Ai GROUP SUBMISSION

Senate Education and Employment Legislation Committee

Inquiry into the *Fair Work Amendment (Closing Loopholes) Bill 2023* [Provisions]

9 October 2023

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INTRODUCTION

The Australian Industry Group (**Ai Group**) welcomes the opportunity to make a submission to the Senate Education and Employment Legislation Committee during its inquiry into the provisions of the *Fair Work Amendment (Closing Loopholes) Bill 2023* (**Bill**).

This submission draws on feedback from Ai Group's national membership across a broad cross section of the Australian economy, including from traditional areas such as manufacturing, road transport and logistics, construction, retail, social and community services and defence industries, as well as emerging sectors such as the 'gig economy'. Our membership ranges from small to medium-sized family businesses through to many of the largest organisations operating in Australia.

This submission is also informed by our unparalleled depth of experience in the operation and development of Australia's workplace relations system gained over our 150 years representing Australian Industry.

Ai Group fundamentally opposes this misconceived and fatally flawed Bill.

The Bill's failed design comes from its starting position of seeking to deliver on an economically incoherent union generated wish list, undoubtedly designed to drive up union membership.

The Bill does not 'close loopholes'.

Such a description misleadingly suggests that it contains modest changes to address technicalities that may enable parties to evade current laws or rectify ambiguities and uncertainties in the current legislation. That is not what the Bill proposes.

Instead, the Bill would implement a radical reworking of core elements of Australia's workplace relations system. It overrides carefully considered approaches determined by the Fair Work Commission and High Court to fundamental concepts underpinning our system. This includes the notion of who is an employee; when someone can be engaged as a casual employee and when they should be eligible to covert to permanent employment.

At the same time, it proposes giving the Fair Work Commission extraordinary new powers and discretion to regulate parts of the economy. This would include new powers to regulate independent contracting and the complex commercial arrangements that operate across the network of supply chains that utilise road transport services. It does so without providing a considered and balanced framework to guide the exercise of the Commission's discretion.

The legislation is inherently in conflict with a range of other Government policies aimed at boosting Australia's capacity and capability.

In recent months, the Government has released its Intergenerational Report and its Employment White Paper. These documents make substantial and positive contributions to our understanding of the challenges of decarbonisation and climate change; of our ageing population; of geopolitical uncertainties; and of ongoing technological changes. Both documents also point to the need to lift productivity and workforce participation if we are to meet these challenges and take advantage of opportunities presented by these disruptive forces.

It is therefore astonishing that this Bill does not assist in any way to revive workplace-based productivity improvements that have languished in recent years. Instead, it focuses entirely on imposing new complexities, inflexibilities and compliance burdens on employers.

If passed, the Bill will make it less attractive to employ people and detract from the ability of businesses and other employers to adjust in the face of change. It would be a substantial barrier to achieving Australia's ambitions in relation to delivering productivity improvements and increasing the pace of real wages growth. It would undoubtedly discourage investment and burden businesses with further unwanted complexity and red tape.

It is no less astonishing that the Bill erects very substantial barriers against organisations offering flexible work opportunities to employees and contractors. Yet this flexibility of work opportunities lies at the heart of future gains in workforce participation.

The Bill will not lead to the creation of one job, it will do nothing to boost national or business level productivity, it will act to stifle innovation, it will discourage employment and investment.

Rather than generating co-operative workplace relations, the legislation will drive conflict.

Rather than promoting enterprise bargaining, the legislation will discourage it.

Rather than reducing the complexity of the almost 1200 page Fair Work Act, it will only create further confusion.

Ai Group's approach to the engagement with the Government and Parliament in relation to the Bill

Ai Group is a non-partisan organisation. We have engaged constructively with the Department of Employment and Workplace Relations and the office of the Minister for Employment and Workplace Relations in relation to the development of the Bill notwithstanding our opposition to elements of the Government's agenda.

We recognise and appreciate that the current Bill incorporates a significant number of elements that have undoubtedly been crafted with the intent to go some way towards addressing concerns that we have raised. These changes have addressed a number of deficiencies contained in earlier iterations of the Bill or Government proposals.

However, unfortunately, the Bill remains a bad Bill when viewed in its totality. Elements of the legislation are an incoherent mess. Indeed, it would implement various measures that are simply unworkable. This is not hyperbole.

The Bill, as framed, needs to be fundamentally reconsidered. The legislation has been rushed and must not be rubberstamped by the Parliament.

We are also concerned at the lack of any meaningful justification for many aspects of the Bill or analysis of their impact.

The Regulatory Impact Statement that supports the legislation is vague, incomplete and often completely unhelpful. So riddled is it with the inability to actually quantify the impact of what is

being proposed, the document is useless as the basis for any realistic modelling of the economic impact of the measures.

These submissions address the operation and foreseeable effect of key elements of the Bill and, where relevant, our concerns. We note that we have sought to identify possible changes to some elements of the Bill to address specific deficiencies. Although such changes would be crucial, they do not rectify fundamental flaws in the Bill. They do not warrant its passage into legislation.

By way of summary, we here flag for the Committee our overarching concerns regarding major elements of the Bill:

1. **The proposed changes to casual employment** will create significant and entirely unwarranted problems.

   They are squarely inconsistent with the High Court's clarification of who a casual employee is under common law and are incompatible with a Full Bench of the Fair Work Commission's identification of how casual employment has long operated in awards and enterprise agreement; as well as the Full Bench's determination of when 'casual conversion' should be available. A determination that underpinned the recent inclusion of casual conversion rights into the NES that resulted in casual employees working regularly having a stronger pathway to permanent employment than ever before.

   Although measures have been implemented in the Bill to moderate the difficulties that the proposed changes will create, they do not go far enough and cannot overcome the inherent flaws in the proposal.

2. **The proposed changes relating to implementation of the 'same job same pay' or 'closing the labour hire loophole**' policy represent an unfair attack on the labour hire sector and the organisations and employees that rely upon it.

   The proposed scheme represents considerable overreach given it will apply well beyond traditional labour hire arrangements (even if this isn't the intent) and will potentially require payment of the same pay (or in some cases more pay) regardless of whether an employee is actually performing the same job as a direct employee of a host employer.

   Crucially, there are deficiencies in the scheme that will make it extremely unfair and, frankly, unworkable. These include a raft of uncertainties relating to how the relevant 'protected rate of pay' would even be calculated. They also include proposed new obligations on 'hosts' that will be impossible to comply with in many instances, and overwhelmingly burdensome in others.

3. **The changes to the meaning of 'employee' and 'employer'** for the purpose of the FW Act represent a radical attempt to override the High Court's articulation of the proper approach to such matters. They will impose uncertainty and complexity on industry that will

foreseeably disturb and put at risk the current uncontroversial engagement of a raft of independent contractors.

4. **The proposed regulation of contractors in the Road Transport Sector** must be recognised as an attempt to largely resurrect the flawed experiment that was the Road Safety Remuneration System and Road Safey Remuneration Tribunal.

   The Bill includes a number of superficial measures that make the initiative appear different to that system but, at its core, it is a recipe for repeating the mistakes of the past. It does not reflect the kind of sophisticated, nuanced and carefully constructed regulatory response to the challenges of the road transport sector that is required to avoid the risk of problematic consequences flowing from further flawed, even if well intended, intervention into the regulation of Australia's freight task and supply chain arrangements.

   Instead, the Bill simplistically handballs the development of such an initiative to the Fair Work Commission, a body which is not well placed to grapple with such matters. The mistakes of the past will undoubtedly be repeated if the Bill is implemented.

5. **The changes directed at enabling employers and employees to transition from multi-employer bargaining system to single-enterprise agreements** represent a welcome acknowledgement of a deficient aspect of the hurriedly implemented changes to multi-employer bargaining.

   However, by radically altering the system by replacing the previous requirement to assess agreements against the safety net of awards with a new requirement to compare them against multi-employer agreements, coupled with a proposed capacity for unions to veto employers from entering into such agreements, the utility of the changes is critically undermined. Indeed, it takes the system backwards.

6. **The introduction of changes to the enforcement and compliance regime** will dramatically increase penalties for certain contraventions without any meaningful effort to address the complexity of our system. The changes are made against a backdrop of recent increases in civil penalties and the proposed instruction of criminal penalties. This is unduly heavy handed and will do little to improve compliance. The 'safe harbour' provisions need to be amended if their potential to encourage disclosure and pro-active engagement with the FWO is to be maximised.

7. The changes to **delegates rights and union right of entry** are unnecessary given the raft of protections already afforded to employee representatives under our system. There is also a disturbing lack of clarity around how the proposed delegates rights provisions will operate.

   Ai Group respects the constructive role that unions can play in our system, but the changes reflect an impractical, unjustified and unbalanced change in the regulation of such matters. They will give union delegates and officials a raft of new rights to wield in

workplaces, regardless of whether relevant employees in such workplaces actually want a union to represent them.

The FW Act, when it was implemented by a Labor Government, afforded unions an extensive range of new rights and powers and there is no serious need to rebalance the regulation further. This Bill seeks to disturb the balance that was previously struck in relation to such matters by further extending union rights without any meaningful justification.

SCHEDULE 1

Part 1: Casual employment

Summary of the key provisions in Part 1 of the Bill

The Bill would:

1. Repeal the current definition of a 'casual employee' in s 15A of the FW Act and replace it with a new definition that is uncertain, risky and far more limited than the current definition. The new definition would:
    - severely constrain the ability of employers and employees to enter into new casual employment relationships; and
    - lead to a raft of unfair consequences for employers and casual employees.
2. Create two different classes of casual employees for the Purposes of the FW Act, leading to widespread disruption and confusion.
3. Give casual employees a new right to convert to full-time or part-time employment if the employment relationship no longer meets the new definition of a 'casual employee', with the employer having no right of 'reasonable refusal'. This right is in addition to a casual employee's existing conversion rights.
4. Give the FWC the power to determine whether an employee is a 'casual employee' under the new definition and to issue an order requiring the employer to convert the employee to full-time or part-time employment.
5. Implement new civil remedy and general protection provisions in relation to casual employment matters. This includes a very problematic new prohibition against misrepresenting employment as casual employment.

The provisions in Part 1 of the Bill have no merit and will cause significant and widespread problems

According to the latest ABS figures, there are around 2.5 million casual employees in Australia. This equates to:

- Less than 20% of all workers (if independent contractors and owner-managers are included in the workforce); and
- 22.2 per cent of all employees in the workforce. (This compares with 25 per cent of all employees in 1998).

The oft-repeated claim that the Australian workforce is increasingly becoming casualised is a myth.

Also, the notion embedded in the Bill that there is something wrong with the idea of a casual employee working regular hours for an extended period is against the interests of around 1 million casual employees who prefer such work arrangements.

The casual employment provisions in the Bill would operate as a substantial barrier to casual employment. Casual employment arrangements would become risker and more problematic for employers. It cannot be assumed that an employer who would have been willing to hire a casual under the current provisions in the Act, will be willing to hire either a casual or permanent employee under the arrangements in the Bill. In response, many employers will decide not to invest, not to expand, or to offshore or import more products and services.

It is fanciful for the Government to expect that employers would not change their work practices in response to this ill-conceived, illogical and inappropriate legislation. The changes that employers are likely to make will not be in the interests of a very large number of people who prefer to work on a casual basis and prefer to work regular hours.

Unemployment is rising and the Bill will make matters worse. In a Statement released on 5 September 2023, the Governor of the Reserve Bank of Australia stated that "*the unemployment rate is expected to rise gradually to around 4½ per cent late next year*".[1] It is likely that this projection did not take into account the impacts of the casual employment provisions in the Bill which will undoubtedly have an adverse impact upon employment.

The casual employment provisions in the Bill have no merit and need to be rejected by the Parliament, as explained in the sections that follow.

Definition of a 'casual employee' – Item 1 in Part 1 of the Bill

[1] Reserve Bank of Australia, *Statement by Philip Lowe, Governor: Monetary Policy Decision*, 5 September 2023.

Ai Group strongly opposes the proposed new definition of a 'casual employee'. The definition is based on two Federal Court decisions[2] that were wrongly decided and were overturned and strongly criticised by the High Court of Australia.[3]

The existing definition in s 15A of the FW Act:

- Is consistent with the common law definition;
- Is consistent with the High Court decision in *WorkPac v Rossato*;[4]
- Aligns with the orthodox approach to determining whether a person is a casual employee;
- Is working well in practice;
- Protects the interests of both employers and employees;
- Is clear and certain;
- Recognises the fact that around a million casual employees work regular hours and have been with their current employer for at least 12 months;
- Recognises that the vast majority of casual employees have no wish to convert to permanent employment;
- Is consistent with the outcomes of various casual employment test cases in federal and state industrial tribunals;
- Is consistent with the definition of 'long term casual employee' in the FW Act which recognises that many casuals work on a regular and systematic basis for periods of more than 12 months; and
- Aligns with the meaning of casual employment in modern awards and most enterprise agreements.

The definition of a 'casual employee' in the Bill:

- Is inconsistent with the common law definition;
- Is inconsistent with the High Court decision in *WorkPac v Rossato*;
- Is based on the flawed approach in two Federal Court decisions that the High Court strongly criticised and overturned;

[2] *WorkPac v Skene* (2018) 264 FCR 536; *WorkPac v Rosatto* (2020) 278 FCR 179.

[3] *WorkPac v Rossato* (2021) ALJR 681, [2021] HCA 23.

[4] (2021) ALJR 681.

- Is inconsistent with the longstanding orthodox approach to determining whether a person is a casual employee under most industrial instruments;
- Is risky and uncertain;
- Is bound to cause major problems for both employers and employees;
- Will reduce employment opportunities for employees and lead to an increased level of unemployment;
- Ignores the fact that around a million casual employees work regular hours and have been with their current employer for at least 12 months;
- Is inconsistent with the outcomes of various casual employment test cases in federal and state industrial tribunals;[5]
- Is inconsistent with the definition of 'long term casual employee' in the FW Act; and
- Will encourage litigation, including class action claims.

Some of the above problems are discussed below. The current definition needs to be retained, and Item 1 in Part 1 of the Bill needs to be rejected by Parliament.

The common law definition

The common law definition of a 'casual employee' is as articulated by the High Court in *WorkPac v Rossato* (2021) ALJR 681, [2021] HCA 23. In their majority judgment, Kiefel CJ, Keane, Gordon, Delmen, Stewart and Gleeson JJ were very critical of the approach taken by Bromberg, White and Wheelahan JJ of the Full Court of the Federal Court in *WorkPac v Rossato* (2020) 278 FCR 179 and in the Federal Court's earlier decision in *WorkPac v Skene* (2018) 264 FCR 536. The High Court majority stated: (emphasis added)

> 57. *A court can determine the character of a legal relationship between the parties only by reference to the legal rights and obligations which constitute that relationship. The search for the existence or otherwise of a "firm advance commitment" must be for enforceable terms, and not unenforceable expectations or understandings that might be said to reflect the manner in which the parties performed their agreement. To the extent that Bromberg J expressed support for the notion that the characterization exercise should have regard to the entirety of the employment relationship, his Honour erred.*

[5] FWC's *4 Yearly Review of Awards - Casual and Part-time Employment Case* [2017] FWCFB 3541); *Metal Industry Casual Employment Case*, AIRC, December 2000, Print T4991; NSW *Security Employment Test Case* [2006] NSWIRComm 38; *Clerks (SA) Award Casual Provisions Appeal Case* [2001] SAIRComm 7.

The majority went on to say (at para 61): (emphasis added)

> 61. *…….Something that is not binding cannot meaningfully be described in a court of law as a "commitment" at all. Some amorphous, innominate hope or expectation falling short of a binding promise enforceable by the courts is not sufficient to deprive an agreement for casual employment of that character.*
>
> 62. *To insist upon binding contractual promises as reliable indicators of the true character of the employment relationship is to recognise that it is the function of the courts to enforce legal obligations, not to act as an industrial arbiter whose function is to synthesise a new concord out of industrial differences. That it is no part of the judicial function to reshape or recast a contractual relationship in order to reflect a quasi-legislative judgment as to the just settlement of an industrial dispute has been emphatically the case in Australia at the federal level since the Boilermakers Case.*
>
> 63. *To insist that nothing less than binding contractual terms are apt to characterise the legal relationship between employer and employee is also necessary in order to avoid the descent into the obscurantism that would accompany acceptance of an invitation to enforce "something more than an expectation" but less than a contractual obligation. It is no part of the judicial function in relation to the construction of contracts to strain language and legal concepts in order to moderate a perceived unfairness resulting from a disparity in bargaining power between the parties so as to adjust their bargain. It has rightly been said that it is not a legitimate role for a court to force upon the words of the parties' bargain "a meaning which they cannot fairly bear [to] substitute for the bargain actually made one which the court believes could better have been made"….*

With regard to the Federal Court's earlier decision in *WorkPac v Skene*, the High Court majority said:

> ***Skene fell into error***
>
> 66. *In light of this discussion, it should now be understood that in approaching the characterisation exercise by reference to "[t]he conduct of the parties to the employment relationship and the real substance, practical reality and true nature of that relationship", the Full Court in Skene strayed from the orthodox path.*
>
> 67. *None of the authorities cited by the Full Court in Skene in support of its approach to the characterisation exercise were cases where the parties had committed the terms of the employment relationship to a written contract and thereafter adhered to those terms. In such a case, it is to those terms that one must look to determine the character of the employment relationship. WorkPac's submission that Skene was wrongly decided in this respect should be accepted.*

Despite the High Court's clear reasoning and warnings about straying from the orthodox approach of determining the terms of the employment relationship through the terms of the parties' written contract of employment, the Bill adopts the very approach that the High Court strongly criticised.

The Bill, in effect, reinstates the discredited approach taken by the Federal Court in *WorkPac v Skene* in 2018 and in *WorkPac v Rossato* in 2020 prior to that approach being overturned by the High Court in 2021.

The Bill also implements an approach that a Full Bench of the FWC described as ill-defined and requiring "the application of criteria that do not deliver a clear and unambiguous answer in many cases but, rather, lead to results on which reasonable minds may differ".[6]

At no stage did the Federal Court's approach constitute the common law meaning of a 'casual employee'. As determined by the High Court, the Federal Court judgments were wrongly decided.

The current definition of a 'casual employee' in s 15A of the FW Act aligns with the common law definition. In contrast, the definition in the Bill is very different to the common law definition.

Key differences between the current definition of a 'casual employee' and the definition in the Bill

The following table compares key elements in the definition of a 'casual employee' in item 1 of Part 1 of the Bill, compared to the current definition in s 15A of the FW Act.

Element	***How this element is dealt with in the current definition***	***How this element is dealt with in the definition in the Bill***
Central concept	Whether there is "a firm advance commitment to continuing and indefinite work according to an agreed pattern of work" for the person. (s 15A(1)(a) and (2) in the FW Act)	1. Whether there is a "firm advance commitment to continuing and indefinite work" for the person; and 2. Whether the employee is entitled to a casual loading or a specific rate of pay for casual employees under a modern award, enterprise agreement or contract of employment. (s 15A(1) in the Bill)

[6] *Telum Civil (Qld) Pty Limited v CFMEU* [2013] FWCFB 2434 at [20]-[21], as cited in *4 Yearly Review of Awards - Casual and Part-time Employment Case* [2017] FWCFB 3541 at [76].

Element	*How this element is dealt with in the current definition*	*How this element is dealt with in the definition in the Bill*
During the course of the employment, can post-employment conduct be taken into account in determining whether the person is a casual employee?	No, consistent with the common law, the test applies only to the understandings that applied between the employer and employee at the time when the employment was offered and accepted. (s 15A(1) and (4) in the FW Act)	Yes. At any time during the employment, the person can argue that the real substance, practical reality and true nature of the employment relationship is not one of casual employment. (s 15A(2) and (3) in the Bill)
Can the presence of a 'firm advance commitment' be determined based on an alleged mutual understanding or expectation between the parties, not rising to the level of a term of the employment contract?	No, consistent with the common law, an employee's status is determined by the terms of the employment contract. (s 15A(1), (2) and (4))	Yes. (s 15A(2)(b) in the Bill)
Is the issue of whether the employer can elect to offer work and whether the employee can elect to accept or reject work, relevant in determining whether the person is a casual employee?	Yes. (s 15(2)(a) in the FW Act)	Yes. However, the Bill includes consideration of whether, in practice, the employer does not offer work and, in practice, whether the employee does not accept work. (s 15A(c)(i) in the Bill)
Is the issue of whether the employee will work as required according to the needs of the employer, relevant in determining whether the person is a casual employee?	Yes. (s 15A(2)(b) of the FW Act)	The Bill would remove this important issue as a required consideration.

Element	*How this element is dealt with in the current definition*	*How this element is dealt with in the definition in the Bill*
Is the issue of whether the employment is described as casual employment, relevant in determining whether the person is a casual employee?	Yes. (s 15A(2)(c) of the FW Act)	The Bill would remove this important issue as a required consideration.
Is the issue of whether the employee is entitled to a casual loading or a specific casual rate of pay, relevant in determining whether the person is a casual employee?	Yes. (s 15A(2)(d) of the FW Act)	Yes. (s 15A(1)(b) of the Bill)
Is the issue of whether there is likely to be future availability of continuing work, relevant in determining whether the person is a casual employee?	No. This consideration has no foundation in the common law.	Yes. (s 15A(2)(c)(ii))
Is the issue of whether there are full-time or part-time employees performing the same kind of work, relevant in determining whether the person is a casual employee?	No. This consideration has no foundation in the common law.	Yes. (s 15A(2)(c)(iii))
Is the regularity of the employee's hours of work during the employment relevant in	No. This consideration has no foundation in the common law. (s 15A(3) of the FW Act)	Yes. The regularity of the employee's pattern of work is a major consideration in

Element	*How this element is dealt with in the current definition*	*How this element is dealt with in the definition in the Bill*
determining whether the person is a casual employee?		determining whether the person is a casual employee. (s 15A(2)(c)(iv) and (3)(c) in the Bill)

The definition in the Bill is based on the incorrect and inappropriate assumption that working a regular pattern of hours is inconsistent with the nature of casual employment

The definition of a 'casual employee' in the Bill, includes, as a major indicia of whether an employment relationship is one of casual employment, *"whether there is a regular pattern of work for the employee"* (s 15A(2)(c)(iv)) and clarifies that *"a pattern of work is regular …. even if it is not absolutely uniform and includes some fluctuation or variation over time".* (s 15A(3)(c)).

This contrasts with the current definition in the FW Act which states that *"a regular pattern of hours does not of itself indicate a firm advance commitment to continuing and indefinite work according to an agreed pattern of work"* (s 15A(3)).

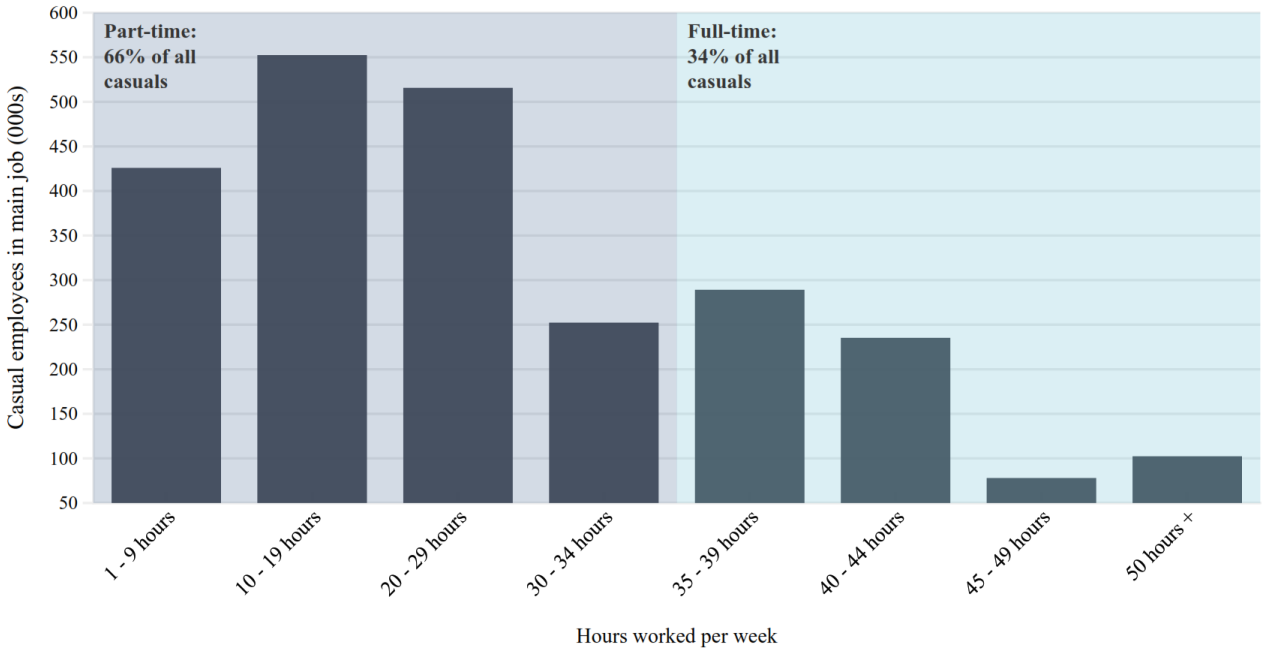
The proposed approach is also squarely inconsistent with notion of casual employment as defined under common law, as long contemplated under our federal award system (with the endorsement of Australia's industrial tribunal's since at least early last century), and as commonly implemented within enterprise agreements.

Put simply, this aspect of the Bill is a radical proposal that will disrupt the way manner in which casual employment arrangements have historically operated in Australia.

The definition of a 'casual employee' in the Bill ignores the realities of the Australian labour market and the preferences of a very large number of employees. It is beyond contention that a very large number of employees in Australian prefer to work on a casual basis, and prefer to work regular hours.

As can be seen from chart 1, 34% of all casuals (approximately 850,000 employees) work full-time hours (i.e. defined as 35 or more hours per week, according to the ABS statistics).

Chart 1: Hours of work of casual employees



ABS *Characteristics of Employment*, August 2022.

According to the latest HILDA data, approximately 40% of casual employees work regular hours and have been with their employer for a year or more.[7] This means that there are approximately 1 million casuals who work regular hours and have been with their employer for a year or more.

The ill-conceived and inappropriate definition of 'casual employee' in the Bill would undoubtedly lead to widespread disruption for both employers and employees.

In four major test cases on casual employment, federal and state industrial tribunals have accepted the fact that a large proportion of casuals work regular hours for extended periods and have no desire to be permanent employees. This is the reason why casual conversion provisions were invented by these tribunals and inserted into awards, and later in the FW Act. Casual conversion provisions are based on the reality that many casual employees work a regular pattern of hours for an indefinite period:

- The FWC's *4 Yearly Review of Awards - Casual and Part-time Employment Case* ([2017] FWCFB 3541);
- The *Metal Industry Casual Employment Case*;[8]
- The NSW *Security Employment Test Case*;[9] and
- The *Clerks (SA) Award Casual Provisions Appeal Case*.[10]

The definition in the Bill treats the working of a regular pattern of hours as being inconsistent with casual employment.

The definition conflicts with various other provisions in the FW Act which recognise that a large proportion of casuals work regular hours, including:

- The casual conversion provisions in ss 66B, 66C, 66D and 66E of the Act, which give casual employees conversion rights after 12 months of employment, if the employee has worked 'a regular pattern of hours on an ongoing basis' during at least the last 6 months of the period;
- The definition of a 'long term casual employee' in s 12 of the Act which relates to casuals who have been employed on a 'regular and systematic basis' during a period of at least 12

[7] Melbourne University, Melbourne Institute, The 16th Annual Statistical Report of the HILDA Survey (2021), *The Household, Income and Labour Dynamics in Australia (HILDA) Survey: Selected Findings from Waves 1 to 19*, p.72.

[8] Australian Industrial Relations Commission, December 2000, Print T4991.

[9] [2006] NSWIRComm 38.

[10] [2001] SAIRComm 7.

months;

- The rights in s 65(2) of the Act for a 'long term casual employee' to request flexible work arrangements;
- The rights in s 67(2) of the Act for a 'long term casual employee' to take unpaid parental leave;
- The unfair dismissal rights of a casual employee which require that casual employees be employed on a 'regular and systematic basis' for a 6 or 12-month minimum period of employment before having access to the unfair dismissal laws (ss 383 and 384).

Defining casual employment with reference to whether the employee has worked a regular pattern of hours is an illogical and damaging proposition in the context of the Australian labour market, and this approach needs to be decisively rejected by Parliament.

The definition of a 'casual employee' in the Bill would result in:

- Less casuals being employed;
- Casuals being offered less hours of work;
- Casuals being offered only irregular work patterns by their employer, even though a large proportion of casuals prefer to work regular work patterns;
- Casuals having their longstanding current work patterns disrupted;
- Casuals not being offered employment for more than a few months;
- A very large number of casual employees experiencing hardship;
- Substantial disruption for businesses; and
- Substantial risks for businesses that employ casuals who work regular hours for extended periods.

The Bill would create two different classes of casual employee under the FW Act, leading to disruption and confusion

The Bill would create the following two different classes of casual employee under the FW Act:

1. Casuals employed on or after 1 July 2024.
2. Casuals employed prior to 1 July 2024 (referred to as 'Continuing Casuals' in the legislation).

Class 1 – Casuals employed on or after 1 July 2024

Casual employment relationships entered into on or after 1 July 2024 would need to meet the new definition of a 'casual employee' at the time when the employee is engaged.

Thereafter, the employee would remain a casual employee until the occurrence of one of the following specified events (s 15A(5)):

- the employee's employment status is changed or converted to full-time employment or part-time employment under Division 4A of Part 2-2 of the FW Act; or
- the employee's employment status is changed or converted by order of the FWC under ss 66MA or 739 of the FW Act; or
- the employee's employment status is changed or converted to full-time employment or part-time employment under the terms of a fair work instrument that applies to the employee; or
- the employee accepts an alternative offer of employment (other than as a casual employee) by the employer and commences work on that basis.

