Australian Chamber of Commerce and Industry

ACCI Submission

Fair Work Amendment (Closing Loopholes) Bill 2023

Australian Chamber of Commerce and Industry

Working for business.
Working for Australia.

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1 Introduction

OVERVIEW

1.1. The Australian Chamber of Commerce and Industry (**ACCI**), as the nation's largest and most representative business network, advocates for safe and productive workplaces that generate strong wage growth. This is critical for the furtherance of Australia's national prosperity and economic future.

1.2. The changes proposed in the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (**Bill**) are fundamentally incompatible with these objectives. They will move us in the wrong direction.

1.3. Overall, the legislation will hinder, not help, efforts to boost productivity. It will inhibit future wage growth by increasing the rigidity, risks, and costs of employing people, thereby damaging labour market outcomes. It will undermine the growth and viability of businesses. All of these outcomes are contrary to the purported economic objectives of the Federal Government as outlined in the Employment White Paper.

1.4. The changes in the Bill must also not be viewed in isolation. This legislation follows the passage of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* in December 2022, which represented the most radical changes to the workplace relations system since the introduction of the *Fair Work Act 2009* (**FW Act**). Taken together, there is no question about the magnitude or complexity of these changes.

1.5. This has real and pernicious consequences for Australian businesses. Workplace laws, by virtue of providing a framework of minimum standards, inevitably have a near-universal impact on the economy and labour market. Significant changes to workplace laws cause widespread disruption and pose serious compliance challenges for employers.

1.6. In particular, small businesses are already facing fatigue from the extent of legislative changes. The rate of legislative change far exceeds a manageable level for small businesses. This will have a detrimental impact on compliance, for which the Bill then proposes to increase the penalties considerably. The "small business" exemptions included in the Bill do not go far enough and are a tacit admission that the changes proposed will hurt business of all sizes.

1.7. In particular, ACCI has the following serious concerns:

1.7.1 **The proposed changes to casual employment** will make it harder for businesses to engage casuals. Both employer and employee expect that when they agree to a casual employment arrangement, that this will be upheld. These changes undo this certainty.
The shift to abstract, broad and conceptual notions will cause uncertainty for businesses, especially small businesses who have dealt with many new laws in the last few years. The only winners from these changes will be plaintiff law firms and litigation funders who will benefit from an increase in class action claims arising because of a vague definition of casual employment. It will not benefit those people who value working flexibly as a casual employee, including those with caring responsibilities or students.

1.7.2 **The proposed changes impacting labour hire arrangements will exacerbate our existing workforce shortage by making labour hire too costly and burdensome to engage**. In fact, these changes go much further than impacting traditional labour hire. The Government's failure to properly

exempt "service contracting" from its legislation could hinder businesses' ability to receive services from specialist contractors when they need them.

1.7.3 **The proposed changes to delegate's rights and right of entry** reflect Government's attempt to deputise union representatives and union delegates, establishing them in proxy law enforcement roles. These changes are no more than a sop to unions who want more power. The Government has been unable to point to an actual loophole to close here.
Unions already have the right to enter workplaces to investigate suspected wage underpayments and unions can and already do have the ability to bargain for enterprise agreements related to delegates rights.

1.7.4 **The proposed regulation of contractors in the road transport industry** signals the Government's revival of the failed Road Safety Remuneration Tribunal. Multiple independent reviews found this failure to have cost the lives and livelihoods of hard-working owner-drivers.
This new body within the Fair Work Commission (**FWC**) will have the same profound impact on the road transport industry. Owner drivers will again lose the flexibility to set their rates and conditions. These changes will hurt regional and remote communities. Australians will ultimately feel the pinch at the supermarket checkout.
Additionally, ACCI has serious concerns with those provisions which give the Minister the power to make regulations for "contractual chain participants". In doing so the Government could effectively hand over control of our supply chains to the FWC.

1.7.5 **The proposed changes to gig platforms and independent contractors** are broad and go much further than the election commitment to regulate the rideshare and food delivery sectors.

The scope of these changes will impact a broad range of contractor arrangements and puts at risk the right of Australians to be their own boss. This can be seen in the broad definitions of 'digital labour platform' and 'employee-like'.

This is a significant intervention into the commercial arrangements of business owners/the self-employed. It is contrary to the right of independent contractors to set their own rates and conditions and to work flexibly. In practice the types of independent contractors targeted will be determined by various unions.
The lack of guardrails around the new powers will mean that the breadth of the minimum standard orders are likely to include a range of matters which increase costs for businesses which are then passed down the supply chain onto consumers.

ACCI POSITION

1.8. ACCI supports the intention of Senators Lambie and Pocock to move Private Senators' Bills so that Parliament can, as soon as practicable, consider the below, non-contentious, aspects of the legislation:

- part 2 of schedule 1, which would amend the small business redundancy exemption to protect worker entitlements in the event of insolvency;
- part 8 of schedule 1, which would enhance protections against discrimination for workers who have been subject to family and domestic violence;
- schedule 2, which would help eliminate diseases arising from silica dust; and

- schedule 3, which would improve access to compensation for emergency services workers suffering from post-traumatic stress disorder.

1.9. This would allow Government to give further consideration to the remaining, contentious aspects of the Bill, which the business community stands united in their concerns against. It's ACCI's position that these remaining provisions should be referred to the Productivity Commission for an inquiry into its economic impacts, especially their impact on productivity. This would ensure that the Parliament is sufficiently advised as to its consequences on growth, productivity, employment, and wages, prior to deciding whether to support its passage.

1.10. There are clear deficiencies in the Government's own regulatory impact statement (**RIS**), which should clearly set out the cost of the proposed changes on business. The Government itself repeatedly admits throughout the RIS that the data has degrees of uncertainty or is subject to significant limitations.

1.11. In short, there is no justification for appending measures which all stakeholders wholeheartedly support to highly controversial and experimental industrial relations changes. Consolidating all these proposals in the same legislation is the curtailment of proper scrutiny and any prospects of subsequent amendments.

1.12. ACCI thanks the Senate Education and Employment Legislation Committee (**Committee**) for the opportunity to provide our submissions in respect of the Bill.

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2 Casual Employment

OVERVIEW

2.1. The changes contained in Schedule 1 Part 1 would replace the current definition of casual employment with a new definition that considers not only the contract of employment but also the "real substance, practical reality and true nature" of the employment relationship.[1]

2.2. Regard would also be had to:

- whether there is an inability of the employer to elect to offer work or an inability of the employee to elect to accept or reject work;
- whether, having regard to the nature of the employer's enterprise, it is reasonably likely that there will be future availability of continuing work in that enterprise of the kind usually performed by the employee;
- whether there are full-time employees or part-time employees performing the same kind of work in the employer's enterprise that is usually performed by the employee; and
- whether there is a regular pattern of work in determining if an employee is a casual.[2]

2.3. A new path for conversion would also be introduced.

2.4. Employees who commenced employment as a casual employee and believe their status has subsequently changed (under the new definition) would be able to notify their employer and seek conversion after:

- 12 months, if working in a small business; or
- 6 months, if working in any other business. [3]

CONSEQUENCES

Proposed Definition

2.5. If a business offers a prospective worker a contract providing for casual employment and it is accepted, it is expected that the worker will be treated as a casual employee for the purposes of the law. For legislation to treat a worker as a part-time or full-time employee, contrary to the terms of the contract,[4] is inconsistent with the expectations and understandings of business and casual employees.

2.6. Unfortunately, the Bill proposes a definition of "casual employee" which would do exactly that.[5] This new definition would wholly undo the significant certainty provided to employers following the introduction of the current definition in the FW Act in 2021 and the subsequent High Court decision in *WorkPac Pty Ltd v Rossato* [2021] HCA 23.

[1] Bill sch 1 item 1 (proposed s 15A(2)(a)).
[2] Bill sch 1 item 1 (proposed s 15A(2)(c)(i)-(iv)).
[3] Bill sch 1 item 18 (proposed s 125A(2)(a)).
[4] Bill sch 1 item 1 (proposed s 15A(2)(b)).
[5] Bill sch 1 item 1 (proposed s 15A(1)-(4)

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2.7. It would create significant confusion and uncertainty through the creation of a test considering the "real substance, practical reality and true nature" of a relationship,[6] rather than solely its *contractual* nature,[7] and thereby require consideration of extra-contractual matters, including mutual understandings and expectations "not rising to the level of" a contractual term.[8]

Regular Pattern of Work

2.8. The proposed definition would include consideration of whether an employee works a "regular pattern of work".[9] If the employee does work a regular pattern of work, this would, under the new definition, indicate that they are a part-time or full-time employee.

2.9. The *FW Act 2009* explicitly recognises the notion of "regular casual employees", who are casual workers employed "on a regular and systematic basis".[10] This demonstrates that the proposed definition is at odds with other aspects of workplace laws.

2.10. More importantly, consideration of a "regular pattern of work" contradicts the established practices and expectations of both employers and employees. A significant number of casual employees work on a regular basis and refuse conversion to part-time or full-time employment, which proves that a "regular pattern of work" is not a distinctive characteristic of non-casual work.

2.11. The consequence of this new definition, as well as the uncertainty around the operation of the proposed sham provision, will risk forcing employers to convert casual employees working regular patterns of work. This is because they may face the risk of substantial penalties for misclassification under the new offence.

2.12. Consider the below example.

Case Study:

Dom is a university student who is casually employed at Red Café.

During the university year, Dom elects to work only on Thursday and Fridays.

Dom enjoys being a casual employee because he earns 25% extra pay and is able to increase his hours over the summer holidays.

Under the new definition, it is likely that Dom would be technically a part-time employee because he works a regular pattern of work.

Red Café may risk facing up to $93,900 in penalties for misclassifying Dom as a casual employee.

Red Café could offer Dom part-time employment. This would deprive Dom of the 25% extra pay and make it more difficult to increase his hours over the summer holidays.

If Dom declines this offer, Red Café may be forced to dismiss (or stop rostering) Dom out of a fear of facing penalties.

However, by dismissing Dom, Red Café may face penalties under the general protections regime (for taking adverse action against an employee who decides not to exercise their workplace right of casual conversion) or be forced to pay compensation under the unfair dismissal regime.

[6] Bill sch 1 item 1 (proposed s 15A(2)(a)).
[7] Cf FW Act s 15A.
[8] Bill sch 1 item 1 (proposed s 15A(2)(b)).
[9] Bill sch 1 item 1 (proposed s 15A(2)(c)(iv)).
[10] FW Act s 12.

Red Café is therefore placed in an impossible dilemma.

Interaction of Subsection (5) and Sham Provision

2.13. The proposed definition of casual employment, which would consider the "the "real substance, practical reality and true nature" of a relationship,[11] rather than solely its *contractual* nature,[12] is qualified by subsection (5). This subsection provides that "[a] person who commences employment as a casual employee within the meaning of subsections (1) to (4) remains a casual employee of the employer until" the occurrence of one of four events.[13]

2.14. The proposed sham provision would prevent employers from misrepresenting employees as casual employees under an employment contract when they are in fact not a casual employee.[14] A defence would apply for employers who "reasonably believed" that the employee was a casual employee.[15] The reasonableness of the employer's belief would include consideration of the size of the business.[16]

2.15. The interaction between subsection (5) in the proposed definition and the proposed new sham offence are of critical importance to the operation of the changes. There are potentially two available interpretations of this interaction. As will be explained, one interpretation may have disastrous consequences for the use of casual employment in Australia businesses.

First Interpretation — Qualified Sham Provision

2.16. As noted, subsection (5) in the proposed definition provides that "[a] person who commences employment as a casual employee within the meaning of subsections (1) to (4) remains a casual employee of the employer until" the occurrence of one of four events.[17]

2.17. On one reading of the provisions, the consequence of this subsection *may* be that, although an employment relationship must be characterised by reference to its "real substance, practical reality and true nature",[18] the point in time from which it will be characterised (other than for the purposes of the new right to request conversion) will be when an employee *commences* employment.[19]

2.18. At that point in time, the "real substance, practical reality and true nature" of an employment relationship as it pertains to whether there is a firm advance commitment to continuing and indefinite work will largely, but not exclusively, involve contractual matters. At the commencement of an employment relationship, the extra-contractual matters that are available for consideration will generally be limited.

2.19. At the commencement of an employment relationship, it will be unknown as to whether the exercise of an ability for an employee to accept or reject work "occurs in practice".[20] There will be no work "usually performed by the employee"[21] to which regard can be had. There will, absent circumstances in which an employer immediately rosters the employee far into the future, no "regular pattern of work"[22] which can be

[11] Bill sch 1 item 1 (proposed s 15A(2)(a)).
[12] Cf FW Act s 15A.
[13] Bill sch 1 item 1 (proposed s 15A(5)).
[14] Bill sch 1 item 21 (proposed s 359A(1)).
[15] Bill sch 1 item 21 (proposed s 359A(2)).
[16] Bill sch 1 item 21 (proposed s 359A(3)).
[17] Bill sch 1 item 1 (proposed s 15A(5)).
[18] Bill sch 1 item 1 (proposed s 15A(2)(a)).
[19] Bill sch 1 item 1 (proposed s 15A(5)).
[20] Bill sch 1 item 1 (proposed s 15A(2)(c)(i)).
[21] Bill sch 1 item 1 (proposed s 15A(2)(c)(ii)-(iii)).
[22] Bill sch 1 item 1 (proposed s 15A(2)(c)(iv)).

considered. Accordingly, the four mandatory considerations proposed by the Bill, each of which involve extra-contractual matters, will be largely insignificant when an employee "commences employment".

