of changes to the way in which new single-enterprise agreements can replace multi-employer agreements made in the new supported bargaining agreements or single-interest employer agreements framework recently established under the SJBP Act 2022.

Under the Bill, new single-enterprise agreements will be able to replace and override in-term multi-enterprise agreements, but only if:

- all relevant employee organisations (unions), or alternatively the FWC, agree to the holding of the vote on the new single-enterprise agreement
- the employer establishes as part of the approval process that the new single-enterprise agreement leaves the employees 'better off overall' as compared with the multi-enterprise agreement that it is replacing (rather than the standard BOOT requiring an enterprise agreement to leave employees better off overall compared to the relevant Modern Award.

BCA position

The BCA does not support this change. Enterprise bargaining at the single employer level should be fostered and encouraged. Employers should be able to make single enterprise agreements directly with their employees at any time, noting the substantial protections in the FW Act on the outcomes of bargaining (the BOOT), on genuine agreement, and democratic determination of whether agreements proceed through a properly conducted vote.

Instead, employers who have been subject to certain multi-employer bargaining processes, will be limited in their ability to negotiate directly with their employees even when union intervention is not supported by the workforce, and will only be able to make an enterprise level agreement where it is a further improvement on a multi-employer deal (which an employer can be made party to without their consent).

This creates a different safety net for these agreements compared to other agreements the FWC approves.

In short, these proposed changes to multi-employer bargaining will add more costs to business, which flow through to consumers, and create a system that continually increases payments irrespective of capacity to pay, potentially risking the viability of businesses and resulting in job losses.

Franchises

Schedule 1, Part 3 of the Bill addresses bargaining for franchises. Any employers wanting to be covered by a single agreement should be subject to voluntary and strictly opt in options to do so.

10. Compliance and other matters

BCA Position

Government should accept the request from the Senate crossbench to separate from the Bill the following measures and bring them forward for earlier consideration:[30]

- amendment of the *Asbestos Safety and Eradication Agency Act 2013* to deal with silica related diseases (Schedule 2)
- introducing a presumption that employment was a significant contributor to post traumatic stress disorder (**PTSD**) developed by first responders (Schedule 3)
- enhancing protections from discrimination for workers who experience family and domestic violence (Schedule 1, Part 8)
- changes to the small business redundancy exemption in insolvency situations for the purpose of the Fair Entitlements Guarantee Scheme (Schedule 1, Part 2)
- criminal penalties for intentional wage underpayments subject to improvements to the safe harbour provisions identified above and clarity in the construction of the criminal offence (Schedule 1, Part 14).

The BCA's support for the criminal penalty provisions in Sch 1, Part 14 of the Bill is subject to amendments to give effect to the safe harbour policy intent in the Bill.

The Bill proposes to provide a "safe harbour" from wage theft prosecutions by establishing a framework (proposed ss 717A-G) to allow employers to enter "cooperation agreements" if they've engaged in conduct amounting to the possible commission of the new wage theft offence and have self-reported their conduct to the Fair Work Ombudsman (**FWO**). Section 717A in the Bill provides that an employer who is party to an in-force cooperation agreement entered into with the FWO is protected from the FWO referring the relevant conduct to the Commonwealth DPP or the AFP for prosecution. The FWO can end the agreement by written notice if a term is breached or if the employer gives the FWO false or misleading information (both before and after entry into the agreement).

The *Explanatory Memorandum* describes the cooperation agreement framework as giving employers an opportunity to *"access 'safe harbour' from potential criminal prosecution"* ([930]).

However, this exaggerates the effect of the cooperation agreement mechanism in the Bill.

- the Bill's cooperation agreement framework does not prevent prosecution by the DPP, but only referral of conduct by the FWO
- it does not prevent another interested party (e.g., an aggrieved employee or a union) from notifying the DPP of the potentially offending conduct or the DPP commencing a prosecution of their own volition, thereby undermining the effect and intent of the cooperation agreement
- the consequence of this will be a disincentive to self-auditing, disclosure, and remediation
- a better approach would be for employers that enter into and comply with cooperation agreements to be protected from criminal prosecution for wage theft in full.

11. Regulatory impact

The Bill will decrease flexibility and the ability of companies to innovate and adapt to changing business and economic conditions. It will lead to less choice for workers, and lower pay, via the loss of the casual loading, and employers including less incentives and benefits in enterprise agreements which may be subject to regulated labour hire arrangement pay orders.

There is also a significant increase in powers given to registered employee organisations (unions) throughout the Bill, in the context where union density is just eight per cent in the private sector.[31] Increased capacity for workplace disputation and conflict throughout the Bill is counterproductive and damaging.

Viewed in conjunction with the raft of other changes made to the workplace relations system by last year's SJBP Act, some of which have still not been fully implemented, the net effect is to decrease flexibility and increase legal risk and uncertainty at a time when Australians can least afford it due to cost-of-living pressures, record low productivity growth and high inflation.

For example, employers who are just now coming to terms with new restrictions on fixed and maximum-term employment, will now also need to reassess who they can offer casual engagements to, and what new systems will need to be introduced to deal with two inconsistent and conflicting casual conversion mechanisms, introduced notwithstanding the low uptake of casual conversion.