Class 2 – Casuals employed prior to 1 July 2024 (Continuing Casual Employees)

For casuals who were employed prior to 1 July 2024, the following transitional provision in clause 93 in Part 18 of the Bill is relevant:

> ***Continuing casual employees***
>
> *(3) For the purposes of subclause (1), an employee who was, immediately before commencement, a casual employee of an employer within the meaning of section 15A as in force at that time, is taken to be a casual employee of the employer within the meaning of section 15A of the amended Act on and after commencement.*

The above provision would deem all existing casual employees on 1 July 2024 (as defined under the current FW Act) to be casual employees within the meaning of the new definition of a 'casual employee' for the purposes of the FW Act (even though the employment arrangements of a very large number of these 'Continuing casual employees' are inconsistent with the new definition).

From 1 July 2024 on, the new definition would apply.

When determining whether a casual employee meets the new definition at any point in time, *"conduct of an employer and employee that occurred before commencement* [i.e. before 1 July 2024] *is to be disregarded for the purposes of applying subsections 15A(2) and (3) in relation to that employee"* (clause 93(2)(a) in Part 18 of the Bill).

If, at any stage from 1 July 2024 on, the employment relationship did not meet the new definition of a 'casual employee', for example, because the employee had worked regular hours after 1 July 2024, the employee could notify the employer of their right to be converted to permanent

employment (as discussed later in this submission).

Subsection 66L(2) in the Bill states:

> *(2) Nothing in this Division:*
>
> *(a) requires an employee to change or convert to full-time employment or part-time employment under this Division; or*
>
> *(b) permits an employer to require an employee to change or convert to full-time employment or part-time employment under this Division; or*
>
> *(c) requires an employer to increase the hours of work of an employee who gives a notification to change, or requests conversion, to full-time employment or part-time employment under this Division.*

Therefore, it appears that a casual employee employed prior to 1 July 2024 would continue to be a 'casual employee' for the purposes of the Act unless the employee converts to permanent employment through one of the pathways in the legislation.

Over the years ahead, less and less casuals would be 'Continuing casual employees' and more and more would be subject to the new definition of a 'casual employee' in s 15A.

The proposed definition is inconsistent with the current and historical meaning of casual employment in modern awards and enterprise agreements and will lead to employees being casuals under such instruments but not the Act (or vice versa) – *this will cause significant problems*

Casual employment is overwhelmingly a category of employment that is used in the context of employees engaged under awards or enterprise agreements.

The Bill changes the definition of who is an employee for the purposes of the Act but does not directly alter the definition contained in awards or enterprise agreements.[11] Consequently, if the Bill is passed an employee could be rendered a permanent employee under the Act but may nonetheless be a casual under such instruments. Conversely, an employee may be deemed a casual for the purposes of the Act but not meet the definition of casual employment under such instruments. Whether such issues arise in the context of such instruments will depend upon the wording of individual instruments. The scope for such inconsistency will obviously cause problems.

It is important that the Committee appreciates that the 'type of employment' (be it casual, full-time or part-time) of an employee not only dictates their entitlements under the FW Act to leave and/or other benefits, it also determines their entitlements under awards or enterprise agreements. For example, many industrial instruments contain specific rules around hours of work or rostering arrangements that apply to permanent employees but not to casual employees. Awards also often

[11] It does however regulate the status of an employee under such instruments following conversion

contain different rules for when and how penalty rates apply to permanent employees compared to casual employees. Similarly, many awards also have highly prescriptive requirements governing the engagement of part-time employment that necessitate the setting of hours of work in a very rigid way upon engagement with obligations to pay penalty rate for hours worked outside of such arrangements.

The rules in such instruments have generally been set on the assumption that an employer will be able, at its election, to engage a portion of their workforce as casual employees in order to address needs that they have for flexibility. The changes in the Bill that are designed to limit the use of regular casual employment will undoubtedly put in issue the sustainability of many of the restrictions on the manner in which permanent employment employees are regulated under such instrument.

In the debate over the proposed changes there has been little, if any, acknowledgement that the proposed casual employment definition would be fundamentally inconsistent with the notion of casual employment as it has long been contemplated under our system of awards (and overwhelmingly also under enterprise agreements). There has certainly not been any serious attempt to examine the effect that radically changing who can be engaged as casual will have on employers and employees as a consequence of the interaction of the definition with award terms. This is alarming given that it will foreseeably result in a raft of problems.

The nature of casual employment, and in particular how it has been contemplated in Australia and under the industrial system of awards, was carefully examined in the *Casual Employment Decision* issued by a 5 member Full Bench of the Fair Work Commission hand down in only 2017. [12] The decision was part of the comprehensive '4 Yearly Award Review' and followed lengthy proceedings.

Crucially, the analysis by the Full Bench depicts how, at least in the federal workplace relations system, awards largely evolved to provide alternate modes of employment comprised of categories of permanent employment and casual employment. These alternate modes of employment which were available as an option to be selected or utilised by agreement between the employer and employee. Access to casual employment was typically not restricted by reference to some objective criteria as to what constitutes casual employment as is contemplated by the Bill. Instead, an employee could essentially be engaged as a casual if they were designated to be a casual at engagement and paid in a manner that reflected that. This is reflected in the way most awards previously provided that an employee was a casual if they were "engaged and paid as such". As succinctly summarized by the Full Bench:

> **[85]** The above analysis demonstrates that, beyond the basic proposition that a casual employee will almost always be an employee engaged and paid as such, it is difficult to assign any consistent legal or practical criteria to the concept of casual employment. From a contractual perspective, a casual employee may be engaged under a succession of hourly or

[12] [2017] FWCFB 3541 at 15 to 85

daily fixed-term contracts, or under a succession of fixed term contracts for a longer period, or under a single ongoing contract with no fixed term but terminable at short notice. In practical terms, casual employment may be used for the performance of short-term, intermittent and irregular work at one end of the range, but at the other end it may be used for long term work with regular, rostered hours. In respect of the modern award context with which we are concerned, casual employment has under most modern awards evolved into an alternative payment and entitlement system available at the election of the employer upon engagement (subject to the operation of any casual conversion provision which may currently exist in the modern award).

Most modern awards and some enterprise agreements now define a 'casual employee', for the purpose of the entitlements in the award or agreement, through the following model award provision:

> ***casual employee*** *has the meaning given by section 15A of the Act.*

This definition of casual employment was inserted in awards following the introduction of the current statutory definition. This reflected the practical reality, previously acknowledged by the Commission, that employers generally treat employees either as casual or permanent consistently for the purposes of the FW Act and awards and negated the practical difficulties that would flow from having different definitions of casual employment under awards and the NES. Aligning the definition of casual employment in awards with this statutory definition did not cause problems as the definition is broadly consistent with the key aspects of nature of casual employment that had historically underpinned the development of our system. Relevantly:

- The determination of whether an employee is a casual or permanent employee is determined at initial engagement and based on the terms of the offer of employment; and
- There is nothing incompatible with casual employment and regular work.

If, however, the definition of a 'casual employee' in s 15A of the Act is amended as proposed by the Bill, this will have major ramifications for the entitlements of employees under awards and enterprise agreements. It will cause a raft of difficulties for employers who have structured their industrial instruments and operations on the assumption of the availability of casual employees working regular hours. This is, in part, because the proposed new is intended to be inconsistent with the above two principles that have underpinned the development and operation of the award system.

What would be the effect of the new definition on parties covered by awards and enterprise agreements?

The impact of the Bill on employers and employees covered by awards and enterprise agreements will vary depending upon the terms of individual industrial instruments and arrangements between an employee and their employer. This is because the Bill generally defines casual

employment for the purposes of the FW Act rather than such instruments[13]. As already indicated, this creates the potential problematic outcome of an employee being defined as a casual under the Act but not under an agreement or award – unless that instrument linked the definition of casual employee to provisions of the Act (thereby incorporating any new definition by reference).

Those employees who meet the new definition in s 15A would continue to receive the entitlements of casual employees under the award or agreement, if the definition is incorporated into the award based on the terms of the award or agreement (an approach that is by no means typical under agreements struck before the current legislative definition was developed). However, those employees who no longer meet the new definition of a 'casual employee' will no longer have those entitlements. **This an extremely significant problem.** Alarmingly, there does not seem to have been any considered analysis of the impact of changing the definition of 'casual employee' under the award or enterprise agreements.

The 1 million or more existing casual employees whose current employment arrangements do not meet the proposed new definition of a 'casual employee' might not be casuals for the purposes of awards or enterprise agreements that define casual employment by refence to s 15A of the Act. It cannot be assumed that the employees will necessarily be full-time employees or part-time employees under an award or enterprise agreement. The entitlements of these employees under awards and enterprise agreements would be very unclear as a result. A very large number of casual employees could lose existing entitlements under awards and enterprise agreements.

At the same time, a very large number of employers could be exposed to claims by, or on behalf of, casual employees for various benefits of permanent employment.

The implications in particular cases will depend upon the wording in the relevant award or enterprise agreement. However, no awards or enterprise agreements are currently drafted in a manner that addresses the complex provisions in the Bill that create two different classes of casual employee.

The provisions in clause 92 in Part 18 of the Bill, which empower the FWC to resolve uncertainties and difficulties about the interaction between fair work instruments and the definition of casual employee, are relevant but inadequate given the extent of the interaction problems that would result from changing the definition of a 'casual employee' in s.15A of the Act.

If a new definition of a 'casual employee' is to be implemented, the legislation should require that the FWC review every modern award prior to commencement of any new definition to ensure that the award provisions interact appropriately with the legislative amendments and to assess whether any consequential changes to award terms are required to accommodate the significantly reduced level of flexibility that will be available to industry. The relevant legislative provisions could be partly modelled on the transitional provisions that applied in 2021 when section 15A was

[13] An employee who is converted to permanent employment through new conversion process is a permanent employee under both the FW Act and industrial instrument.

inserted into the Act. These provisions required that the FWC review the casual employment provisions in every modern award. However, given the proposed definition in inconsistent with the notion of casual employment as traditionally reflected in our industrial relations system (going back to at least early last century) a much broader review of awards would be required and accordingly a longer period would need to be afforded to the FWC.

The much more restrictive definition of casual employment proposed would justify a re-examination of award provisions not directly related to casual employment. This is because the current provisions of awards have been set assuming that casual employment was available upon agreement by an employer and employee (as discussed above). This should include consideration of terms regulating and restricting access to part-time employment, minimum engagement / payment provisions for other categories of employment, rostering arrangements and various provisions that relate to overt-time and penalty rates at the very least. There would undoubtedly need to be a reconsideration of the sustainability of many the rigidities in the award system that attach to permanent employment, in particular, if the ability for employers and employees to access casual employment is curtailed as proposed.

While we identify the need for the FWC to review award terms as a consequence of the implementation of the proposed new definition of casual employment, we do not suggest that it would entirely overcome the problems that the Bill would create. The legislative changes should not be implemented.

There is no easy solution to the potential inconsistency between the proposed legislative definition and the definitions of casual employment current in place in enterprise agreements.

It would also be deeply misguided to assume that the fundamental nature of casual employment could be radically altered, as proposed by the Bill, without giving rise to a raft of consequences for the operation of awards and enterprise agreements that have been designed on the assumption of availability of casual employment as category of employment that could be utilized by agreement between an employer and employee, without the limitations on its use that are now being proposed.

What are the key problems with specific terms / drafting of the proposed new definition (s 15A)?

Moving beyond the overarching problems with the proposed new definition, there are a range of deficiencies in the drafting of specific elements of the proposed new s 15A. These are not simple or minor wording issues. They are fundamental problems with the architecture of the Bill that necessitate Parliament's rejection if it.

Firstly, the Bill mandates an assessment of factors that are either difficult for either party to establish or unclear or vague in nature or which will require a highly speculative or subjective assessment as to their existence. For example, on what basis is it be determined that an employer and employee share a "mutual understanding or expectation" and on what basis is the "real

substance, practical reality and true nature of the employment relationship" to be determined? We again echo the Comments of the High Court in *Rossato* effectively emphasizing the difficulties that will flow from having regard to factors short of binding contractual commitments when identifying whether an employee was engaged as a casual employee. The proposed approach will undoubtedly lead to uncertainty and disputation.

Secondly, the factors that are identified as indicia of an "absence of a firm advanced commitment to work" will simply not shed any light on the issue. For example:

- **In relation to proposed s 15A(2)(c)(ii),** the mere fact that some employees perform the same work as that usually undertaken by a casual should not be viewed as necessarily suggesting that the casual was somehow given certainty as to future engagement. It is trite to observe that it is extremely common for causal and permanent to undertake the same work. Often this is because casual employees are used to fill in for absences of permanent employees.

- **In relation to proposed s 15A(2)(iii),** the mere fact that there may be continuing work available in enterprise is similarly not indicative of future work being available to a casual. The employer may intend other casual or indeed permanents or labour hire workers or casuals to undertake such work. The unavailability of work, or otherwise, is an indicator of whether a position is redundant or may become redundant – not whether it needs to be staffed by a casual employee.

- **In relation to proposed s 15A(2)(iv)** (the requirement to consider whether there is a regular pattern of work for the employee) we make the obvious point that a past pattern of work will often not reflect availability of future work and certainly does not, of itself, constitute a firm advance commitment to continuing and indefinite work. This is reflected in the current statutory definition which provides:

  > S 15A(3) To avoid doubt, a regular pattern of hours does not of itself indicate a firm advance commitment to continuing and indefinite work according to an agreed pattern of work.

  Indeed, this element of the proposed new s 15A is rendered even more nonsensical by the fact that s.15A(1) does not even require an absence of a 'pattern of work' for the employee to be a casual. We note that we explained that both the scheme and awards have long assumed that there is no inconsistency between casual work and a regular patter of work.

The requirement to have regard to a raft of potentially irrelevant considerations in relation to the determination of who is a casual will undoubtedly mislead parties into believing that employees have been inappropriately categorised as casuals.

Thirdly, the scheme will create a perverse incentive for employers to adopt the following practices to mitigate against the risk of employees claiming that they are were not truly engaged as casuals or subsequently seeking conversion on the basis that their engagement had evolved into something other than casual employment:

- Not offering a regular pattern of work to employees;
- Not offering full-time or part-time and casual employees to undertake the same work; and
- Offering work to an employee that an employer expects the employee to reject.

The confusing and problematic exception to the general rule created by s 15(A)4 – *the prohibition on advising a casual when a contract will end*

The new definition would require that a casual employee not be given a firm advance commitment to "continuing and indefinite work". However, section 15(A)4 would create a contradictory exemption to the provision by preventing employers from telling employees when their casual employment contract will end.

The provision would prevent employers from providing guidance to employees as to when they expect the opportunity for work to cease to exist (should they be able to anticipate this). It would, somewhat perversely, create a need for employers who know that they have an opportunity for a casual employee that will end at a particular period of time to not tell the casual employee any details about how long how long a casual employment opportunity is expected to exist for. This will visit unnecessary uncertainty and insecurity on many casual employees and undoubtedly make it harder for employers to engage casual employees to cover short-term purposes.

The provision will disturb the way casuals are currently engaged and result in fewer casual employment opportunities being offered.

The provision contains an exception for employees engaged for a season or shift but, illogically, does not permit other short-term engagement of casual employees (such as to work on a specific project with a known end date or to cover a temporary absence of a fixed duration where it may be hoped that the employee may return in some capacity prior to such a date – as occurs in the context of injured or ill workers).

<u>Section 15A(4) should be deleted, in the interest of all parties.</u>

Section 15A(5) - Will casuals remain casuals until the occurrence of a specified event?

Proposed subsection 15A(5) operates to deem a person initially engaged as casual employee to continue to be casual employee until certain events occur. Such events are listed in the provision and include situations where an employee's conversion is ordered or where they accept employment with the employer on a different basis.

While subsection 15A(5) is welcome, it is a wholly inadequate attempt to moderate the adverse and obviously unfair consequences that would be visited on employers by the new definition.

The provision is an attempt to provide a measure of certainty to employers that a person engaged as a casual cannot evolve into a permanent employee and thus expose the employer for retrospective liability for unpaid entitlements attaching to permanent employment. Nonetheless, the provision, in conjunction with the broader content Schedule 1 Part 1, creates a convoluted and frankly deeply confusing scheme whereby an employee who does not meet the new extremely restrictive definition of who is a casual employee (under subsections 15A(1) to 15A(4) is taken to be a casual employee if they would have when they first commenced employment.

The provision is a necessary measure to address the inevitable tension that results from adopting a definition of 'casual employee' that is not based on the agreed terms of the contract of employment or offer of employment (as occurs under the common law, the current legislative definition and as has, in effect, been the long-standing practice under industrial instruments).

However, s.15A(5) is likely to be ineffective in many instances. Relevantly, although s.15A is intended to constrain a consideration of an employment to the point of engagement, it will be open to parties to argue that subsequent conduct was indicative of the nature or extent of the 'advanced commitment' that existed when the relationship when it was first entered. Indeed s.15 A (2) and s.15A (3) arguably requires a consideration of such matters.

Section 15A(5) will not be sufficient to provide many employers with the level of certainty that they need to offer casual employment opportunities.

At the very least, s.15 A(5) will certainly not stave off the significant disputation that will result if the Bill is passed over whether employees were genuinely casual when then first commenced.

An employer may apply for s.545A statutory backpay orders to offset casual loading amounts against unpaid accrued entitlements. Retention of this provision is important and of some assistance. However, this does not resolve the risk of backpay because is restricted to specific entitlements and cannot be applied against penalties which may be imposed. It also fails to deal with circumstances where the quantum of the loading may not entirely cover the value of any accrued entitlement arising from permanent employment.

The currently proposed implementation date and transitional arrangements are inadequate

The Bill assumes that the casual employment definition will commence on 1 July 2024. This is wholly inadequate.

If the proposed definition of casual employment is to be implemented, despise the almost universal opposition of industry, it is very important that both a realistic commencement date and broader transitional arrangements are implemented to somewhat moderate the likelihood of

major problems and unfairness for both employers and employees. It would also enable any ramifications for the award system to be considered (we note that the conduct of the FWC's major review of casual employment and part-time employment provisions in Awards took several years to complete in order to facilitate a robust examination of all relevant issues).

The definition will encourage litigation, including class action claims

Immediately prior to the High Court's appeal decision and the legislative reforms in 2021, at least eight class actions were being pursued against employers on the basis of arguments about the alleged misclassification of casuals. Seven of these were funded by overseas litigation funders and were targeted against WorkPac, Skilled Workforce Solutions, Hays Recruitment, Ready Workforce, Tesa Mining, One Key Resources and Stellar Personnel. Some of these companies are Ai Group members. These class actions were just the 'tip of the iceberg' of 'double-dipping' claims that would have been pursued if the legislative amendments had not been made.

The definition of a 'casual employee' in the Bill is uncertain and will encourage litigation, including class action claims.

Most of the above class actions were pursued by Adero Law, in conjunction with overseas litigation funders. Rory Markham, the Principal of Adero Law was quoted in the following extract from an article that appeared in the *Australian Financial Review* on 7 September 2023:[14]

> *Labor's new definition of a casual worker reopens a path for backpay claims in mining, construction, IT and hospitality, says a lawyer who led a wave of class actions on behalf of more than 80,000 regular casuals in 2018.*
>
> *Legal experts have said the Closing Loopholes Bill's definition of casual as one without an advance commitment of ongoing work could expose such sectors to litigation if casuals have regular patterns of work.*
>
> *Workplace Relations Minister Tony Burke has assured business that casuals' 25 per cent loading would offset any backpay claims from misclassifying permanent employees.*
>
> *However, Adero Law principal Rory Markham said enforcement actions would still be viable even with the offset.*
>
> *He said a 25 per cent loading would probably only offset annual leave, not redundancy pay or notice of termination.*
>
> *''There appears to be an assumption, which is not a legal or factual basis, that the payment of a loading at 25 per cent is sufficient to discharge the entitlements to annual leave, and so forth,'' he said.*

[14] David Marin-Guzman, Australian Financial Review, *Class action fear over casual reforms*, 7 September 2023.

''In our experience, the loading would actually have to be somewhere in the order of 30 to 35 per cent. There is inevitably a shortfall.''

He said workers could also pursue high penalties for such a shortfall as a serious contravention involving systemic underpayments.

Adero had to discontinue its class actions after the High Court held in 2021 that a casual was defined by their contract and the Morrison government introduced retrospective laws cancelling what it said was $8.4 billion in backpay owed to regular casuals.

Mr Markham said because Labor's law was not retrospective, the enforcement actions would ''come in a few years''.

As can be seen from the above, if the new definition is implemented, in a few years' time plaintiff law firms and litigation funders are likely to once again seek super profits at the expense of Australian businesses and the broader community.

Casual conversion – Items 6 – 14 in Part 1 of the Bill

Under ss 66B and 66C of the existing FW Act, an employer (other than a small business employer) must offer conversion to a casual employee if:

- the employee has been employed by the employer for a period of 12 months beginning the day the employment started; and
- during at least the last 6 months of that period, the employee has worked a regular pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to work as a full-time employee or a part-time employee.

However, the employer is not required to offer conversion if:

- there are reasonable grounds not to make the offer; and
- the reasonable grounds are based on facts that are known, or reasonably foreseeable, at the time of deciding not to make the offer.

The Bill would retain the above provisions but include a new pathway for casual employees to move to full-time or part-time employment.

Casual employees would have a new right (s 66AAB) to notify their employer if they believe that, at that point in time, they are no longer a 'casual employee' under the new definition in s 15A. If the employee no longer meets the new definition, the employer must convert the employee to full-time or part-time employment unless conversion would require substantial changes to the employee's terms and conditions in order to comply with a term in an applicable award or enterprise agreement (s 66AAC(4)). This right would be able to be exercised so long as the

employee had served the minimum employment period, was not engaged in a dispute about casual conversion, and certain notification or dispute resolution events had not occurred in the preceding six months (s 66AAB(d)). The employer would have no right of 'reasonable refusal'.

Consistent with the issues raised earlier in this submission about why the new definition of a 'casual employee' is inappropriate, these new casual conversion rights relating to the new definition are not appropriate. We nonetheless below elaborate on three specific problems with the casual conversion provisions,

1. **Lack of ability for employers to reject conversion on reasonable grounds**

There is a problematic absence of any ability for an employer to refuse the conversion of a casual employee to permanent employment even if there are reasonable grounds for doing so beyond the narrow matters identified in s. 66AAC (4) of the Bill.

The proposed approach is illogical given the FWC is required by s.66MA(2) , when arbitrating disputes about the operation of the division of the Bill dealing with casual employment, to *"…not make an order under this section unless the FWC considers it would be fair and reasonable to make the order."* Proposed s.66MA2 suggests an appropriate recognition by the Government that there will be circumstances where it is not appropriate to order a casual employee's conversion to permanent employment even if they work regularly or do not meet the proposed new definition.

Similarly, in the Casual Employment Decision handed down in the 4 Yearly Review of Modern Awards by a 5-member Full Bench of the Commission accepted that employers should retain a capacity to refuse conversion on reasonable grounds. Indeed, it considered that a contrary approach would be "unreasonable":

> **[380]** In relation to the fourth question, we do not consider that the employer should be deprived of the capacity to refuse a casual conversion request on reasonable grounds. If it would require a significant adjustment to the casual employee's hours of work to accommodate them in full-time or part-time employment in accordance with the terms of the applicable modern award, or it is known or reasonably foreseeable that the casual employee's position will cease to exist or the employee's hours of work will significantly change or be reduced within the next 12 months, we consider that it would be unreasonable to require the employer nonetheless to convert the employee in those circumstances. The circumstances we have identified would generally constitute the grounds upon which a conversion request could reasonably be refused, although there may be other grounds which we currently cannot contemplate. We emphasise that for a ground for refusal to be reasonable, it must be based on facts which are known or reasonably foreseeable, and not be based on speculation or some general lack of certainty about the employee's future employment. A conversion request should only be able to be refused after consultation with the employee, the refusal and the reasons for it should be communicated in writing within a reasonable period, and if the reasons are not accepted resort should be had to the award's dispute resolution procedure.[15]

[15] [2017] FWCFB 3541

(emphasis added)

Clearly the Parliament should not create a new pathway to casual conversion which incorporates an approach that the Commission has, after careful consideration, characterised as "unreasonable". An employer should always be afforded a capacity to refuse conversion on reasonable grounds, as held by the Full Bench.

It would not be in anyone's interest to require employers to convert a casual employee to permanent employment if it is foreseeable that the position won't be available on an ongoing basis or that there will be some change in the hours that can be offered. Such an approach would put the employer in the position of needing to terminate the employee (even though they could potentially have provided further employment as a casual.

The approach contemplated by the Full Bench ultimately informed the development of the 'casual conversion' provisions of the Fair Work Act. Such provisions deal with an employer's right of refusal in the following way:

Section 66H Refusals of requests

(1) The employer must not refuse the request unless:

(a) the employer has consulted the employee; and

(b) there are reasonable grounds to refuse the request; and

(c) the reasonable grounds are based on facts that are known, or reasonably foreseeable, at the time of refusing the request.

(2) Without limiting paragraph (1)(b), reasonable grounds for refusing the request include the following:

(a) it would require a significant adjustment to the employee's hours of work in order for the employee to be employed as a full-time employee or part-time employee;

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

(c) the hours of work which the employee is required to perform will be significantly reduced in the period of 12 months after giving the request;

(d) there will be a significant change in either or both of the following in the period of 12 months after giving the request:

(i) the days on which the employee's hours of work are required to be performed;

(ii) the times at which the employee's hours of work are required to be performed;

(iii) which cannot be accommodated within the days or times the employee is available to work during that period;

The Bill's failure to include a right of refusal of conversion is unreasonable and will cause detriment to both employers and employees. Parliament should reject the Bill given its departure from the considered approach contemplated by the Commission in relation to this issue and reflected in the FW Act.

The absence of a right of refusal on reasonable grounds is particularly baffling given the Commission isn't permitted to make an order under in the context of a dispute about the new provisions unless it considers it would be "…fair and reasonable to make the order." There is no sensible reason why an employer should not be able to refuse conversion in circumstances where the Commission would not be permitted to order it.

2. The ground for refusal identified in subsection 66AAC(4)(b) is inadequate, unclear and reflects a misunderstanding of how award / agreement provisions relating to 'types of employment' operate

Section 66AAC provides a limited capacity to refuse conversion if:

> "…accepting the notification would be impracticable because substantial changes to the employee's terms and conditions would be necessary to ensure the employer does not contravene a fair work instrument that would apply to the employee."

The provision appears to be an attempt, albeit a somewhat clumsy one, to recognise and account for the prospect that casual employees may work a pattern of hours that are not permissible under awards. However, the manner in which it does this won't be effective and is far from a fair approach. We note various significant but specific deficiencies with the proposed approach below.

Firstly, the capacity to refuse conversion turns on an assessment of whether the acceptance is "impracticable". This is an inappropriate basis because it requires a consideration of whether the conversion would be "impossible in practice". This fails to capture the many circumstances where the conversion might be practically possible but very expensive or unreasonably detrimental to the employer's interests.

Secondly, the provision fails to recognise that conversion would in some cases not be practicable not because it would cause a 'contravention' by an employer of an industrial instrument, absent substantial changes to the employee's terms and conditions, but rather because it would cause an employee to 'fall between' types of employment permitted by the instrument (i.e. the employee won't meet the definition of either a full-time, part-time or casual employee under the instrument). As a consequence, it would result in an employer being required to covert an employee to a form of engagement that is simply not recognised under the relevant instrument. In some instances, this would result in significant legal uncertainty as to the status of the employee.

In almost all instances under awards, conversion would result in a substantial change to an employee's terms and conditions because the employer would become subject to much stricter obligations relating to the payment of over-time rates if additional hours of work are afforded to

the employee. It is unclear, on the text of the Bill, whether this will justify refusal in all circumstances (or at least in circumstances where the employer may require the working of additional hours to those set under 66AAC(b)).

Thirdly, it is unclear whether the provision will enable an employer who agrees to a conversion request to unilaterally set an employee's hours of work post conversion and as a consequence whether the employee us required to work such hours (nothing in the Bill deals with this). It is also unclear how such an arrangement will be reconciled with common award provisions that require agreement upon hours of work (commonly prior to commencement of employment) and payment of overtime hours for additional hours worked.

When considering the above points, it is important to appreciate that different awards contain different approaches to defining different 'types of employment'. There is an even wider diversity of approach taken in enterprise agreements. We below set out an extract from the *Clerks – Private Sector Award 2020* that deals with types of employment to illustrate some of the difficulties with reconciling the proposed legislative definition (and conversion process) with award terms.

8. Types of employment

8.1 An employee covered by this award must be one of the following:

(a) a full-time employee; or

(b) a part-time employee; or

(c) a casual employee.

9. Full-time employees

9.1 Each of the following is a full-time employee:

(a) an employee who is engaged to work 38 ordinary hours per week ; or

(b) an employee who is engaged to work the number of ordinary hours (fewer than 38) per week that is considered full-time at the workplace by the employer.

NOTE: The number of ordinary hours worked per week by a full-time employee may be averaged over a period of up to 4 weeks or over an agreed roster period. See clause 13.2 (Ordinary hours of work).

10. Part-time employees

10.1 A part-time employee is an employee who is engaged to work for fewer ordinary hours than 38 per week (or the number mentioned in clause 9.1(b) (Full-time employment)) on a reasonably predictable basis.

10.2 At the time of engaging a part-time employee, the employer and employee must agree in writing on all of the following:

(a) the number of hours to be worked each day; and

(b) the days of the week on which the employee will work; and

(c) the times at which the employee will start and finish work each day.

10.3 Changes to the number of hours to be worked under clause 10.2(a) , or to the times at which the employee will start and finish work each day under clause 10.2(c) , must be agreed in writing between the employer and employee.

10.4 The days worked under clause 10.2(b) may be changed by the employer by giving the employee 7 days' notice of the change.

10.5 An employer must roster a part-time employee on any shift for a minimum of 3 consecutive hours.

10.6 All time worked in excess of the number of ordinary hours agreed under clause 10.2 or as varied under clause 10.3 is overtime and must be paid at the overtime rate in accordance with clause 21 — Overtime (employees other than shiftworkers) .

Clause 2 of the Award provides:

Casual employee has the meaning given by section 15A of the Act .

(The effect of the definition would appear to be that the new statutory definition, but not the transitional arrangement regarding current casual employees, would be incorporated into the Award)

If an employee working less than 38 hours a week is required to be converted under the new legislative provisions how will clause 10 of the Award be applied? What happens if the engagement of the employee entails a firm advanced commitment to work but doesn't involve a commitment to a pattern of hours as contemplated by clause 10.1? What happens if the employer and employe don't agree on the matters referred to in 10.2? A raft of similar types of questions would arise when you consider the interaction of the proposed amendments with most industrial instruments.