2.20. The terms of the employment contract may, therefore, retain primacy in the characterisation of an employment relationship.

2.21. Therefore, on this interpretation, whether the employee "performs … work other than as a casual employee"[23] under the sham provision, may be determined by the definition of "casual employee" in the legislation which includes the qualification in subsection (5) as it forms part of that definition of "casual employee".

2.22. This would mean that the proposed sham provision would only apply to an employee who "performs … work other than as" a person "who commences employment as a casual employee within the meaning of subsections (1) to (4)".[24] Accordingly, if the employee "commences employment as a casual employee", their subsequent reclassification to part-time or full-time employment by reference to the test outlines in subsections (1) to (4) could not result in a misrepresentation of the employment contract.

Second Interpretation — Unqualified Sham Provision

2.23. On another reading, subsection (5) may not qualify who "performs … work other than as a casual employee"[25] under the sham provision.

2.24. Absent the qualification in subsection (5), it is unquestionable that the proposed sham provision for casual employment would not serve a similar purpose to the analogous sham provision for independent contracting of preventing deliberate misrepresentations of contractual relationships to avoid paying legal entitlements.

2.25. Instead, it could effectively force employers to convert employees engaged as casual employees whose "real substance, practical reality and true nature" no longer reflects this status, such as due to working a "regular pattern of work".[26]

2.26. Otherwise, it could be argued they have represented to the employee "that the contract of employment under which the individual is … employed by the employer is a contract for casual employment under which the individual performs, or would perform, work other than as a casual employee"[27] and, aware of this fact, could not rely on the defence that they "reasonably believed that the contract was a contract for employment as a casual employee".[28]

2.27. If the employee rejected the offer of conversion (or new contract), the employer may then face the impossible dilemma of either continuing to treat them as a casual employee, thereby exposing themselves to the $93,900 in penalties under the proposed sham provision,[29] or dismiss the employee, which is likely to expose the employer to a general protections claim for taking adverse action against an employee for the operative purpose of preventing the exercise of a workplace right,[30] namely the employee's ability to initiate proceedings under a workplace law for penalties under the proposed sham provision.

[23] Bill sch 1 item 21 (proposed s 359A(1)).
[24] Bill sch 1 item 1 (proposed s 15A(5)).
[25] Bill sch 1 item 21 (proposed s 359A(1)).
[26] Bill sch 1 item 1 (proposed s 15A(2)(c)(iv)).
[27] Bill sch 1 item 21 (proposed s 359A(1)).
[28] Bill sch 1 item 21 (proposed s 359A(2)).
[29] Bill sch 1 item 23.
[30] FW Act s 340.

Uncertainty

2.28. As shown, the interaction between subsection (5) and the proposed sham provision is highly uncertain.

2.29. The consequence of this will be, until it is definitively determined by the courts, employers will face substantial risk when employing casuals. This will make employing casual employees completely unattractive to business. This will destroy job creation at this level which will have disastrous consequences for young people, carers, and other workers who depend on casual employment to support their livelihoods.

2.30. The proposed definition has serious conceptual flaws and will present challenges for some businesses.

2.31. These provisions will create widespread confusion, concern and uncertainty for businesses.

2.32. In particular, the proposed definition may entitle a significant number of regular casual employees to conversion under the proposed new right.[31] This new right would, unlike the existing casual conversion framework, regrettably have limited protections for employers.

2.33. Employers would not be able to refuse the request for conversion on reasonable business ground, nor even on the basis that it would be completely impractical (it must be impractical because of necessary changes to comply with terms of industrial instruments).[32]

Potential for Class Action Litigation

2.34. The new definition of "casual employee" could reopen the potential for significant class action claims against employers. This was a major concern of employers with respect to the definition prior to the 2021 legislative reforms that provided significant certainty to employers.

2.35. The definition proposed in the Bill is vague and uncertain. In particular proposed section 15A(2)(c)(iv) could allow for litigation in instances in which a class of casual employees perform regular patterns of work.

2.36. A major beneficiary of these changes will be plaintiff law firms and litigation funders who are able to capitalise on an increase in class action claims arising because of the uncertain definition of casual employment.

ACCI POSITION

2.37. ACCI opposes the changes to casual employment. The existing definition provides certainty to employers and is consistent with the common law. The existing conversion right already provides casual employees with adequate pathways to part-time or full-time employment.

[31] Bill sch 1 item 6 (proposed s 66AAB).
[32] Bill sch 1 item 6 (proposed s 66AAC(4)(b)).

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3 Labour Hire

OVERVIEW

3.1. Under Schedule 1 Part 6 of the Bill, the FWC would be given new powers to make orders in relation to arrangements which involve the supply of labour between businesses.

3.2. The new regulated labour hire arrangement orders would broadly apply to arrangements where one business supplies, either directly or indirectly, one or more employees to another business to perform work.[33]

3.3. The new orders would only apply where the host business (i.e., the business to whom the labour is being supplied) is covered by an enterprise agreement or similar instruments (but not merely a modern award).[34]

3.4. The new orders can only be made upon application by an affected party or a union.[35]

3.5. After considering submissions from parties, the FWC can make an order which requires the host business to ensure that the supplied employee is provided with no less than the "protected rate of pay".[36]

3.6. The FWC cannot make the order if it is satisfied that it is not "fair and reasonable in all the circumstances to do so". It is anticipated that employers would bear the burden of proof on this issue.[37]

3.7. The "protected rate of pay" is the full rate of pay that would be payable to a worker employed directly by the host business under the applicable enterprise agreement or similar instrument.[38]

CONSEQUENCES

Full Rate of Pay

3.8. While the Bill does not strictly prevent employers from paying direct employees more than labour hire workers for skills, qualifications and experience, the requirement to pay labour hire workers the full rate of pay to which a comparable direct employee would be made is not appropriate.

3.9. This is because factors such as skills, qualifications and experience which lead to higher pay levels are sometimes taken into account when parties bargain for wage rates in enterprise agreements. In such circumstances, the policy would therefore still entitle labour hire workers to the higher wage rates despite those factors not applying to them.

3.10. For instance, during bargaining, an employer may agree to minimum wage rates that are 15% higher than award minimum rates on the basis that they only hire employees who already possess industry experience and/or possess a certain level of qualifications. In such circumstances, as long as a labour hire worker is capable of being covered by a classification in the employer's enterprise agreement, the labour hire worker would be entitled to those higher award rates, even though they may less skilled or qualified.

Service Contracting

[33] Bill sch 1 item 73 (proposed s 306E(1)(a)).
[34] Bill sch 1 item 73 (proposed s 306E(1)(b)).
[35] Bill sch 1 item 73 (proposed s 306E(7)).
[36] Bill sch 1 item 73 (proposed s 306F).
[37] Bill sch 1 item 73 (proposed s 306E(2)).
[38] Bill sch 1 item 73 (proposed s 306F(4)).

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3.11. The Bill does not propose any *exemption* for arrangements that involve service contracting.

3.12. Instead, the Bill merely proposes to require the FWC to consider whether an arrangement is "wholly or principally for the provision of a service" when satisfying itself of whether it is "not fair and reasonable in the circumstances" to make an order.[39]

3.13. Under the Bill, it would therefore be open to the FWC to still make an order in respect of a service contracting arrangements.

3.14. This may have disastrous consequences for many service contracting arrangements.

3.15. The construction industry is one example of part of the economy which could be adversely affected. The construction industry depends on service contracting arrangements, including often through several chains of subcontracting relationships, which clearly should not be caught by "labour hire" orders. The purpose of these arrangements is entirely unrelated to the avoidance of engaging direct employees or undercutting of wages, which these proposed laws are purportedly intended to prevent.

3.16. However, the construction industry is not alone in this respect. Service contracting arrangements are widespread across the economy and perfectly legitimate commercial relationships. There is no basis for covering these relationships with regulations that is purportedly intended to cover labour hire. They should be exempted outright.

Consideration of Prospective Employees

3.17. Within the consideration of whether an arrangement is "wholly or principally for the provision of a service" when satisfying itself of whether it is "not fair and reasonable in the circumstances" to make an order,[40] the FWC would be required to have regard to a particular matter that would cause issues in practice. The FWC would be required to have regard to "the extent to which, in the circumstances, the regulated host employs, has previously employed or could employ employees to whom the host employment instrument applies, applied or would apply".[41]

3.18. This consideration is completely inappropriate. Simply because an employer has previously employed or merely could employ workers to perform the work being performed by a service contractor does not mean that it is fair and reasonable to make a labour hire order apply to them. The FWC should only be required to have regard to matters that assist it in ascertaining whether a particular arrangement is in fact a service contracting arrangement.

3.19. There are countless circumstances in which an employer may engage a service contractor to perform a function in their business that they theoretically could engage an employee to perform. This does not make it appropriate to treat such a contractor as a labour hire employee.

Impact on Labour Hire Workers

3.20. It is worth reiterating that labour hire workers are employees of the labour hire provider, not the host business. As employees of the labour hire provider, labour hire workers are already entitled to negotiate and bargain for their own terms and conditions of employment, just as any other employee can. These workers can be, and are often, represented by trade unions.

[39] Bill sch 1 item 73 (proposed s 306E(8)(b)).
[40] Bill sch 1 item 73 (proposed s 306E(8)(b)).
[41] Bill sch 1 item 73 (proposed s 306E(8)(b)(i)-(vi)).

3.21. It is therefore unclear how the arrangements to which the proposed orders would apply are in fact a "loophole".

3.22. Furthermore nothing in the legislation prevents multiple regulated labour hire arrangement orders applying to a single worker. This would create significant and superfluous complexity for employers.

ACCI POSITION

3.23. ACCI opposes this part of the legislation.

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4 Workplace Delegates' Rights

OVERVIEW

4.1. The Bill, in Schedule 1 Part 7, would introduce a series of new rights for union delegates employed in workplaces.

4.2. The FWC would be provided with discretion to design and insert a new term into all modern awards which provides special rights for union delegates.[42]

4.3. The new modern award term which provides rights for union delegates must then be replicated into or expanded in all enterprise agreements.[43]

4.4. Union delegates would be given new protections under the FW Act, including prohibitions on employers:

- unreasonably failing or refusing to deal with union delegates;
- knowingly or recklessly making a false or misleading statement to a union delegate; or
- unreasonably hindering, obstructing or preventing the exercise of the rights of union delegates.[44]

CONSEQUENCES

Lack of Guardrails to Lead to Increased Costs

4.5. The Bill does not propose to introduce any new criteria which would bind the FWC's design of the new workplace rights in modern awards and industrial instruments. Accordingly, their discretion would be essentially unfettered. This would deprive the Parliament of any real control over what new rights to which union delegates become entitled. The Bill would provide a protection against any unreasonable hinderance, obstruction, or prevention of rights, but no say in what those rights are.

4.6. The Bill does not propose any restrictions on how many union members in a workplace can be delegates and therefore become entitled to the additional rights. This matter is determined unilaterally by the union. This means that, theoretically, a union could allow for every single union member in a workplace to be a delegate and therefore obtain all the rights provided by the Bill.

4.7. In fact, the ACTU, in their factsheet on union delegates, answers the question as to whether you can "have more than one delegate in your workplace", with the following response:

> Definitely. The more employees there are, the more delegates there should be so delegates aren't overwhelmed while making sure every member's voice is heard.

4.8. With additional rights for delegates, there is no doubt that unions will appoint large numbers of delegates in each workplace.

4.9. Similarly, unions can unilaterally determine the amount of time required for training. This would subject the right to paid time off to training to the unions' discretion.

[42] Bill sch 1 item 78 (proposed s 149E).
[43] Bill sch 1 item 80 (proposed s 201(1)(1A)(b)).
[44] Bill sch 1 item 84 (proposed s 350A(1)).

4.10. Both of these decisions could have a seriously detrimental impact on businesses. It could require employers to pay large numbers of employees, as determined by the relevant union, to complete training over long periods, as determined by the relevant union. The only recourse for an employer would be to argue that the extent of paid time off for training was not "reasonable", leading to a workplace dispute against an organised trade union, as well potentially face a general protections claim and associated penalties.

Special Union Treatment

4.11. The Bill proposes to give employees who are union delegates significantly more favourable rights and protections than all other employees in the workforce.

4.12. This is despite merely 8 per cent of private sector employees being members of a union.[45]

4.13. Employers would be effectively prohibited from ever providing inaccurate information to a union delegate. This is because they would be at risk of having knowingly or recklessly made a misleading representation to the delegate. Unlike the other protections, there is no defence for *reasonable* conduct of the employer. This could have potentially disastrous ramifications for the operations of a business.