It is also noted that the Regulation Impact Statement for the Bill contains significant deficiencies, ranging from key assumptions underpinning costings through to both the lack of and limitations associated with the available data on which costings are based.

Given this, a fresh, detailed and comprehensive regulatory impact statement should be prepared, based on the impact of the precise measures proposed in the Bill, conducted in consultation with industry, workers and other affected stakeholders.

12. Conclusion

The Bill is unnecessary, will return Australian workplace relations to an age of unnecessary conflict and low productivity, and does not respond to key challenges for jobs, enterprises or Australians facing rapidly increasing costs of living.

The Bill is complex, unworkable, has not been demonstrated to achieve its policy aims, and in most areas is not based on clearly articulated or properly evidenced need for change.

No reliable current and detailed impact assessment has been brought forward or developed in consultation with industry and other affected stakeholders.

The Bill should therefore be rejected, and the government should go back to the drawing board, save for the following elements:

- amendment of the *Asbestos Safety and Eradication Agency Act 2013* to deal with silica related diseases (Schedule 2)
- introducing a presumption that employment was a significant contributor to post traumatic stress disorder (PTSD) developed by first responders (Schedule 3)
- enhancing protections from discrimination for workers who experience family and domestic violence (Schedule 1, Part 8)
- changes to the small business redundancy exemption in insolvency situations for the purpose of the Fair Entitlements Guarantee Scheme (Schedule 1, Part 2)
- Criminal penalties for intentional wage underpayments subject to improvements to the safe harbour provisions identified above and clarity in the construction of the criminal offence (Schedule 1, Part 14).

[1] Australian Financial Review, *Union membership in private sector shrinks to 8pc*, 15 January 2023.
[2] https://ministers.dewr.gov.au/burke/qa-national-press-club-speech-closing-loopholes-bill
[3] Albeit these measures should still be subject to appropriate scrutiny to ensure the legislation achieves the aims and commitments set out in the *Explanatory Memorandum* and will not lead to unintended consequences.
[4] Review of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Cth)
[5] Pursuant to s.546(2) of the FW Act a body corporate may face a pecuniary penalty of up to five times the maximum penalty units prescribed in column 4 of the table in s 539(2).

[6] Review of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Cth), which reflects two bodies of research: a quantitative survey of 1,211 current and recent casual employees, and 813 employers of casual employees; and 12 qualitative interviews with current and recent casual employees, and 8 interviews with employers of casual staff (Report p.10). The report acknowledges limitations regarding self-reporting (Report p.2) and small samples (Report p.2), The report also cites the report of the Job Security inquiry (Report p.9), which appears somewhat circular as this is also cited as evidence of the impact of the changes proposed in the Bill.
[7] Standing up for casual workers (OBPR22-02421), page 11
[8] The Hon Tony Burke MP, *Speech to the National Press Club*, 31 August 2023.
[9] The Hon Tony Burke MP, Transcript, *ABC Insiders with David Speers*, 3 September 2023.
[10] Ipsos, *Uber Earner Preferences Australia*, June 2022
11 Peter Kerr and Tom Richardson, Labor's work laws will cut dividends, BHP warns *Australian Financial Review*, 18 September 2023
[12] https://thewest.com.au/business/mining/bhp-senior-executives-say-shareholders-should-worry-about-federal-governments-industrial-relations-reforms-c-11937504
[13] Australian Bureau of Statistics (June 2023), Industrial Disputes, Australia, ABS Website, accessed 20 September 2023.
[14] Metro Train workers vow to shut down rail network in early October strikes - https://www.theage.com.au/national/victoria/metro-train-workers-vow-to-shut-down-rail-network-in-early-october-strikes-20230921-p5e6nv.html
[15] Source - https://www.fwc.gov.au/registered-organisations/entry-permits/disputes-about-entry-workplaces
[16] Drawn from FWC Annual Reports - https://www.fwc.gov.au/about-us/reporting-and-publications/annual-reports
[17] Bill, Item 84, proposed 350C(3)(b)(ii)
[18] Bill, Item 84, proposed 350A
[19] Bill, Item 84, proposed 350A(1)(b)
[20] Bill, Item 84, proposed 350A(1)(c)
[21] Bill, Item 84, proposed 350C(3)(a)
[22] Bill, Item 84, proposed 350C(3)(b)(i)
[23] Bill, Item 78, proposed s 149E
[24] Bill, Item 81, proposed s 205A
[25] Bill, Item 84, proposed s 350C
[26] https://www.fwc.gov.au/documents/decisionssigned/html/2010fwa9013.htm
[27] https://www.afr.com/policy/economy/australian-services-union-delegate-sacked-for-swearing-at-coo-20170925-gyo5pz
[28] https://www.afr.com/policy/economy/cfmeu-delegate-unfairly-sacked-despite-abusing-and-threatening-coworkers-20171106-gzfnut
[29] Bill, Item 84, proposed s 350C(3)(b)(ii).
[30] Albeit these measures should still be subject to appropriate scrutiny to ensure the legislation achieves the aims and commitments set out in the *Explanatory Memorandum* and will not lead to unintended consequences.
[31] Australian Financial Review, *Union membership in private sector shrinks to 8pc*, 15 January 2023.

BUSINESS COUNCIL OF AUSTRALIA

GPO Box 1472, Melbourne 3001 T 03 8664 2664 F 03 8664 2666 www.bca.com.au