If the Bill passes an employee may be engaged in terms that fail to meet the new definition of casual employment (thus rendering them a permanent employee) but nonetheless not be given a commitment to a pattern of hours that is reconcilable with the assumed (or required) ordinary hours of a full-time or part-time employee under an industrial instrument. This possibility arises, in part, because the proposed definition removes the requirement in the current statutory definition that be an "…absence of a firm advance commitment to a continuing and indefinite work, according to an agreed pattern of work".

The Parliament should not pass the Bill given the proposed definition of casual employment and contemplated casual conversion process would plainly not operate conformably with the approach to defining different types of employment under currently in force industrial instrument (including awards).

The approach currently adopted in the Bill is blatantly unworkable and will result in unclear and chaotic consequences.

3. Casual conversion should not be available after only 6 months

In the Casual Employment Case, the Full Bench of the Commission considered a union claim that casual conversion should be made available after only 6 months and rejected the approach. After considering evidence of industry practices, it effectively noted that a 6 month period would pick up casual employees who were engaged to address seasonal or temporary needs and that many awards provided for conversion after 12 months:

> ***[375]*** *In relation to the first question, we consider that the ACTU's proposal for a 6 month eligibility period is not appropriate for the model provision. The evidence before us, in particular that of Ms Colquhoun and Ms Neill, indicated that, at least in some industries, a 6*

month period would tend to render eligible for conversion casual employees whose employment was seasonal or for the purpose of meeting a temporary surge in demand or which for other reasons was not likely to continue on an ongoing basis. We note that a number of awards which currently contain a casual conversion clause provide for a 12 month qualifying period. 330 We consider that a calendar period of 12 months is the appropriate qualifying period for the model provision.

Consistent with the reasoning of the Full Bench casual conversion case, casual conversion (in any circumstances) should only be available after 12 months of employment. This would reduce the risk that an employer being forced to convert an employee only to have to terminate them at some later point due to unavailability of work. It would also reduce the compliance burden on industry.

It would be unduly confusing to have different qualifying period for separate casual conversion pathways available under the FW Act and to have the casual conversion provision operate differently for different sizes of employers. Our system should avoid providing differential casual conversion entitlements to employees engaged by different employers in the interests of both simplicity and providing parity of entitlement to employees as well as obligations upon competing employers.

Disputes – Items 15 and 24 in Part 1 of the Bill

Under the existing provisions in the FW Act, a party to a dispute about the operation of the casual employment provisions may notify the FWC. The FWC can conciliate and, if all parties agree, it can arbitrate. In addition, under the existing provisions in the Act, the Federal Circuit and Family Court, in the small claims jurisdiction, is able to make orders relating to the eligibility of an employee to convert to permanent employment.

The Bill would give the FWC wide powers to settle disputes about casual employment matters, including by arbitration. This would include:

- Disputes about whether the employee is a 'casual employee' under s 15A; and
- Disputes about casual conversion.

The FWC would be empowered to make various orders, including but not limited to:

- An order that the employee be treated as a full-time or part-time employee from the first pay period that starts after the day the order is made (or a later date if the FWC considers it appropriate);
- An order that the employee continue to be treated as a casual employee;
- An order that the employer make the employee an offer of casual conversion; or

- An order that the employer grant a request made by an employee for casual conversion.

In addition, the Bill would enable an application to be made to the Federal Circuit and Family Court, in the small claims jurisdiction, for a declaration as to whether an employee was a casual, part-time or full-time employee at the commencement of the employment.

These new powers for the FWC and Federal Circuit and Family Court are unnecessary. There is no evidence that the existing dispute settling processes in the FW Act have not been effective in resolving disputes about casual employment matters.

Casual Employment Information Statement – Item 19 in Part 1 of the Bill

Under s 125B(1) of the existing FW Act, an employer is required to give each casual employee the Casual Employment Information Statement before, or as soon as practicable after, the casual employee commences employment with the employer.

The Bill would amend s 125B(1) to impose an additional requirement for an employer to give each casual employee the Casual Employment Information Statement as soon as practicable after 12 months of employment.

In addition, the transitional provision in clause 93(4) in Part 18 would require employers of existing casual employees, as at 1 July 2024, to give each casual employee the Casual Employment Information Statement within three months of this date.

If a new definition of casual employment and associated new conversion rights are implemented, despite Ai Group's opposition, we do not oppose the transitional requirement to provide a new Casual Employment Information Statement within three months.

However, the requirement in the Bill for casuals to be provided with a second Casual Employment Information Statement after 12 months of employment is inappropriate and unnecessary. This would impose a substantial regulatory burden upon employers.

The requirement in the Bill is similar to a previous requirement in awards that a Full Bench of the FWC decided to abolish given the unnecessary regulatory burden that was being imposed on employers.

Under an alternate approach devised by the FWC, the employer could notify the employee of their casual conversion rights at the time of commencement of employment or after 12 months of employment, but the employer was not required to notify the employee more than once.

The notification requirement that the FWC regarded as important is fulfilled by the existing requirement that all employees must be given a copy of the Casual Employment Information Statement on engagement. The proposed new requirement to give a copy of the Statement after 12 months would impose a requirement very similar to the one that the FWC decided to abolish due to the regulatory burden that it imposed upon employers.

General protections re. casual employment – Item 21 in Part 1 of the Bill

The Bill would create three new general protection provisions, with associated civil penalties:

- s 359A – Misrepresenting employment as casual employment;
- s 359B – Dismissing to engage as casual employee; and
- s 359C – Misrepresentation to engage as casual employee.

Given the uncertain nature of the definition of a 'casual employee' in the Bill, s 359A would operate very unfairly for employers. On any reasonable assessment this punitive provision should be deleted.

Section 359B is unnecessary. Other provisions in the FW Act protect employees if they have been terminated unfairly or unlawfully.

Section 359C is also unnecessary. Section 345 in the FW Act prohibits a person from knowingly or recklessly making a false or misleading representation about the workplace rights of another person (including casual employment rights).

Part 4 – Transitioning from multi-enterprise agreements

Summary of the key provisions in Part 4 of the Bill

The Bill would:

- allow a single-enterprise agreement to replace a single interest employer agreement or supported bargaining agreement (as the case may be) which has not passed its nominal expiry date;
- provide that if a single-enterprise agreement comes into operation it will replace the earlier multi-enterprise agreement;
- require each covered union to agree in writing before the single-enterprise agreement is put to the employees for a vote or otherwise the employer may seek a voting request order from the FWC;
- require that the BOOT threshold be conducted against the earlier multi-enterprise agreement instead of the applicable modern award for the employees covered by that earlier multi-enterprise agreement
- provide that scope orders and majority support determinations are not available for the proposed single-enterprise agreement where one or more employees to be covered by it are also covered by the earlier multi-enterprise agreement.

The provisions in Part 4 of the Bill adopt a flawed approach to addressing a problem created by the secure jobs better pay amendments

The current bargaining framework in the FW Act does not permit employers and employees to strike a single interest agreement while they are covered by an in-term multi-enterprise agreement or if they are named in a supported bargaining or single interest bargaining authorisation. However, previously under the FW Act (before the amendments made by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (**SJBP Act**)), employers and employees had been able to strike a single enterprise agreement in comparable circumstances.

This amendment by the SJBP Act should be regarded as a mistake.

The Bill represents a welcome acknowledgement of this mistake and the need to create a pathway out of multi-employer bargaining. However, the proposed approach is unjustifiably restrictive and will result (or at least not assist in avoiding) problematic outcomes.

The key deficiencies are:

- the union has the right to veto employers and employees who wish to make a single enterprise agreement (and exiting the multi-enterprise agreement or relevant authorisation); and

- the better off overall test is applied against the multi-enterprise agreement rather than the safety net provided by modern awards and the National Employment Standards.

A different approach needs to be adopted, as explained in the sections that follow.

In short, the Bill should be varied to enable parties covered by a single interest or supported bargaining enterprise agreement (or named in a supported bargaining authorisation or a single interest bargaining authorisation) to strike a single enterprise agreement with their employees. Once made and approved, the single enterprise agreement should then override the application of any applicable multi-enterprise agreement or the employer's name should be removed from the relevant authorisation, as the case may be.

There is no justification for discouraging single enterprise level bargaining, where it is genuinely desired by the parties and promotes outcomes that are favourable to employees. We elaborate on this in the sections below.

How does the FW Act currently provide for transition from multi-enterprise to single-enterprise agreements?

The current multi-enterprise bargaining framework

On 6 June 2023, the FW Act as amended by (**SJBP Act**), introduced a revised multi-enterprise bargaining framework.

Previously, the FW Act provided for two types of multi-enterprise bargaining streams: single-enterprise agreements and low-paid authorisations. A single-enterprise agreement was between one employer and their employees or was a 'multi-enterprise' agreement when it was between multiple employers that were 'single interest' employers (i.e., because they were in a joint venture or common enterprise, or were related corporations, or were specified to be single-interest employers by a Ministerial declaration).

The current multi-enterprise framework provides three multi-enterprise bargaining streams:

- supported bargaining (replacing low-paid bargaining arrangements) stream;

- single interest employer agreement (for 2 or more employers with common interests) stream;

- cooperative enterprise agreement stream.

Parties may only participate in the supported bargaining or single interest employer streams if they are named in a supported bargaining employer authorisation or single interest employer authorisation.

Parties covered by authorisations

Prior to the SJBP Act amendments to the FW Act, nothing prevented employers and employees who were covered by a low-paid authorisation from making a single enterprise agreement which covered only that employer and the employees specified in the authorisation.

However, when introducing the new bargaining framework, the SJBP Act amendments in subsections 172(5) and (7) of the FW Act provided that employers named in supported bargaining and single interest employer authorisations could not elect to bargain for a single-enterprise agreement:

> *Requirement for employer specified in single interest employer authorisation*
>
> (5) Despite any other provision of this Part, if an employer is specified in a single interest employer authorisation that is in operation:
>
> (a) the only kind of enterprise agreement the employer may make with their employees who are specified in the authorisation is a single interest employer agreement; and
>
> (b) the employer must not initiate bargaining, agree to bargain, or be required to bargain with those employees for any other type of enterprise agreement.

and

> *Requirement for employer specified in supported bargaining authorisation*
>
> (7) Despite any other provision of this Part, if an employer is specified in a supported bargaining authorisation that is in operation:
>
> (a) the only kind of enterprise agreement the employer may make with their employees who are specified in the authorisation is a supported bargaining agreement; and
>
> (b) the employer must not initiate bargaining, agree to bargain or be required to bargain with those employees for any other kind of enterprise agreement.

This was an extremely retrograde change as it prevented an employer who is (or becomes) covered by a single interest employer or supported bargaining enterprise agreement (or authorisation) making an enterprise agreement at the single-enterprise level which can replace the multi-enterprise agreement before it reaches its nominal expiry date.

Employers can apply to be removed from an authorisation, but only on vert narrow grounds. The FWC will only remove the employer from the authorisation if is satisfied it is no longer appropriate for the employer to be specified in the authorisation "*because of a change in the employer's circumstances*" (pursuant to subsection 251(2A)(b), and subsection 244(2) of the FW Act, respectively). In addition, for a single interest employer authorisation, the FWC must also be satisfied before removing an employer from the authorisation that the employers specified in the authorisation and the bargaining representatives of the employees of those employers have had

an opportunity to express to the FWC their views (if any) on the application (pursuant to s.251(2A)(a)).

Parties covered by in-term single-interest employer or supported bargaining enterprise agreements

Prior to the amendments made by the SJBP Act, the **general rule** was if two enterprise agreements covered the same employee, the enterprise agreement that was made first (the "earlier agreement") applied to the employee until it passed its nominal expiry date and the agreement that was made second (the "later agreement") could not apply during this time. Once the earlier agreement passed its nominal expiry date, it ceased to apply (and could never so apply again) and the later agreement applied instead (FW Act, subsection 58(2)).

However, the general rule applied subject to a **special rule** in s.58(2)(c), in circumstances when the earlier agreement was a multi-enterprise agreement. If the earlier multi-enterprise agreement applied to an employee in relation to particular employment, and a single-enterprise agreement that covers the employee in relation to the same employment subsequently came into operation, the earlier multi-enterprise agreement would cease to apply to the employee in relation to that employment when the single enterprise agreement came into operation and could never so apply again (FW Act, subsection 58(3)).

This meant an employer who was (or became) covered by a multi-enterprise agreement could make a single-enterprise agreement which could immediately apply to employees without the need to wait until the multi-enterprise agreement reaches its nominal expiry date. This included where a multi-enterprise agreement was made under the low paid bargaining stream. In that case an employer to whom it applied was able to make a later single-enterprise agreement with some or all of the employees covered by the multi-enterprise agreement, and the operation of the "special rule" meant the later single-enterprise agreement was able to apply to the employer and employees immediately without the need to wait until the nominal expiry date of the multi-enterprise agreement passed.

However, the amendments made by the SJBP Act varied this special rule:

> *Special rule – supported bargaining agreement replaces single-enterprise agreement*
> (3) If:
> (a) a single-enterprise agreement applies to an employee in relation to particular employment; and
> (b) a supported bargaining agreement that covers the employee in relation to the same employment comes into operation;
> the single-enterprise agreement ceases to apply to the employee when the supported bargaining agreement comes into operation, and can never so apply again.

The effect of the varied subsection 58(3) is that:

- if a single enterprise agreement that is made after a multi-enterprise agreement, it will no longer immediately start to apply. Instead, the later single enterprise agreement may only apply once the earlier multi-enterprise agreement has passed its nominal expiry date; and
- a supported bargaining agreement will commence applying before the nominal expiry date of a single enterprise agreement that covers the same employees.

This means under the current bargaining framework, when employers and their employees become covered by multi-employer agreements, it is virtually impossible for such employers to bargain directly with their own employees.

Put simply, the framework introduced by the SJBP Act creates new and unjustifiable barriers to enterprise bargaining and will, somewhat perversely, prevent employers from reaching agreements with their employees even if employees view such agreements as more favourable.

What are the problems with the proposed solution?

Requires union agreement and a revised BOOT

While the proposed pathway makes some improvements by enabling a single-enterprise agreement to replace a supported bargaining or single interest employer agreement before they reach their nominal expiry dates, it does so in very limited circumstances:

- First, a vote for a proposed single enterprise agreement cannot take place unless each employee organisation has provided written agreement (s.180B). An employer may apply to the FWC to make a voting request order permitting the employer to hold the vote if the failure to agree was unreasonable (s.240A(4)).
- Secondly, instead of the single-enterprise agreement being assessed against the applicable modern award, it is assessed against the multi-enterprise agreement (see discussion below).

The proposed pathway is inconsistent with key tenets of the FW Act because it fails to:

- encourage industry to engage in enterprise-level bargaining for the benefit of employers and employees, including by increasing productivity and allowing for more beneficial and sustainable terms and conditions;
- maintain the current primacy of single enterprise agreements, where this is genuinely desired by the parties; and
- promote sustainable outcomes that are favourable to employees.

Written agreement from employee organisations is inappropriate

The Government is proposing all employee organisations which are party to the relevant in-term multi-enterprise agreement must provide written agreement before an employer can arrange for a vote on a bargained for single enterprise agreement to replace it.

This requirement is an impediment to enterprise level bargaining which is for the benefit of their enterprise and those employees. To require unions, who may have no or very limited direct involvement as bargaining representatives for any of the employees under the proposed single-enterprise agreement, is highly inappropriate. The requirement and it should be removed.

Relevantly, while the employer may apply to the FWC for a voting request order, there is a lack of clear guidance on how such applications should be treated by the FWC - this renders such an application uncertain and unnecessarily impedes bargaining at a single-enterprise level. It also unduly adds to the costs for the parties.

The BOOT should be assessed against the relevant modern award

The proposed change will require the single-enterprise agreement to be BOOT assessed against the in-term multi-enterprise agreement for employees covered by that agreement, even if that only applies to one employee.

This is completely inconsistent with the objective of modern awards and the National Employment Standards providing a safety net of minimum terms and conditions for employees above which parties are free to negotiate agreement terms. To instead conduct a BOOT against a multi-enterprise agreement contravenes this objective and supplants it with a comparison that does not form part of the safety net. It is a radical and entirely inappropriate departure from the central tenets of the FW Act and its bargaining framework.

This approach undermines enterprise-level bargaining. It prevents parties entering into arrangements which are genuinely desired and reaping all the benefits which can be achieved from enterprise-level bargaining. For example, productivity improvements alongside sustainable above-award terms and conditions.

By requiring the proposed replacement single-enterprise agreement provide better of overall conditions for employees covered by the multi-enterprise agreement, this also fails to recognise that there will in some contexts, at either the industry or at an enterprise level, that require a change in terms in industrial instrument such as an enterprise agreement or even, for that matter, awards that make them less beneficial to some employees covered by the instrument.

Ai Group, no doubt like many other employer associations and unions, has at times worked with employers who have had to make the difficult decision to remove or modify benefits that employees have in their agreements to ensure business continuity and/or financial viability. Indeed, there are times that workforces (and unions) recognise difficult outcomes need to be accepted in the interest of maintaining viable businesses and employment opportunities.

Of course, a proposal that assumes conditions can only ever, and in all circumstances, improve will be superficially popular. Similarly, achievement of such an outcome is overwhelmingly the shared objective of employers. However, it would be reckless to build such naïve assumptions into our workplace relations system. Such an approach does not enable sufficient capacity for business to adjust to changed conditions. It does not establish an industrial framework that will assist businesses to navigate the inevitable changes and challenges in the years ahead. Instead, it is a recipe for future business failures and job losses.

Even modern awards can be amended to reduce entitlements in appropriate circumstances. Indeed, there are instances where such an approach has been deemed necessary by the Fair Work Commission in pursuit of the objective of maintaining a "fair and relevant" minimum safety net.[16] Absent such a capacity, industries would be trapped and would have no recourse even if parties agree.

The proposed approach disrespects that parties are capable of coming to an agreement which is relevant and appropriate for their circumstances at an enterprise level. Indeed, rather than removing barriers to bargaining, this aspect of the Government's proposal seeks to erect or maintain them.

The proposal does not provide any ability for a business to navigate unforeseen problems or mistakes. It unduly favours employees under multi-enterprise agreements and the interests of employee organisations which may have not had any involvement in bargaining for the proposed single-enterprise agreement.

Parliament should reject the unbalanced proposal to conduct the BOOT against the multi-enterprise agreement.

[16]As contemplated by s.134 of the Fair Work Act 2009

Proposed changes to the FW Act

Ai Group recommends the following alternate changes to the FW Act to ensure there is an appropriate pathway out of multi-enterprise agreements for employers and employees:

Proposed changes to the Bill

Amend subsection 58(3) to return it pre-SJBP Act;

Special rule – ~~supported bargaining agreement replaces~~ single-enterprise agreement replaces multi-enterprise agreement

(3) ~~If~~Despite subsection (2), if:

(a) a ~~single~~ multi-enterprise agreement applies to an employee in relation to particular employment; and

(b) a ~~supported bargaining~~ single-enterprise agreement that covers the employee in relation to the same employment comes into operation;

the ~~single~~multi-enterprise agreement ceases to apply to the employee in relation to that employment when the ~~supported bargaining~~ single-enterprise agreement comes into operation, and can never so apply again.

and

Amend new subsections 172(5) and (7) such that each subsection, in effect, provides:

Requirement for employer specified in single interest employer authorisation

(5) Despite any other provision of this Part, if an employer is specified in a single interest employer authorisation that is in operation:

~~(a) the only kind of enterprise agreement the employer may make with their employees who are specified in the authorisation is a single interest employer agreement; and~~

(b) the employer must not ~~initiate bargaining, agree to bargain, or~~ be required to bargain with those employees for any other type of enterprise agreement.

and

Requirement for employer specified in supported bargaining authorisation

(7) Despite any other provision of this Part, if an employer is specified in a supported bargaining authorisation that is in operation:

~~(a) the only kind of enterprise agreement the employer may make with their employees who are specified in the authorisation is a supported bargaining agreement; and~~

(b) the employer must not ~~initiate bargaining, agree to bargain or~~ be required to bargain with those employees for any other kind of enterprise agreement.

Part 6 – Closing the labour hire loophole

Summary of the key provisions in Part 6 of the Bill

The Bill would:

1. Insert a new Part 2-7A into the FW Act which would allow employees and unions to apply to the FWC for a regulated labour hire arrangement order.

2. Require the FWC to make a regulated labour hire arrangement order unless it was satisfied that it would not be fair and reasonable to do so, having regard to any submissions made by affected businesses and employees.

3. If a regulated labour hire arrangement order is in place, labour hire providers would generally be required to pay their employees the 'protected rate of pay', defined as the 'full rate of pay' that would be payable to the employee if the host employment instrument were to apply to the employee.

4. Exemptions would apply for labour hire employees engaged for a short-term period or under a training arrangement. Also, the provisions would not apply where the host is a small business employer.

5. The FWC would be able to resolve disputes about the operation of Part 2-7A, including by mandatory arbitration.

6. The FWC would be able to determine an alternative protected rate of pay for a labour hire employee where it would be unreasonable for an employer to pay the employee the protected rate of pay.

The provisions in Part 6 of the Bill are unnecessary and would have widespread negative consequences – *they should not be passed*

In June 2022, labour hire workers represented around 2.3% of employed people in Australia.[17] Four years earlier, this figure was 2.7%. Over that four-year period, the number of labour hire workers decreased substantially in both percentage and absolute terms.

There is no justification for the ill-conceived proposed regulatory response in Part 6 of the Bill.

[17] ABS, *Labour hire workers, June 2022* (released 6 December 2022) using ABS, *Labour Account, June 2022*.

The provisions in Part 6 of the Bill have caused alarm amongst labour hire businesses. There is widespread concern that it represents an unfair attack on labour hire businesses that comply with relevant workplace laws and which are providing a valuable and legitimate service.

The provisions in the Bill have also caused alarm amongst a wide range of manufacturing, construction, maintenance, Information and Communications Technology (ICT), professional services, and other businesses, small and large, that have entered into contractual arrangements with client businesses to provide services which include a labour component.

The provisions in the Bill are likely to disrupt countless business-to-business contracting arrangements to the detriment of the relevant businesses, their employees and the broader community.

Potentially thousands of small and medium-sized businesses which supply services to larger businesses would be forced to increase the remuneration they pay to their employees in order to comply with the requirements in the Bill. This would substantially increase their costs. It would be naïve to assume that these businesses would be able to fully recoup those cost increases from their clients through charging higher prices for their services. The provisions in the Bill are likely to destroy many small businesses and the livelihoods of many business owners.

If implemented, the provisions in Part 6 of the Bill are likely to result in widespread job losses because host businesses would have little incentive to engage other businesses to provide labour and associated services, due to the increased regulatory burden, uncertainties and risks involved.

The provisions in Part 6 of the Bill will have the effect that employees working under a regulated labour hire arrangement order will receive the same rate of pay as employees of the regulated host, but a different rate of pay to that payable to other employees of their employer who may be performing comparable work for a different host. This lack of parity will cause industrial disharmony amongst the workforces of those employers, and create a disincentive for employees to accept deployment to host employers other than where the most beneficial terms and conditions apply. There appears to have been no regard given to these kinds of practical adverse flow on effects of the Bill.

The provisions in the Bill would:

- Create widespread uncertainty and cost risks for businesses, which would discourage investment and workforce growth;
- Impose major cost increases on businesses which will lead to price increases, higher inflation, higher interest rates and an increased cost of living for consumers;
- Have a major negative impact on productivity in the private and public sectors because much less work would be outsourced; (Outsourcing to other businesses often leads to substantial gains in productivity. Insourcing would reverse many of these gains);

- Lead to a major expansion in offshoring.
- Impose a major regulatory burden on businesses, requiring resources to be devoted away from innovation and other productive uses of resources;
- Deter businesses from submitting bids during public and private tender processes because they would have no certainty about what labour costs they are likely to incur over the year ahead;
- Substantially increase Federal, State and Territory Government costs which would lead to taxation increases, a reduction in Government services and/or an inability for Governments to delivery vital community infrastructure such as hospitals, schools, roads and railway lines;
- Provide a strong disincentive for labour hire businesses to reach enterprise agreements with their employees because of the major problems associated with complying with their own enterprise agreement as well as with inconsistent remuneration terms in the enterprise agreements of many of their clients;
- Provide a strong disincentive for all employers that use labour hire arrangements to enter into enterprise agreements for fear that it will expose them to the proposed new obligations, and
- Lead to widespread disruption that would have an adverse impact on workplace harmony.

The provisions in Part 6 of the Bill have no merit and need to be rejected by the Parliament.

The concept of 'labour hire' in the Bill

The policy is purportedly aimed at regulating labour hire arrangements yet the concept of 'labour hire' in the Bill is extremely broad and unworkable. The concept of 'labour hire' in the Bill extends far beyond any reasonable conception of a labour hire arrangement.

Under s 306E(1)(a) in the Bill, regulated labour hire arrangement orders would be able to apply where *"an employer supplies or will supply, either directly or indirectly, one or more employees of the employer to a regulated host to perform work for the regulated host."* This would cover a vast array of business-to-business contracting arrangements that include a labour component.

The unworkable nature of the above provision in the Bill is highlighted by the following quotes attributed to Professor Andrew Stewart of the University of Adelaide in a 7 September 2023 article in the *Australian Financial Review*:[18]

> ***'Major flaw in the drafting'***
>
> *"But, and this is a problem, I think there is a major flaw in the drafting of the legislation – it doesn't define labour hire, and it doesn't even use the term labour hire," he said.*
>
> *"All you have to have is an arrangement to supply employees to work for a host organisation.*
>
> *"Now, the government says that's not meant to cover specialist contracting services. But it's not what the legislation says. In fact, the legislation, as I read it, says the exact opposite. It says specialist contracting services are covered. But the commission will have the discretion to not make an order to cover them."*
>
> *He said he would be talking with the Department of Employment and Workplace Relations about fixing the issue and make submissions to the bill's Senate inquiry, "as to how the legislation can be brought back to deal with what is labour hire, not sending someone to work for another business".*
>
> *The latter concept was a "much broader concept", he said, "like a law firm sends somebody to give some advice for a firm, an accounting firm sends an accountant to do some auditing, IT firms send someone in to do diagnose some problems".*
>
> *"All of those are potentially covered," he said. "As sure as I can be, it's not the intent."*

The Bill needs to be varied to define 'labour hire' in the same manner as reflected in the modern award system. The concept of 'labour hire' in the modern award system is addressed through the following definition that appears in most awards:

> '***on-hire*** *means the on-hire of an employee by their employer to a client, where such employee works under the general guidance and instruction of the client or a representative of the client.*'

The above definition of 'on-hire' was determined by a seven-member Full Bench of the Australian Industrial Relations Commission (**AIRC**) during the 2008-09 award modernisation proceedings.

As identified in the following extract from a Statement issued by the AIRC Full Bench on 17 November 2009,[19] there was general acceptance amongst employer groups and unions of the

[18] David Marin-Guzman, *Australian Financial Review*, 'Labour hire laws could extend to lawyers, accountants and IT staff', 7 September 2023 (online version). A similar article appeared in the print version of the *Australian Financial Review* on 8 September 2023.

[19] [2009] AIRCFB 925.

definition of 'on-hire' that was incorporated into modern awards: (Emphasis added)

> ***[2]*** *During the consultations which followed the statement of 25 September 2009, it became apparent that most of those participating take the view that labour hire or on-hire employers and their employees should be covered by the award covering the host employer to whom the employees are on-hired and that most modern awards should have a provision in the coverage clause to that effect.*
>
> ***[3]*** *In addition, there is a general view that group training organisations, which employ apprentices and trainees and place them with host employers, and the employees, should be covered by the award covering the host employer and that modern awards with apprentice and/or trainee provisions should have a provision in the coverage clause to that effect.*
>
> ***[4]*** *Several draft clauses were proposed. The differences between the drafts are not great and it is now apparent that there are few differences of substance. We are now faced with a situation in which it is practical to arrive at clauses which will have general acceptance and should be capable of application in the great majority of the relevant awards. Accordingly we think it is now appropriate to publish some draft model provisions to be inserted in each modern award where relevant.*

The definition of 'on-hire' in the award system is well-understood amongst employers, employees, industrial parties and the FWC. It is used as the basis for determining wages and entitlements for labour hire employees covered by modern awards and it is sensible for the same definition to be used for the purposes of the provisions in Part 6 in the Bill.

The dispute settling role that would be given to the FWC under Part 6 of the Bill reinforces the importance of the definition of 'labour hire' aligning with the FWC's definition of 'on-hire' in the modern award system. If two different definitions are used for different aspects of the safety net under the FW Act, uncertainty and confusion would result.

Exemptions / exceptions in the Bill

Part 6 of the Bill includes only three exemptions / exceptions:

1. The requirements in the Bill would not apply where the host is a small business employer. This would do virtually nothing to protect the interests of small businesses because typically small businesses provide services to larger businesses and, in these circumstances, they are not the host. Small businesses that provide services to other businesses are not exempt.

2. The requirements in the Bill would not apply if a 'training arrangement' (i.e. a formal apprenticeship or traineeship) applies to an employee who carries out work for the host. This is an important exemption that will protect the jobs of thousands of trainees and apprentices employed by group apprenticeship and traineeship schemes, like the one operated by Ai Group.

3. The requirements in the Bill would not apply to certain 'short-term arrangements'. 'Short-term arrangements' are excluded from regulated labour hire arrangements if:

    - the employee performs, or is to perform, work for the regulated host during a period of no longer than 3 months; or

    - such longer or shorter period (which can include no period), as determined by the FWC.

The exemptions in points 1 and 3 above are inadequate to satisfactorily address the circumstances which they are purportedly aimed at.

A broader small business exemption is necessary

All small businesses need to be exempt from the requirements in Part 6 of the Bill; not just in circumstances where they are the host. If the Bill is not confined to applying to traditional labour hire arrangements, then in most circumstances, small businesses will not be the host but rather they will be a provider of services to the host.

In the event small businesses are not exempt in full from the requirements in Part 6 of the Bill, it is imperative that the FWC, when considering if it is "fair and reasonable in all the circumstances" to make an order, is required to take into account whether the employer is a small business.

Irrespective of whether an employer or regulated host is a small business, the factors required to be taken into account by the FWC should also include the compliance burden on the regulated host and employer likely to result from the making of the order, taking into account:

- the size of the employer and/or regulated host's enterprise, and

- the absence of dedicated human resource management specialists or expertise in the employer and/or regulated host's enterprise.