4.14. Consider a workplace investigation into an alleged incident of bullying. The alleged perpetrator may be represented by a union delegate. In such circumstances, the employer may have genuine reasons for concealing aspects of the bullying complaint during discussions with the alleged perpetrator and their union representative. The employer may desire to protect the privacy of the complainant. However, any misleading statement that conceals such information made to the union delegate could result in penalties of $93,900. This is irrespective of the reasonableness of the employer's decision.

4.15. Additionally, union delegates would be provided with a plethora of workplace rights to which non-union employees are not entitled. Importantly, this is not limited to the already substantial new rights relating to access to facilities and paid time off for training as proposed under the Bill; every single workplace delegate would be entitled to *additional* rights that are determined by the FWC and then inserted into *every* modern award and enterprise agreement. [46]

4.16. Further, the workplace rights of union delegates would attract greater protection than the workplace rights of non-union employees. Whereas the workplace rights of non-union employees (or even non-delegate unionised employees) are merely protected from "adverse action",[47] such as dismissal or demotion, the workplace rights of union delegates would be protected from any *hinderance*, *obstruction* or *prevention*.

4.17. This means that the right of union delegates to represent workers who are not even members of their union would attract greater protection than a non-union employee's right to sick leave, parental leave, minimum wages, or making bullying complaints. This is a manifestly absurd and unjust outcome.

4.18. It is also not clear whether these stronger protections for the workplace rights of union delegates apply only to delegate-specific workplace rights, or to all workplace rights. In other words, union delegates would have delegate-specific rights proposed under the Bill, such as the right to paid time off for training, as well as their ordinary workplace rights such as the right to sick leave or minimum wages.

4.19. The proposed protection merely states that an employer must not "unreasonably hinder, obstruct or prevent the exercise of the rights of the workplace delegate *under this Act or a fair work instrument*",[48] which could

[45] 'Union membership in private sector shrinks to 8pc', David Marin-Guzman, 15 January 2023
[46] Bill sch 1 item 80 (proposed s 201(1)(1A)(b)); Bill sch 1 item 84 (proposed s 350A(1)).
[47] FW Act s 340.
[48] Bill sch 1 item 84 (proposed s 350A(1)(c)).

be interpreted to extend to *all* rights of the union delegate under the FW Act and relevant industrial instrument. The effect of this would be that the non-delegate specific workplace rights of union delegates (e.g., sick leave) would also attract stronger protection that those of non-union employees. This interpretation would mean that, for example, whereas non-union employees are only protected from "adverse action" (e.g., dismissal or demotion) taken "because of" their workplace right to take sick leave, union delegates are protected from any hinderance, obstruction or prevention of their right to take sick leave.

4.20. In summary, union delegates would effectively become the most protected workers in the entire workplace relations system.

ACCI POSITION

4.21. ACCI opposes this part of the legislation. It is beyond repair because it is fundamentally premised on an unjust notion that workers who are delegates of unions should be entitled to stronger rights and protections than employees who exercise their right to freedom of association and do not join a union.

Australian Chamber of Commerce and Industry

5 Sham Arrangements

OVERVIEW

5.1. Schedule 1 Part 9 of the legislation changes the defence to the prohibition on sham arrangements (misrepresenting employees as independent contractors) from "did not know" and "was not reckless" to whether the employer "reasonably believed" the worker was a contractor.[49]

5.2. The legislation therefore introduces a higher evidentiary threshold for employers as it relates to sham arrangements. An employer would need to demonstrate that they had an objectively reasonable belief that the employee was an independent contractor.

5.3. Accordingly, an employer may have a genuine, honest, subjective belief that the employee was an independent contractor, but if the belief was not reasonable according to the standards of an ordinary person, the employer would not escape liability.

CONSEQUENCES

Evidentiary Threshold

5.4. The FW Act currently prohibits employers misrepresenting employees as independent contractors.[50]

5.5. The defence to the prohibition is currently if the employer can prove that when the misrepresentation was made, the employer did not know and was not reckless as to whether the contract was in fact one of employment rather than independent contracting.[51]

5.6. For example, if an employer operating a construction business informs a worker that they are an independent contractor and therefore not entitled to paid leave, but, in actual fact, the worker is an employee, the employer may be in breach of the FW Act. However, if the construction business can prove that, at the time they informed the worker they were an independent contractor, they genuinely did not know and were not reckless to the fact that they were an employee, the construction business can escape liability.

5.7. The Bill proposes to change the defence to the prohibition.

5.8. Instead of "did not know" and "was not reckless", an employer would only escape liability if they "reasonably believed" that the contract was for an independent contracting arrangement.[52]

5.9. This is a higher evidentiary threshold that the employer would need to satisfy.

5.10. An employer would need to demonstrate that they had an objectively reasonable belief that the employee was an independent contractor.

5.11. This means that an employer may have a genuine, honest, subjective belief that the employee was an independent contractor, however, if the belief was not reasonable according to the standards of an ordinary person, the employer would not escape liability.

[49] Bill sch 1 item 103 (proposed s 357(2)).
[50] FW Act pt 3-1, div 6.
[51] FW Act s 357(2).
[52] Bill sch 1 item 103 (proposed s 357(2)).

5.12. When determining whether an employer's belief was reasonable, the changes would mean that regard must be had to the size and nature of the employer's enterprise and any other relevant matters.[53]

Concurrent Changes

5.13. The effect of these changes should be considered alongside other changes proposed in the Bill.

5.14. A new statutory definition of "employee" is being introduced into the FW Act[54] which is inconsistent with the common law and established business practices, which both consider an employment relationship to be defined by the terms (not label) of a contract.

5.15. This means that more employers will be at risk of litigation for engaging in sham arrangements because more independent contracting arrangements will be reclassified as employment relationships, despite it being contrary to the employer's genuine and honest belief.

5.16. Accordingly, this will expose more employers to liability under these provisions.

Case Study

Director of the Fair Work Building Industry Inspectorate v Bavco Pty Ltd (No 2) [2014] FCCA 2712

In this case, Bavco was a floor-repairing business that engaged five workers as independent contractors.

At common law, those five workers were in fact employees because Bavco controlled their work, provided them with tools and materials, was responsible for any defects, insured the workers, etc.

However, the court held that the employer genuinely believed that the workers were independent contractors and was not reckless to the fact that they were employees.

Despite this genuine belief, it is possible that, under the new defence, Bavco would be penalised for misrepresenting the arrangements on the basis that their beliefs may not have been reasonable.

Accordingly, Bavco may be penalised for not understanding the highly complex and uncertain new statutory definition of "employee" proposed by the Bill, despite having no malintent.

ACCI POSITION

5.17. ACCI opposes these changes. There is no demonstrated need for making it harder for employers to avoid liability for sham contracting.

[53] Bill sch 1 item 103 (proposed s 357(3)).
[54] Bill sch 1 pt 15.

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6 Right of Entry (Exemption Certificates)

OVERVIEW

6.1. Schedule 1 Part 10 of the Bill proposes to add an additional circumstance in which an exemption certificate can be obtained, which is where the FWC is satisfied that the suspected contravention involves the underpayment of wages, or other monetary entitlements, of a member of the union whose industrial interests the union is entitled to represent who is performing work at the premises.[55]

6.2. Currently the FWC must give an exemption certificate to a union if it is reasonably satisfied that advance notice of the entry given by an entry notice might result in the destruction, concealment or alteration of relevant evidence.[56]

CONSEQUENCES

New Union Powers

6.3. There are currently three broad categories under which rights of entry can be obtained:

(1) entry to investigate suspected contraventions of the FW Act or fair work instruments (eg modern awards or enterprise agreements);

(2) entry to hold discussions; and

(3) entry to investigate OHS breaches. [57]

6.4. The changes which the Government is making through this legislation are only relevant to the first category. They do not change the rules around right of entry, apart from amending the circumstances in which permit holders can enter workplaces without obtaining notice.

6.5. Previously notice was required before entry into any worksite was permitted except in those instances where the FWC reasonably believed that notice of entry may lead to the destruction, alteration, or concealment of evidence.[58]

6.6. Entry under the above circumstances is granted without notice in order to prevent a person suspected of contravening the FW Act from destroying evidence of that contravention.

6.7. In addition to those instances, under these latest changes, the FWC may also grant entry to a premises without notice in any circumstance where it is satisfied that a contravention or contraventions have occurred in relation to underpayments of workers' wages or other monetary entitlements.[59]

6.8. This means in practice that an entry could be granted without notice to permit holders to enter any given worksite if the FWC is satisfied that there is a contravention of wage underpayment provisions within the FW Act.

No Justification

[55] Bill sch 1 item 122 (proposed s 519(1)(b)(ii)).
[56] FW Act s 519.
[57] FW Act pt 3-4, div 2.
[58] Fair Work Act s 519.
[59] Bill sch 1 item 122 (proposed s 519(1)(b)(ii)).

6.9. This part of the legislation represents an extension of powers to unions, granting them the ability to enter worksites without notice, on permission of the FWC, whenever there are concerns that an underpayment has occurred.

6.10. In such a case, proposed section 519(1)(b) of the Bill states that the FWC must be satisfied "that the suspected contravention, or contraventions, involve the underpayment of wages, or other monetary entitlements, of a member of the organisation whose industrial interests the organisation is entitled to represent and who performs work on the premises."

6.11. A permit holder must have a reasonable suspicion that a contravention has occurred or is occurring.[60]

6.12. Previously, the only time the FWC could provide entry without notice was in the instances where the provision of notice prior to entry could potentially lead to the destruction, concealment or alteration of evidence.

6.13. This amendment appears to be redundant. Even in the case of a suspected underpayment, why would entry without notice be required in such a case if there is no risk that providing notice would lead to the destruction, concealment or alteration of evidence.

6.14. There is no justification for giving entry to a workplace without notice where there is no threat of destruction, concealment or alteration of evidence. In fact, it's not clear why union representatives should be provided with special rights (usually reserved for law enforcement and other officers) to attend workplaces at all to investigate non-compliance.

ACCI POSITION

6.15. ACCI opposes this aspect of the legislation.

[60] Fair Work Act, s 481.

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7 Definition of Employment

OVERVIEW

7.1. Currently, the FW Act uses the common law definition of "employee" which is determined solely by reference to the terms of the contract.

7.2. Schedule 1 Part 15 of the Bill proposes to introduce a new statutory definition of "employee" which would look beyond the contract to the "real substance, practical reality and true nature" of the relationship.[61]

7.3. This is a return to a "multi-factor test" of the employment relationship that considered the "totality of the relationship" which was previously applied before it was ultimately rejected by the High Court.

CONSEQUENCES

New Definition

7.4. Currently, the FW Act uses the common law definition of "employee".

7.5. The common law definition was recently clarified in two significant High Court decisions which were handed down at the same time in February 2022: *CFMMEU v Personnel Contracting* and *ZG Operations v Jamsek*.

7.6. In these decisions, a majority of the High Court held that under the common law, whether a worker is an "employee" is determined solely by reference to the terms (express or implied) of the employment contract.

7.7. Importantly, and contrary to some perception, these decisions did not mean the *label* used by the contract was at all relevant to characterisation. Rather, the High Court held that the legal *rights* and *duties* under a contract were determinative.

7.8. The High Court's decisions overturned prior Federal Court decisions which held that the "multi-factor" test should be applied which took into account the "totality of the relationship".

7.9. The High Court rejected the existence of a "multi-factor" test at common law as well as the notion that non-contractual and post-contractual matters should be taken into account.

7.10. The Bill proposes to undo the High Court's decisions by introducing a new statutory definition of "employee" that resembles the definition which the Federal Court understood to be in place at common law.

7.11. The new definition would look beyond the terms of the contract to the "real substance, practical reality and true nature" of the relationship. In determining these aspects of the relationship, the new definition would have regard to "the totality of the relationship" and "how the contract is performed in practice".[62] This would be achieved by assessing the totality of the relationship against a range of criteria and considerations.

Uncertainty

7.12. The new definition would generate considerable uncertainty for businesses that engage independent contractors. This will inevitably lead to higher costs for businesses which will, in many cases, need to obtain legal advice to be assured that independent contractors they engage are in fact independent contractors, rather than employees.

[61] Bill sch 1 item 237 (proposed s 15AA(1)).
[62] Bill sch 1 item 237 (proposed s 15AA(2)).

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7.13. However, because the new definition would take into account post-contractual matters, even if a business engages a worker as an independent contractor, over time, they may subsequently be converted to an employee. This would contribute to further uncertainty.

7.14. It was on this very basis that the High Court harshly criticised the test applied by the Federal Court on which the proposed statutory definition is based.

7.15. Chief Justice Kiefel, and Justices Keane and Edelman, described the multi-factor test (by quoting the parts of the Federal Court judgment) as "necessarily impressionistic" and thereby "inevitably productive of inconsistency".[63] Their Honours stated that the definition "is apt to generate considerable uncertainty, both for parties and for the courts."[64]

7.16. Their Honours further noted that the "uncertainty is exacerbated where it is contended that the test is to be applied in respect of the parties' conduct over the whole course of their dealings with each other".[65] By taking into account "the totality of the relationship", the test proposed by the Bill would do exactly that.

7.17. It is therefore unclear why the Federal Government would deliberately choose to adopt such a definition which would apply to the entire statutory framework for workplace relations at the federal level.