The requirement for an employer to comply with a host employment agreement necessarily requires the employer to undertake tasks such as:

- *Familiarising itself with the requirements of the agreement:* This may necessitate specialist expertise and be particularly burdensome for employers who do not have that expertise in-house.

- *Adjusting any relevant record-keeping requirements:* Regulation 3.33 of the *Fair Work Regulations 2009* (**FW Regulations**) requires an employer to keep a record specifying (amongst other things) the rate of remuneration paid to the employee, and the details of any incentive-based payment, bonus, loading, penalty rate or other monetary allowance of separately identifiable amount that the employee is entitled to be paid. If a penalty rate or loading is payable for overtime hours actually worked, Regulation 3.34 of the FW Regulations imposes a requirement to record the number of hours of overtime worked

each day, or when the employee started and ceased working overtime hours. Accordingly, each time an employee becomes entitled to a new or changed entitlement under a host employment agreement, a corresponding record keeping burden is imposed on the employer. In advancing this submission we do however note that there is a degree of uncertainty as to precisely what records the FW Regulation will require an employer to keep if the employee is only entitlement to receive not less than a specified amount (which is calculated by reference to a hosts agreement) but is not actually subject to the terms of the host's agreement. Of course, regardless of such technicalities, if records akin to those required by the records are not kept establishing compliance will be difficult.

- *Updating payroll configurations to align to the terms of the employment agreement*: Commonly, it is necessary for employers to need to engage payroll software specialists to build or reconfigure payroll programs to be able to pay in accordance with a particular industrial instrument. It is conceivable an employer may need to increase any in-house payroll resources to accommodate the requirement to pay against multiple industrial instruments for particular employees; alternatively, employers that have outsourced payroll requirements may incur increased costs associated with having this work performed.

The 3 month exemption needs to be amended to 12 months

Also, the exception for labour hire arrangements of up to three months needs to be extended to at least 12 months, with no ability for the FWC to reduce or abolish this exemption period. This will cover most seasonal needs for labour hire. 12 months is also reasonable and appropriate taking into account the compliance burden to the employer. Updating payroll configurations to deal with the proposed new order will commonly take many months to implement (Feedback from members is that such matters can commonly take 6 to 9 months, if all goes well, and cost hundreds of thousands of dollars).

In addition, the time periods in the exemption provisions for short-term work need to relate to work that is carried out for the regulated host on a *continuous* basis, not on an intermittent basis. Many businesses provide services to client businesses through ongoing contractual relationships between the businesses. During the course of a year, the employees of a business will often carry out work for a substantial number of client businesses, with each deployment being for short periods. In such circumstances, multiple deployments should not be counted as one period when calculating the length of time that an employee has performed work for a regulated host.

If multiple deployments are counted as one period, businesses that supply labour are likely to be forced to comply with numerous regulated labour hire arrangement orders for the same employee. This would be unfair and unworkable.

The orders should not be available in the context of agreements in force prior to commencement of the Bill

Further, in circumstances where a host has an enterprise agreement (or other agreement capable of being a 'covered industrial instrument') in place at the time the provisions in Part 6 of the Bill commence, the host should be exempt from potential coverage of a regulated labour hire arrangement order.

Requirements for a host employer to only engage labour hire employees in particular circumstances and/or on particular terms and conditions have been a feature of enterprise agreements (and before the FW Act, other forms of registered collective agreements) for many years. Accordingly, to the extent employees of host employers (or unions representing then) have considered it desirable to negotiate terms of the enterprise agreement that may be considered desirable to "protect bargained rates" (Explanatory Memorandum, at paragraph 559), it has been open to them to seek such terms and for the costs and impact of such matters to be taken into account the context of any bargain struck through an agreement. Where such terms were not negotiated as part of an enterprise agreement, it is inappropriate for the host employer to subsequently become covered by such requirements in the form of a regulated labour hire arrangement order. In these circumstances, there is no "loophole" – it is simply subject matter that the parties elected not to address. To afford unions a further avenue to address such matters in the context of an in term agreement is unfairly moving the goal posts on an employer.

Orders should not be available if parties have dealt with Labour hire arrangements in their EA

It is also appropriate that where the issue of the use of labour hire employment has been dealt with in the terms of an enterprise agreement the arrangements that have been struck between a host employer and its workforce who are covered by the enterprise agreement are allowed to stand, rather than be supplemented or effectively overridden by a regulated labour hire arrangement order. That is, if such a clause is contained in a agreement applicable to the host an order requiring payment referable to such an agreement should not be able to be obtained. Once again, in these circumstances there is no "loophole". An exemption of this nature would incentivise bargaining and encourage parties to deal with the issue at an enterprise level, which is likely to lead to more suitable arrangements than those that may be imposed on a host employer by a third party (ie. the FWC).

It is vital that the Bill exempts arrangements where the performance of work for the host is wholly or principally for the provision of a service, rather than the supply of labour

The Bill needs to be varief to exclude arrangements where the performance of work for the host is wholly or principally for the provision of a service, rather than the supply of labour. Examples of arrangements that would fall within this proposed exclusion are:

1. Tradespersons employed by electrical contracting, plumbing, air-conditioning, refrigeration and other businesses, who carry out installation, maintenance and/or repair work on customer sites using the tools, equipment, materials and/or components provided by their employer.

2. Engineers, IT professionals, lawyers, accountants, architects, analysts, surveyors, trainers, marketing professionals, designers, Work Health and Safety (WHS) professionals, environmental specialists, management consultants, HR consultants, IR consultants, and other professionals employed by professional services businesses, who carry out work from time to time at a customer's premises.

3. Employees of subcontractors in the construction industry, that work with the employees of other subcontractors and those of the head contractor, in the construction of projects.

4. Employees of security, cleaning, catering, facilities management, equipment hire and traffic management businesses, that provide these services to other businesses.

5. An employee of a road transport business providing a road transport service utilising a vehicle supplied by their employer.

In a media release of 4 September 2023, the Hon Tony Burke MP, Minister for Employment and Workplace Relations, said:

> *There will always be a place for labour hire – when it comes to surge work, short-term arrangements and specialist staff. This legislation does nothing to change that. These changes will affect a small number of workers.*

Despite the above acknowledgement by the Government of the importance of this issue, the Bill contains no exemption for specialised service providers.

The Bill simply gives a *discretion* to the FWC to exclude arrangements where the performance of work for the host is wholly or principally for the provision of a service, rather than the supply of labour. However, to exercise this discretion, the FWC would need to be satisfied "*that it is not fair and reasonable in all the circumstances"* for a regulated labour hire arrangements order to be made. If the FWC is unsure about whether it would be 'fair and reasonable', the Bill requires the FWC to make the order.

The Bill provides no guidance to the FWC on what would be 'fair and reasonable' in any particular circumstances. The criteria in s 306E(8)(b) in the Bill gives guidance to the FWC on when the performance of work may be wholly or principally for the provision of a service, but no guidance is given to the FWC on when it would be 'fair and reasonable' to exclude a specialised service provider.

The Explanatory Memorandum states: (emphasis added)

> *589. New paragraph 306E(8)(b) would provide that the FWC may consider whether the work performed by the regulated employee is part of the provision of a specific service, rather than the supply of labour. This paragraph would recognise that employers often contract for the provision of specialised external services rather than for the provision*

of labour to undertake work that the employer engages in the ordinary course of its business. The Part does not intend to regulate contracting for specialised services. For example, a catering service contracted to provide catering for employees of a regulated host whose primary business is not the provision of catering services may be found to be the provision of a specialised service, even where the host employment instrument provided for the performance of work of the type provided by the service. New subparagraphs 306E(8)(b)(i)–(vi) would outline factors that would inform this consideration. Not all the factors listed would need to be satisfied for the FWC to find that the arrangement relates to the provision of a service rather than the provision of labour.

There are many decisions of Courts and tribunals which have given no weight to relevant content in Explanatory Memoranda because the explanation provided was considered to conflict with the plain meaning of the words in the statute (including several Federal Court and FWC decisions relating to the FW Act). Also, it must be understood that the FWC will not be bound by the terms of the Explanatory Memorandum when exercising its discretion under the proposed new provisions. The above extract states that Part 6 *"does not intend to regulate contracting for specialised services".* However, such intent is not reflected in the drafting of the legislation. It is essential that this is redressed.

Specialised service providers need to be excluded from Part 6 of the Bill.

To achieve this, the following changes should be made to the Bill.

Proposed changes to the Bill

1. Vary s 306E(1) to add a new paragraph (e) as follows:

(e) the performance of the work is not or will not be wholly or principally for the provision of a service, rather than the supply of labour, having regard to:

(i) the involvement of the employer in matters relating to the performance of the work; and

(ii) the extent to which, in practice, the employer or a person acting on behalf of the employer directs, supervises or controls (or will direct, supervise or control) the regulated employees when they perform the work, including by managing rosters, assigning tasks or reviewing the quality of the work; and

(iii) the extent to which the regulated employees use or will use systems, tools, plant, equipment or structures of the employer to perform the work; and

(iv) the extent to which either the employer, or another person is or will be subject to industry or professional standards or responsibilities in relation to the regulated employees and the extent to which the regulated employees will be subject to such standards or responsibilities; and

(v) the extent to which the work is of a specialist or expert nature; and

(vi) the extent to which, in the circumstances, the regulated host employs~~,~~ or has previously employed ~~or could employ~~ employees to whom the host employment instrument applies~~,~~ or applied ~~or would apply;~~ in similar jobs to those of the

regulated employees.

Note:

Examples of the types of employees who would fall within the exclusion in paragraph 306E(1)(d) are:

1. *Tradespersons employed by electrical contracting, plumbing, air-conditioning, refrigeration and other businesses, who carry out installation, maintenance and/or repair work on customer sites using the tools, equipment, materials and/or components provided by their employer.*
2. *Engineers, IT professionals, lawyers, accountants, architects, analysts, surveyors, trainers, marketing professionals, designers, Work Health and Safety (WHS) professionals, environmental specialists, management consultants, HR consultants, IR consultants, and other professionals employed by professional services businesses, who carry out work from time to time at a customer's premises.*
3. *Employees of subcontractors in the construction industry, that work with the employees of other subcontractors and those of the head contractor, in the construction of projects; and*
4. *Employees of security, cleaning, catering, facilities management, equipment hire and traffic management businesses, that provide these services to other businesses.*
5. *An employee of a road transport business providing a road transport service utilising a vehicle supplied by their employer.*

2. In conjunction with the inclusion of the above paragraph, delete s 306E(8)(b).
3. Amend s 306D(2) as follows:

(2) A reference in this Part to work performed for a person ~~includes~~ means a reference to work performed wholly or principally for the benefit of the person or an enterprise carried on by the person.

Multiple regulated labour hire arrangement orders applying to the same regulated employee

An employer should not be forced to comply with more than one regulated labour hire arrangement order for the same employee, as well as with all applicable industrial instruments and employment laws. Nonetheless, this could occur under the approach contemplated by Bill. This would impose a major and unreasonable regulatory burden on employers and create confusion for both employers and employees about their obligations and entitlements.

The Bill should prohibit this.

Covered employment instruments

Under s 306E(1)(b) in the Bill, regulated labour hire arrangement orders would be able to be made where *"a covered employment instrument that applies to the regulated host would apply to the employees if the regulated host were to employ the employees to perform work of that kind".*

A 'covered employment instrument' is defined as:

- an enterprise agreement;
- a workplace determination;
- a determination under s.24 of the *Public Service Act 1999* that applies to a class of APS employees in an Agency (within the meaning of that Act);
- an instrument made under any other law of the Commonwealth (other than this Act), or of a State or Territory, that provides for the terms and conditions of employment for a class of national system employees of the Commonwealth or a State or Territory or an authority of the Commonwealth or of a State or Territory; or
- any other instrument relating to the employment of a class of national system employee that is made under a law of the Commonwealth (other than this Act) or a State or Territory and is prescribed by the regulations.

The above definition of a 'covered employment instrument' is very broad and would allow a regulated labour hire arrangement order to be made in a wide range of circumstances.

A 'covered employment instrument' is a 'host employment instrument' (s 306E(6)).

Many enterprise agreements that apply to host businesses have broad classification structures that simply describe levels of skill, rather than identifying specific occupations or jobs. In these circumstances, s 306E(1)(b) would do nothing to implement a reasonable boundary for when a regulated labour hire arrangement order should and should not be made. In these circumstances, numerous job roles that the regulated host does not employ staff to perform, and has never employed staff to perform, could readily fit within the classifications in the host employment instrument and therefore the requirement in s 306E(1)(b) would be met.

For example, many regulated hosts have never employed a security guard, an office cleaner or a gardener (on at least not in the past 20 years) but the classification structures in many enterprise agreements would be wide enough to cover a security guard, an office cleaner and a gardener. It would be unfair to disrupt the employment arrangements of security, cleaning and gardening businesses by requiring them to be paid the 'full rate of pay' in the regulated host's enterprise agreement.

Similarly, many employers directly engage employees who have broad skills and deep experience

to perform complex or difficult tasks but engage labour hire workers to perform work that involves the performance of a much narrower range of tasks or requires much less experience but which both cohorts of workers would fall within the same classification. In such circumstances there is no unfairness in the labour hire worker receiving a lower rate of pay given the different value of their work. Nor is the employer exploiting any 'loophole'. However, because of the use of broad classification structures the Bill would enable labour hire employees performing a different job to that performed by a hosts directly engaged work force to become entitled to the same rate of pay.

This issue is an important one for both private and public sector businesses. Similar to private sector enterprise agreements, the classifications in public sector instruments are often very broad. A very wide range of services are provided to Federal and State Governments by private sector businesses.

Geographical issues are also important. It is inadequate to leave this issue to be dealt with through the FWC's discretion. The Government has often referred to its 'same job, same pay' / 'closing the labour hire loophole' policy as being aimed at ensuring that workers doing the same job in the same workplace receive the same pay. Two jobs cannot be considered comparable where one is carried out in a metropolitan area and the other is carried out in a remote area. A regulated host with a national enterprise agreement may employ a cleaner on a remote mine site, but it would be unfair to require a contract cleaning company to pay its employees, who clean the host's office in a regional town or in a metropolitan city, the same 'full rate of pay' as the host pays to its cleaner on the remote mine site.

Orders should not be available if a labour hire worker is not performing the same job (i.e. undertaking the same duties in the same location) as is, or has, been performed by direct employees of the employer. The Bill should be altered to provide for this.

'Fair and reasonable' test

Under s 306E of the Bill, the FWC must decide not to make a regulated labour hire arrangement order if is satisfied that it would not be *'fair and reasonable in all the circumstances"* to do so.

The assessment of '*fair and reasonable*' in the Bill is by reference to non-exhaustive criteria, including pay arrangements, the performance of work, the history of industrial arrangements, the relationship between regulated host and the employer, the terms and nature of the arrangement under which the work will be performed, and any other matter considered relevant by the FWC.

As discussed above, it is critical that the Bill is amended to exempt arrangements where the performance of work for the regulated host is wholly or principally for the provision of a service, rather than the supply of labour. It is grossly inadequate for this centrally important issue to be dealt with by the FWC as a discretionary matter.

Also, an additional discretionary consideration needs to be added to deal with circumstances

where an employer is bound by an existing commercial contract requiring the employer to supply employees to perform work for the regulated host at particular price/s. If a business is bound by an existing commercial contract which sets prices for several years with no ability to adjust these prices to take into account legislative changes, it is fair and reasonable that the FWC is able to take this into account when determining whether to make a regulated labour hire arrangement order. If a business is forced to provide services at a loss, there is the risk that the business will become insolvent and there will be a consequential loss of its employees' jobs. This is of course in no-one's interests.

Consistent with the heading of s 306E ("FWC may make…"), the reference to "must" in s 306E(1) should be changed to "may". A new paragraph 306(1)(d) should also be inserted requiring that the Commission be satisfied that it is fair and reasonable to make the order. This would give the FWC the discretion to decide *not* to make a regulated labour hire arrangement order where appropriate (e.g. because the applicant union has failed to provide adequate materials to the FWC to enable a fair decision to be made) and indeed would require that it only make the order if it is fair and reasonable to so. It is entirely appropriate that a party asserting that an order should be made is encouraged through the structure of the legislation to be encouraged to put material before the Commission that enable it to make an informed decision in relation to such matters.

Currently, the Bill provides, in effect, that the FWC must make the order unless it is satisfied that that it would not be fair and reasonable to make the order and it is only required to take into account various relevant factors identified in 306E if parties raise them. This creates the risk that orders which are not fair and reasonable could be made. As currently drafted, s.306E of the Bill would operate unfairly for employers.

Also, relevant discretionary considerations, such as the matters identified in part 8 should be required to be considered in the context of each application that is made, regardless of whether submissions are made.

The Bill should also identify the relevance of the various matters identified in s.8 to the FWC's determination. That is, it should identify which of the factors should weigh in favour of or against the granting of the application. As it stands the Bill provides insufficient guidance to the FWC and parties.

Also, there are a number of other important considerations that should be expressly referred to in section 8 and modifications to this provision to ensure it operates fairly. There should be further consultation with industry to enable these issues to be identified.

'Protected rate of pay'

If a regulated labour hire arrangement order is made by the FWC the employer would be required to pay each regulated employee *"no less than the protected rate of pay"* (s 306F(2)).

The 'protected rate of pay' is the 'full rate of pay' that would be payable to the employee if the

host employment instrument were to apply to the employee (s 306F(4)).

If the host employment instrument does not apply to casual employees, the 'protected rate of pay' for a casual employee is the 'full rate of pay' that would be payable under the host employment instrument if the employee was a permanent employee, with the base rate of pay increased by 25%.

The 'full rate of pay' is defined in s 18 of the FW Act as follows:

> *(1) The full rate of pay of a national system employee is the rate of pay payable to the employee, including all the following:*
>
> *(a) incentive-based payments and bonuses;*
>
> *(b) loadings;*
>
> *(c) monetary allowances;*
>
> *(d) overtime or penalty rates;*
>
> *(e) any other separately identifiable amounts.*

The calculation of the 'protected rate of pay' with reference to amounts that fall within the definition of 'full rate of pay', as defined in s 18 of the FW Act, is inappropriate and unworkable.

Such an approach would potentially include the following remuneration elements:

- Base rate of pay (as defined in s 16 of the FW Act);
- Incentive-based payments and bonuses;
- Loadings;
- Monetary allowances;
- Overtime;
- Penalty rates; and
- Any other separately identifiable amounts.

We below deal with specific difficulties that will, in some instances, arise in relation of the calculation of each of the remuneration elements identified above. Before doing so, we note that obligation to the protected rate of pay (i.e. the full rate of pay) is confined by the operation of s.306F which requires that it the employer must pay "… not less than the protected rate of pay for the employee <u>in connection with the work performed by the employee for the regulated host</u>." (Emphasis added).

The underlined words will give rise to significant uncertainty around which elements of remuneration are "connected with the work". For example, if amounts under an enterprise

agreement are not expressly tied to the performance of work, or particular hours of work, but instead payable as a product of employment, will they need to be taken into consideration? For example, how will an obligation to pay annualized salaries or weekly wage pursuant to a hosts's agreement be applied in the context of a casual employee where there is no hourly rate identified for the performance of work? If they are, how will the protected rate of pay be calculated if there is no hourly rate in the relevant agreement? The Bill does not contain an appropriate mechanism for dealing with this issue.

Incentive-based payments and bonuses

It would not be workable or fair to require an employer to pay a regulated employee the same incentive-based payments or bonuses as the regulated host pays to its own employees through the terms of an employment instrument, for reasons which include the following:

- Production bonuses are a common form of incentive, particularly in industries such as mining and steel. Bonuses are typically based on a company's production performance over a specified period (e.g. quarterly or annually). It would be unfair to expect employers of regulated employees to pay these amounts to their employees just because such a bonus is referred to in a host employment instrument.

- Profit sharing bonuses typically reward employees in circumstances where a business makes a profit of at least a specified percentage or amount. It would be unfair to expect employers of regulated employees to pay these amounts to their employees just because such a bonus is referred to in a host employment instrument.

- Some enterprise agreements provide for individual incentive-payments to be made to employees, typically based on the performance of each individual employee. Different employees perform at different levels and therefore different incentive-payment are typically made to different employees. In such circumstances, how could an employer determine the amount that is required to be paid to a regulated employee?

- Some employers pay substantial flat dollar payments to their employees at the commencement of operation of their enterprise agreement (often to compensate for a delay in reaching a new agreement after the nominal expiry of the previous agreement). Such amounts are often included as a term of the agreement. It would be unfair to require an employer to pay such an amount to a regulated employee. Often employers of regulated employees have their own enterprise agreement which includes a schedule of wage increases and may also include a flat dollar amount that was payable at a different point in time to that paid by the host to its employees.

There are a wide variety of different bonuses and incentive schemes, including payment by results, merit pay, gainsharing, profit sharing and employee share plans. No amounts paid under bonus or incentive schemes are appropriately or fairly included in the 'protected rate of pay'.

Overtime and penalty rates

The inclusion of overtime and penalty rates in the 'protected rate of pay' would operate unfairly for employers, including where the employer of a regulated employee and the regulated host are covered by different industrial instruments that deal with overtime and penalty rates in different ways.

For example, many businesses have implemented annualised salaries or 'loaded rate' arrangements whereby employees are paid a higher pay rate to account for requirements to work afternoon shifts, night shifts, public holidays, weekend shifts, public holiday shifts and/or rostered overtime. It would be unfair to require an employer to pay the same loaded rate to a regulated employee as the regulated host pays to its employees, when the regulated employee may not work afternoon shifts, night shifts, public holidays, weekend shifts, public holiday shifts and/or rostered overtime.

With annualised salaries and loaded rates arrangements, the rates that are paid are often not able to be readily 'unpacked' into discrete elements.

Allowances and loadings

The inclusion of allowances and loadings in the 'protected rate of pay' is unworkable and unnecessary.

Different industrial instruments deal with allowances and loadings in very different ways. For example, in one industrial instrument numerous different disabilities (e.g. hot work, cold work, wet work, dirty work, working at heights) may be rolled up in an industry allowance, but in another industrial instrument each disability may be the subject of a different allowance. Also, in one industrial instrument a particular allowance may be payable daily while in another instrument an allowance dealing with the same subject matter may be payable hourly or weekly. Further, in one industrial instrument an allowance dealing with a particular subject matter may be payable on an all-purpose basis but not in another industrial instrument.

In numerous circumstances, the parameters for payment of allowances and loadings in the industrial instrument that applies to the employer of a regulated employee will not be able to be sensibly aligned with the allowances and loadings in the host employment instrument.

Any other separately identifiable amounts

The concept of 'any other separately identifiable amounts' is extremely broad and uncertain. A vast array of different payments to employees could be captured.

It would be unworkable, unfair and inappropriate to include such amounts in the 'protected rate of pay'.

The Bill falsely assumes that employment instruments require that each employee is entitled to be paid the same amount for carrying out the same kind of work

The Bill is drafted on the fanciful and simplistic assumption that enterprise agreements and other employment instruments require that every employee is paid the same amount for carrying out the same kind of work. In numerous circumstances, this assumption is not correct. This is not the way that most modern, private sector enterprises operate.

For example:

- In numerous enterprise agreements, different wage rates apply based upon the amount of time that an employee has spent working for the current employer. These different rates apply even though the employees are carrying out the same kind of work.

- In numerous enterprise agreements, different wage rates apply to employees in the same job, based on the employer's assessment of an employee's skills, experience, qualifications, performance and/or other factors. These different rates apply even though the employees are carrying out the same kind of work.

- Numerous enterprise agreements contain detailed processes for classifying employees in accordance with industry competency standards. For example, many enterprise agreements underpinned by the *Manufacturing and Associated Industries and Occupations Award 2020*, (**Manufacturing Award**) include a requirement to classify and pay employees in accordance with the detailed competency assessment processes in the Award and in the 107-page *National Metal and Engineering Industry Competency Standards Implementation Guide* which is incorporated into the Award (see clause 20.5). Under these processes, individual employees are classified by identifying all the relevant competencies associated with their job. Where an individual has the relevant skills and experience to competently perform the tasks identified in a particular industry competency standard, the employee receives the number of points for that standard. Each employee's classification is derived by adding up the number of points associated with all the relevant competency standards that the employee is entitled to claim credit for, and applying a number of other detailed classification rules. Two employees may have the same job title (e.g. fitter or process worker) and be carrying out similar work, but be classified at different levels in the classification structure and receive different rates of pay.

- Many existing enterprise agreements do not include specific pay rates, for example, because there is no single rate of pay in the relevant workplace for each classification. Even though a Full Bench of the FWC recently decided that all enterprise agreements must

contain wage increases,[20] the fact remains that many enterprise agreements are in operation which do not contain wage rates. Many just include a schedule of wage increases (e.g. percentage wage increases on particular operative dates) without identifying the wage rates that the increases are to be applied to.

The above examples highlight that the Bill is unworkable. Employers of regulated employees would have no way of determining the protected rate of pay for the employee when there are multiple classifications and pay rates that apply to employees of the regulated host who carry out the same kind of work.

Also, regulated hosts would have no way of providing the information that the Bill requires them to provide upon request. For example, what information is a regulated host required to provide when there are 10 or more different pay rates that apply to its employees who are carrying out the same kind of work?

The Bill fails to take into account that the full rate of pay under employment instruments may be impacted by individual flexibility agreements and/or facilitative arrangements

All modern awards and enterprise agreements are required to contain terms that permit an employer and an employee covered by the instrument to agree to vary the application of the terms of the instrument regarding one or more issue concerning arrangements for when work is performed, overtime rates, penalty rates, allowances or annual leave loading. Such allowances, loadings, penalty rates and overtime payments for part of the "full rate of pay" payable to an employee. A host employer has the ability under the terms of its host employment agreement to enter into arrangements with individual employees that may ultimately impact the full rate of pay required to be paid.

Many modern awards also contain facilitative provisions, which allow agreement between an employer and employees on how specific award provisions are to apply at the workplace or section(s) of it.

The Bill does not address whether an employer of a regulated employee is entitled to pay them in accordance with any facilitative arrangements in place at the regulated host's enterprise. Nor does it address whether an employer of a regulated employee is permitted to enter into an individual flexibility arrangement under the terms of the covered employment instrument.

The consequence of an employer of a regulated employee being excluded from the benefit of facilitate arrangements and/or individual flexibility agreements (in circumstances where the regulated host is able to use such provisions) is that the employer may be obliged to pay a protected rate of pay to employees that does not reflect the actual full rate of pay being paid to

[20] *Application by VIP Plastic Packaging Pty Ltd* [2023] FWCFB 161.

the employees of the regulated host to whom the host employment instrument applies, taking into account the operation of any facilitative agreements or individual flexibility agreements.

Complexities relating to the calculation of superannuation entitlements

The Bill effectively requires a 'top up' payment be made to an employee in order to ensure they receive the protected rate of pay. It does not require that they receive the specific monetary entitlements payable under the agreement.

This approach fails to account for different nature of the payments that may be payable under the hosts agreement and, as a result, does not genuinely deliver the *same* pay for the *same* job. It potentially delivers a greater entitlement.

For example, if a host's agreement requires the payment of overtime penalties that for the performance of work that would not actually be undertaken during overtime hours under the regulated employer's industrial instrument the employer would potentially need to pay a quantum of money to an employee to compensate them for such entitlements. However, while the host's direct employees working such hours would not be entitled to superannuation in relation to such entitlements, it appears a regulated host 's employees arguably would be (at least in some circumstances). The consequence is that a regulated host would not be required to provide the *same* pay for the s*ame* job, they would be required to pay *more* pay for the *same* job. There can be no justification for this.

The treatment of any payment that must be made for the purposes of superannuation should be explained in the explanatory memorandum.

Payments made to third parties for the benefit of an employee

It appears that, under the provisions of the Bill, the 'protected rate of pay' would not include payments that a regulated host is required to make to a third party for the benefit of its employees, through the terms of a host employment instrument (e.g. contributions to a superannuation fund or a worker entitlement fund). Consistent with the apparent intent of the Bill, it is important that these amounts are <u>not</u> included. To avoid any doubt, this issue should be clarified in the Bill.

Period over which the 'protected rate of pay' is to be calculated

The Bill does not clarify the period of time over which the protected rate of pay is to be calculated or paid. This gives rise to a fundamental uncertainty over how the provisions will operate.

Many enterprise agreements include arrangements for pay and hours of work to be averaged over a roster cycle. It is common in many industries for roster cycles to continue for two or three months. For example, standard 4 shifts on, 4 shifts off, 12-hour continuous shift rosters typically average hours over an 8-week period.

It is important that the Bill to clearly identify the period over which the protected rate of pay is to be calculated. Any such mechanism must take into account pay averaging provisions commonly found in industrial instruments to avoid obvious unfairness to employers.

Proposed changes to the Bill

It is simply not possible to address all the deficiencies in the Bill so as to render the provisions relating 'labour hire' either fair or workable in all instances. Part 6 of the Bill needs to be rejected by Parliament.

Obligations on regulated hosts

Section 306H gives an employer covered by a regulated labour hire arrangement order the ability to request, in writing, information reasonably needed to determine the protected rate of pay for one or more regulated employees covered by the order.

The request can be made if, "…the employer reasonably considers that the employer does not have all of the information needed regarding what is the protected rate of pay for one or more regulated employees covered by the order"

If such a request is made, the regulated host must either:

- provide the employer with the information requested; or
- Provide information, for each relevant pay period of the employees, setting out the protected rate of pay for each employee for the period.

The provisions in the Bill are overly rigid and impractical, particularly given that a large civil penalty applies for non-compliance. In some contexts. they will impose an unreasonable burden on hosts. In others, compliance by the host will simply be impossible.

Put bluntly, s.306H is not a workable solution to the obvious inability of regulated employers to calculate a rate payable under an order. Unless an alternate mechanism for addressing this problem could be identified, this issue alone warrants rejection of Part 6 of the Bill.

We note the following specific practical issues that must be grappled with (but there will be many more):

- The provision does not require the employer to attempt to itself obtain the relevant information or keep the relevant records, so as to facilitate compliance with the order. This is a major deficiency as the record keeping requirements in the Act and regulations likely won't require the keeping of such records either.
- The request may be made at a point in time at which it has become a practical impossibility to comply with the request. For example, it may be made at a time after the work has been

undertaken in circumstances where the host did not create a record of the relevant information that is ultimately requested.

- The request may seek information that the host could never obtain. Similarly, it may be simply impossible for a host to obtain certain information so as to calculate the rate as contemplated under 306(H)(4)(b). There will be a myriad of examples of this particular problem, but we note the following:

    I. Hosts will not be able to determine the employee's classification if it is based on a competency based classification structure or dependent the particular license or qualification held by the employee. Hosts cannot verify such matters in the usual manner that an employer can in the context of a direct employment relationship.

    II. Hosts often won't have reliable access to personal information about an employee that enables them to calculate amounts that may be payable under agreements. For example, they won't always be able to verify a person's age in contexts where their agreement may prescribe 'junior rates' nor will they necessarily know the person's residential address or usual travel times which are all matters that will in some contexts need to be known to calculate the protected rate of pay.

    III. Hosts won't always be able to obtain information about matters related to the performance of the work that is required to determine the amount payable under an agreement. For example, a host will generally not have a legal capacity to require a regulated employee to comply with its system for recording the performance of work (i.e. to clock on using its time recording systems) or to provide them with records of the work undertaken (be it the time worked or the condition in which is undertaken if performed remotely) or expenses incurred in the performance of such work that might entitle the employee to an allowance / amount under the host's agreement because they are not their direct employees.

We also note that, in many instances it will be unclear to the host (and to the regulated employer) what hours are deemed to be the employee's 'ordinary hours' for the purposes of calculating an employee's protected rate of pay. Many enterprise agreements set limits in which ordinary hours can be worked and prescribe penalty rate for 'over-time' worked outside of such hours. They frequently do not however specify what the actual ordinary hours are for either individual employees or even for types or cohorts of employees. Instead, this is commonly dependent upon the arrangement of hours at a particular workplace or enterprise or upon the arrangement entered into with an individual worker. It will be entirely unclear to both many regulated employers and hosts how such matters are to be dealt with when there is no agreement between the host and the employee as to what the ordinary hours of the worker will be.

The requirement under s.306(H) for a host to comply with a request absent some capacity for an

alternate arrangement being reached (short of the host calculating protected rate of pay) is heavy handed. In the real world, after receiving a request for information, the regulated host is likely to discuss the matter with the employer and reach agreement (if possible) on what information is needed, what information is available, what information will be provided and in what format. In many cases, no doubt the agreed information will be different in some respects to the information initially requested.

The requirement under s.306H(3) as to the time whin which the relevant information must be provided by the Host employer is plainly unfair. Section 306H(3)(b) appears to countenance the possibility that the information must be provided sooner than is reasonable practicable if this is necessary to enable compliance with s.306F. Although, we note that the precise requirement of s.306(H0(3) is somewhat ambiguous given s.306F does not impose any temporal requirement upon the payment of the relevant amount.

Also, the reference to the 'relevant pay period' in s. 306H(4) is unworkable. Which pay period – the pay period of the employer or that of the regulated host? As currently drafted, the reference appears to be to the pay period of the regulated employees but the host is unlikely to have information in a format that could be provided to align with the pay period of another business.

See also the section above about the Bill falsely assuming that employment instruments require that each employee is entitled to be paid the same amount for carrying out the same kind of work. Regulated hosts would have no way of providing the information that the Bill requires them to provide upon request where multiple pay rates apply to their employees who are carrying out the same kind of work.

Further, the Bill offers no protection for regulated hosts in relation to the confidentiality of the information provided to the employer and/or the purposes for which that information can be used. The Bill should prohibit an employer using or disclosing any information that it is provided by a host for a purpose than the compliance with a relevant order.

Short-term arrangements

Short-term arrangements are addressed in the section of this submission dealing with exemptions / exceptions.

Alternative protected rate of pay orders

The Bill empowers the FWC to make alternative protected rate of pay orders to address circumstances where it would be unfair or unreasonable for the employer of a regulated employee to be required to pay the 'protected rate of pay'.

The FWC should not have the power to make an alternative protected rate of pay order with a higher rate of pay than the 'protected rate of pay'.

FWC dispute settlement powers

The Bill would give the FWC the power to settle disputes about the operation of provisions in Part 6, including a dispute about:

- what the protected rate of pay for a regulated employee is; or
- whether a regulated employee has been, or is being, paid less than the protected rate of pay for the employee.

Consistent with the FWC's powers under ss 595 and 739 of the FW Act, the FWC should have the power to deal with a dispute about requirements in Part 6 in the following ways:

- By mediation or conciliation;
- By making a recommendation or expressing an opinion; and
- By arbitration, if the parties have all/both agreed that the FWC may arbitrate.

The FWC should not have a power of arbitration unless all parties have agreed to submit their dispute to arbitration.

It is essential that parties have access to judicial review by the Federal Court of Australia and the Federal Circuit and Family Court of Australia of decisions by the FWC to make an arbitrated protected rate of pay orders, and for the terms of those orders. As the Bill is currently drafted, this is unclear.

It is well-established that under the current provisions in the FW Act, where the parties jointly *agree* to submit their dispute to arbitration by the FWC, the FWC exercises a power of private arbitration and such decisions cannot generally be reviewed by a Court.[21]

However, the Bill enables the FWC to make an arbitrated protected rate of pay order even if one or more parties oppose arbitration. Such orders could require an employer to pay hundreds of thousands or even millions of dollars. Fairness and justice for all parties dictate that such decisions need to be able to be reviewed by a Court.

Anti-avoidance provisions

The anti-avoidance provisions in Part 6 of the Bill are unnecessary and inappropriate.

If Part 6 of the Bill is passed by Parliament, the substantive provisions will be 'workplace rights' and protected under ss 340 and 341 of the FW Act.

[21] For example, see: *CFMEU v Wagstaff Piling Pty Ltd* [2012] FCAFC 87; and *Linfox Australia v Transport Workers Union of Australia* [2013] FCA 659.

The retrospective operative date of 4 September 2023 for the provisions which would prohibit an employer or a host from implementing a scheme, arrangement, plan, course of conduct, etc., for the sole or dominant purpose of preventing the FWC from making a regulated labour hire arrangement order is not appropriate (see clause 102 in Part 18 of the Bill).

This type of retrospective provision is found in taxation legislation but is not appropriate in employment legislation. It is ludicrous to think that employers and hosts are broadly aware of this proposal given the Bill is not yet law.

Part 7 – Workplace delegates' rights

Summary of the key provisions in Part 7 of the Bill

The Bill would:

- Give workplace delegates rights in relation to representing the industrial interests of members and persons eligible to be a member of the relevant union, in a dispute with their employer;
- Require all modern awards, new enterprise agreements and new workplace determinations to include a delegates' rights term; and
- Insert a new general protection in the FW Act specific to workplace delegates.

The provisions in Part 7 of the Bill are unnecessary, unclear and would trample on the rights of employers and employees

The role of workplace delegates is already protected under the FW Act. Heavy penalties apply for anyone who takes adverse action against a union delegate.

All awards and virtually all enterprise agreements provide entitlements for employee representatives (including workplace delegates).

Given the protections that are already in place, there is no need for any new laws about delegates rights. Beyond the existing protections, delegates rights and entitlements should be dealt with at the enterprise level.

The provisions in Part 7 of the Bill have no merit and need to be rejected by the Parliament.

The provisions would trample on the rights of:

- Employers;
- Non-union members; and
- Union members who wish to elect or appoint their own workplace representative, rather than being represented by a person appointed by union head offices.

According to the latest ABS statistics, only 12.5 per cent of employees are union members.[22] The ABS has stopped publishing statistics on union membership in the private sector but data

[22] ABS, *Union membership*, August 2022 (published 14 December 2022)

compiled by the ABS for the *Australian Financial Review* shows that only 8.2% of employees in the private sector are union members.[23]

History of delegates rights provisions in awards and legislation

Clauses providing protection for union delegates were commonly included in federal awards from the 1920s until the late 1990s. For example, the following clause appeared in the *Metal Trades Award 1952*.

SHOP STEWARDS.

24. An employee appointed shop steward in the shop or department in which he is employed shall upon notification thereof to his employer, be recognised as the accredited representative of the Union to which he belongs, and he shall be allowed the necessary time during working hours to interview the employer or his representative on matters affecting employees whom he represents.

The clause remained largely unchanged up until 1998 when the clause was removed during the award simplification process. The clause in the *Metal Industry Award 1984* (that was operative until 1998) was:

30 - SHOP STEWARDS

(a) An employee appointed shop steward in the shop or department in which he is employed shall, upon notification thereof to his employer, be recognised as the accredited representative of the Union to which he belongs. An accredited shop steward shall be allowed the necessary time during working hours to interview the employer or his representative on matters affecting employees whom he represents.

(b) Subject to the prior approval of the employer an accredited shop steward shall be allowed at a place designated by the employer a reasonable period of time during working hours to interview a duly accredited Union official of the Union to which he belongs on legitimate union business.

As a result of the 1996-1998 award simplification process, awards were simplified to remove unnecessary content, such as matters that were dealt with in legislation. The *Workplace Relations Act 1996* (**WR Act**) contained a list of 20 'allowable award matters'[24], with other matters generally not allowed to be included in awards.

Shop stewards' clauses were removed from awards during the award simplification process. The WR Act included comprehensive freedom of association provisions which provided far more protections for union members and delegates than the former award clauses. Therefore, shop stewards' clauses were no longer necessary. The freedom of association provisions in the WR Act were replaced by the general protections in the FW Act from 2009, which provide even more protection for union members and delegates.

Up until 1998, some awards included Trade Union Training Leave clauses. These clauses were allowed to remain in awards provided they were converted into dispute resolution training leave

[23] D. Marin-Guzman, *Australian Financial Review*, 'Union membership in private sector shrinks to 8pc', 15 January 2023.

[24] Section 89A of the Act.

clauses. This ensured that the content of the courses which employers were giving delegates time off to attend was directed at avoiding and resolving industrial disputes, and not at topics such as organising industrial campaigns and industrial action.

Dispute resolution training leave clauses are included in various modern awards (e.g. clause 44 in the *Manufacturing and Associated Industries and Occupations Award 2020* (Manufacturing Award), clause 39.10 in the *Building and Construction General On-site Award 2020* (**Building Award**) and clause 31 in the Cleaning Services Award 2020 (**Cleaning Award**).

Existing protections and entitlements for union delegates in the FW Act, FW Regulations, modern awards and enterprise agreements

FW Act

Union delegates are 'officers' under the FW Act

In the FW Act, an 'officer' of an industrial association (including a union) is defined in the following expansive manner (s 12): (emphasis added)

> *"officer", of an industrial association, means:*
>
> *(a) an official of the association; or*
>
> *(b) a delegate or other representative of the association.*

Delegates are 'officers' under the FW Act even though they may not hold 'office' in a union for the purposes of the *Fair Work (Registered Organisations) Act 2009*. Persons that hold 'office' in a union are called 'officials' under the FW Act. Officials are included in the above definition of an 'officer', but all union delegates are 'officers' regardless of whether they are officials.

General protections

Sections 346 and 347 of the existing FW Act protect delegates and past delegates from adverse action being taken against them because:

- They are or were an officer or member of a union (s 346(a));
- They are engaging, have engaged, or propose to engage in any industrial activity that is lawful (s 346(b) and s 347(a) and (b));
- They are not engaging, have not engaged, and are not proposing to engage in any unlawful industrial activity (s 346(c) and s 347 (c) to (g)).

Section 347 provides that lawful industrial activity includes (amongst other activities):

- becoming, not becoming, remaining, or ceasing to be an 'officer' or member of an industrial association (s 347(a));

- organising or promoting a lawful activity organised or promoted by an industrial association (s 347(b)(ii));

- encouraging, or participating in, a lawful activity organised or promoted by an industrial association (s 347(b)(iii)); and

- representing or advancing the views, claims or interest of an industrial association (s 347(b)(v)).

Heavy civil penalties apply for employers and others who take adverse action against delegates in breach of ss 346 and 347 of the Act.

If an allegation is made that an employer has taken action in breach of the above provisions, it is presumed that the action was taken for that reason, unless the employer proves otherwise (s 361).

Bargaining representatives

The FW Act gives delegates an important role as bargaining representatives for the members of their union in the workplace, unless a particular member chooses to appoint a different bargaining representative.

Section 176(1)(b) deems a union to be the bargaining representative of its members, unless the employee has appointed another representative. In many workplaces, delegates, rather than union officials, carry out the role and functions of a bargaining representative on behalf of the union.

Unfair dismissal laws

Subsection 387(d) of the FW Act recognises that an employee has the right to have a support person present to assist in any discussions relating to dismissal. Where an employee is a union member often a union delegate will carry out the role of the support person, unless the employee wishes to have a different support person.

Fair Work Regulations

The *Fair Work Regulations 2009* (**FW Regulations**) recognise the role of employee representatives (including union delegates), as highlighted by the following provisions:

- The Model Consultation Term in Schedule 2.3 of the FW Regulations includes the following provision which enables the employees to appoint a representative for the purposes of consulting about major workplace changes. The representative can be a union delegate, if this is what the employees wish, or the employees can choose to appoint another person to represent them:

3. *The relevant employees may appoint a representative for the purposes of the procedures in this term.*

4. *If:*

    a. *a relevant employee appoints, or relevant employees appoint, a representative for the purposes of consultation; and*

    b. *the employee or employees advise the employer of the identity of the representative;*

    the employer must recognise the representative.

- The Model Consultation Term in Schedule 2.3 in the Regulations includes the following provision which enables the employees to appoint a representative for the purposes of consulting about changes to rosters or hours of work. The representative can be a union delegate, if this is what the employees wish, or the employees can choose to appoint another person to represent them:

    11. *The relevant employees may appoint a representative for the purposes of the procedures in this term.*

    12. *If:*

        a. *a relevant employee appoints, or relevant employees appoint, a representative for the purposes of consultation; and*

        b. *the employee or employees advise the employer of the identity of the representative;*

        the employer must recognise the representative.

- The Model Term for Dealing with Disputes for Enterprise Agreements in Schedule 6.1 of the FW Regulations includes the following provision which enables an employee who is a party to a dispute about a matter arising under an enterprise agreement or the National Employment Standards to appoint a representative (which can be a union delegate):

    2. *An employee who is a party to the dispute may appoint a representative for the purposes of the procedures in this term*

Awards

Modern awards include various rights and entitlements for union delegates and other employee representatives, as highlighted by the following provisions:

- The standard award clause requiring consultation about major workplace changes, requires that the employer:
    - Give notice of the changes to employees and employee representatives;
    - Discuss the changes with employees and their representatives; and
    - Give all relevant information about the changes to employees and their representatives.
- The standard award clause requiring consultation about changes to rosters or hours of work, requires that the employer:
    - Consult with employees and employee representatives about the proposed change;
    - Give information about the changes to employees and employee representatives;
    - Invite employees and employee representatives to give their views about the impact of the proposed change; and
    - Consider any views given by employees and employee representatives.
- The standard dispute resolution clause in awards, provides for an employee to be represented by an employee representative, if the employee wishes.
- The dispute resolution training leave clauses in various awards, give employee representatives (including, but not limited to, union delegates) the right to attend training courses directed at dispute avoidance and resolution, For example,
    - In clause 44 in the Manufacturing Award and clause 39.10 in the Building Award. In these clauses an 'eligible employee representative' is defined as an employee:

        who is a shop steward, a delegate, or an employee representative duly elected or appointed by the employees in an enterprise or workplace generally or collectively for all or part of an enterprise or workplace for the purpose of representing those employees in the dispute resolution procedure.

    - In clause 31 of the Cleaning Award, an 'eligible employee representative is defined in relatively similar terms as:

a shop steward, delegate or employee representative duly elected or appointed by employees in that enterprise or workplace to represent them in the dispute resolution procedure.

Enterprise agreements

Enterprise agreements that are negotiated between employers and unions commonly include provisions about delegates' rights and entitlements.

Addressing this issue through enterprise bargaining allows the needs of the employees and the employer in particular workplaces to be addressed.

A 'one size fits all' approach is not appropriate because of:

- the preferences of employees in different workplaces about how they wish to be represented;
- the diverse nature of different enterprises;
- the diverse nature of different workforces;
- the vastly different resources of small, medium and large businesses; and
- widely varying levels of union membership in different enterprises.

Summary of the current approach reflected in the FW Act, FW Regulations, modern awards and enterprise agreements

It can be seen from the above outline of relevant provisions in the FW Act, FW Regulations, modern awards and enterprise agreements that the existing approach is characterised by:

- Strong protections for workplace delegates;
- Recognising the rights of employees (union members and non-union members) to have a workplace representative of their choice, rather than forcing them to be represented by a union delegate;
- Recognising that union delegates and other employee representatives need to be elected or appointed by the employees in the enterprise who they will be representing, and not by union head offices; and
- Recognising that 'one size does not fit all' in relation to delegates' entitlements in enterprise agreements and this is an issue that should be addressed at the enterprise level.

The meaning of a 'workplace delegate'

Subsection 350C(1) in the Bill defines a workplace delegate as follows: (emphasis added)

> *A **workplace delegate** is a person appointed or elected, in accordance with the rules of an employee organisation, to be a delegate or a representative (however described) for members of the organisation who work in a particular enterprise.*

The above definition would give a union the right to impose a workplace delegate, and a particular person to be a workplace delegate, on a group of workers without their consent. This is preposterous proposition that would trample on the rights of employees to choose who they wish to be represented by.

In many cases, unions would nominate the most militant union members to be the workplace delegates rather than those who the employees in the workplace would like to be represented by.

The definition in the Bill is very different to the following definition that appears in clause 44 of the Manufacturing Award and clause 39.10 in the Building Award:

> *an **eligible employee representative** is an employee who is a shop steward, a delegate, or an employee representative duly elected or appointed by the employees in an enterprise or workplace or part of an enterprise or workplace for the purpose of representing those employees in the dispute resolution procedure.*

Consistent with the above definition determined by the AIRC and adopted by the FWC in modern awards, employee representatives need to be elected or appointed by the employees in the enterprise who they will be representing, and not by union head offices.

The following changes to the Bill are proposed to address these issues:

Proposed changes to the Bill

1. Vary s.350C(1) as follows:

   *Meaning of **workplace delegate***

   (1) A ***workplace delegate*** is a person appointed or elected by the members of an employee organisation who work in a particular enterprise~~, in accordance with the rules of an employee organisation~~, to be a delegate or a representative (however described) for members of the organisation who work in ~~a particular~~ the enterprise.

The workers that a workplace delegate has the right to represent

Subsection 350C(2) in the Bill would give a workplace delegate an entitlement to represent the industrial interests of union members who the delegate has been appointed or elected to represent, *"and any other persons eligible to be such members".*

The above wording is not appropriate. It would give a workplace delegate the right to represent workers who have chosen not to join the union. The wording is inconsistent with the definition of a 'workplace delegate' which clarifies that the delegate's role is to "*be a delegate or a representative (however described) for members of the organisation who work in a particular enterprise".*

A statutory note in s 350C(2) states:

> *Note: This section does not create any obligation on a person to be represented by a workplace delegate.*

However, the above statutory note is inadequate:

- Firstly, the note states that "*This section does not create any obligation on a person to be represented by a workplace delegate".* Given that the note appears in subsection 350C(2), there is doubt about whether the note only relates to subsection 350C(2), or to the whole of section 350C.

- Secondly, the note does not address the rights of workplace delegates. It only deals with the obligations of other persons.

- Thirdly, the note does not address whether any of the provisions in Part 7 of the Bill create a right for a workplace delegate to be involved in disputes between one or more employees and their employer. For example, would a workplace delegate have the right to attend a meeting where an employee is being disciplined or terminated even if the employee did not want the delegate to attend?

The Bill needs to expressly state that workplace delegates do not have the right to represent anyone who does not wish to be represented by them or to be involved in disputes in which the employees do not wish them to be involved. This is an important democratic principle that is embedded in numerous provisions in the FW Act, FW Regulations, modern awards and enterprise agreements, as discussed earlier in this submission.

To address the above issue, the following changes to the Bill are proposed:

Proposed change to the Bill

1. Amend s 350C(2) and insert new subsections (2A), (2B) and (2C) as follows:

Rights of workplace delegates

(2) The workplace delegate is entitled to represent the industrial interests of those members who wish the delegate to represent such interests, ~~and any other persons eligible to be such members,~~ including in disputes with their employer.

~~Note: This section does not create any obligation on a person to be represented by a workplace delegate~~.

(2A) A workplace delegate does not have the right to represent any person who does not wish to be represented by the workplace delegate.

(2B) There is no obligation on a person to be represented by a workplace delegate.

(2C) A workplace delegate does not have the right to be involved in a dispute as a representative of the relevant employees in circumstances where none of the relevant employees want the delegate to be involved.

Entitlements of workplace delegates

Communication and access to facilities

Subsection 350C(3) of the Bill states that a workplace delegate is entitled to:

(a) reasonable communication with those members, and any other persons eligible to be such members, in relation to their industrial interests; and

(b) for the purposes of representing those interests:

(i) reasonable access to the workplace and workplace facilities where the enterprise is being carried on; and

- - -

The above provisions are not appropriate. For example, they could be interpreted as giving a union delegate the right to:

- access a company's email system for the purposes of sending union membership literature to employees who are not members of the union;
- organise meetings with groups of employees during working hours;
- post union materials on company intranet sites, websites and social media sites, for the purported purpose of communicating with any employees eligible to be members of the union; and
- demand access to the phone numbers and email addresses of employees, in breach of employees' privacy.

Related training

Paragraph 350C(3)(b)(ii) of the Bill states that a workplace delegate is entitled to:

(ii) unless the employer of the workplace delegate is a small business—reasonable access to paid time, during normal working hours, for the purposes of related training.

The above provision does not clarify:

- What type of training would be regarded as 'related training';
- How many workplace delegates in a workplace would be entitled to attend such training at any point in time and in each year; or
- What a 'small business' is given that the provision does not use the expression 'small business employer' which is a defined term in the FW Act.

The provision contrasts starkly with award provisions that deal with a similar topic such as the following clause 44 in the Manufacturing Award:

> ***44. Dispute resolution procedure training leave***
>
> ***44.1*** *Subject to clauses 44.7 , 44.8 and 44.9 , an eligible employee representative is entitled to, and the employer must grant, up to 5 days training leave with pay to attend courses which are directed at the enhancement of the operation of the dispute resolution procedure including its operation in connection with this award and with the Act, or with any relevant agreement which provides it is to be read in conjunction with this award.*
>
> ***44.2*** *An eligible employee representative must give the employer 6 weeks' notice of the employee representative's intention to attend such courses and the leave to be taken, or such shorter period of notice as the employer may agree to accept.*
>
> ***44.3*** *The notice to the employer must include details of the type, content and duration of the course to be attended.*
>
> ***44.4*** *The taking of such leave must be arranged having regard to the operational requirements of the employer so as to minimise any adverse effect on those requirements.*
>
> ***44.5*** *An eligible employee representative taking such leave must be paid the wages the employee would have received in respect of the ordinary time the employee would have worked had they not been on leave during the relevant period.*
>
> ***44.6*** *Leave of absence granted pursuant to clause 44 counts as service for all purposes of this award.*
>
> ***44.7*** *For the purpose of determining the entitlement of employee representatives to dispute resolution procedure training leave, an* ***eligible employee representative*** *is an employee:*
>
> *(a) who is a shop steward, a delegate, or an employee representative duly elected or appointed by the employees in an enterprise or workplace generally or*

collectively for all or part of an enterprise or workplace for the purpose of representing those employees in the dispute resolution procedure; and

(b) who is within the class and number of employee representatives entitled from year to year to take paid dispute resolution procedure training leave according to the following quota table:

Number of employees employed by the employer in an enterprise or workplace	***Maximum number of eligible employee representatives entitled per year***
5–15	*1*
16–30	*2*
31–50	*3*
51–90	*4*
More than 90	*5*

44.8 *Where the number of eligible employee representatives exceeds the quota at any particular time for a relevant enterprise or workplace, priority of entitlement for the relevant year must be resolved by agreement between those entitled or, if not agreed, be given to the more senior of the employee representatives otherwise eligible who seeks leave.*

44.9 *For the purpose of applying the quota table, employees employed by the employer in an enterprise or workplace are full-time and part-time employees, and casual employees with 6 months or more service, covered by this award who are employed by the employer and engaged in the enterprise or workplace to which the procedure established under clause 43 — Dispute resolution applies.*

Unlike the above award clause, s 350C(3)(b)(ii) in the Bill:

- Does not limit the number of workplace delegates who are eligible to attend training courses in a year;
- Does not limit the number of days that a workplace delegate can be absent from the workplace in a year undertaking training courses;
- Does not clarify that the training courses must be for the purposes of avoiding and settling disputes;
- Does not require the employee to give a reasonable period of notice to the employer of the workplace delegate's intention to attend a training course;

- Does not require that the workplace delegate give the employer details of the type, content and duration of the course to be attended; and

- Does not require that leave to attend a training course is to be arranged having regard to the operational requirements of the employer so as to minimise any adverse effect on those requirements.

Unlike the above award clause, which is aimed at avoiding and resolving disputes, the provisions in the Bill are a recipe for disputation and disharmony.

Delegates' rights terms in modern awards

Subsection 350C(4) in the Bill states that:

> *(4) The employer of the workplace delegate is taken to have afforded the workplace delegate the rights mentioned in subsection (3) if the employer has complied with the delegates' rights term in the fair work instrument that applies to the workplace delegate*.

Even though it would be possible for the FWC to make a delegates' rights term that does not have the obvious flaws inherent in s 350C(3), and for that term to then apply in relation to workplace delegates covered by modern awards, the reality is that the FWC will undoubtedly be guided by s 350C if this provision is passed by Parliament.

Also, s 350C(4) only deals with the entitlements set out in s 350C(3). The FWC is not empowered to make a delegates' rights term that is inconsistent with the inappropriate meaning of a 'workplace delegate' in s 350C(1) or with the inappropriate rights of workplace delegates under s 350C(2).

Section 149E provides that modern awards must include a delegates' rights term for workplace delegates covered by the award.

Transitional provisions in Part 18 of the Bill:

- Require that by 30 June 2024, the FWC must vary all modern awards to include a delegates' rights term; and

- Prescribes that such delegates' rights terms come into operation on 1 July 2024.

This unreasonably short timeframe will give the FWC insufficient time to obtain input from employer and employee representatives, and develop appropriate delegates' rights terms for modern awards.

Ai Group does not support the inclusion of such terms in modern awards. As discussed earlier in this submission, the role of employee representatives (including union delegates) is already recognised in various clauses in modern awards.

If awards or any other instrument is required or enabled to include delegates rights terms s. 350C(3) should be deleted.

Delegates' rights terms in enterprise agreements

Section 205E provides that enterprise agreements must include a delegates' rights term for workplace delegates to whom the agreement applies.

Ai Group does not support all enterprise agreements being required to include such terms. This is an issue best addressed at the enterprise level. As discussed earlier in this submission, 'one size does not fit all'.

Subclause 205A(2) of the Bill is illogical. This subclause provides that, if, when an enterprise agreement is approved, the delegates' rights term is less favourable than the delegates' rights term in one or more modern awards that cover the workplace delegates:

- the term in the enterprise agreement has no effect; and
- the most favourable term of those in the modern awards is taken to be a term of the enterprise agreement.

The above provision fails to recognise that if the FWC is required to determine delegates' rights terms for each modern award, the FWC may develop different terms to suit the characteristics of different industries and occupations. If an enterprise agreement covers construction workers and clerical workers, it makes no sense for a clause designed for construction workers to apply to clerical workers, and vice versa.

Section 350A – Protection for workplace delegates

Section 350A in the Bill would implement a new general protection for workplace delegates imposing a substantial civil penalty for an employer who:

- unreasonably fails or refuses to deal with a workplace delegate; or
- knowingly or recklessly makes a false or misleading representation to a workplace delegate; or
- unreasonably hinders, obstructs or prevents the exercise of the rights of a workplace delegate under the FW Act or a fair work instrument.

The employer would have the burden of proving that the employer's conduct is not unreasonable.

Section 350A in the Bill is unnecessary and inappropriate. As discussed earlier in this submission, the FW Act already includes comprehensive protections for workplace delegates, including general protections.

Proposed changes to s 355 of the FW Act

If Part 7 of the Bill is passed by Parliament in anything remotely like its current form, militant unions are likely to try to coerce employers to allow union delegates to operate on a full-time basis, paid by the company but without performing any duties for the company. Their only role would be to represent workers in industrial matters. This is a recipe for industrial disputation because the full-time delegates would often have little to do other than formulating industrial claims.

The Grocon dispute and associated blockade of Melbourne's CBD in 2012 highlights this problem. The union set up a blockage and for four days failed to comply with orders of the Victorian police and injunctions issued by the Supreme Court of Victoria to remove the blockade.

The dispute related to union demands for Grocon to employ individuals nominated by the union, and to assign these individuals roles as full-time union delegates and WHS officers.

Confrontations between police on horseback and unionists were widely displayed in the media. Also, the CFMEU distributed a poster with the photographs of workers who have defied the picket, labelling them "scabs".

As a result of the Grocon dispute, the CFMEU was found guilty of contempt of court and fined $1.25 million. In addition, the CFMEU ultimately agreed to pay damages of $3.55 million to Grocon.

In order to protect employers from claims of this type, the following changes to s 355 of the FW Act is proposed:

Proposed changes to the Bill

1. Vary s 355 of the FW Act as follows:

355 Coercion--allocation of duties etc. to particular person

A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to:

(a) employ, or not employ, a particular person; or

(b) engage, or not engage, a particular independent contractor; or

(c) allocate, or not allocate, <u>any duties or responsibilities, or</u> particular duties or responsibilities to a particular employee or independent contractor; or

(d) designate a particular employee or independent contractor as having, or not having, particular duties or responsibilities.

Note:	Actions organised, taken or threatened with intent to coerce an employer to not allocate any duties to a workplace delegate to enable the workplace delegate to represent members of the industrial association on a full-time basis would contravene subsection 355(c).
Note:	This section is a civil remedy provision (see Part 4-1).

Regulated workers

The issues raised in the above sections of this submission are relevant to the provisions in Chapter 7 of the Bill relating to regulated workers, with necessary modifications to terminology and section numbers.