7.18. To understand the High Court's criticisms further, it is necessary to consider what might constitute the "totality of a relationship". Whereas the terms of a contract are to some degree certain, at least where the contract is in writing, the "totality of the relationship" can effectively include any aspect of the relationship.

7.19. For instance, in a dispute about the status of a worker, there may be arguments about the "expectations", "understandings" of parties, irrespective of how difficult they are to prove or disprove. There may also be arguments raised regarding how the worker *acted*, such as whether they behaved as a member of the business or as a member of their own business (the "own business vs employer's business" is a common dichotomy used when analysing the characterisation of a working relationship). These matters are inherently imprecise and may be subject to significant change over the course of a relationship.

Case Study

A media company engages an IT professional, Peter, to create and implement a new cyber security system.

The company and Peter both agree for Peter to be engaged as an independent contractor.

Under Peter's contract, he has a right to delegate work (i.e. to subcontract) and possesses significant control over the implementation of the cyber security system.

In practice, Peter never exercises his right to delegate work and regularly seeks advice from an IT professional employed by the business on how the system should be implemented. Peter acts under the employee's instruction for most of the time, although he is under no contractual obligation to do so. Peter also chooses to wear the company uniform with its logos.

In such circumstances, Peter may have a strong case to argue that the "totality of the relationship" suggests he is in fact an employee of the business, even though his contract clearly stipulates that he is a contractor.

[63] *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 [33].
[64] *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 [33].
[65] *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 [33].

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Changing Status

7.20. Unlike the proposed new definition of "casual employee", the Bill does not propose to restrict changes in status of a worker to the occurrence of certain events under the new definition of "employee".

7.21. A consequence of this is the possibility that a worker can be engaged as an independent contractor and, over time, gradually 'morph' into an employee because of the "how the contract is performed in practice". The same applies in the reverse — a worker engaged as an employee could conceivably 'morph' into an independent contractor.

7.22. A worker could even be engaged as an independent contractor, become an employee after a certain period, and then return to the status of an independent contractor. Nothing in the Bill would prevent this from occurring.

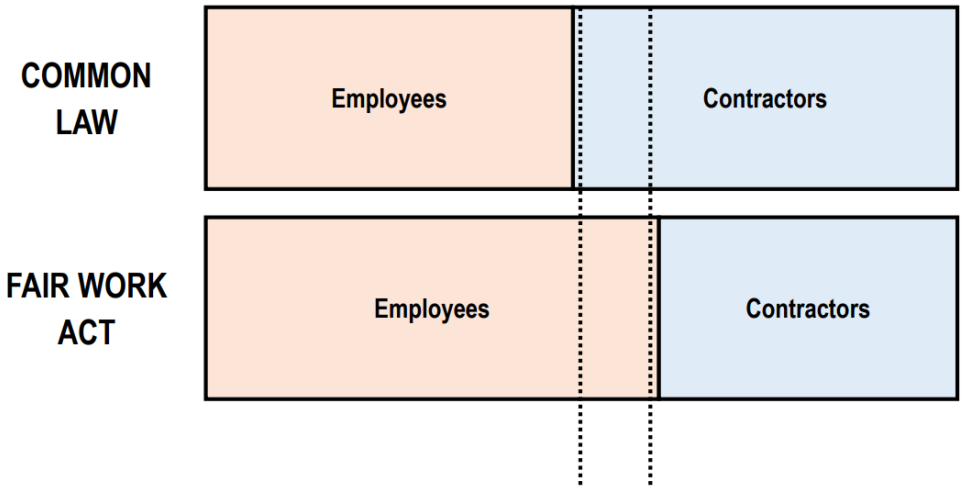
7.23. These possibilities only increase the uncertainty for employers under the proposed definition. It can lead to the creation of liabilities for employers, without their knowledge, and possible windfall gains for employees.

Divergence of Common Law and Statute

7.24. A consequence of the new definition will be that there would be one definition under the common law and a different definition under the FW Act.

7.25. The new definition would not change or amend the common law. This is because the definition would only apply "[f]or the purposes of this Act".[66]

7.26. This would mean that there will be workers, even if rare, who are independent contractors at common law but employees for the purposes of the FW Act.



Workers who are independent contractors at common law but employees for the purposes of the Fair Work Act

7.27. This is noteworthy because there are specific rights and duties which apply to employees which arise under common law rather than under the FW Act. Accordingly, workers who are independent contractors at common law will not be bound by these rights and obligations but will still obtain the benefits of being an employee for the purposes of the FW Act.

[66] Bill sch 1 item 237 (proposed s 15AA(1)).

7.28. The most significant obligation which applies to common law employees is the duty to obey the lawful and reasonable directions of the employer. This duty is implied into common law employees' contracts.[67]

7.29. This duty is central to the employment relationship because it allows employers to direct employees how to perform their work. It also forms the grounds on which employers become entitled to dismiss employees who disobey their directions. Without it, employees would be effectively free to perform the work in any way they wish and disobey any requests of their employer, as long as they adhere to the other terms of the contract.

7.30. In *Macken's Law of Employment*, a seminal text on employment law, the authors describe this obligation in the following way:[68]

> "One of the most important obligations resting on an employee is the obligation to obey all lawful and reasonable commands given by the employer. This is one of the characteristics of the contract of employment which distinguishes it from other types of contract. The duty to obey orders provides a mechanism or a "governance structure" which allows adaption and change to meet the needs of the workplace."

7.31. Other duties which apply to common law employees which are generally distinctive of the employment relationship include:

- the duty to exercise reasonable care when carrying out employment; and
- duties of fidelity and loyalty to the employer.

7.32. The divergence of the definition of employment under the FW Act from the common law will mean that some common law contractors will obtain nearly all of the benefits of being an employee — protections for dismissal, leave entitlements, minimum wages, collective bargaining, industrial action, etc — with few of the countervailing obligations.

Case Study

Sam is engaged as an independent contractor by a professional services firm, AAC.

However, due to how the relationship exists in practice, a court determines that for the purposes of the FW Act, Sam is in fact an employee, while still remaining an independent contractor at common law.

Sam becomes entitled to paid leave entitlements and can engage in industrial action with the other employees of AAC.

However, Sam is under no obligation to obey the directions of AAC.

For instance, Sam is under no obligation to adhere to a new workplace dress code, new workplace policies, participate in workplace investigations, report misconduct, or perform his work in a particular way, apart from what is expressly provided for under his contract and any relevant industrial instrument.

Interaction with other Changes

7.33. The proposed definition should be considered alongside other changes proposed in the Bill.

[67] *R v Darling Island Stevedoring & Lighterage Co Ltd; Ex parte Halliday; Ex parte Sullivan* (1938) 60 CLR 601, 621- 622 (Dixon J).
[68] *Macken's Law of Employment* (Thomas Reuters, 9th ed, 2022) p 212.

7.34. Specifically, the employee-like changes are acutely relevant to the new definition. This is because the employee-like changes are largely premised on the fact that workers of digital platforms are independent contractors and therefore lack the protections offered to employees under the FW Act.

7.35. However, there is a risk that many workers on digital platforms may be converted to employees under the new definition, depriving the employee-like changes of a policy basis and resulting in significant complexity.

7.36. Prior to the High Court's decisions, some workers on digital platforms were considered the marginal cases in which it was strongly arguable that they were in fact employees.

7.37. For example, in *Deliveroo Australia Pty Ltd v Diego Franco* [2022] FWCFB 156, a Full Bench considered a decision of a single commissioner which held that a food delivery driver on Deliveroo was an employee and thereby entitled to protection from unfair dismissal. The initial decision decided that the driver was an employee after applying the test outlined by the Federal Court, which took into account the "totality of the relationship". The Full Bench delayed deciding the appeal against the initial decision until the High Court handed down its decisions on the test, after which it applied the High Court's test and found that the driver was an independent contractor.

7.38. Had the High Court upheld the Federal Court's test that characterisation depends on the "totality of the relationship", it is possible, perhaps *probable*, that the Full Bench would have upheld the initial decision and found that the driver was an employee. This very test that was applied in the initial decision which found that a Deliveroo driver was an employee is the test to which the Bill seeks a return.

7.39. Accordingly, there is a substantial risk that workers on digital platforms become reclassified as employees under the proposed definition. This would be contrary to the Bill's intention of regulating these workers as "employee-like" workers.

ACCI POSITION

7.40. ACCI opposes this aspect of the legislation.

Australian Chamber of Commerce and Industry

8 Road Transport

OVERVIEW

8.1. Schedule 1 Part 16 of the Bill would provide codifies the FWC with new powers relating to the road transport industry.

8.2. The FWC would have the power to:

- make "road transport industry contractual chain orders" that confer rights and obligations on participants in the road transport industry supply chain.[69] The scope and content are both defined by the Minister via regulation;
- make minimum standard guidelines for the road transport industry;[70]
- register collective agreements for participants in the road transport industry;[71]
- provide remedies for unfair termination of services contracts of road transport contractors; [72]
- deal with disputes between participants in the road transport industry supply chain, even if they are independent contractors (i.e., businesses) rather than employees or employees-like. [73]

CONSEQUENCES

Re-Run of the Road Safety and Remuneration Tribunal (RSRT)

8.3. The Government is essentially re-establishing the RSRT, which was ruled to be ineffective by ASBFEO and two independent reports.[74]

8.4. The RTAG in combination with the FWC's ability to set minimum standards orders bares striking similarities to the RSRT:

Old RSRT Power/Function	New RTAG/FWC Power/Function	Effect
The RSRT determines work program for road transport industry inquiries.	RTAG sets priorities of FWC for road transport industry.	Near identical process.

[69] Bill sch 1 item 238 (proposed s 40J).
[70] Bill sch 1 item 238 (proposed s 536KR).
[71] Bill sch 1 item 249 (proposed s 536MS).
[72] Bill sch 1 item 249 (proposed s 536LR).
[73] Bill sch 1 item 238 (proposed s 40J(2)(d)).
[74] 'Inquiry into the effect of the Road Safety Remuneration Tribunal's Payments Order on Australian small businesses', ASBFEO, September 2016; 'Review of the Road Safety Remuneration System', PwC, 2016; 'Review of the Road Safety Remuneration System', Jaguar Consulting, April 2014.

RSRT President – Deputy President of FWC 2-4 other RSRT Members from FWC.	The RTAG will sit within the FWC.	Significant overlap.
RSRT Orders on RSRT's own initiative.	Minimum standards orders on FWC/RTAG's own initiative.	Near identical process.
8.5. RSRT could make orders about: • rates of remuneration • working conditions • waiting times • working hours • payment methods and payment periods;	FWC & RTAG, may make minimum standards orders about: • payment terms • deductions • working time • record keeping • insurance • consultation • representation • delegates rights • cost recovery	Significant overlap. New minimum standards go further.
The RSRT Act defines the road transport industry as: • The Road Transport and Distribution Award 2010 • The Road Transport (Long Distance Operations) Award 2010 • The Transport (Cash in Transit) Award 2010	The current legislation defines the road transport industry as: • The Road Transport and Distribution Award 2020 • The Road Transport (Long Distance) Award 2020 • The Waste Management Award 2020	Near identical definition and coverage of the road transport industry. New laws' coverage goes further.

• The Waste Management Award 2010	• The Transport (Cash in Transit) Award 2020 • The Passenger Vehicle Transportation Award 2020, not including paragraph 4.2(c)	

8.6. It is clear from the above table that there are overlapping processes, powers and coverage between the RSRT and what is proposed in this legislation.

8.7. ASBFEO's report into the RSRT found that small business in particular was significantly impacted by the RSRT and its decisions. ASBFEO found that the RSRT set flawed payment orders – which were discriminatory, financially devastating and economically disastrous for owner-drivers and small businesses.[75]

8.8. Importantly, two independent reports found that increasing rates of pay via the RSRT did not increase driver safety, completely nullifying the Tribunal's original purpose.[76]

8.9. By implementing the RTAG and hence many of the RSRT's failings, the Government is risking reimplementing the outcomes which were a result of the RSRT.

Case Study

ASBFEO found that the RSRT's decisions led to suicides of owner drivers and small business owners.[77]

Attendees at several community forums, including at least one telephone submission and one written submission, run by ASBFEO for its inquiry into the effects of the RSRT on small businesses referred to owner drivers 'they knew' that had taken their own lives as a consequence of financial pressure, at least in part, imposed by the Payments Order.[78]

Attendees at multiple forums also stated that they were aware of small operators who were reportedly still considering suicide once they had their personal affairs in order.[79]

"I have a mate in Dubbo that lost his job just because of it. And a gentleman I know in Queensland definitely killed himself over it. And that's all I want to say about that." (Owner driver, NSW).[80]

Minimum Standards to Repeat RSRT Complications

8.10. The FWC would have discretion to consider a range of terms that could be included in a minimum standards order.

8.11. The FWC would have broad discretion to set a variety of different standards, given that the FWC is not limited to the terms listed in s536KL. The FWC must consult the RTAG in the setting of minimum standards.