Part 9 – Sham arrangements

Summary of the key provisions in Part 9 of the Bill

The Bill would:

1. Change the defence to misrepresenting employment as an independent contracting arrangement (known as 'sham contracting'), in s.357(2) of the FW Act from a test of 'recklessness' to one of 'reasonable belief'.

2. Provide a non-exhaustive list of factors a court must consider when assessing reasonableness under the new defence.

3. Applies to representations made at any time during the relationship.

4. Retain the current evidence requirements, where the burden of proof rests with the party who made the representation.

The provisions in Part 9 of the Bill have no merit

The amendments will be problematic because:

- the new statutory approach to determining the ordinary meaning of 'employer' or 'employee' creates **significant uncertainty** for organisations and makes inadvertent misrepresentations more likely;

- the new statutory approach means s.357 as it currently exists has significantly broader application as employment is characterised on an **ongoing basis**, so it is relevant for representations made at and after the relationship starts;

- will, from a practical perspective, compel many organisations to pay for legal or professional advice on the status of employment or contracting relationships in order minimise their risk of potentially falling foul of the new provisions. This will be so regardless of what the independent contractor agreement says as it will have limited applicability (and afford limited protection) given the new statutory approach to determining the ordinary meaning of 'employee' and 'employer' which also has regard to subsequent conduct as between the parties.

The revised defence should be rejected by the Parliament, as explained in the sections that follow.

Inappropriately changes the defence to misrepresenting employment as an independent contracting arrangement

Ai Group opposes the proposed change to the defence to misrepresenting an employment relationship as an independent contracting arrangement.

Currently s.357(2) enables an employer to defend an allegation of sham contracting if the employer proves, that when the representation was made, the employer:

- did not know; and
- was not reckless as to whether;

the contract was a contract of employment rather than a contract for services.

The Government proposes to amend the defence to a claim of sham contracting in s.357(2) of the FW Act to provide that an employer will not be liable for a sham arrangement, if the employer misrepresents the relationship as a contract for services rather than a contract for employment, the employer ***reasonably believed*** that the contract was for services and not for employment.

Ai Group does not support the proposed amendment to the defence; it significantly raises the threshold that must be met for the availability of the defence.

Significant uncertainty over who is an employee increases the likelihood of misrepresentations

The change is even more problematic given the proposed new statutory approach to determining the meaning of 'employee' or 'employer' would require the multi-factorial analysis to not only have regard to the contract, but also now to subsequent conduct.

This changed approach significantly increases the risk that an employer may misrepresent the relationship because of the uncertainty surrounding the characterisation of employment.

It is also section that Section 357 as currently drafted, is applicable to representations made at the outset of employment and representations made throughout the employment/contractor

relationship. Given the proposed fluid nature of the statutory approach to determining the ordinary meaning of 'employee' and 'employer' - this creates an extremely onerous burden for organisations who may need to revisit the characterisation of the workers they engage at various stages during the engagement.

Ai Group opposes the changed defence.

Requires legal advice of limited applicability and duration

The Government has indicated, through the Explanatory Memorandum, that an organisation's size and nature will be relevant when determining if an employer's belief is reasonable: s.357(3). However, regard may be had to any other relevant matters.

The Explanatory Memorandum, assumes the FWC will consider whether:

> "the employer sought legal or other professional advice about the proper classification of the individual, including any advice from an industrial association, and, if so, acted in accordance with that advice."

We are particularly concerned the parties are now required to go to the significant expense of obtaining legal or other professional advice to confirm the proper classification to be able to prove 'reasonable belief'. To require organisations to obtain legal advice to be able to properly characterise work relationships is a significant and inappropriate burden.

Also, given the relationship may change over time under the proposed statutory approach to employment, any legal or professional advice obtained may quickly become invalid and will need to be refreshed over time to reflect the parties' subsequent conduct. This increases the costs of compliance significantly, as organisations will need to constantly refresh their legal and professional advice.

This change will be of no benefit to contractors that have genuinely agreed to enter into an arrangement that suits them. It will simply add another layer of regulatory burden and compliance costs on organisations and likely make then less willing to enter such arrangements.

Part 10 – Exemption certificates for suspected underpayment

Summary of the key provisions in Part 10 of the Bill

The Bill would amend the right of entry provisions in the FW Act to:

- enable a union to obtain an exemption certificate from the FWC to waive the minimum 24 hours' notice requirement for entry if they reasonably suspect a member of their organisation has been or is being underpaid;
- empower the FWC to take action in relation to the future issue of exemption certificates if those rights are misused (e.g., by imposing conditions, or banning further certificates being issue for a specified period);
- empower the FWC to impose conditions on a permit, as an alternative to revoking or suspending an entry permit in certain circumstances; and
- expand the prohibitions that apply to occupiers and employers in respect of union officials who are exercising entry rights.

Certificates will presumably be applied for and issued on an ex parte basis without notification to the employer.

Ai Group's position on Part 10 of the Bill

The Bill would undermine and largely negate the careful balance that has been struck in the existing right of entry laws relating to suspected contraventions of workplace laws and instruments.

Part 10 of the Bill needs to be rejected by Parliament.

The current provisions in the FW Act relating to the rights of unions to enter workplace to investigate suspected underpayments

The current provisions in the FW Act give union officials strong rights to enter workplaces to investigate suspected underpayments, as summarised below:

- A union official has a right to enter a workplace to investigate a suspected contravention of the FW Act or a fair work instrument that relates to, or affects, a member of the relevant union (s 481)(1)). The fair work instrument must apply or have applied to the member (s 481(2)).
- The union official must reasonably suspect that the contravention has occurred, or is

occurring. The burden of proving that the suspicion is reasonable lies on the union official. (s 481(3)).

- A union official needs to have a valid entry permit (s 481(1)).
- When a union official enters a workplace to investigate a suspected contravention of the FW Act or a fair work instrument, the official can:
    - inspect any work, process or object that relates to the suspected contravention (s 482(1)(a));
    - interview any person about the suspected contravention if the person agrees to be interviewed and the union official's union is entitled to represent them (s 482(1)(b)); and
    - require the occupier or an affected employer to allow the union official to inspect and make copies of any record or document (other than a non-member record or document) that is directly related to the suspected contravention and that is kept on the premises or is accessible from a computer kept on the premises (s 482(1)(c)).
- A union official may, by written notice, require an affected employer to produce, or provide access to, a record or document (other than a non-member record or document) that is directly related to the suspected contravention, on a later date specified in the notice (s 483(1)).
- Union officials are not permitted to see the records of non-union members, except with:
    - the non-member's written permission (s 482(2A); or
    - an order from the FWC (s 483AA).
- A union official may apply to the FWC for an order allowing the union official to inspect and make copies of specified non-member records or documents (s 483AA(1)). The FWC may grant access if it is satisfied that the order is necessary to investigate the suspected contravention (s 483AA(2)).
- A union official needs to generally give written notice of entry to the site occupier and any other affected employers of at least 24 hours and not more than 14 days (ss 487(1), (2), (3) and 518).
- The FWC can issue an Exemption Certificate giving a union official the right to enter without notice, if the FWC reasonably believes that advance notice of the entry might result in the destruction, concealment or alteration of relevant evidence (ss 487 and 519).
- A union official must not use or disclose any information or document obtained when

investigating a suspected breach for an unrelated purpose, unless authorised to do so by the FW Act (s 504).

- While on site, union official must comply with the site occupier's reasonable requests to comply with WHS requirements (s 491).
- Union officials must not:
    - intentionally hinder or obstruct another person or act improperly (s 500).
    - misrepresent their authority as a permit holder under the FW Act (s 503);
    - use or disclose information or a document obtained in the investigation of a suspected contravention for a purpose that is not related to the investigation or rectification (limited exceptions apply) (s 504); or
    - enter any part of premises that is mainly used for residential purposes (s 493).
- An employer, site occupier or other person must not:
    - refuse or unduly delay a union official's entry onto premises (s 501);
    - intentionally hinder or obstruct a union official who is exercising a right to enter the premises (s 502);
    - refuse or fail to comply with a union official's lawful request to produce or provide access to records or documents (s 482(3)); or
    - misrepresent that something they are doing is authorised by the right of entry provisions in the FW Act (s 503).
- The FWC has the power to settle disputes over right of entry matters (ss 505 and 505A).

Exemption certificates

The Bill would amend s 519(1) of the FW Act as follows:

519 Exemption certificates

*(1) The FWC must issue a certificate (an **exemption certificate**) to an organisation for an entry under section 481 (which deals with entry to investigate suspected contraventions) if:*

(a) the organisation has applied for the certificate; and

~~*(b) the FWC reasonably believes that advance notice of the entry given by an entry notice might result in the destruction, concealment or alteration of relevant evidence*~~*.*

(b) either:

(i) the FWC reasonably believes that advance notice of the entry given by an entry notice might result in the destruction, concealment or alteration of relevant evidence; or

(ii) the FWC is 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.

It can be seen that s 519 already states that the FWC must issue an exemption certificate if "*the FWC reasonably believes that advance notice of the entry given by an entry notice might result in the destruction, concealment or alteration of relevant evidence*".

It can also be seen that the Bill would give unfettered rights to unions to obtain an exemption certificate for suspected contraventions that involve an underpayment of wages or other monetary entitlements. The Bill states that the FWC must issue an exemption certificate in such circumstances.

Nearly all suspected contraventions of the FW Act or a fair work instrument relate to suspected underpayments of wages or other monetary entitlements. Therefore, the Bill would undermine and largely negate the careful balance that has been struck in the existing right of entry laws relating to suspected contraventions.

The Explanatory Memorandum for the *Fair Work Bill 2008* states that the right of entry provisions in the legislation provide *"a fair and balanced framework for right of entry for officials of organisations"*.[25]

The Explanatory Memorandum for the *Fair Work Bill 2008* also states:

> *1950. Subclause 487(3) provides that an entry notice must be provided to the occupier of premises (and any affected employer in relation to entry for investigation purposes) at least 24 hours, but not more than 14 days, before the proposed entry. This ensures there is an appropriate notice of entry.*

The Bill would remove the requirement for *"an appropriate notice of entry"* for entry to investigate suspected breaches of the FW Act and fair work instruments, in a large proportion of cases, and disturb the existing fair and balanced approach.

In 2011 and 2012, an Expert Panel (Professor Ron McCallum AO, retired Federal Court Judge - the Hon Michael Moore, and Economist – Dr John Edwards) was appointed by the Rudd Labor

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to carry out a Post-Implementation Review of the FW Act. The Panel received many submissions from unions, employer groups and others about the right of entry laws, including on whether any changes were warranted to the 24-hour notice requirement for entry to investigate suspected breaches of the Act and fair work instruments. In its final report, the Panel said: (emphasis added)

> *Several submissions about entry notice were received, relating to the level of information they are required to contain, the period for which they authorise entry and their provision to employers. Provisions about entry notices in the FW Act are similar to those that applied under Work Choices and the WR Act. They provide for the right of employers to be notified of the date and nature of entry while avoiding overly onerous procedural requirements or inappropriate disclosure of information about members. They have operated effectively in similar form over many years, and we are not persuaded that any change is required.*

The proposed amendment to s 519 has no merit and needs to be rejected by Parliament.

History of the 24-hour notice requirement in the federal workplace relations statute

Up until 1996, right of entry of union officials was typically dealt with in award clauses rather than in statutes.

The *Workplace Relations Act 1996* (**WR Act**), from 1996, included detailed right of entry provisions and, from that point, this topic has not been an allowable award matter. A requirement for union officials to give 24 hours' notice when entering to investigate suspected breaches of the Act, an award or a certified agreement, was included in the WR Act from 1996.

The 24-hour notice requirement has remained in the Act to this day.

As discussed above, and as concluded by the 2012 Review of the FW Act, the 24-hour notice requirement has operated effectively for the past 27 years. There is no valid case for the provisions to be amended in the manner proposed in the Bill.

FWC powers to impose conditions on an entry permit

The Bill would give the FWC the power to impose conditions on an entry permit in a wider range of circumstances, rather than suspending or revoking an entry permit.

Ai Group does not support the change proposed in the Bill.

Section 507(1) of the FW Act empowers the FWC to take the following action against a permit holder:

(a) impose conditions on any entry permit issued to the permit holder;

(b) suspend any entry permit issued to the permit holder;

(c) revoke any entry permit issued to the permit holder.

Subsection 510(1) of the Act requires that the FWC revoke or suspend an entry permit (rather than, for example, imposing conditions on an entry permit) in specified serious circumstances. However, s 510(2) enables the FWC not to suspend or revoke an entry permit in some circumstances where the suspension or revocation would be harsh or unreasonable in the circumstances.

It can be seen that the change in the Bill would substantially dilute the provisions of s 510 and send entirely the wrong message to union officials about the serious, unacceptable forms of conduct listed in s 510(1).

However, it would be beneficial to amend the powers of the Fair Work Ombudsman (**FWO**) to reinforce the FWO's important role in making applications under ss 507 and 508 for entry permits to be revoked when a union official consistently breaches right of entry laws. The Australia Building and Construction Commission (**ABCC**) regularly made such applications, many of which were successful, given the egregious conduct of the union officials concerned. Given the abolition of the ABCC, it is important that the FWO protects the community's interests in this regard.

The following change to the FW Act is proposed:

Proposed change to the FW Act

1. Amend s 682(1) to add a new paragraph (da) as follows:

   (da) to publish a compliance and enforcement policy, including guidelines relating to the circumstances in which the Fair Work Ombudsman will, or will not:

      (i) make an application for an entry permit to be revoked or suspended, or for conditions to be imposed, under sections 507 and 508;

Expanding the prohibitions that apply to occupiers and employers in respect of union officials who are exercising entry rights

Currently an employer or occupier of premises must not:

- refuse or unduly delay a union official's entry onto premises (s 501);
- intentionally hinder or obstruct a union official who is exercising a right to enter the premises (s 502);
- refuse or fail to comply with a union official's lawful request to produce or provide access

to records or documents (s 482(3)); or

- misrepresent that something they are doing is authorised by the right of entry provisions in the FW Act (s 503).

Given the comprehensive prohibitions that already apply to employers and occupiers of premises, there is no need for a further prohibition on acting in 'an improper manner'.

Part 11 – Penalties for civil remedy provisions

Summary of key provisions in Part 11

Part 11 of the Bill significantly changes the FW Act's compliance and enforcement framework and the necessity for such changes should be assessed in conjunction with a consideration of the effect of Part 14 which imposes a new criminal offence for underpaying employees. Under the Bill, employers who do not pay employees correctly would be subject to significantly increased civil penalties or, where the underpayment was intentional, a criminal penalty, including 10 years' imprisonment for individuals. We have set out our analysis of Part 14 of the Bill further below in this submission.

In summary the Part 11 of the Bill would:

- very significantly increases civil pecuniary penalties that apply to a large range of contraventions, including serious contraventions;
- inappropriately import elements of Australian consumer law in relation to the formulation of penalties, notwithstanding that, unlike consumer law, employers would also be required to pay outstanding entitlement amounts to employees; and
- broadens the threshold of what constitutes a 'serious contravention' in s.557A of the FW Act from one that is done knowingly and systematically, to one that is done either *knowingly* or *recklessly*.

Ai Group's position on Part 11

Ai Group does not seek to in anyway condone the deliberate underpayment of workplace entitlements or non-compliance with workplace relations laws.

Australia's workplace relations system is comprised of a variety of different sources of minimum employment conditions, including some 121 modern industry and occupational awards, the NES and other provisions in the FW Act, enterprise agreements, state long service leave laws, and many other laws, regulations and industrial instruments. Workplace laws, regulations and industrial instruments are complex, are frequently the subject of contested interpretations and often contain ambiguous or uncertain.

Determining a rate of pay should be a straightforward exercise, but for many employers, including larger businesses, it is not. A rate of pay may be determined by reference to not only multiple sources of legal obligations, but also the application of multiple provisions in an industrial instrument that interact to set monetary entitlements, (e.g. loadings, allowances, and penalty rates). In other words, calculating a rate of pay can involve calculating multiple pay points depending on the hours worked and applicable conditions.

We have seen a range of media reports about large, reputable organisations who have failed to pay employees correctly. This should come as no surprise given that larger organisations often face the challenge of applying various industrial instruments, the NES and various complex record-keeping obligations to different occupational groups with varied work arrangements and hours of work.

In recent years, Australia has seen a number of High Court decisions that have dealt with public interest matters on competing interpretations under workplace laws – including in relation to fundamental issues such as the definition of a casual employee, the tests for which workers are independent contractors and the meaning of a '*day*' in the FW Act for the purpose of personal/carers leave.

These cases demonstrate that workplace laws are not static but dynamic and vulnerable to different and competing interpretations.

The prevalence of competing interpretations is most keenly observed in the Fair Work Commission's administration of Australia's modern award system. Ai Group was the lead registered organisation representing employers in the FWC's four -yearly review of modern awards. These FWC proceedings continued for over 8 years, during which time countless arguments were considered about the correct interpretation of many different award provisions across Australia's 121 modern awards. Numerous ambiguities, uncertainties, anomalies and errors in the terms of awards needed to be addressed through this process and there is little doubt that a range of further problems still exist in the system.

Ai Group, as a national employer association, devotes significant resources and services to assist employers in understanding Australia's workplace relations system such that relevant minimum rates of pay can be properly identified. It is one of our core services to members.

In particular, Ai Group receives thousands of calls from employers, particularly large to medium sized employers, seeking advice on the correct payment of wages as they relate to competing modern award coverage, classification structures, the application of loadings to irregular hours of work and the interpretation of enterprise agreements. This is not to mention the calculation of long service leave and other leave or monetary entitlements.

The Bill's significant changes to the FW Act's compliance and enforcement framework as set out in Part 11 and Part 14 of the Bill (the new 'wage theft' criminal offence) does nothing to support employers or address the complexity of workplace laws that in many cases lead to underpayment

of wages. Part 11, together with Part 14 of the Bill are unbalanced responses that do not engage with the reasons as to why underpayments occur.

We acknowledge that the Government has very recently written to the President of the Fair Work Commission asking that the President initiate a further review of awards with a view to, amongst other objectives, making them easier to use, but we would suggest that this is far from a sufficient response to the problems in our system, many of which will increase with the Government's successive waves of legislative changes significantly increasing employer obligations and the compliance burden.

Excessive and very significant increases to civil pecuniary penalties are unjustified

Ai Group does not support the Bill's excessive increases to civil penalties in the FW Act.

The Bill would significantly increase the quantum of civil penalties for a wide range of FW Act contraventions by up to 5 times for bodies corporate and individuals.

Under section 539(2) of the Bill, an individual would face the new maximum penalty of 300 penalty units ($93,000) and for a serious contravention 3000 penalty units ($939,000).

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).

The Bill would also increase the civil pecuniary penalty by 10 times for failures to comply with a compliance notice issued by the FWO.

Facilitating compliance and rectification should be prioritised over excessive penalties

The merits of varying the FW Act to increase the maximum penalties for remuneration-related contraventions must be viewed within the context of an assessment of the often-significant costs associated with rectifying an underpayment.

Of course, underpayments must be rectified and should be addressed quickly. However, many underpayment cases will turn on disputed interpretations of workplace laws plagued by ambiguities, difficult to determine contextual consideration that guide the way they should be read – including the historical development of relevant provisions and customs and practices, and an unnecessarily complex patchwork of overlapping and inconsistent provisions in awards, the NES and a myriad of other workplace laws, regulations and instruments.

A compliance and enforcement framework that imposes an excessively punitive penalty regime on employers, without sufficient consideration to an employer's capacity to repay the underpayment amounts, is not in the interests of workers or the community – particularly where the underpayment arises from a mistake.

Increasing civil penalties is unnecessary if a new criminal offence is introduced

The stated purpose for the Bill to introduce a new criminal offence for underpayments is to serve as a deterrent for employers from paying employees incorrectly. If this is the intent, then the Bill's additional and significant increases to civil penalties is unnecessary.

Such steep increases in civil penalties will deter investment, inhibit jobs growth and weigh heavily on business decisions to expand business functions or enter new markets, particularly where there is complexity in how various worker arrangements fit within Australia's workplace laws.

Civil penalties have only recently increased

Civil contravention penalties have already been significantly increased for employers.

As a response to some significant and high-profile underpayment cases, the FW Act was amended by the Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 (Cth), to increase maximum penalties for underpayments by 10 times, and for breaches of the pay record requirements, by 20 times.

Since then, the monetary value of a penalty unit has also increased.

From 1 January 2023 and following the 2022 October Budget the Australian Government increased the value of a penalty unit 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.

And then again effective 1 July 2023, the Australian Government further increased the value of a penalty unit 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.

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

The range of FW Act contraventions for which the new maximum pecuniary penalty can be ordered by a Court is also very wide, ranging from a contravention of the NES, to contravening an equal remuneration order, to mispresenting employment as an independent contracting arrangement. The full range of FW Act contraventions subject to the increase in maximum pecuniary penalty is set out below.

	Provision/Section	**Current maximum civil pecuniary penalty amount**	**Proposed maximum civil pecuniary penalty amount**
1.	Section 44 (NES)	60 penalty units ($18,780) 600 penalty units for serious contraventions ($187,800)	300 penalty units ($93,900)

			3000 penalty units for serious contraventions ($939,000).
2.	Section 45 (Modern award)	60 penalty units 600 penalty units for serious contraventions	300 penalty units 3000 penalty units for serious contraventions.
3.	Section 45 (Modern award - outworker term)	60 penalty units 600 penalty units for serious contraventions	300 penalty units 3000 penalty units for serious contraventions.
4.	Section 50 (Enterprise agreement)	60 penalty units 600 penalty units for serious contraventions	300 penalty units 3000 penalty units for serious contraventions.
5.	Section 50 (Enterprise agreement - outworker term)	60 penalty units 600 penalty units for serious contraventions	300 penalty units 3000 penalty units for serious contraventions.
6.	Section 280 (Workplace determination)	60 penalty units 600 penalty units for serious contraventions	300 penalty units 3000 penalty units for serious contraventions.
7.	Section 293 (Minimum wages)	60 penalty units 600 penalty units for serious contraventions	300 penalty units 3000 penalty units for serious contraventions.
8.	Section 305 (Equal remuneration)	60 penalty units 600 penalty units for serious contraventions	300 penalty units 3000 penalty units for serious contraventions.
9.	Sections 323(1) and 323(3) (payment of wages), 325(1) (unreasonable requirements to spend and pay amount), 328(1)-(3) (guarantee of annual earnings)	60 penalty units 600 penalty units for serious contraventions	300 penalty units 3000 penalty units for serious contraventions.
10.	Section 325(1A) (prospective employee - unreasonable requirement to spend and pay amount)	60 penalty units 600 penalty units for serious contraventions	300 penalty units 3000 penalty units for serious contraventions.
11.	Sections 357(1) (mispresenting employment as independent contracting), 358 (dismissing to engage as an independent contractor), 359	60 penalty units	300 penalty units

	(misrepresenting to engage as an independent contractor)		
12.	Sections 535(1)-(2) and (4) (employee records), 536(1)-(3) (pay slips)	60 penalty units 600 penalty units for serious contraventions	300 penalty units 3000 penalty units for serious contraventions.
13.	Sections 536AA(1)-(2) (obligations in relation to advertising rates of pay)	60 penalty units	300 penalty units
14.	Sections 558B(1)-(2) (Franchisee entity and holding company contraventions)	60 penalty units	300 penalty units
15.	Section 712(3) (complying with a notice to produce records or documents)	60 penalty units	300 penalty units
16.	Section 716(5) (failing to comply with a compliance notice)	30 penalty units	300 penalty units
17.	Section 718A(1) (providing false or misleading information to the FWO)	60 penalty units	300 penalty units
18.	Section 745 (extension of unpaid parental leave) and 760 (extended notice of termination)	60 penalty units	300 penalty units
19.	Section 757BA (employer obligations in relation to pay slips relating to paid leave)	60 penalty units	300 penalty units 3000 penalty units for serious contraventions.

Note: The above penalty units are in respect of the maximum number of penalty units available against an individual. For bodies corporate, the maximum penalty unit is determined by multiplying the maximum number of penalty units by five times.

Penalty formulations inappropriately based on consumer law

The Bill, at section 546(2A), enables a Court in certain circumstances to order a penalty based on a multiple of 3 times the underpayment amount. Those circumstances include where:

- the contravention is associated with an underpayment amount;
- the applicant specifies in their application that they want the maximum penalty to be calculated based on a multiple of the underpayment amount;

- the person (respondent) is not taken to have contravened section 555 (accessorial liability).

This could be particularly unfair if it is alleged the employer has underpaid a very large quantum based, for example, on applying an incorrect, but not unreasonable, award interpretation to a large number of employees. An order requiring the employer to pay a penalty 3 times the underpaid amount in such cases could potentially render the employer insolvent.

The framing of civil penalties based on a multiplier of the underpayment amount is similar to the 'benefit obtained' approach in consumer law. This approach originated from the Migrant Workers Taskforce Report (**MWTR**) recommendation that FW Act penalties should be "more in line" with other penalty frameworks applying to business, such as consumer law.

Underpayment contraventions, however, are different in character to contraventions in competition, consumer and corporations laws. For instance, a large number of separate contraventions may arise where employers mistakenly apply the incorrect modern award, or genuinely consider certain employed occupations to be award-free.

The above kinds of mistakes that occur in the context of applying our workplace relations laws contrast starkly with circumstances involving an organisation deliberately seeking to obtain a financial benefit by contravening a legal obligation that would otherwise cost the organisation a particular amount.

Under competition law, where a company has obtained a commercial benefit from unfair and unlawful competition, it is logical to impose a penalty that is based on the extent of the benefit obtained because the company will not be typically required to compensate those impacted. However, this is not a logical approach with wage underpayments because the employer will have to back-pay the employees and therefore will not typically receive any benefit from the underpayments. That is, any benefit obtained from an underpayment contravention would invariably be reduced to nil once the employer repaid the amounts owing.

If the Bill is to maintain the 'benefit obtained' approach to penalties, despite Ai Group's strong opposition, this framework should be confined to cases where employers have knowingly contravened workplace laws, as found in the current serious contravention provisions of the FW Act.

The expansion of the serious contravention threshold should be reason to moderate civil penalty amounts

Currently, a contravention of a FW Act civil remedy provision by a person is a serious contravention if:

- the person **knowingly** contravened the provision (s.557(1)(a)); **and**
- the person's conduct constituting the contravention was part of a **systematic pattern of conduct** relating to one or more other persons (s.557(1)(b).

The Bill broadens the threshold of what will constitute a serious contravention and amends the FW Act such that a contravention is a serious contravention if either:

- the person **knowingly** contravenes the provision; **or**
- The person was **reckless** as to whether the contravention would occur.

The Bill would mean it is no longer necessary for a serious contravention to be a systematic pattern of conduct relating to one or more persons. For example, if an employer failed to pay an employee the full amount payable to the employee in relation to the performance of work as required s.323(1) it will be a serious contravention if:

- the employer **knowingly** does not pay the employee in full; or
- is **reckless** as to whether the failure would occur.

Notably, it will be a serious contravention even if the employer does not know the exact amount of the underpayment (Note to s.557A(1)).

A person will be **reckless** as to whether a contravention would occur if:

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

The Bill's expansion of the FW Act's serious contravention provisions in this way is likely to capture a broader range of employer conduct in relation to underpayments that may not meet the current threshold of a serious contravention.

Given that the serious contravention threshold has been lowered, it is unjustified and excessive for the Bill to impose such steep and rapid increases in civil penalties – including for serious contraventions themselves.

Part 14 – Wage theft

Summary of the key provisions in Part 14

Part 14 of the Bill introduces a significant change to the FW Act by creating a new criminal offence for employers who fail to pay certain amounts to their employees as required. The new criminal offence is to operate in addition to the FW Act's civil contravention framework that also applies to employers who fail to pay employees as required. The FW Act's civil contravention framework is also subject to significant amendment by Part 11 of the Bill. Part 11 is discussed above.

In summary, Part 14 of the Bill:

- Creates, for the first time in federal workplace laws, a new criminal offence for employers and individuals who intentionally engage in conduct resulting in failure to pay a required amount to an employee in full.

- Applies Part 2.5 of the Criminal Code to establish corporate criminal liability in relation to the new criminal offence.

- Enables the application of the Criminal Code to apply to individuals, including human resources professionals and payroll managers if they engage in ancillary criminal conduct. This effect is not explicitly referred to in the Bill or the Explanatory Memorandum.

- Imposes a penalty of up to 10 years' imprisonment for an individual *and* a fine of 5,000 penalty units ($1,565,000) or the greater of 3 times the underpayment amount (if the underpayment amount can be determined);

- Imposes a penalty for a **body corporate** of up to the greater of 25,000 penalty units ($7,825,000) or 3 times the underpayment amount (if the underpayment amount can be determined).

- Empowers only the Australia Federal Police (**AFP**) or the Commonwealth Department of Public Prosecutions (**CDPP)** to commence criminal proceedings.

- Does not exclude the continued operation of current and future state 'wage theft' laws that could expose employers to multiple criminal prosecutions for potentially the same conduct.

- Provides a very limited 'safe harbour' for employers through the operation of a 'cooperation agreement', which if in force, will preclude the FWO from referring the relevant conduct in the co-operation agreement to the AFP or CDPP for criminal prosecution. The AFP or CDPP may still commence criminal proceedings and the FWO may still commence civil proceedings against the person/employer.

- Enables, but does not require, the Minister to create a Voluntary Small Business Wage Compliance Code. Compliance with any Voluntary Small Business Wage Code however may still result in criminal proceedings against a small business and relevant individuals.

- Extends the application of the new criminal offence and associated penalties to the Commonwealth Government.

- Removes a person's immunity in relation self-incrimination in relation to employee records required to be kept under the FW Act.

- Creates criminal liability for 6 years after the commission of the new offence.

Ai Group's position

While acknowledging the Bill's confinement of the criminal penalty to intentional conduct, we remain concerned that the Bill's proposed new criminal offence, combined with proposed excessive increases to civil penalties, is an unbalanced response that does not address why the vast majority of underpayments occur.

It is likely that individuals, be they directors, managers, officers, payroll and human resources professionals and their advisors may also be deterred from holding responsibilities regarding the management of compliance with workplace laws by the application of severe civil and criminal penalties that could apply to them as people.