[75] 'Inquiry into the effect of the Road Safety Remuneration Tribunal's Payments Order on Australian small businesses', ASBFEO, September 2016, page 4.
[76] 'Review of the Road Safety Remuneration System', PwC, 2016; 'Review of the Road Safety Remuneration System', Jaguar Consulting, April 2014.
[77] 'Inquiry into the effect of the Road Safety Remuneration Tribunal's Payments Order on Australian small businesses', ASBFEO, September 2016, page 26.
[78] Ibid.
[79] Ibid.
[80] Ibid.

8.12. Leaving such discretion to the FWC and the RTAG, instead of clearly defining it on the face of the legislation for example, will create a degree of uncertainty across the road transport industry and allows for unintended decisions or consequences.

8.13. One of the failings of the RSRT was the breadth of standard setting powers that were left to the Tribunal. This Bill risks the same outcomes – it leaves significant discretion to the FWC in its ability set minimum standards.

8.14. For example, the FWC is able to consider standards which are not listed in s536KL or s536KM, meaning that it could decide that superannuation would be a necessary standard to set for industry – this could have serious fiscal implications for businesses and would not have been intended by the Minister.

8.15. Additionally, naturally, as drivers are required to meet new standards, compliance duties also increase. Compliance measures increase the administrative burden of businesses, leading to added costs more particularly to small businesses who are more likely to require financial or legal advice to meet their obligations.[81]

8.16. Under this legislation, the FWC and the RTAG would be able to impose a variety of standards, all of which will increase the compliance framework for the industry – small operators and owner drivers could exit the market, this was previously the case when the RSRT was active.[82]

8.17. The RSRT had catastrophic social consequences, leading to the suicides of small operators and owner drivers in the road transport industry.

8.18. The RSRT was also found to have been fundamentally unable to achieve its goal of increasing driver safety with the link between remuneration and that outcome being tenuous and without evidence.[83]

Broad Effect of Road Transport Industry Contracted Chain Orders

8.19. These sections of the Bill would provide powers to the Minister for Employment and Workplace Relations at a unilateral level to make regulations which will affect broad sections of the road transport industry, including along the road transport contracted chain which is simply 'connected with' the road transport industry.

8.20. The breadth of this power is wide. The coverage of the awards which are defined to be the road transport industry could include the transport, receipt, storage and distribution of:

- manufactured goods, partly manufactured and raw goods, wares, merchandise, materials;
- livestock;
- meat;
- petrol, bulk petroleum products, crude oil or gas condensate; and
- milk, cream, butter, cheese and their derivatives.[84]

8.21. It would also cover:

[81] Guidance Note: Small Business, Office for Impact Analysis, the Department of Prime Minister and Cabinet, May 2023.
[82] 'Inquiry into the effect of the Road Safety Remuneration Tribunal's Payments Order on Australian small businesses', ASBFEO, September 2016, page 23.
[83] 'Review of the Road Safety Remuneration System', PwC, 2016; 'Review of the Road Safety Remuneration System', Jaguar Consulting, April 2014.
[84] Road Transport and Distribution Award 2020.

- transportation by road of all materials, whether in a raw or manufactured state, or of livestock, throughout Australia where the operation is interstate, or the distance exceeds 500km from the point of commencement;
- the transport of cash, securities and other financial instruments, bullion and other precious goods and materials, including valuables such as gold and jewels;
- the collection, transportation, handling, recycling and disposal of any waste material whatsoever and includes the operation of transfer stations, landfill sites, incinerators, recycling depots, yards or terminals, treatment plants, compost facilities, alternative waste treatment facilities and the operation of other facilities of the same kind; and
- the transport of passengers via limousine, taxi, bus or coach.[85]

8.22. Under the legislation, the Minister would be able to empower the FWC to confer rights and obligations on any business or worker 'connected with' the road transport industry under the meanings listed above through road transport industry contracted chain orders.

8.23. It is evident that whole supply chains could be covered by such orders.

8.24. In effect any business-like supermarket chains that ship food to their stores or farmers who have their goods delivered by freight to their vendors could be captured under the wording used in this Bill.

8.25. The Minister would unilaterally define the scope of the FWC's ability to set standards under a road transport industry contracted chain order.

8.26. In practicality the Minister could hence, for example, empower the FWC to create a road transport industry contracted chain order for a supermarket business and determine that the FWC must create certain specified rules for that business.

8.27. Road transport industry contractual chain orders could therefore impact entire supply chains and if implemented poorly could have significant economic impacts.

8.28. It is concerning that there are no limitations as to the nature and content of these new powers for the FWC in the legislation.

8.29. The Bill proposes to empower the Minister to make regulations that then empower the FWC to make road transport industry contractual chain orders.

8.30. This lacks parliamentary accountability and oversight.

Lack of Guardrails Create Cost Issue

8.31. The lack of guardrails on the FWC's ability to set minimum standards for the road transport industry mean that a broad range of terms could be applied to large parts of the sector.

8.32. The effect of section 536KL is that the FWC may consider any additional terms so long as they are not mentioned in the list of excluded terms in section 536KM.

8.33. For example, under the legislation as drafted, although superannuation is not specifically included, it is not specifically excluded either. This means the FWC could use its discretion to impose superannuation as a

[85] As per the Road Transport (Long Distance Operations) Award 2020, Transport (Cash in Transit) Award 2020, Waste Management Award 2020, and Passenger Vehicle Transportation Award 2020.

minimum standard for certain aspects of the road transport industry. This would have massive cost implications.

8.34. There are also many contested terms in this space. For instance, platforms would argue that "penalty rates" are an employment entitlement and not appropriate for a contractor, while unions would argue that they should be included as a minimum standard.

8.35. The powers of the FWC are too broad and the FWC is granted far too much scope to consider various terms.

8.36. The lack of an exhaustive and minimalist set of standards in this legislation could fundamentally shift the commercial positions of road transport businesses, leading to consumers bearing significant costs.

8.37. Additionally, the FWC is not explicitly discouraged from making minimum standard orders that would have adverse outcomes for consumers, including by leading to significant cost increases.

8.38. The Bill does not currently require the FWC to consider the impact of consumers under the minimum standards objective when making minimum standard orders.

Interaction with State Regimes

8.39. The Bill expressly provides that the Victorian and News South Wales jurisdictions regulating the road transport industry would continue to operate.[86] However, the Bill does not propose to preserve the owner-driver regulatory regime in Western Australia, which is closely similar to the Victorian system. There does not seem to be any justification for this discrepancy.

8.40. Additionally, the Bill does not provide for how inconsistency between state and federal regulation should be managed. This could lead to complex overlap of obligations, generating higher compliance costs.

Consultation in the Making of Minimum Standards Orders

8.41. ACCI is concerned with several deficiencies in the consultation process for the setting of minimum standards orders as currently drafted.

8.42. The Bill does not expressly require the FWC to consult affected parties, only that they be given a reasonable opportunity to make submissions.[87]

8.43. ACCI believes this is not appropriate.

8.44. Parties likely to be affected by minimum standards order would only be afforded the reasonable opportunity to make written submissions but not to file evidence in support of their submissions.[88] ACCI believes this is also inadequate.

8.45. Additionally, ACCI is concerned that the FWC is not required to consult peak councils in relation to the setting of minimum standards orders.

Industrial Action for Regulated Workers

8.46. The Bill provides for a new definition of industrial action for regulated workers in proposed section 19A.

[86] Bill sch 1 item 249 (proposed s 536JP).
[87] Bill sch 1 item 249 (proposed s 536KC(1)).
[88] Bill sch 1 item 249 (proposed s 536KC(1)).

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8.47. In ACCI's view, the extension of the definition of industrial action to regulated workers creates a significant level of uncertainty as to what other existing provisions in the FW Act could also apply to regulated workers and businesses.

8.48. Through these new provisions, it is likely that employee organisations will use the threat of industrial action to pressure employers in relation to minimum standards orders and collective agreements.

ACCI POSITION

8.49. ACCI opposes these changes.

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9 Employee-Like

OVERVIEW

9.1. Under Schedule 1 Part 16 of the Bill, a new jurisdiction in the FWC would be established.

9.2. The FWC would be given new powers that affect "employee-like" workers who are engaged through "digital labour platforms".

9.3. The FWC would have the power to:

- make minimum standard orders affecting pay and conditions for employee-like workers; [89]
- make minimum standard guidelines for employee-like workers;[90]
- register collective agreements between employee-like workers and digital platforms;[91]
- provide remedies for unfair deactivation of employee-like workers on digital platforms;[92] and
- deal with disputes between employee-like workers and digital platforms.

CONSEQUENCES

Scope

9.4. The most significant risk is the broad range of independent contracting arrangements which may be caught up in this new jurisdiction. The Bill provides that an "employee-like" worker is a worker who performs work through a "digital labour platform".[93]

9.5. The Explanatory Memorandum claims that workers such as tradespersons would not be affected by the changes.[94] This is not the case. The Explanatory Memorandum would also have no effect in aiding tradespersons to avoid being captured by the new orders.

9.6. The reality is that a significant number of independent contractors advertise their services through "digital labour platforms". This number will only grow as technology advances.

9.7. Most traditional tradespeople don't advertise their services through the white pages anymore. They use apps and websites like "Hipages", "OneFlare" and "AirTasker" (just to name a few).

9.8. Similarly, professionals may use "Expert360" and "Freelancer.com", tutors and sporting coaches may use platforms such as "Learnmate", "Playbook Coach" and "Superprof" and pet sitters and walkers may use platforms such as "Mad Paws" and "Pawshake".

9.9. The manner in which digital labour platforms are defined in the legislation, set out in section 15L, are very broad. Specifically, subsection 15L(1)(b) emphasises the importance of the system making aggregated payments to workers. This will capture many gig platforms under this scope.

[89] Bill sch 1 item 249 (proposed s 536JY).
[90] Bill sch 1 item 249 (proposed s 536KR).
[91] Bill sch 1 item 249 (proposed s 536MS).
[92] Bill sch 1 item 249 (proposed s 536LH).
[93] Bill sch 1 item 248 (proposed s 15P).
[94] EM [1087].

9.10. The Bill in this respect will have implications not just for workers such as rideshare drivers but also many additional independent contractors including tradespeople who use technology-enabled services to access the market.

9.11. Despite Government assurances that platforms such as AirTasker would not be captured by this legislation, both horizontal and vertical platforms would be captured.

9.12. Furthermore, the Bill proposes to give the Minister the power the prescribe by regulation new definitions of "digital labour platform" and "digital platform work".[95] This is unjustified and exceeds appropriate ministerial authority.

9.13. Furthermore, the test for determining whether a worker is employee-like is too broad. A worker must only meet one of the requirements set out in subsection 15P(1)(e).

9.14. ACCI is concerned that an employee-like worker only has to meet one of the test requirements listed below to be deemed employee-like:

- low bargaining power; or
- receive remuneration at or below the rate of an employee performing comparable work; or
- have a low degree of authority over the performance of the work.[96]

9.15. It could mean that independent contractors could be determined to be employee-like because they have low bargaining power even though they may retain a significant degree of authority in the performance of their work.

Minimum Standards Far Too Broad

9.16. The FWC would have discretion to consider a variety of different standards, including standards not explicitly included or excluded in sections 536KL and 536KM.

9.17. Each new standard would impose additional costs on platform companies and would hinder the contractor's ability to set their own minimum standards (as entire classes of worker would be bound by an order, regardless of individual preferences).

9.18. While rideshare and food delivery companies support a light-touch and sensible set of minimum standards they do not support providing the FWC with broad discretion to set an unknown number of different standards.

9.19. The effect of section 536KL is that the FWC may consider any additional terms so long as they are not mentioned in the list of excluded terms in section 536KM.

9.20. There are many contested terms in this space. For instance, platforms would argue that "penalty rates" are an employment entitlement and not appropriate for a contractor, while unions would argue that they should be included as a minimum standard.

9.21. The powers of the FWC are too broad and the FWC is granted far too much scope to consider various terms.

[95] Bill sch 1 item 248 (proposed s 15L); Bill sch 1 item 248 (proposed s 15N).
[96] Bill sch 1 item 248 (proposed s 15P(1)(e)(i) to (iv)).

9.22. The lack of an exhaustive and minimalist set of standards in this legislation could fundamentally shift the commercial positions of gig businesses, leading to consumers bearing significant costs.

9.23. Additionally, the FWC is not explicitly discouraged from making minimum standard orders that would have adverse outcomes for consumers, including by leading to significant cost increases.

9.24. The Bill does not currently require the FWC to consider the impact of consumers under the minimum standards objective when making minimum standard orders.

Unfair Deactivation and Remedies

9.25. The Bill proposes to make a circumstance in which "the person is no longer able to perform work" as constituting deactivation.[97]

9.26. This is plainly at odds with the true meaning of deactivation, which is when a digital platform takes actions to prevent a worker from accessing or performing work through the platform.

9.27. The inability of a worker to perform work could result from any of innumerable causes, many of which would be completely out of the platform's control. For example, an injury which prevents a worker from driving should not constitute "deactivation".

9.28. The Bill also proposes to empower the FWC to order lost pay in response to deactivation.[98]

9.29. This is contrary to the Minister's commitment to not allow for compensation under the unfair deactivation regime.

9.30. Additionally, allowing the FWC to order lost pay could result in the unfair deactivation jurisdiction being inappropriately utilised by lawyers for profit-making endeavours by running claims on a condition of receiving a portion of compensatory lost pay.

9.31. Employee-like workers may make an unfair deactivation claim if they have been performing work with or through the digital platform for at least 6 months. Meanwhile, road transport workers may only make an unfair termination claim after having worked for over 12 months with the principal[99]

9.32. It is unclear on what basis the Government has deprived digital platforms of the additional 6 months afforded to road transport businesses before a worker is eligible to make an unfair deactivation claim.

Consultation in the Making of Minimum Standards Orders

9.33. ACCI is concerned with several deficiencies in the consultation process for the setting of minimum standards orders as currently drafted.

9.34. The Bill does not expressly require the FWC to consult affected parties, only that they be given reasonable opportunity to make submissions.[100]

9.35. ACCI believes this is not appropriate.

[97] Bill sch 1 item 249 (proposed s 536LG).
[98] Bill sch 1 item 249 (proposed s 536LQ(3)).
[99] Bill sch 1 item 249 (proposed s 536LD(c)); Bill sch 1 item 249 (proposed s 536LE(c)).
[100] Bill sch 1 item 249 (proposed s 536KC(1)).

9.36. Parties likely to be affected by minimum standards order would only be afforded the reasonable opportunity to make written submissions but not to file evidence in support of their submissions.[101] ACCI believes this is also inadequate.

9.37. Additionally, ACCI is concerned that the FWC is not required to consult peak councils in relation to the setting of minimum standards orders.

Industrial Action for Regulated Workers

9.38. The Bill provides for a new definition of industrial action for regulated workers in proposed section 19A.

9.39. In ACCI's view, the extension of the definition of industrial action to regulated workers creates a significant level of uncertainty as to what other existing provisions in the FW Act could also apply to regulated workers and businesses.

9.40. Through these new provisions, it is likely that employee organisations will use the threat of industrial action to pressure employers in relation to minimum standards orders and collective agreements.

ACCI POSITION

9.41. ACCI opposes these changes.

[101] Bill sch 1 item 249 (proposed s 536KC(1)).

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10 Unfair Contracts

OVERVIEW

10.1. The FWC would be given new powers to make orders in relation to unfair contract terms in independent contracting arrangements.

10.2. The FWC would be able to, in relation to an unfair contract term, either:

- set aside all or part of the contract which relates to workplace relations matters; or
- amend all or part of the contract which relates to workplace relations matters.[102]

10.3. There would be no definition for as to what constitutes an "unfair contract term". The FWC would be left with discretion over what constitutes "unfair".[103]

10.4. However, the FWC may take into account various matters prescribed in the legislation.[104]

CONSEQUENCES

New Discretionary Powers for the FWC

10.5. The FWC would receive new powers in relation to unfair contract terms of services contracts, commencing 1 July 2024. It would be open to a party to a services contract, or an industrial organisation entitled to represent the party's interests to make an application to the FWC.[105] In order to make a determination the FWC would be able to hold conferences and hearings in relation to an application.[106]

10.6. This jurisdiction would only be available to those independent contractors earning below a contractor high-income threshold.[107] The high income threshold would be set by the Minister for Employment and Workplace Relations. An application for an unfair contract term to be assessed by the FWC may only be made in cases where the sum of the person's annual rate of earnings is less than the contractor high income threshold.

10.7. The remedies of the FWC do not include compensation, but the FWC would be able to set aside, void, amend or vary services contracts of contractors when they are deemed unfair.[108]

10.8. In determining whether a contract term is unfair, the FWC would have broad discretion bestowed to them. The FWC may take into account:

- any significant imbalance between the rights and obligations of the parties;
- whether the contract term is reasonably necessary to protect the legitimate interests of a party to the contract;
- whether the contract term imposes a harsh, unjust or unreasonable requirement on a party to the contract;

[102] Bill sch 1 item 249 (proposed s 536NC).
[103] Bill sch 1 item 249 (proposed s 536NB).
[104] Bill sch 1 item 249 (proposed s 536NB(1)(a)-(f)).
[105] Bill sch 1 item 249 (proposed s 536ND).
[106] Bill sch 1 item 249 (proposed s 536NB).
[107] Bill sch 1 item 249 (proposed s 536ND).
[108] Bill sch 1 item 249 (proposed s 536NC).

- whether the services contract as a whole provides total remuneration for performing work less than that earned by employees or regulated workers under a Minimum Standards Order or Minimum Standards Guideline; and
- any other matter the FWC considers relevant.[109]

FWC Discretion

10.9. Under the proposed law, the FWC must consider the criteria listed in section 536NB.

10.10. It is likely the FWC would balance these criteria against one another, but it is not entirely clear how each of these considerations would be weighted.

10.11. Furthermore, section 536NB is filled with terms which would require interpretation and may result in differing judicial perspectives.

10.12. Terms such as whether a contract imposes a harsh, unjust or unreasonable requirement could be interpreted differently from case to case as none of those terms are defined on the face of the legislation.

10.13. This could create significant uncertainty and may lead to businesses being less likely to engage independent contractors,

Repealed Considerations

10.14. Some of the proposed considerations to which the FWC would be permitted to have regard when deciding if a term of a services contract is unfair replicate the considerations which currently exist in the *Independent Contractors Act 2006* (Cth).

10.15. However, some considerations have not been replicated. The courts may find that this indicates a legislative intention that these considerations should not be given as much weight. There is no basis for this. They are important indicia which should be considered.

10.16. First, "whether any undue influence or pressure was exerted on, or any unfair tactics were used against, a party to the contract"[110] has not been replicated as a consideration under the Bill. Both principals and independent contractors should be protected from undue influence or unfair tactics.

10.17. Second, the proposed consideration of "the relative strengths of the bargaining positions of the parties to the contract" does not extend to that of "any persons acting on behalf of the parties". This overlooks the fact that a party may appear to have weak bargaining power when considered in isolation, however, during the negotiation for the contract, they may be represented by a party with strong bargaining power (eg a large trade union).

Benefits of Independent Contracting

10.18. The consideration of whether a contract provides for a total remuneration for performing work that is less than employees performing the same work disregards the many other factors that may compensate independent contractors for lower remuneration, such as more flexibility or certain non-monetary benefits.

10.19. An independent contractor may, for example, accept lower remuneration in exchange for retaining the ability to set their own hours.

[109] Bill sch 1 item 249 (proposed s 536NB).
[110] *Independent Contactors Act 2006* (Cth) s 15.

10.20. These changes, however, may discourage businesses from negotiating such terms for independent contractors due to the new unfair contract regime.

Freedom of Contract

10.21. Under the unfair contract terms of service provisions, in section 536ND a party to a services contract may apply to the FWC for a remedy in the form of amendment, variation, setting aside of and the voiding of contracts entered into.

10.22. These laws could abrogate parties' freedom of contract by allowing a tribunal to set aside or amend contractual terms that were freely entered into.

10.23. The FWC would have the power to vary or amend a contract without a party to the contract consenting to the terms of the agreement.[111] This could result in certain businesses or independent contractors being some of the only persons in Australia privy to contracts with terms to which they did not agree.

ACCI POSITION

10.24. ACCI opposes these changes.

[111] Bill sch 1 item 249 (proposed s 536NB).

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11 Transitioning from Multi-Enterprise Agreements

OVERVIEW

11.1. Schedule 1 Part 4 of the Bill proposes to make various technical amendments to the multi-enterprise bargaining laws that were passed in November 2022.

11.2. These changes would assist employers and employees transitioning out of the multi-enterprise streams back into the single enterprise bargaining stream by amending the FW Act to allow a single-enterprise agreement to replace a single interest employer agreement or supported bargaining agreement (as the case may be) that has not passed its nominal expiry date.

CONSEQUENCES

Transitions

11.3. The Bill proposes to make various technical amendments to the multi-enterprise bargaining laws that were passed in November 2022.

11.4. These changes would assist employers and employees transitioning out of the multi-enterprise streams back into the single enterprise bargaining stream by amending the FW Act to allow a single-enterprise agreement to replace a single interest employer agreement or supported bargaining agreement (as the case may be) that has not passed its nominal expiry date.[112]

11.5. The changes would also clarify that when a single enterprise agreement that covers an employee comes into operation, any single interest employer agreement or supported bargaining agreement applying to them ceases to do so.[113]

11.6. The changes would also allow parties covered by an in-term (i.e., not yet expired) single interest employer agreement or supported bargaining agreement to bargain for a single enterprise agreement if the employee organisations covered by the agreement consent, or a voting request order permits them.[114]

11.7. Where an old agreement applies to at least one of the employees who is covered by the new agreement, new section 180B would require an employer to have received the written agreement of all employee organisations to which the old agreement applies before asking employees to vote to approve the new agreement.

11.8. The intent of these changes is positive for businesses because they are aimed at allowing employers and employees to leave the multi-enterprise bargaining system. Employers and employees should have the option of bargaining for a single enterprise agreement, which is the preferable avenue of bargaining for most businesses.

11.9. However, the form of the changes as presented in the Bill has two key deficiencies: the requirement for union consent; and the application of the Better Off Overall Test.

Union Consent

[112] Bill, Explanatory Memorandum, pg 82.
[113] Bill sch 1 item 34.
[114] Bill sch 1 item 34.

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11.10. An employer would require the consent of the union before being able to transition their employees to a single enterprise agreement. The proposed section 180B requires an employer to have received the written agreement of all employee organisations to which the old agreement applies before asking employees to vote to approve the new agreement.

BOOT Changes

11.11. The "Better Off Overall Test" ("BOOT") would be amended. The changes would mean that if parties wish to bargain for a single enterprise agreement to leave a multi-enterprise agreement, each employee covered by the new single enterprise agreement must be "better off overall" than under the multi-enterprise agreement, rather than just under the relevant modern award. These changes would also apply to the reconsideration of whether an agreement passed the BOOT.[115]

11.12. New paragraph 193(1)(b) would modify the operation of the BOOT in the circumstance where an application has been made for approval of a single-enterprise agreement (new agreement) which covers at least one employee to whom a single interest employer agreement or supported bargaining agreement (each of which is an old agreement) applies. It would require the new agreement to be assessed against the old agreement rather than relevant modern award, for each employee to whom the old agreement applies.

11.13. Other similar amendments apply to voting request orders and scope orders.

ACCI POSITION

11.14. The changes to the BOOT are inappropriate because this gives multi-enterprise agreements special treatment over single enterprise agreements, despite the latter being preferred by the FW Act.[116]

11.15. When bargaining for a single enterprise agreement to replace another single enterprise agreement that has expired, the new agreement only needs to ensure that the employees are better off overall relative to the modern award, whereas these changes would mean that any existent multi-enterprise agreement becomes the new benchmark.[117]

11.16. The multi-enterprise bargaining laws were introduced last year with undertakings that such agreements were not intended to create a new level of awards, however, these changes to the BOOT partly vindicate that concern.

11.17. In practice, the impact of this requirement will mean that the avenue of transitioning off multi-enterprise agreements will not be used. An employer is disincentivized from transitioning off these instruments because of the higher threshold that must be met.

11.18. Furthermore, by forcing businesses and their employees to have the consent of unions before transitioning from a multi-enterprise agreement, the Government is discouraging the uptake of these provisions.

11.19. This is unnecessary and unjustified. If the employer and a majority of employees support transitioning to a new agreement, the opinion of a trade union should not be given consideration.

[115] Bill sch 1 item 42 (proposed s 193(1)(b)).
[116] Fair Work Act 2009 (Cth) ss 3(f), 171.
[117] Bill sch 1 item 42.

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12 Civil Penalties

OVERVIEW

12.1. Schedule 1 Part 11 of the Bill proposes to increase the penalties for civil contraventions of the FW Act fivefold from $18,780 for contraventions and $187,800 for serious contraventions to $93,900 for contraventions and $939,000 for serious contraventions.[118]

12.2. A body corporate would face a new maximum penalty of 1500 penalty units ($469,500) and for a serious contravention 15,000 penalty units ($4,695,000).[119]

12.3. The Bill proposes to replace the requirement of knowledge for serious contraventions with a requirement of recklessness, which would be defined as:

- the person was aware of a substantial risk that the contravention would occur; and
- having regard to the circumstances known to the person, it was unjustifiable to take the risk.[120]

CONSEQUENCES

Recklessness

12.4. The Bill proposes to retain the requirement that the person must have "knowingly" committed the contraventions while introducing a requirement that the person "recklessly" committed the contraventions.[121]

12.5. The Bill would also define this new threshold of recklessness as:

- the person was aware of a substantial risk that the contravention would occur; and
- having regard to the circumstances known to the person, it was unjustifiable to take the risk.[122]

12.6. The new maximum penalties for contraventions and serious contraventions would apply to a contravention of:

- the National Employment Standards;
- a term of a modern award;
- a term of an enterprise agreement;
- a term of a workplace determination;
- a term of a national minimum wage order;
- a term of an equal remuneration order;
- certain terms and conditions of employment provided by statute;
- the prohibition on requiring prospective employees to make unreasonable payments;

[118] Bill sch 1 pt 11.
[119] Bill sch 1 pt 11.
[120] Bill sch 1 item 148 (proposed s 557A(2)).
[121] Bill sch 1 item 148 (proposed s 557A(2)).
[122] Bill sch 1 item 148 (proposed subsection 557A(2))

- the employee records and pay slips requirements;[123]

12.7. The new maximum penalties for contraventions would also apply to other contraventions including of the following:

- the prohibition advertisements offering unlawful pay rates;
- the prohibition on franchisors failing to take reasonable steps to prevent franchisees from committing reasonably foreseeable contraventions; and
- the requirement to comply with Fair Work Inspectors' orders to produce records and documents.[124]

12.8. There are key terms in the definition (replicated elsewhere in Commonwealth legislation) that make the interpretation of reckless variable.