It must also be understood that criminal proceedings are not concerned with the recovery of unpaid entitlements for employees. A criminal penalty relates only to the committing of an offence under the FW Act. In cases of conduct that meets the new criminal offence, it is likely that affected employees will be afforded no remedy in relation to seeking recovering of unpaid wages through the prosecution of the new criminal offence. Indeed, such action may delay the recovery of relevant amounts.

We are concerned that the 'safe harbour' provisions are unduly limited in effect and such limitations will work against the encouragement of disclosure by employers to the FWO, noting that the AFP or CDPP may still commence criminal proceedings against them.

We have set out our specific concerns with Part 14 below.

New Criminal Offence

The Bill provides at section 327A than an employer commits a criminal offence if the following elements can be established:

- the employer is required to pay a required amount to, on behalf of, or for the benefit of an employee under the FW Act, a fair work instrument or a transitional instrument; and
- the required amount is not a contribution payable to a super fund for the benefit of the employee; and
- the employer engages in conduct (that is does an act or omits to perform an act); and
- the conduct (that act or omission) 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.

A contribution to a superannuation fund for the benefit of the employee is not covered by the wage theft provisions. Superannuation contributions are enforceable under the superannuation framework and may also be enforceable as workplace entitlements under the FW Act in some

circumstances, by way of proceedings for a contravention of a civil remedy provision. From 1 January 2024, the right to superannuation will be a NES entitlement and will be enforceable on that basis.

In order for the offence to be committed, the employer must have engaged in conduct and the conduct results in the failure to pay the required amount. The term 'engage in conduct' will be defined in s.12 of the FW Act to mean: '*do an act or omit to perform an act.*' For this element, there is no need to prove that an employer intentionally did not pay the required amount, but rather that the employer was required to pay the required amount.

However, for there to be an offence, the person must mean to bring about the result (that is, a failure to pay the required amount), or be aware that result will occur in the ordinary course of events. It will need to be proved, beyond reasonable doubt, that an employer intentionally engaged in the conduct (the act or omission) and the employer intended that the conduct would result in the failure to pay the required amount.

In respect of determining an amount required to be paid, the provision is broadly expressed. It will apply to obvious underpayments where an employer has failed to pay an employee an amount owed under an enterprise agreement or an award. But it may also apply in other broader circumstances. This is because s.327 of the FW Act will also apply to determine whether there has been a failure to pay a required amount. For example, an employee may have been required to pay an amount of their wages back to their employer (or a person nominated by their employer) as 'cashback'. Section 327 of the FW Act would apply so that:

- anything given or provided by the employer contrary to s.323(1)(b) and s.323(3), for example a 'payment in kind', is taken never to have been given or provided to the employee; and
- any 'cashback' or other amount of the employee's money that the employee has been required to spend or pay to the employer where that is directly for the employer's benefit and where the requirement is unreasonable (in contravention of s.325(1) or in accordance with a term to which s.326(3) applies), is taken to be a deduction, from an amount payable to the employee made by the employer.

Any unlawful off-set or requirement to spend would also be treated as an underpayment for the purposes of the new offence.

It is inappropriate for delayed underpayments to be criminalized

Section 327A(1)(d) inappropriately characterizes the criminal offence of a failure to pay in full on or before the day when the required amount is due for payment. This has significant consequences for many contracts of employment and annualized salary arrangements that may rely on common law set-off provisions whereby monetary entitlements may be paid over successive pay periods. Such arrangements are often highly valued by employees because of the certainty of earnings they provide but difficult legal questions can arise as to whether they offend any temporal requirement under an industrial instrument or the FW Act regarding the payment of wages.

Such conduct should not be treated in the same way as a failure to permanently deprive employees of their monetary entitlements. It is inappropriate to include delayed or late wage payments that are intended to be paid as a wage theft criminal offence. The offence should only apply to the intentional failure to pay the monetary entitlement.

Section 327(A)(d) must be changed to remove the words *"on or before the day when the require amount is due for payment."*

This is not to say that an employer who inappropriately delays payment of an owing monetary entitlement would faces no consequence. An employer may still, depending upon the circumstances, contravene a term of a relevant industrial instrument or the FW Act itself, in which civil penalties may still apply.

Criminal liability for individuals is too broad

The Bill enables extensions of liability provisions that apply to ancillary offenders of the new criminal offence, which could implicate individual employees, officers and agents of employers.

There are various offences in the *Crimes Act 1914* and the *Criminal Code 1995* that will be taken to be a '*related offence*' under the FW Act (to the extent that they relate to a Wage Theft Offence).

A related offence will be committed by a person if they:

- assist the employer, who has, to their knowledge, committed the Wage Theft Offence, in order to enable them to escape punishment of the Wage Theft Offence (Accessory after the fact);
- attempt/s to commit the Wage Theft Offence (Attempt);
- Aids, abets, counsels or procures the commission of the Wage Theft Offence by the employer (Complicity and Common Purpose);
- enter into an agreement to commit the Wage Theft Offence with the employer and the Wage Theft Offence is committed in accordance with that agreement in certain circumstances (Joint Commission);
- have the relevant intention and procures the conduct of another person that would have constituted the Wage Theft Offence on the part of the procurer if the procurer had engaged in it (Commission by Proxy);
- urges the commission of the Wage Theft Offence (Incitement); and
- conspires with another person to commit the Criminal Offence (and it is as if the Criminal Offence has been committed) (Conspiracy).

Exact knowledge of the required underpayment amount (to a dollars and cents value) would not be required to establish the offence.

Ai Group contends that the operation of the Bill's new criminal offence has the potential to capture an overly broad range of individuals or individual behaviours. It could see individuals, including those employed in some non-managerial roles such as payroll positions, exposed to criminal prosecution should their conduct fall within the relevant threshold of related offence described above.

The potential for conduct by third party payroll providers to employers being captured is also possible under the Bill's new offence, and related offences.

The Bill creates unnecessary confusion by failing to exclude the simultaneous application of state 'wage theft' laws

The Bill fails to include provisions ensuring that the new criminal offence is intended to 'cover the field' and prevent the unfair application of state wage theft laws (e.g. the *Wage Theft Act 2020* (Vic)) to an employer covered by the FW Act.

Currently, Victoria and Queensland have wage theft legislation. New South Wales introduced a Bill to investigate payroll tax liabilities of employers alleged to have engaged in wage theft, but this lapsed in 2023. South Australia has an ongoing inquiry and Western Australia has implemented wage theft related amendments through the *Industrial Relations Legislation Amendment Act 2021* (WA).

The *Wage Theft Act 2020* (Vic) (**Wage Theft Act**) contains criminal offences for the dishonest withholding of employee entitlements, and the falsification of or failure to keep employee entitlement records to gain a financial advantage (or prevent the exposure of such an advantage).

The definition of stealing at section 391 of Schedule 1 of the *Criminal Code Act 1899* (Qld) (**Queensland Criminal Code**) includes a failure to pay an employee, or another person on behalf of the employee, an amount payable to the employee or other person in relation to the performance of work by the employee. The Queensland offence is intended to apply to intentional behaviour leading to under- or non-payment of entitlements.

The issue as to whether state 'wage theft' laws are actually enforceable under the Australian Constitution is a live one that remains unresolved. Presently, there are proceedings before the High Court in *Rehmat & Mehar Pty Ltd & Anor v. Hortle* challenging the validity of the Victorian Wage Theft Act under section 109 of the Australian Constitution.

It is essential that any new criminal penalty relating to compliance with, and enforcement of, workplace laws, including criminal sanctions for underpayment of wages, operate to the express exclusion of any concurrent application of any state and territory laws relating to the same subject matter. To do otherwise, would create a compliance and enforcement framework with competing, superfluous and inconsistent enforcement procedures and consequences across the country, notwithstanding that the FW Act already provides a comprehensive enforcement regime for non-compliance with modern awards, enterprise agreements and employment contracts.

Additional and inconsistent state and territory compliance and enforcement frameworks would undermine the extent to which the FW Act is able to provide a national workplace relations framework, and would unnecessarily add to the complexity of our workplace relations system and the costs of compliance for employers.

Competing frameworks raise the prospect of employers being faced with multiple enforcement actions under differing national and state/territory laws, including exposure to multiple penalties for the same offence. This risk must be removed to ensure the integrity of a national compliance framework and the objectives supporting it. Employers and the community should not wear an added regulatory burden where state and federal governments choose to regulate in relation to the same issue in different ways.

The ongoing presence of competing state legislation, without a clear signal as to the validity of its enforceability, will significantly undermine the policy objectives of the Federal Government in relation to compliance and erode community confidence in the role of a national compliance framework.

Further, it is unfair and inappropriate for the community to carry the burden of any constitutional challenge to the enforceability of competing and inconsistent state/territory laws, when the Federal Government can make this clarification prophylactically under statute or regulation.

The uncertainty can be dealt with through a straightforward change to the Bill to expand s.26 of the FW Act:

Proposed changes to the Bill

s.26(2)(da):

(da) a law of a State or Territory providing for an employer, or officer, agent or an employee of an employer, to be liable to be prosecuted for an offence relating to underpaying an employee an amount payable to the employee in relation to the performance of work or the employee's employment.

The Bill's Voluntary Small Business Wage Compliance Code may be meaningless

The Bill, at section 327B (1), does not require the Minister to make a Voluntary Small Business Wage Compliance Code but merely provides the Minister with discretion to do so. The Minister may choose not to make one at all. Alternatively, if the Minister decides to make a Voluntary Small Business Wage Compliance Code, there is nothing requiring the Minister to consult with relevant stakeholders, including registered employer or employee organisations and the small business community about its content.

The Bill does **not** provide immunity or 'safe haven' to small business who comply with the Voluntary Small Business Wage Compliance Code. Section 327B(2)(a) by referencing the word "or"

instead of “and” enables the FWO to still refer conduct by a small business who has, in good faith, complied with the Code, to the AFP or CDPP for criminal prosecution.

The Bill’s Cooperation Agreements provides only limited immunity for employers who self-disclose

The Bill at section 717A describes the effect of a cooperation agreement entered into by the FWO and the employer. In summary, a cooperation agreement is intended to provide a person with the opportunity to access ‘safe harbour’ from potential criminal prosecution if they have engaged in conduct that amounts to the possible commission of the offence or related offence and self-report their conduct to the FWO.

A cooperation agreement is a written agreement between a person and the FWO which covers specified conduct engaged in by that person which they have self-reported to the FWO.

The specified conduct is conduct that amounts to the possible commission of an offence, or at least the physical elements of an offence, against either or both of the following:

- the new criminal offence (failing to pay the amounts as required);
- a related offence, to the extent that the offence created by the provision relates to the new criminal offence.

When a cooperation agreement is in force, the Bill only precludes the FWO from referring conduct covered by a cooperation agreement to the AFP and CDPP; it does not preclude the AFP or CDPP from commencing a criminal prosecution in relation to the conduct covered by the cooperation agreement. A cooperation agreement does not preclude the FWO from commencing civil proceedings against the employer.

The Bill would therefore enable an employer to be criminally prosecuted by the AFP and the CDPP in relation to the new offence if the employer has entered a cooperation agreement and complied with its terms in good faith. (For instance, if a referral was made by somebody else to the AFP or CDPP). Similarly, the Bill does not require a Court before whom criminal proceedings are brought to consider whether an employer has entered a cooperation agreement and whether the agreement remains in force.

Ai Group views the ‘safe harbour’ provisions of the Bill as extremely limited and will provide little or no incentive for employers to self-disclosure or report conduct relating to underpayments to the FWO.

A Cooperation Agreement should be a voluntary agreement and not a unilateral enforcement device to circumvent contested legal proceedings

The Bill at section 717D(1) empowers the FWO to unilaterally terminate a cooperation agreement in certain circumstances, including where the employer has provided false or misleading information either before or after the agreement was entered into.

Instead of terminating the cooperation agreement, the Bill, under section 717D(2) and (3) inappropriately empowers the FWO to seek court orders that the employer comply with a term of the cooperation agreement. This could include where there may be a contested interpretation around a particular provision relevant to correctly calculating an employee's rate of pay.

A court should not be empowered to order an employer to comply with a cooperation agreement (including an order pay a significant financial sum to someone else) where there is no opportunity for the employer to argue that the terms of the agreement themselves may be invalid or incorrect or inappropriate for the employer to comply with. This is inappropriate.

Proposed changes to the Bill

Section 717D(2) and (3) should be removed from the Bill.

Section 717E of the Bill only permits an employer to withdraw from a cooperation agreement if the FWO has consented. In doing so, a co-operation agreement ceases to be an agreement. Given the limitation period of 6 years applying to the commission of the new criminal offence, it is conceivable that a cooperation agreement could have a minimum expiry date of 6 years or longer.

During that time, relevant circumstances can change and there should be opportunity for an employer to voluntarily withdraw knowing that a consequence of doing so may mean exposure to criminal proceedings. Section 717E does not qualify the FWO's consent. It may be unreasonably withheld, for example, where the employer has complied and demonstrated future compliance with the terms of the agreement, or where the FWO may consider that all cooperation agreements should continue for a minimum period of 6 years.

Section 717E should be changed to ensure that the FWO's consent must not be unreasonably withheld.

Part 15 – Definition of employment

Summary of the key provisions in Part 15 of the Bill

The Bill would:

1. Introduce a new statutory approach to determine the ordinary meaning of *'employer'* and

'employee' for the purposes of the FW Act (only) which overrides the certainty provided by the High Court of Australia in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1[26] (**Personnel Contracting**). The new statutory approach would:

a. permit the 'multi-factorial' assessment, to look beyond the agreed contractual terms to consider conduct at the beginning and throughout the relationship;

b. have the purpose of 'ascertaining the real substance, practical reality and true nature of the relationship between the individual and the person'; and

c. reintroduce a wide-ranging review which enables the ordinary meanings of 'employee' and 'employer' to continue to adapt to changing social conditions, market structures and work arrangements and which creates "ambiguity, inconsistency and contradiction[27]" and significant uncertainty for organisations.

2. Have a piecemeal application as it applies to only national system employees and employers which creates widespread disruption and confusion.

3. Permits individuals to be 'employees' under the FW Act but be 'independent contractors' for many other purposes under legislation other than the FW Act. For example, superannuation, long service leave, workers compensation, payroll and PAYG tax etc. This similarly will create widespread disruption and confusion.

4. Reintroduces the risk of employment class actions based on the misclassification of an employee as an independent contractor.

5. Consequentially further broadens the application of the sham contracting provisions in ss.357-359 FW Act by narrowing the defense, by requiring that a party as formed a 'reasonable belief' as to their characterisation of the arrangement.

6. Disturb existing contractual arrangements as it is not limited to arrangement entered into after the commencement of the new provisions.

The uncertainty that will result from the proposed change will undoubtedly cause many organisations to reassess their engagement of independent contractors, even in circumstances where such arrangements are currently operating controversially and in the mutual interests of all parties.

This aspect of the Bill will undoubtedly put the likelihood of many small contractors at risk.

[26] Also see *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2
[27] Lee J, in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2020] FCAFC 122 at 61

The provisions in Part 15 of the Bill have no merit

The provision in have no merit because:

- the High Court of Australia has provided certainty and finality on how to determine the ordinary meaning of 'employer' and 'employee'[28];
- this has been beneficial for all parties who are now able to ascertain rights and obligations with increased certainty;
- the contract-centric High Court approach significantly decreased the 'gaming' of the system by class actions and other legal action; and
- the current approach provides certainty for a relationship of such fundamental importance and where the parties have taken legitimate steps to avoid uncertainty in their relationship.

The proposed statutory approach to the ordinary meaning of 'employer' and 'employee' in the Bill has no merit and needs to be rejected by the Parliament, as explained in the sections that follow.

New statutory approach to determine the ordinary meaning of 'employer' and 'employee' - item 237 in Part 15 of the Bill

Common law approach to characterising 'employee' and 'employer' is uncertain

Ai Group strongly opposes the proposed statutory approach to determine the ordinary meaning of 'employer' and 'employee' for the purposes of the FW Act.

It overturns the certainty achieved in *Personnel Contracting*, in which the High Court confined the analysis of whether a person is an employee or an independent contractor to the terms of the written contract, where a comprehensive written contract exists and the contract is not a sham, rather than the subsequent conduct of the parties. This created certainty with a point-in-time at which parties could be definitive about what relationship had been established. Previously, Courts applied a multi-factor analysis that considered how the relationship operated in practice. This created significant uncertainty as the way parties work together often changes over time.

The proposed statutory approach will no longer apply the current and certain contract focused approach but instead implement an approach that will be a recipe for '*ambiguity, inconsistency and contradiction*'[29].

Common law does not provide a definition, only a 'smell test'

[28] *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2

[29] *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2020] FCAFC 122 at 61

Importantly also, the common law approach does not provide a definition and will never therefore be capable of providing an acceptable outcome for an organisation.

The Explanatory Memorandum in paragraphs 984 to 986 identifies factors which it alleges have been identified by '*[a] considerable number of case authorities'*. However, this is not borne out on examination of the case law. What the common law instead provides is a melting pot of criteria, which are not always relevant in the parties' circumstances and none of which are exclusive[30].

This means the common law approach is uncertain, ambiguous and inconsistent - none of which supports business productivity and economic growth and in fact supports the opposite.

The courts have been damning in their criticism of the common law approach to be reintroduced by s.15AA, observing it:

- is "a matter of impression"[31]
- requires a "smell test" or "level of intuition"[32]
- is an "impressionistic and amorphous exercise"[33]
- is susceptible to manipulation and its application is inevitably productive of inconsistency[34]
- produces inconsistency where different commissions or courts may apply the same approach but reach different conclusions as there is no guidance on how any of the criteria should be weighted in the analysis[35]
- is unclear for parties who do not know the true nature of their relationship from the outset but instead are dependent on a court decision[36]
- applies in circumstances where the FW Act applies significant civil penalties on organisations which misrepresent the nature of the relationship under its sham contracting provisions (s.357, FW Act)[37] - up to a proposed maximum of 300 penalty units (currently indexed at $93,900 for an individual and $469,500 for a corporation for each contravention)

There is no justification for forcing this uncertain common law approach where the High Court of

[30] *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1 at 35.
[31] *Re Porter, Re Transport Workers Union of Australia* (1989) 34 IR 179 at 184
[32] *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3)* (2011) 214 FCR 82 at 204
[33] Allsop, CJ, *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2020] FCAFC 122 at 76
[34] Allsop, CJ, *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2020] FCAFC 122 at 76
[35] Allsop, CJ, *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2020] FCAFC 122 at 76
[36] Gray, J in *Re Porter, Re Transport Workers Union of Australia* (1989) 34 IR 179 at 184
[37] Bromberg, J in *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3)* (2011) 214 FCR 82 at 206

Australia rejected it so comprehensively in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1. As aptly stated by Kiefel CJ, Keane and Edelman JJ (emphasis added):

> *"It is the task of the courts to promote certainty with respect to a relationship of such fundamental importance. Especially is this so where the parties have taken legitimate steps to avoid uncertainty in their relationship. The parties' legitimate freedom to agree upon the rights and duties which constitute their relationship should not be misunderstood.[38]"*

The Government is instead promoting uncertainty for organisations on a matter of fundamental importance to rights and obligations of all concerned parties. This is unacceptable.

Common law approach is maladapted to modern work arrangements

In the Explanatory Memorandum, the Government says the common law is flexible and adaptive to changing social conditions, market structures and work arrangements, this is certainly not the case.

Instead, the common law approach provides for an outdated binary classification which "*shoehorns*"[39] a person into a classification and which is "*too deeply rooted to be pulled out*"[40] of the common law approach. Nothing about the statutory approach enables the court to apply a different approach to take account of modern-day work.

The proposed statutory approach reintroduces this maladapted approach which is not fit for purpose. That is especially so for modern day gig economy arrangements as multi-factorial assessments have little value in that context[41].

For parties engaging regulated contractors that may be subject to orders made by the FWC setting terms and conditions for either 'employee like workers' or road transport contractors, it is deeply concerning that they may act on the assumption that they are covered by such orders if they have contracted with a party on the mutual understanding that it is a contractor relations, and consequently pay employees in accordance with such orders, but nonetheless subsequently face the prospect of a worker arguing that they are employees and untitled to employment entitlements under the FW Act given the ambiguity that will be reintroduced if the Bill is passed.

If the Parliament is going to implement legislation empowering the FWC to regulated terms and conditions of contractors (notwithstanding industry opposition) there needs to be greater certainty over where or not a worker is either a contractor or employee, not less.

Key differences between the current common law approach and the statutory approach in the Bill

[38] At 58
[39] *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2020] FCAFC 122 at 72.
[40] *Sweeney v Boylan Nominees Pty Ltd* [2006] HCA 19.
[41] *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 at 26

Currently, the common law approach has regard to a written comprehensive contract to determine whether a person is an employee or an independent contract, unless that contract is a sham. No regard is had to subsequent conduct as between the parties[42].

The central question determined by the court when making this determination is whether the worker is working in the business of the engaging entity, having regard to multiple factors, including a consideration of whether the engaging entity has a right of control and whether the alleged contractor is running their own business.

After the High Court's decisions in *Personnel Contracting* (and applied in *Jamsek*), the analysis no longer had regard to subsequent conduct between the parties where the relationship was committed to a comprehensive written contract (and there was no evidence of sham or illegality). This resolved a tumultuous and uncertain period for parties.

The Government wishes to reintroduce this uncertainty to the detriment of all, where once again the courts will approach this analysis with little regard to agreed contractual terms and with a fact-based and inconsistent approach to a parties' individual conduct and surrounding circumstances.

Ai Group regards this as entirely unacceptable.

Has piecemeal application as it only applies to national system employees and national system employers

The organisation needs to be a constitutional corporation

The proposed statutory approach to determining 'employee' and 'employer' only applies to national system employers and national system employees.

This requires the employer be a constitutional corporation.

This creates patchy and unworkable coverage which excludes sole traders, partnerships, other incorporated entities and non-trading corporations or who are state or local government employees from the proposed statutory approach to determining 'employee' and 'employer'.

Also, for organisations which are corporations <u>but</u> where it is questionable as to whether they have financial or trading activities, there is an additional layer of confusion.

For example, a not-for-profit corporations who engages in some form of peripheral trading activity, for example, selling goods (ie, including fundraising), providing services for a fee, charging admission for public performances, hiring out equipment, charging for a car park, deriving income from investments or renting out property, or supplying labour to another entity - even where this is carried out pursuant to a statutory duty or responsibility.

[42] *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2020] FCAFC 122

If a court decides the peripheral activity of the not-for-profit corporation is *'substantial'* or *'not insubstantial*' they will be a trading corporation and a constitutional corporation falling within the new s.15AA multi-factorial framework. However, if not, the organisations falls outside the proposed statutory approach. The only way an organisation can be certain of this is by seeking a determination from a court or tribunal. Adding to this difficulty is that caselaw is not clear and according to Professor Andrew Stewart, *'court and tribunal decisions have tended to confuse rather than clarify the position'*[43].

This leaves not-for-profit organisations in an untenable situation.

Permits individuals to be 'employees' under the FW Act but be 'independent contractors' for many other purposes under workplace legislation other than the FW Act

Independent contractors may be covered by workers' compensation and tax legislation which impose obligations on the engaging entity depending on whether the independent contractor is deemed an 'employee' or 'worker' (as the case may be) for these purposes.

Currently, the *Personnel Contracting* contract focused approach is largely applied for the purposes of deeming for workers compensation and tax legislation[44]. This will continue to apply.

If the Bill is passed, it is very likely a person may be determined to be an employee under the FW Act, but not be an employee for the purposes of tax or workers compensation legislation.

In the context of parties providing road transport services (in either the gid economy or traditional road transport sector), it also appears that they may be an employee for the purposes of the FW Act but also caught by the provisions of Chapter 6 of the Industrial Relations Act 1996(NSW) that regulate the engagement and terms of conditions for contractors constituting 'contract carriers'. At the very least they are more likely to face argument over such matters.

This is an untenable situation which creates uncertainty in an environment where significant penalties will be imposed for getting it wrong.

The proposed statutory approach reintroduces the risk of employment class actions

[43] Stewart, A., "Stewart's Guide to Employment Law", The Federation Press, 2018

[44] See for example, the ongoing ATO review of various related rulings and guidelines: SGR 2005/1 *Superannuation guarantee: who is an employee*?, Taxation Ruling TR 2005/16W Income tax: Pay As You Go - withholding from payments to employees, Superannuation Guarantee Ruling SGR 2005/2 *Superannuation guarantee: work arranged by intermediaries.* Taxation Ruling TR 2013/1 *Income tax: the identification of 'employer' for the purposes of the short-term visit exception under the Income from Employment Article, or its equivalent, of Australia's tax treaties*, Superannuation Guarantee Ruling SGR 2009/1 *Superannuation guarantee: payments made to sportspersons,* ATO Interpretive Decision ATO ID 2014/28 *Superannuation Guarantee Status of the Worker: Pizza delivery drivers as employees*

A class action is a legal proceeding where one or more persons represent a group of people who each have a common interest in a claim against another party. For example, when an organisation has a practice of misclassifying a group of employees as independent contractors,

Based on caselaw as it existed prior to the certainty achieved in *Personnel Contracting* and *Jamsek*, the class action landscape featured class actions on the basis that employees had been misclassified as employees. For example, in *BSA Ltd v Foxtel, Optus and NBN Co*, it was alleged that BSA Ltd, a company whose technicians carry out work on behalf of Foxtel, Optus and NBN Co, engaged in sham contracting by misclassifying its workers as independent contractors instead of employees. The workers claimed unpaid wages, leave, superannuation and other employee entitlements. This settled for approximately $20 million in 2022, to be paid over three years between 2022 and 2024[45].

The current contract focused High Court decisions very much put paid to this type of claim because organisations have increased certainty where they characterise the relationship on the basis of comprehensive written contractual terms. However, the Government, by reinstating the uncertain, ambiguous and inconsistent analysis which existed prior to *Personnel Contracting* and *Jamsek*, once again makes class actions a real and substantial risk for organisations.

Significantly broadens the application of the sham contracting provisions

Alongside the proposed statutory approach for determining the ordinary meaning of 'employer' and 'employee', the Government is also proposing to change the employer's defence to the allegation it misrepresented employment as an independent contracting relationship.

Instead of an employer needing to prove that when they made the representation, they did not know and were not reckless as to whether the contract was a contract of employment rather than a contract for service, they will now need to provide they had 'reasonable belief'.

One factor a court will foreseeably have regard to when assessing 'reasonable belief' is whether the employer sought legal or other professional advice about the proper classification of the individual, including any advice from an industrial association and, if so, acted in accordance with that advice. However, given the uncertainty and complexity surrounding this analysis as set out above, this type of advice will be very expensive and likely out of reach by many organisations.

The consequential narrowing of this sham contracting defence, creates a very unfair situation for those national system employees and employers who are subject to the proposed uncertain, ambiguous and inconsistent approach reinstated by s.15AA. Employers who are otherwise covered by s.357 but not subject to s.15AA will not be impacted in same way which creates further uncertainty for organisations.

[45] This was the amount provisionally agreed subject to court approval to the ASX, as required: 455swgcbnnnq2d.pdf (asx.com.au)

Part 16 - Provisions relating to regulated workers

The newly proposed employee-like worker and road transport industry jurisdictions reflect a flawed regulatory response

Ai Group is deeply concerned about the potential negative consequences that will potentially flow from this part of the Bill.

We also observe, as a threshold issue, that the proposed radical regulation of independent contractor arrangements was not foreshadowed by the Government ahead of the last election and do not have widespread industry support. The proposed changes are highly contentious.

This aspect of the Bill should not be passed.

Summary of key provisions

The Bill introduces new powers for the FWC to:

- Set '*minimum standards orders*' (**MSOs**) and '*minimum standards guidelines*' (**MSGs**) for '*employee-like workers*' and '*road transport contractors*'.
- Approve, vary and terminate '*collective agreements*' between '*digital platform operators'* and unions, as well as between '*road transport businesses'* and unions .
- Deal with an '*unfair deactivation*' claim by an employee-like worker and '*unfair termination*' claim by a road transport contractor.
- The Bill also proposes to afford the Minister broad powers to pass regulation enabling the FWC to regulate contractual arrangements between supply chain participants and address disputes between such parties.
- The Bill would also introduce a new definition of industrial action in s.19A for regulated workers and businesses.

Overview of Ai Group's position

We set out specific concerns over elements of the Bill in the sections that follow, but first raise various key overarching considerations.

Putting aside any broader concern over the desirability of prescriptively regulate terms and conditions for independent contractors, Ai Group is concerned that the Bill does not reflect a sufficiently well considered, balanced or targeted legislative framework for the regulation of such matters.

The proposal to empower the FWC to set minimum standards orders (**MSOs**) for 'employee like workers' and 'road transport contractors' risks establishing a framework for the development of regulation by the FWC that will be extremely problematic for a raft of contractors across our

economy, the parties that engage them and the myriad of individual consumers and the organisations that rely on the services of such parties. As framed, it will undoubtedly cause organisations, in some sectors, to reassess their willingness to engage contractors that potentially fall within the ambit of this jurisdiction.

Empowering the FWC, a body that exists to administer Australia's workplace relations system as it relates to employees, with radical new powers to set terms and conditions for contractors, and to intervene much more broadly into complex commercial arrangements in the road transport industry supply chain, has the potential to cause significant disruption across the economy.

At the very least, there is an undeniable risk, or indeed likelihood, that the scheme proposed by the Bill will increase costs throughout relevant affected supply chains or industries. Indeed, it is presumably the Government's intent that the Bill will result in improved terms and conditions for some contractors.

Given the breadth of contractors potentially caught by the proposed scheme, there is potential for the Bill to have ramifications across broad sectors of the economy and community.

The precise impact of this part of the Bill cannot be reliably estimated.

Ultimately, there is no basis upon which to accurately and reliably model the costs and consequences of the Bill's proposed regulation of contractor arrangements because, to a very large extent, the Bill seeks to 'pass the buck' to the FWC for the determination of what regulation of terms and conditions will be afforded to contractors. Relevantly, the FWC, as an independent statutory body, will have a very broad discretion over what kinds of mandatory terms and conditions it sets and, what factors it takes into account when considering such matters. We note in this respect that the FWC would be afforded much greater discretion in relation to the setting of terms and conditions for relevant contractors than it has in relation to the setting modern award terms for employees.