12.9. Firstly, substantial risk. To say that a risk was substantial, it is necessary to adopt the standpoint of a reasonable observer at the time of the allegedly reckless conduct, before the outcome was known. The risk is substantial if a reasonable observer would have taken it to be substantial at the time the risk was taken. The standard is obviously vague. It also involves significant conceptual problems.[125]

12.10. Secondly, the term requires proof that the person was aware of the risk. The definition of recklessness appears to have been intended to require proof of conscious awareness of risk of a particular result or circumstance. To be aware of a risk is to be conscious of it and, in the absence of consciousness of risk, the case is one of negligence at most. This will create difficulties and wildly different outcomes depending on perspectives.[126]

Impact on Small Business

12.11. The size of the proposed penalties should be considered alongside the capacity of small businesses to pay them. Only very few small businesses will be capable of paying $93,900 for a non-serious contravention of the FW Act.

No Reduction in Complexity

12.12. The proposed increases to civil penalties are not accompanied by any proposed remedies for the frequent cause of contraventions: the overwhelming complexity of the FW Act and industrial instruments. Strengthening purported deterrence mechanisms will achieve nothing for businesses who are already endeavouring to comply with their obligations in good faith yet are impeded by regulatory burden.

12.13. Ithough this part of the legislation increases deterrence mechanisms for genuinely bad actors it does not reduce the complexity in the Act which is associated with many contraventions.

ACCI POSITION

Penalties Recently Increased

[123] Bill sch 1 Pt 11.
[124] Ibid.
[125] Commonwealth Criminal Code: Guide for practitioners, Attorney-General's Department.
[126] Ibid.

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12.14. From 1 January 2023 the value of a penalty unit has increased from $225 to $275, thereby significantly increasing the monetary amount of the FW Act's civil contravention penalties from $66,000 to $82,500 for a body corporate and from $666,000 to $825,000 for a serious contravention.[127]

12.15. And then again effective 1 July 2023, the value of a penalty unit increased from $275 to $313, increasing the FW Act's civil contravention penalties to $93,900 for a body corporate and to $939,000 for a serious contravention.[128]

12.16. This represents a 40% increase to the quantum of FW Act penalties in a period of less than 12 months.

Unaddressed Systemic Problems

12.17. There is no evidence that increasing the size of these penalties will improve compliance with workplace obligations.

12.18. Employers are generally trying to do the right thing to comply with the incredible complexity of the workplace relations system, which this proposed legislation does nothing to remedy.

12.19. ACCI is concerned that penalties would be increased at the same time the Government is adding more layers of significant complexity to Australia's workplace relations system. Many small businesses would not be able to afford such a penalty for an accidental underpayment.

12.20. ACCI calls on the Government to fix the systemic issues associated with many contraventions – the incredible complexity of the system and the legislation.

[127] Fines and Penalties, Web Page, ASIC.
[128] Fines and Penalties, Web Page, ACCC.

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13 Withdrawals from Amalgamations

OVERVIEW

13.1. The purpose of Schedule 1 Part 13 is to repeal amendments made by the Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Act 2020, relating to the withdrawal of parts of amalgamated organisations (de-merger).

13.2. These were changes that occurred under the previous Coalition Government, which enabled constituent parts of registered organisations that have amalgamated with other organisations to withdraw from the amalgamated organisation outside the previously time-limited period of five years post-amalgamation, in specified circumstances.

CONSEQUENCES

13.3. The legislation proposes to repeal provisions of the Registered Organisations Act that enable applications for a de-merger ballot to the FWC (to initiate a de-merger process) to be made more than five years after the relevant amalgamation (RO Act, section 94A).

13.4. The Bill also proposes to repeal paragraph (c) of the definition of 'separately identifiable constituent part' to restore certainty about the part(s) of an organisation that may be subject to a de-merger ballot.

13.5. The measure would effectively restore the old arrangements for de-amalgamations, which provide a reasonable opportunity for members of a constituent part of an amalgamated organisation with a connection to a previously de-registered organisation to de-merge within a period of two to five years after the relevant amalgamation occurred.

13.6. The measure would also not preclude members from forming, joining or seeking the registration of trade unions and employer organisations subject to the requirements of the Registered Organisations Act and the rules of those organisations.

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14 Wage Theft

OVERVIEW

14.1. Schedule 1 Part 14 of the Bill proposes to introduce a criminal offence for wage theft at the federal level.

14.2. The new offence would hold employers criminally liable for intentionally underpaying employees.[129]

14.3. However, this would also capture businesses who make a payment late whilst knowing that the late payment would occur.[130]

14.4. The offence would be prosecutable by the Commonwealth Department of Public Prosecutions (CDPP) or the Australian Federal Police (AFP).[131]

14.5. The maximum penalties for the offence would be 10 years imprisonment or the greater of 3 times the amount of the underpayment and $1,565,000 ($7,825,000 for body corporates), or both.[132]

CONSEQUENCES

Fault Element and Timing Issue

14.6. ACCI acknowledges the restriction of the fault element of the new criminal offence to intention, as ACCI has called for throughout the consultation process.

14.7. The criminal offence would only truly apply to "wage theft" if it involves intentional behaviour.

14.8. However, another element of theft offences, in addition to intention (or "dishonesty"), is that the defendant intended to *permanently deprive* the complainant of their property. This has not been replicated in the proposed "wage theft" offence. Instead, under the Bill, employers could be criminally prosecuted for *delayed* payments of wages.

14.9. The Bill defines an underpayment as conduct that "results in a failure to pay the required amount to, on behalf of, or for the benefit of, the employee in full *on or before the day when the required amount is due for payment*."[133]

14.10. This may have severe consequences for businesses. There are genuine reasons that may lead to payments of wages being made after they are due.

14.11. First, the day that the required amount is due for payment may be determined by the relevant industrial instrument (e.g., an enterprise agreement).

14.12. If, for example, an industrial instrument specifies that wages must be paid by the first Tuesday of the month, but an employer is informed by their bank that they are facing issues processing payments, the employer could face criminal penalties for paying wages on the following days during the week.

[129] Bill sch 1 item 220 (proposed s 327A).
[130] Bill sch 1 item 220 (proposed s 327A(1)(d)).
[131] Bill sch 1 item 220 (proposed s 327C).
[132] Bill sch 1 item 220 (proposed s 327A(5)).
[133] Bill sch 1 item 220 (proposed s 327A) (emphasis added).

14.13. This is because the employer would have engaged in conduct that "results in a failure to pay the required amount to, on behalf of, or for the benefit of, the employee in full on or before the day when the required amount is due for payment" and the employer possessed the requisite intention.

14.14. The same could apply where a payroll system is down, or where an employer is facing temporary liquidity issues. This conduct should clearly not be criminalised.

14.15. Second, many employers rely on what are known as "annualised salary arrangements". These arrangements involve the payment of wages above the minimum amounts in a modern award to such an extent that other award obligations, such as requirements to pay overtime, are considered to be "set off".

14.16. For example, rather than paying an employee overtime and meal allowances under a specific award, an employer may offer to simply pay an employee 25% above the award minimum rates. Under these arrangements, the parties may agree for the employee to be paid on a monthly basis, rather than a fortnightly basis as required by the relevant award.

14.17. However, it is possible that these arrangements create criminal liability for the employer. If the employer knows that the award requires the employee to be paid fortnightly and deliberately does not do so pursuant to the agreement with the employee, the offence may apply.

Small Business Wage Compliance Code

14.18. The Bill proposes to give the Minister for Employment and Workplace Relations the power to declare a "voluntary small business wage compliance code" by legislative instrument.[134]

14.19. It is expected that the code would provide guidance for small business on how to comply with wage obligations under industrial instruments.

14.20. The effect of the voluntary small business wage compliance code is that if the Fair Work Ombudsman is satisfied that a small business has complied with the code but has still underpaid an employee, it would be prevented from referring the small business to the Commonwealth Director of Public Prosecutions or the Australian Federal Police.[135]

14.21. This means that small business may be able to avoid the cost and burden of defending themselves in court by complying with guidance endorsed by the government.

14.22. The voluntary small business wage compliance code may assist small businesses by relieving them of the costs of defending criminal charges in court.

14.23. However, the Minister is not obligated to introduce this code under the legislation and small businesses may still be subjected to significant costs in defending against civil liability.[136]

14.24. ACCI is highly concerned that this is not a mandatory requirement on behalf of the Minister.

14.25. Additionally, the extent to which the voluntary small business wage compliance code will actually be utilised may be limited. This is because compliance with the code only assists small businesses in avoiding criminal prosecution. It does not allow them to avoid civil prosecution. The Bill also proposes to significantly increase the penalties for civil contraventions.

[134] Bill sch 1 item 220 (proposed s 327B).
[135] Bill sch 1 item 220 (proposed s 327B(2)(a)-(b)).
[136] Bill sch 1 item 220 (proposed s 327B(1)).

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Termination of Cooperation Agreements

14.26. The Bill proposes to give the Fair Work Ombudsman the ability to enter into "cooperation agreements" with a person they suspect of possibly committing the wage theft offence or a related offence provision.[137]

14.27. Once a cooperation agreement is in place, the Fair Work Ombudsman would be prevented from referring the conduct to the Commonwealth Director of Public Prosecutions or the Australian Federal Police for prosecution.[138]

14.28. When deciding whether to enter into a cooperation agreement with an employer, the Fair Work Ombudsman must have regard to:[139]

- whether the person has made a voluntary, frank and complete disclosure of conduct and the nature and level of detail of the disclosure;
- whether the person is cooperating;
- an assessment of the person's commitment to continued cooperation;
- the nature and gravity of the conduct;
- the circumstances in which the conduct occurred;
- the person's history of industrial compliance; and
- any other matters prescribed by the regulation.

14.29. A cooperation agreement would remain in force from the time it was entered into until the Fair Work Ombudsman terminates it, the person withdraws from it, or it reaches its expiry date.[140]

14.30. The FWO has the ability to unilaterally terminate a cooperation agreement with an employer suspected of a wage underpayment if:[141]

- the person has contravened a term of the agreement;
- the person has, in relation to the agreement, given information or produced a document to the Fair Work Ombudsman, an inspector, or a person referred to in 33 subsection 712AA(2) that:
- (i) is false or misleading; or
- (ii) for information—omits any matter or thing without which the information is misleading;
- whether the person gave the information or produced the document before the agreement was entered into or since; or
- any other ground prescribed by the regulations.

14.31. The effect of this provision is that an employer must hand over all relevant information to the FWO, otherwise they risk omitting a matter without which the information is misleading.

[137] Bill sch 1 item 231 (proposed s 717B(1)).
[138] Bill sch 1 item 231 (proposed s 717A(1)).
[139] Bill sch 1 item 231 (proposed s 717B(2)).
[140] Bill sch 1 item 231 (proposed s 717C).
[141] Bill sch 1 item 231 (proposed s 717D).

14.32. This creates a significant administrative burden for employers seeking to comply with a cooperation agreement and could create a high risk of unintentional non-compliance.

14.33. Furthermore, ACCI is concerned that the FWO may be able to terminate a cooperation agreement unilaterally if an employer does not provide all relevant information and documentation.

14.34. If an employer provides information that "omits any matter or thing without which the information is misleading" the cooperation agreement may be terminated, and they can be referred to the CDPP or the AFP for criminal investigation.

14.35. Providing all relevant documentation could amount to a very significant administrative burden and also creates the possibility that businesses may unintentionally not comply due to the breadth of information that may be required.

14.36. In ACCI's view the operation of proposed section 717D(1)(b)(ii) means that a cooperation agreement could be terminated if a business provides information or documents that are false or even in circumstances where they fail by accident or otherwise to provide relevant information.

Provisions Do Not Override State and Territory Laws

14.37. ACCI is highly concerned that the Commonwealth's new wage theft laws, under these changes, would not override State and Territory laws.

14.38. Employers already face severe challenges managing complex workplace obligations to avoid underpayments – the creation of dual offences in different jurisdictions for largely the same conduct creates needlessly burdensome complications.

ACCI POSITION

14.39. We acknowledge the Government's decision to limit the wage theft criminal conduct to intentional conduct, however, there remain many very serious concerns about the operation of these provisions.

14.40. In particular, the proposed offence should not apply to delayed payments of wages. This aspect of the offence is inconsistent with ordinary theft offences and the conduct it would cover does not warrant criminalisation.

Australian Chamber of Commerce and Industry

15 Small Business Redundancy Exemption

OVERVIEW

15.1. Schedule 1 Part 2 of the Bill would amend section 121 of the FW Act to address an anomaly arising under paragraph 121(1)(b), commonly referred to as the 'small business redundancy exemption'. It only applies to employees of employers that are bankrupt or in liquidation due to insolvency. It does not affect ongoing, solvent businesses.

CONSEQUENCES

15.2. This covers the situation when a larger employer incrementally downsizes due to insolvency, either in the period leading up to liquidation or bankruptcy, or afterwards, and the number of employees falls below the 15-employee threshold for the small business definition, causing some employees to lose their previous entitlement to redundancy pay under section 119 of the NES.

15.3. This may occur, for example, where an insolvency practitioner makes most of the employees of a company redundant upon their appointment but retains the bookkeeping and payroll staff – fewer than 15 employees in total – to assist with the orderly wind up of the business. At present, the majority of employees would receive their redundancy entitlements. However, the employees kept on to finalise the winding up would not because the employer would then come within the small business redundancy exemption.

15.4. The amendments would provide an exception to the operation of the small business redundancy exemption in such downsizing contexts, thus preserving an employee's redundancy pay entitlement in a range of scenarios in which the employer may have become a small business employer due to insolvency. This ensures an employee's legal entitlement to redundancy pay is not taken away based on when they were made redundant.

ACCI POSITION

15.5. ACCI supports these provisions.

15.6. These are sensible changes which protect the entitlements of employees in companies which are downsizing due to insolvency.

Australian Chamber of Commerce and Industry

16 Franchisees

OVERVIEW

Pre-SJBP Act

16.1. Prior to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (**SJBP Act**), franchisees were able to bargain together under the single interest employer stream for a multi-enterprise agreement with significant ease.

16.2. Under the old single interest employer stream, the FWC was obligated to grant a single interest employer authorisation in respect of franchisees if an application was made in respect of franchisees and the FWC was satisfied that the employers had, uncoerced, agreed to bargain together.

Post-SJBP Act

16.3. Following the SJBP Act, franchisees wishing to bargain together under the single interest employer stream must now satisfy the FWC of new requirements which have been introduced because of its expanded scope, including:

- that some of the employees will be represented by an employee organisation;[142] and
- that bargaining representatives have had the opportunity to express their views to the FWC.[143]

Proposed Changes

16.4. The Bill proposes to provide franchisees with the option of bargaining together for a single-enterprise agreement as "related employers" instead of bargaining for a single interest employer agreement.

CONSEQUENCES

16.5. This new option for bargaining may be attractive to franchisees because it would relieve the franchisee employers of the burden of:

- needing to apply to the FWC to obtain a single interest employer authorisation; and
- needing to satisfy the FWC of the new requirements for the granting of a single interest employer authorisation.

16.6. The Bill would achieve this by simply expanding the definition of "related employers" (presently including only joint ventures, common enterprises, and related bodies corporate) to also include:[144]

- franchisees of the same franchisor;
- related bodies corporate of the same franchisor; or
- any combination of the above.

[142] FW Act s 249(1)(b)(i).
[143] FW Act s 249(1)(b)(ii)
[144] Bill sch 1 item 31.

16.7. The Bill would then make two consequential amendments to the eligibility rules for the making of multi-enterprise agreements to ensure that option (bargaining for a single interest employer authorisation) remains open to franchisees.[145]

ACCI POSITION

16.8. ACCI supports these changes.

16.9. These are appropriate changes that would make the enterprise bargaining process easier for franchisee employers and provide them with more options.

[145] Bill sch 1 items 29-30.

Australian Chamber of Commerce and Industry

17 Model Terms

OVERVIEW

17.1. Currently, a model flexibility term and a model dispute resolution term for enterprise agreements is prescribed by regulation of the Minister.[146]

17.2. The model flexibility term prescribes the method of entering into an individual flexibility arrangement, which allows an employer and employee to agree to vary the terms of an enterprise agreement to suit the particular needs of that employee.

17.3. The model dispute resolution term prescribes the method of how employers and employees covered by an enterprise agreement should deal with workplace disputes.

17.4. Schedule 1 Part 5 of the Bill proposes to replace the model terms prescribed by regulation with a new power for the FWC to design new model terms.[147]

CONSEQUENCES

17.5. This would improve the process of designing the model terms by allowing parties and peak bodies to make submissions to the FWC on how the terms should be designed.

17.6. The design of terms by the FWC would need to take into account:[148]

- whether the term is consistent with comparable terms in awards;
- best practice workplace relations as determined by the FWC;
- if all persons or bodies have had a reasonable opportunity to be heard or to make submission to the FWC;
- the objects of the FW Act and the enterprise bargaining system; and
- any other relevant matters.

17.7. The model terms would need to be designed by a full bench of the FWC.

ACCI POSITION

17.8. ACCI supports this aspect of the legislation.

17.9. The FWC is better equipped to design model terms for enterprise agreements than the Minister for Employment and Workplace Relations. The FWC's design of the model terms can be guided by input from peak councils and affected parties in a formal process.

17.10. Additionally, the model terms designed by the FWC can be more easily revisited at a later stage if they are considered to be not fulfilling their intended purpose.

17.11. The existing model flexibility term is rarely being utilised, which makes a redesign of the term appropriate.

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[146] *Fair Work Regulations 2009* (Cth) schs 2.2 and 6.1.
[147] Bill sch 1 item 61.
[148] Bill sch 1 item 61.

Australian Chamber of Commerce and Industry

18 Discrimination

OVERVIEW

18.1. In addition to anti-discrimination legislation at both the state and federal levels, the FW Act provides various protections from discrimination in relation to employment.

18.2. Schedule 1 Part 8 of the Bill proposes to introduce a new attribute which would be included under these protections, which is whether a person has been subjected to family and domestic violence.

18.3. It is anticipated that this protected attribute would apply not only to employees presently experiencing family and domestic violence but also extend to those who have experienced it in the past.

CONSEQUENCES

Adverse Action

18.4. The most significant anti-discrimination protection in the FW Act is the protection under the "general protections" regime which prevents employers taking "adverse action" against an employee on the basis of a protected attribute.

18.5. Under the Bill, the general protections regime would be extended to prevent employers from taking "adverse action" against an employee because of "subjection to family and domestic violence".

18.6. Adverse action means conduct by the employer that involves:[149]

- dismissing the employee;
- injuring the employee in their employment (such as standing the employee down);
- altering the position of the employee to their detriment (such as altering the employee's roster or reducing their level of responsibility); or
- discriminating between the employee and another employee.

18.7. Importantly, employers would only be held liable if the adverse action was taken "because of" the employee's subjection to family and domestic violence.

18.8. This means that if any employer takes adverse action against the employee for another reason, such as underperformance, they would not be held liable.

18.9. However, the employee's subjection to family and domestic violence would only need to be one of the reasons why the employer took adverse action for them to be held liable.[150]

18.10. There are also two key exemptions to liability for employers:[151]

- if the action taken by the employer was not unlawful under any anti-discrimination law in the jurisdiction where it occurred; and
- if the action was taken because of the inherent requirements of the particular position concerned.

[149] Fair Work Act s 342.
[150] Fair Work Act s 360.
[151] Fair Work Act s 351(2).

18.11. The inherent requirements of a position are the essential features or defining characteristics of the position.[152] This means, for example, that an employer may not be held liable for dismissing an employee who was unable to attend the workplace where it is a requirement of the role.

Termination of Employment

18.12. In addition to the unfair dismissal regime in the FW Act which allows the FWC to remedy dismissals that are "unfair", "unjust" or "unreasonable", the FW Act expressly prohibits the termination of employment on specified grounds.[153]

18.13. One the specified grounds for which termination of employment is expressly prohibited relates to protected attributes.[154]

18.14. Under the Bill, an employee's "subjection to family and domestic violence" would be included as a protected attribute for which termination of employment is expressly prohibited.

18.15. As with the general protections regime, this applies to any termination of employment for which the employee's "subjection to family and domestic violence" was one of the reasons leading to the termination, even if it was not the sole or dominant reason.[155]

18.16. Employers who terminate the employment of employees because of their subjection to family and domestic violence can also face penalties of up to $16,500 (60 penalty units).

Unlawful Terms

18.17. The FW Act prohibits the inclusion of discriminatory terms in both awards and enterprise agreements.

18.18. The Bill proposes to include "subjection to family and domestic violence" as an attribute against which terms in modern awards and enterprise agreements cannot discriminate.

Performance of FWC Functions

18.19. In performing its functions and exercising its powers, the FWC is required to take certain matters into account, such as the objects of the FW Act.[156]

18.20. In addition, the FWC is required to take into account "the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin."[157]

18.21. The Bill proposes to require the FWC to take into account the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of "subjection to family and domestic violence".

ACCI POSITION

18.22. ACCI supports these changes.

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[152] Qantas Airways Ltd v Christie (1998) 193 CLR 280, 285 [35] (Gaudron J, Brennan CJ agreeing at 284 [1]).
[153] Fair Work Act s 772(1).
[154] Fair Work Act s 772(1)(f).
[155] Fair Work Act s 772(1).
[156] Fair Work Act s 578.
[157] Fair Work Act s 578(c).

18.23. These changes are sensible and are unlikely to pose any difficulties for employers behaving appropriately.

18.24. To a large extent, much of the conduct which these changes would prohibit is already unlawful under other anti-discrimination law or elsewhere in the FW Act.

18.25. For instance, the FW Act already prohibits employers taking adverse action against employees who use, do not use, or propose to use their right to family and domestic violence leave. These changes would extend that protection to victims of family and domestic violence where the use of the leave entitlement is not relevant.

Australian Chamber of Commerce and Industry

19 Silica Safety

19.1. The amendments seek to expand the scope of the agency to include coordinating action on silica safety and silica-related diseases. The existing functions and outputs in relation to asbestos are duplicated for silica with the objective of greater coordination between stakeholders including State, Territory and Commonwealth Governments and agencies, and a common purpose articulated through a national strategic plan.

19.2. ACCI supports the amendments in Schedule 2 of the Bill noting the importance of coordinated national action on this matter. We particularly support the research function the agency has, noting that ACCI and our members have long sought targeted research activities around exposure level monitoring of a broad sample of workers in construction and other industries, to establish accurate risk matrices beyond those working regularly with engineered stone. This research should also extend to an assessment of what controls are being reliably implemented and the effectiveness of these.

19.3. ACCI commends ASEA on the work done to date in improving asbestos awareness, national coordination and safety outcomes. We particularly appreciate the ongoing engagement and consultation the agency conducts with industry both through relevant committees and public consultation and surveying. The agency is well-placed to take on the additional functions in relation to silica and we look forward to continuing to work with the agency on these important matters.

Australian Chamber of Commerce and Industry

20 PTSD Compensation

20.1. ACCI does not oppose these amendments, noting other recent jurisdictional activity on presumptive provisions and the evidence behind this.

Australian Chamber of Commerce and Industry

21 Other WHS Measures

21.1. **Schedule 4—Amendment of the Work Health and Safety Act 2011,** ACCI does not oppose these amendments noting that they are amendments to adopt several Model WHS Act provisions agreed through the Safe Work Australia (SWA) process. As ACCI is a SWA Member we were involved in the development of the model provisions and so note that the appropriate consultation took place on these as well as additional consultation with Commonwealth representatives.

21.2. For Part 1 and 6 however, we would note our disappointment in the Commonwealth's deviation away from the agreed model provisions and a harmonised approach to the WHS laws across jurisdictions.

21.3. At the February 2023 meeting of WHS Ministers, Ministers agreed to introduce new model industrial manslaughter provisions in the model WHS Act. The agreed maximum jail term was 20 years' imprisonment for an individual. The Commonwealth in this Bill has proposed 25 years.

21.4. Similarly, the tiered maximum monetary penalty amounts for a Category 1 offence as agreed by SWA Members and approved by WHS Ministers (contained within the Model Work Health and Safety Legislation Amendment (Offences and Penalties) 2023) have not been adopted in this Bill. Instead, the Commonwealth has introduced higher penalties for the category 1 offence.

21.5. The Model WHS regime, which ACCI supports, is already under increased pressure with ongoing State and Territory deviations away from a harmonised approach. The Commonwealth's modification to the model provisions will only exacerbate this and further undermine the intent of a model regime designed to reduce complexity, facilitate cross-border practices, and strengthen safety outcomes.

Australian Chamber of Commerce and Industry

About ACCI

The Australian Chamber of Commerce and Industry represents hundreds of thousands of businesses in every state and territory and across all industries. Ranging from small and medium enterprises to the largest companies, our network employs millions of people.

ACCI strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth, and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education, and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

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CMAA Concrete Masonry Association of Australia
Consult Australia
Consulting Surveyors National
Consumer Healthcare Products Australia
CLIA Cruise Lines International Association Australasia
Customer Owned Banking Association
Governance Institute of Australia
HIA
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iteca Independent Tertiary Education Council Australia
LFRA Large Format Retail Association
Live Performance Australia
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master plumbers Expert. Committed. Professional.
NALSPA National Automotive Leasing & Salary Packaging Association
neca national electrical and communications association
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