We can look to examples of the impact of comparable schemes in the context of the road transport industry for guidance as to what can be expected if the Bill is implemented. This must include a consideration of:

- The notoriously disastrous and relatively recent operation of the **Road Safety Remuneration System** - a system that enabled the Road Safety Remuneration Tribunal (**RSRT**) comprised of FWC members and experts (including members appointed with industry experience or expertise), to set minimum rates and conditions for contract drivers.

- The flawed NSW system established under chapter 6 of the *Industrial Relations Act 1996* (NSW) (**NSW IR Act**) that provides for the regulation of contract carrier terms and conditions, and a jurisdiction akin to an unfair dismissal regime for such contractors.

  The NSW system is heavily criticised by industry participants who operate under it. The main instruments made under the NSW system which set minimum terms and conditions (i.e. a contract determination) are so complex that they are almost impenetrable for lay persons. In addition, such instruments frequently '*fall out of date*' (for example the rates

for the courier and taxi-truck industry were adjusted for approximately 14 consecutive years) and have largely had limited application to specialised sectors (i.e. metropolitan Sydney and short-haul work). Moreover, the system is notoriously beset by non-compliance (there is no meaningful enforcement of the jurisdiction by any Government inspectorate and, regardless, this is an extremely difficult task given the nature of the sector).

Ai Group has extensive experience with the operation of both of the abovementioned systems.

We acknowledge that there is an apparent intent in the framing of the Bill to avoid the problems that flowed from the operation of the RSRT. Nonetheless, the various '*safeguards'* in the Bill are not sufficient to ensure that the various flaws of the systems identified above will not be replicated.

There is no Australian precedent for how the regulation of contractors outside of the road transport industry will operate. It is an extremely novel proposal.

We canvass our specific concerns over elements of this part of the Bill in detail in the sections that follow, but here note that they include concerns over:

- The extremely unbalanced approach to the content of the 'minimum standards objective'
- The wide breadth of matters that the FWC is proposed to be empowered to regulate through the setting of new minimum standards - an approach that contrasts starkly with the limited capacity of the FWC to regulate of employee entitlements.
- The lack of clarity over who is an 'employee like worker' and the consequent risk that this may result in the regulation and disturbance of a wide range contracting arrangements that are operating without issue in a wide range of sectors.
- The lack of sufficient measures to ensure that the disastrous consequences of the RST setting minimum freights in the road transport sector will not be repeated.
- The very broad scope of the regulation making power relating to the broader road transport industry supply chain.
- The lack of necessity for the creation of a new 'unfair contracts' jurisdiction in the FWC and the foreseeable burden that it will impose upon industry

If, despite our opposition (and undoubtedly that from many others), there is still an intent to regulate such matters, a much more cautious, balanced and considered approach should be taken.

In the sections that follow we identify specific problems with the Bill and propose some modifications to it. The changes that we identify with the various provisions of the Bill are intended to mitigate (to some extent) the extensive number of deficiencies in the Bill.
We would however emphasize that the changes that we have identified will not render the Bill sufficiently improved so as to justify its passage. In our view, a much more comprehensive reconsideration of the provisions is required.

The remainder of our submission addressing Part 16 of the Bill are set out so as to address the following matters:

- Common issues we have identified for both the employee-like and road transport industry jurisdictions.
- Specific issues affecting the employee-like jurisdiction.
- Specific issues affecting the road transport industry jurisdiction.
- The proposed unfair contract terms jurisdiction

Common issues affecting both the employee-like and road transport industry jurisdictions

Summary of common issues

Ai Group has identified a number of the common issues with the proposed provisions dealing with both the '*employee-like worker'* and 'road transport industry' jurisdictions. We first address these common issues, before turning to the specific issues affecting each of the respective jurisdictions.

The common issues we have identified are as follows:

- The minimum standards objective, which informs the FWC's exercise of powers under the new employee-like and road transport industry jurisdictions (including in the making of MSOs), must be fit for purpose, reflective of, and tailored to the uniqueness of work in both jurisdictions as well as to the differences in the nature and treatment of independent contractors (beyond just their form of engagement) as distinct to employees. The current minimum standards objective does not achieve this.

- The need for a safeguard which ensures that the FWC is directed to avoid the creation of overlapping instruments and orders (including MSOs and Minimum Standard Guidelines (**MSGs**)) that may apply to a regulated business.

- The need for a requirement that an MSO or MSG can only include terms that are *necessary* to achieve the minimum standards objective in order to ensure that they operate as a ' safety net'.

- The list of terms that may be included, and must not be included in MSOs and MSGs, must not be so open so as to potentially cover terms that do not deal with workplace relations matters under a services contract, including commercial terms and arrangements.

- The consultation requirements currently proposed for the making of an MSO must expressly provide parties with the ability to file evidence and for organisations entitled to represent the industrial interests of a regulated business and peak councils to also be part of the consultation process.

- The need for the FWC to be provided with clear grounds upon which it must summarily dismiss an unfair deactivation or unfair termination claim, which on its face, is not reasonably arguable.

- The removal of financial remedies including for the award of compensation and lost pay for unfair deactivations and terminations.

- The removal of regulation-making powers which can significantly and substantially change the scope and application of various provisions relating to the regulation of the employee-like and road transport industries.

- The definition of employee-like worker and road transport contractor and the difficulties with measuring a '*significant majority of the work performed*'.

- The potential for specific regulated businesses to be unfairly targeted as part of an application for the making of an MSO.

- The need for an express prohibition against the taking of industrial action for regulated workers.

Comments on the proposed 'Minimum Standards Objective'

The Bill proposes a '*minimum standards objective'* that the FWC must take into account in performing a function or exercising a power under Part 16 of the Bill, including in making MSOs and MSGs for regulated workers (s.536JX).

There are a number of deficiencies in the proposed *minimum standards objective* that should be addressed in order to ensure that the Bill reflects a more balanced approach and one that reduces the risk of the implementation of orders that results in unforeseen and problematic outcomes.

An alternate minimum standards objective that we propose is set out in a table at the end of this section for convenience and is titled '**Proposed changes to the Minimum Standards Objective**'. This table also compares our proposed alternate minimum standards objective, to the one proposed in the Bill.

We below explain the concerns we hold regarding elements of the proposed minimum standards order and the changes that we suggest should be made to this element of the Bill if it were to be passed.

The need to take into account the different nature of engagement of regulated workers

Proposed s.536JX(a) does not presently require the FWC to take into account the need for standards that reflect the different nature of engagement of regulated workers compared to employees.

In our submission, there should be an additional paragraph in s.536JX(a) which directs the FWC to take into account the need for standards that:

Proposed change to the Bill

'(iv) reflect the different nature of engagement of regulated workers as independent contractors rather than employees; and'

The existing requirement proposed in s.536JX(a)(iv) to avoid implementing orders that change the nature of the engagement is not sufficient to encourage the FWC to recognise the need to adopt a different approach to the setting of conditions for regulated workers to that adopted in the context of employment arrangements.

The proposed change is important given the FWC is a body that is accustomed to regulating employee entitlements. The minimum standards objective should act as a catalyst to ensure that a very different approach should be adopted in relation to the regulation of contracting arrangements compared to its typical approach. For example, the provision would also cause the FWC to take into account less obvious but important issues, such as the different tax treatment of independent contractor earnings as compared to those of employees, amongst various other important differences outlined below.

In addition to the inclusion of the new provision identified above, we submit that if a supplementary Explanatory Memorandum is issued, it contains commentary along the following lines to clarify the purpose of this proposed provision:

> *"The intended purpose of this element of the minimum standards objective is to ensure that the Fair Work Commission has due regard to the nature of engagement of regulated workers as independent contractors and that this will likely necessitate the setting of minimum standards that is different in form and content to that which applies in the context of employment arrangements."*

We note that the wording of the proposed new provision is drafted in a broad manner rather than in a way which directs the FWC to consider specific examples of differences, such as those outlined above. It is envisaged that the parties, during the consultation process for the making of an MSO, will raise the relevant considerations with the FWC – such as those set out above. The proposed wording would put all relevant parties, including the FWC, beyond any doubt that the objective is intended to bring into consideration *any* differences in the nature of engagement of regulated workers as independent contractors that requires the setting of minimum standards that may necessitate a difference in form and content of any order ultimately issued.

The need for the FWC to take into account costs necessary for the performance of a service that the regulated worker has been contracted to provide

Proposed s.536JX(b)(i) currently requires the FWC to consider the need for standards that deal with '*minimum rates of pay*' that takes into account '*all necessary costs*' for regulated workers covered by an MSO or MSG.

Proposed s.536JX(b) should be redrafted in a manner which provides greater certainty as to what is meant by the reference to '*necessary costs*'. Relevantly, this should be costs that are necessary for the performance of a service that the regulated worker has been contracted to provide.

Proposed s.536JX(b) should also be expanded to require that the FWC take into account the necessary costs in the setting of *any* standards (and not just those relating to '*minimum rates of pay*').

We propose a new s.536JX(b) which is framed in the following manner:

Proposed changes to the Bill

'(b) the costs that will be necessarily incurred by regulated workers in the performance of a service that they have been contracted to provide; and'

The need for the FWC to consider only the applicable base rate of pay in an applicable modern award for employees performing comparable work as compared to regulated workers

Proposed s.536JX(b)(ii), currently requires the consideration of any pay and conditions afforded to employees performing comparable work as compared to regulated workers.

This consideration should be narrowed to the applicable base rate of pay in an applicable modern award that covers employees performing comparable work. This is appropriate for two reasons:

- *Firstly*, given that we understand that what is under contemplation is the development of a safety net, a reference to modern awards is appropriate because otherwise the FWC will be required to take into account over-award remuneration or amounts payable under enterprise agreements. Neither would be appropriate.

- *Secondly*, the remuneration should be confined to base rates of pay. The current wording would necessitate the FWC having regard to a raft of other amounts, the payment of which, would be entirely inappropriate in the context of a contracting arrangement. This would inappropriately include overtime rates and other penalties (including those which we understand the FWC will expressly not be able to provide to be payable). A focus on the base rate of pay would not prevent the FWC from having regard to a broader consideration of modern award or NES entitlements if it determined that it was relevant, but such matters would be left to the FWC's discretion.

For the reasons above, we accordingly propose that s.536JX(b)(ii) be replaced with a new s.536JX(c) in the following terms:

Proposed changes to the Bill

'*(c) the applicable base rate of pay prescribed by any modern award covering employees performing comparable work to that undertaken by a regulated worker; and*'

Again, we would seek that the proposed objective above be taken into account in the setting of *any* standards and not just those relating to minimum rates of pay, as currently framed by proposed s.536JX(b)(ii).

Proposed s.536JX(b)(iii) - not changing the form of engagement should be deleted

Proposed s.536JX(b)(iii), as it relates to the need to not change the form of engagement of regulated workers through the setting of minimum rates of pay, is already dealt with by proposed s.536JX(a)(iv) which requires this to be considered in the setting of *any* minimum standards. Accordingly, s.536JX(b)(iii) is otiose and should be deleted.

The need for the FWC to consider the prevalence of regulated workers performing work for multiple businesses

The minimum standards objective does not currently include a consideration of the prevalence of '*multi-apping*' (i.e. where a worker undertakes work for multiple digital labour platform operators) or of road transport contractors performing work for multiple road transport businesses (including at times simultaneously). Members also report that, in some sectors, contractors undertake work for both 'gig' businesses and road transport businesses.

Regulated workers may also perform work in addition to performing digital platform work and/or work in the road transport industry, may perform work as an employee separate to the work that they undertake as a contractor.

The occurrences above are not at all uncommon. Such complexities should be grappled with by the FWC in the making of any orders. This should include consideration of the reality that digital platform work, and work in some sectors of the road transport industry, may not always be the primary source of income for contractors. In that regard, the minimum standards objective should include a requirement that the FWC take this into account. We accordingly propose that a new objective be included in s.536JX(d), as follows:

Proposed changes to the Bill

'*(d) the possibility that regulated workers may be engaged to undertake work for multiple businesses, including multiple digital labour platform operators and road transport businesses; and*'

The need for the FWC to consider the '*effect*' of any standards on certain matters / parties

Proposed s.536JX(c) currently requires a consideration of the need to avoid unreasonable adverse impacts upon various matters / parties. We propose that this subsection be reframed in broader terms to consider not only the need to avoid unreasonable adverse impacts, but also the effects (which may also include positive impacts) such standards may have upon those matters / parties.

We also propose that s.536JX(C) ought to include two additional matters that should be taken into account in the making of MSOs and MSGs:

- *Firstly*, we propose that the FWC should give consideration to the impact of an MSO or MSG on the opportunity for regulated workers to obtain or undertake paid work so that it is not adversely or unduly operating to their detriment.

- *Secondly*, we propose that the FWC should have regard to the potential impact on parties that utilise or rely upon the work undertaken by regulated workers or the services offered by a party that engages them. It is trite to observe that a significant component of our economy and community have become reliant upon the services of regulated workers and the regulated businesses which engage them. This includes many small businesses and individuals.

We further consider that the reference to '*business viability*' in s.536JX(c)(ii), is an unreasonably high threshold and that consideration of the impact of the FWC's functions should not merely be directed

at the impact on business viability. In our view, *any* impacts on business, including costs, viability, innovation, productivity and the regulatory burden should all be taken into account. On any reasonable assessment, the FW Act should promote business success beyond mere viability.

Having regard to the matters above, we propose that a new s.536JX(e) be inserted in place of s.536(JX)(c) and that it provide as follows:

Proposed changes to the Bill

'(e) the effect upon, and need to avoid any unreasonable adverse impacts for:

(i) sustainable competition among industry participants;

(ii) business, including on business costs and viability, as well as innovation, productivity and the regulatory burden;

(iii) administrative and compliance costs for industry participants;

(iv) the opportunity for regulated workers to obtain or undertake paid work;

(v) the parties that utilise or rely upon the work undertaken by a regulated worker or the services offered by a party that engages them;

(vi) the national economy;'

(Emphasis added)

The need for the FWC to avoid unnecessary overlap between the new jurisdictions

The minimum standards objective should direct the FWC to the need to avoid unnecessary overlap between the proposed employee-like worker and road transport industry jurisdictions, and between different MSOs and MSGs applying within each jurisdiction.

The Bill proposes very broad definitions as to what constitutes a '*digital labour platform*' and the '*road transport industry*'. The Bill attempts to limit the overlap of the two aspects of the Bill that regulate the setting of terms and conditions through the operation of proposed s.15Q(1)(e) based on the characteristics of an individual contractor. It does not however prevent regulated businesses from being captured by orders made under each jurisdiction.

There is also the foreseeable possibility that, over time, MSOs and MSGs applicable within each jurisdiction could be made with overlapping coverage (which currently occurs with contract determinations that operate in NSW).

There should accordingly be a safeguard created to direct the FWC to avoid the creation of overlapping instruments as part of the minimum standards objective.

We propose the following change to s.536JX(d) and that the section be renumbered s.536JX(f) as a consequence of other changes that we have proposed:

Proposed changes to the Bill

'(f) the need to consider other orders or instruments (however described) made under this Chapter and to avoid any unnecessary overlap of such orders and instruments.'

(Emphasis added).

This proposal is based upon the existing modern awards objective to avoid unnecessary overlaps as between modern awards (s.134(1)(g) of the FW Act). This should limit the number of MSGs or MSOs that a business is required to comply with. The reference to avoiding '*unnecessary overlap*' still leaves capacity for some overlapping coverage where this is warranted (such as where orders may deal with a different subject matter(s)).

The need for similar provisions to the existing s.138 of the FW Act to ensure that the new employee-like and road transport industry jurisdictions operate as a safety net

The Bill does not currently contain an overarching requirement that an MSO or MSG can only include terms that are *necessary* to achieve the minimum standards objective. Such a requirement should exist (and should be framed in similar terms to s.138 which applies in the context of moderns awards.

The Minimum standards objective should be amended to ensure that MSOs do not provide for more than a safety net of conditions. They should not be capable of requiring the provision of market conditions or 'paid rates'.

Additional amendments would be required, but as a starting point, we propose a new subsection (5) in respect of employee-like MSOs and a new subsection (6) in respect of road transport MSOs, in s.536JY:

Proposed changes to the Bill

'(5) An employee-like worker minimum standards order can only include terms that are necessary to achieve the minimum standards objective.

(6) A road transport minimum standards order can only include terms that are necessary to achieve the minimum standards objective and the road transport objective.'

Similarly, in respect of MSGs, a new subsection (5) for employee-like MSGs and a new subsection (6) for road transport MSGs, in s.536KR:

Proposed changes to the Bill

'(5) Employee-like worker guidelines can only include terms that are necessary to achieve the minimum standards objective.

(6) Road transport guidelines can only include terms that are necessary to achieve the minimum standards objective and the road transport objective.'

Proposed changes to the Minimum Standards Objective

The alternate minimum standards objective that we propose is set out in the right hand side column of the table below, whilst the one proposed in the Bill is set out in the left hand side column. We have also identified our proposed changes through the use of emphasised text .

Proposed Minimum Standards Objective in the Bill	Ai Group Proposed Minimum Standards Objective
536JX The minimum standards objective In performing a function or exercising a power under this Part, the FWC must take into account the need for an appropriate safety net of minimum standards for regulated workers, having regard to the following: (a) the need for standards that: (i) are clear and simple; and (ii) are fair and relevant; and (iii) recognise the perspectives of regulated workers, including their skills, the value of the work they perform and their preferences about their working arrangements; and (iv) do not change the form of the engagement of regulated workers from independent contractor to employee; and (v) do not give preference to one business model or working arrangement over another; and (vi) are tailored to the relevant industry, occupation or sector and the relevant business models; and (vii) are tailored to the type of work, working arrangements and regulated worker preferences; (b) in addition to the other matters provided for in this subsection, the need for standards that deal with minimum rates of pay that: (i) take into account all necessary costs for regulated workers covered by a minimum standards order or minimum standards guidelines; and (ii) compensate regulated workers covered by	**536JX The minimum standards objective** In performing a function or exercising a power under this Part, the FWC must take into account the need for an appropriate safety net of minimum standards for regulated workers, having regard to the following: (a) the need for standards that: (i) are clear and simple; and (ii) are fair and relevant; and (iii) recognise the perspectives of regulated workers their skills, the value of the work they perform and their preferences about their working arrangements; and (iv) **reflect the different nature of engagement of regulated workers as independent contractors rather than employees;** and (v) do not change the form of the engagement of regulated workers from independent contractor to employee; and (vi) do not give preference to one business model or working arrangement over another; and (vii) are tailored to the relevant industry, occupation or sector and the relevant business models; and (viii) are tailored to the type of work, working arrangements and regulated worker preferences; **and** **(b) the costs that will be necessarily incurred by regulated workers in the performance of a service or completion of a task that they have been contracted to provide; and** **(c) the applicable base rate of pay prescribed by any modern award covering employees**

a minimum standards order or minimum standards guidelines in relation to their pay and conditions compared to employees performing comparable work; and (iii) do not change the form of the engagement of regulated workers; (c) the need to avoid unreasonable adverse impacts upon the following: (i) sustainable competition among industry participants; (ii) business viability, innovation and productivity; (iii) administrative and compliance costs for industry participants; (iv) the national economy; (d) the need to consider other orders or instruments (however described) made under this Chapter. This is the ***minimum standards objective***.	**performing comparable work to that undertaken by a regulated worker; and** **(d) the possibility that regulated workers may be engaged to undertake work for multiple parties, including multiple digital labour platform operators and road transport businesses; and** **(e) the effect upon and need to avoid any unreasonable adverse impacts for:** (i) sustainable competition among industry participants; **and** **(ii) business, including on business costs and viability, as well as innovation, productivity and the regulatory burden; and** (iii) administrative and compliance costs for industry participants; **and** **(iv) the opportunity for regulated workers to obtain or undertake paid work; and** **(v) the parties that utilise or rely upon the work undertaken by a regulated worker or the services offered by a party that engages them; and** (vi) the national economy; **and** (f) the need to consider other orders or instruments (however described) made under this Chapter **and to avoid any unnecessary overlap of such orders and instruments**. This is the ***minimum standards objective***.

Terms that may be included and must not be included in MSOs and MSGs

Terms that may be included in MSOs and MSGs

We are deeply concerned with the breadth of matters in the list of terms that may be included in

MSOs and MSGs and by the open-ended nature of the potential content of such instruments (particularly MSOs).

In our view, the list of terms that may be included in MSOs and MSGs, as proposed in s.536KL(1) ought to be exhaustive.

There is no justifiable basis for empowering the FWC with a broader discretion in the types of terms that it can set in an MSO or MSG, as compared to a modern award. The list of terms that may be included in MSOs and MSGs, is already, in many respects, broader than the types of terms that may be included in a modern award – for example terms relating to insurance and cost recovery (see s.139 of the FW Act).

Furthermore, the proposed concepts of '*payments terms*' and '*working time*' as found in s.536KL(1) are far broader concepts than those found in modern awards. In our submission, these concepts should be addressed in a targeted manner or otherwise deleted, so as to ensure commercial and other terms that do not deal with workplace relations related matters under a services contract are not captured by an MSO or MSG term.

We also note that the retention of '*working time*' appears to enable the setting of terms relating to the performance of activities that a contractor has not actually been contracted to undertake (such as engaging with an app prior to actually undertaking a paid activity). It is understood that it is not the Government's intent to permit the regulation of payment for such activities.

Having regard to the matters above we propose the following changes to s.536KL(1):

Proposed changes to the Bill

(a) Delete s.536KL(2) and include the word '*only'* in s.536KL(1) to state as follows:

'A minimum standards may <u>only</u> include terms about any of the following matters:'

(Emphasis added).

(b) Replace '*payment terms*' with '*payment for the performance of work under a contract for services'*.

(c) Delete the words '*working time*'. It is unclear what this term is intended to capture and there is understandable concern that it might capture time spent undertaking activities that the Government has repeatedly promised will not be captured (such as time spent looking at an app but not actually performing a contracted service). It should also be observed that it is common for regulated workers to not receive pay calculated by reference time spent performing work.

It is also not uncommon for payment under a services contract to be calculated by reference to the performance of a task rather than the passage of time. This is entirely appropriate in the context of a contractor relationship and should not be discouraged. There should be no assumption that an MSO or MSG will deal with when or how long it should take to perform a task.

In many contexts, this will be a matter that is properly for the contractor's determination (we note in particular that for the new employee-like jurisdiction, such jurisdiction will potentially be much broader than to just delivery or rideshare platforms).

Furthermore, in our view, the change we have proposed in (b) above would squarely capture payment for work performed, including if such payment is measured by the time spent performing the work and/or in the completion of a particular task under a services contract.

(d) Delete '*cost recovery*'. There is a great degree of uncertainty as to the potential scope of such term. In addition, we submit that matters relating to costs is more appropriately dealt with as part of the FWC's consideration of the minimum standards objective in the making of an MSO or MSG (particularly in the context of determining the payment for performance of work). In this regard, we refer to our proposal for a new s.536JX(b) which would require the FWC to take into account the necessary costs incurred by regulated workers in the performance of a service that they have been contracted to provide.

(e) Limit the reference to '*record keeping*' to '*the keeping of records relevant to establishing compliance with a minimum standards order.*' There is no reason why the FWC should be able to compel parties to keep a broader range of records.

Terms that must not be included in MSOs and MSGs

We would seek that the lists of terms that must not be included in an MSO (s.536KM) and MSG (s.536KN) be expanded to include:

(a) Minimum engagement or minimum payment per engagement provisions.

(b) Penalty rates for performing work at particular times or on particular days (including but not limited to over-time penalties, loadings and shift allowances) – as such terms are not appropriate matters that should be dealt with by an MSO or MSG in respect of regulated workers, given these are employment-related entitlements typically justified by reference to the disutility of being required to work at particular times by an employer (where there is often a capacity for an employer to direct the performance of work at such times). There is no industrial merit to the inclusion of such terms in an MSO or MSG, and they should accordingly be expressly carved out by the Bill.

(c) Education and training – generic standards (such as the problematic NSW blue card system) are less effective than standards developed or implemented by specific businesses. Such terms are not permissible for inclusion in modern awards and should not be permissible in this jurisdiction either. Such matters should be left up to the individual regulated business.

Section 536KM(1)(e) of the Bill limits the capacity of an MSO to deal with '*a matter relating to work health and safety that is otherwise comprehensively dealt with by a law of the Commonwealth, a State or a Territory*'. This does not properly recognise the nature of work, health and safety legislation which could be described as Robens style legislation that does not prescriptively or '*comprehensively*' regulate matters, but instead leaves a role for parties to identify how best to meet overarching obligations. It will likely be open to argue that this provision is of very limited effect. In this regard, the word '*comprehensively'* should be removed from s.536KM(1)(e). Work, health and safety issues are best dealt with in specialist jurisdictions and by specialist bodies (such as Safe Work Australia) that have appropriate expertise.

A similar issue also arises in the context of the treatment of the Heavy Vehicle National Law under s.536KN of the Bill. We note that the elements of the RSRT's first order clumsily dealt with various

issues better addressed through work, health and safety laws or laws modelled on the Heavy Vehicle National Law, and this approach caused significant concern to the road transport industry. The Bill should ensure that this mistake is not repeated, and should not be an issue that should be left to a regulation making power.

The need to change the consultation requirements currently proposed for the making of an MSO

The express right for parties to file evidence in consultations for the making of an MSO

Parties likely to be affected by a road transport MSO or employee-like MSO (providing that our proposal in seeking to extend the same consultation processes to the employee-like work jurisdiction is accepted – which we deal with further below in these submissions), should be provided with a reasonable opportunity to not only make written submissions, but to also file evidence in support of any contentions in their submissions.

The express right for certain organisations and peak councils to be consulted in the making of an MSO

The consultation process for the making of a road transport MSO or employee-like MSO (providing that our proposal in seeking to extend the same consultation processes to the employee-like work jurisdiction is accepted), should also extend to organisations entitled to represent the industrial interests of a regulated business and peak councils (as contemplated under the FW Act).

A reference to peak councils should be included in recognition of the potential for MSOs to impact parties beyond just those that will potentially be covered by a proposed MSO. This is vital to ensure all relevant issues are properly ventilated in order to prevent the FWC issuing orders that have unintended ramifications (we note that in most proceedings before the FWC and in the NSW Industrial Relations Commission, it is registered employee and employer organisations that primarily assist with the development and variation of industrial instruments of common rule application).

Circumstances where the FWC must dismiss an unfair deactivation and unfair termination claim

The Bill proposes a list of '*initial matters*' that the FWC must decide before considering the merits of an unfair deactivation and unfair termination application (s.536LW).

In our submission, s.536LW should be reframed as a provision which provides clear grounds upon which the FWC must summarily dismiss an unfair deactivation or unfair termination claim, which on its face, is not reasonably arguable.

The importance of ensuring that such claims are properly advanced in a manner which discloses a reasonably arguable case is critical to ensuring the efficient management of proceedings, the effective management of the FWC's case load and its allocation of resources, and for mitigating the adverse impacts on regulated businesses in responding to these new claims.

We propose a new s.536LW which is framed in the following manner:

Proposed changes to the Bill

'536LW Circumstances where the FWC must dismiss an unfair deactivation or unfair termination application

The FWC must dismiss an unfair deactivation or unfair termination application (whichever the case may be) if any of the following matters are satisfied:

(a) the application was made out of time (as required in subsection 536LU(3) and no arguable case has been made for the granting of an extension of time under subsection 536LU(4)); or

(b) no arguable case has been made to establish that:

(i) the person is a person protected from unfair deactivation (for the purposes of section 536LD) or unfair termination (for the purposes of section 536LE), as the case requires; or

(ii) the person has been deactivated (for the purposes of section 536LG) or terminated (for the purposes of section 536LL); or

(iii) there was no valid reason for the deactivation (for the purposes of subsection 536LH(1)(a)) or termination (for the purposes of subsection 536LM(1)(a)) relating to the person's capacity or conduct, as the case requires; or

(iv) the deactivation or termination was not consistent with the Digital Labour Platform Deactivation Code or the Road Transport Industry Termination Code, as the case requires.'

In our submission, this proposal will both minimise the burden on parties that engage contractors by relieving them of the need to respond to claims that clearly lack merit and, secondly, require, in effect, that if the deactivation or termination was both for a valid reason and consistent with the relevant Code, that there should not be a broader consideration of the fairness of the decision. This is appropriate in the context of contracting arrangements, particularly in contexts where there will be a very loose connection between the parties and limited oversight of the contract worker.

Removal of any ability of the FWC to award financial compensation

The expansion of a right to obtain reactivation or reinstatement by contract workers of their engagement through an application to the FWC (be they in the road transport industry or employee-like jurisdiction) will be a very significant development.

In our submission, it can be expected that the availability of reactivation and reinstatement will have a material impact upon regulated businesses, which cannot be understated. Such parties will want to ensure that they avoid the impact on their resources of dealing with such matters (including both those associated with legal costs and the time of their staff) and to avoid associated negative publicity. It is likely to encourage proactive changes to practices preceding deactivations or terminations and promote reasonable responses to claims (where a contractor's application articulates a reasonable case for reinstatement or reactivation).

The jurisdiction should not go so far as to enable the payment of compensation generally or the payment for recovery of lost earnings. Such remedies should not be available in either the road transport context or the employee-like context.

In our submission, the availability of a financial remedy in an unfair deactivation and termination claim should be removed for the following reasons:

- It is still unclear and unknown what kinds of contractors or sectors might be caught within the new unfair deactivation and termination jurisdictions.

- The precise manner in which the FWC will need to calculate any compensation is not thoroughly dealt with by the Bill. Relevantly, it is unclear how, or the extent to which, the FWC will take into account the fact that a contractor will not incur costs (particularly the '*running costs'*) when they are not working or the impact of any delay by either the FWC or the worker in the conduct and resolution of the proceedings.

- It is unclear how the FWC will be able to reliably ascertain whether the contractor is undertaking other paid work during any period following deactivation (this will likely be much more difficult to determine in practice than in the employment context).

- The volume of contractors that may seek to access the new jurisdiction will potentially be extremely large and this will potentially impose a significant burden on digital labour platform businesses. Some existing digital labour platform businesses have very small '*back office*' support compared to the size of the contractor base that they engage.

- In the '*sectors'* that have been identified as priorities (such as food or parcel delivery), there is generally neither any guarantee of work or any expectation of availability of contractors to work.

- Workers, particularly employee-like workers, will often have a very tenuous connection / relationship with the party that engages them.

- A digital labour platform operator will often have very limited control or visibility over the conduct of an employee-like worker.

- A digital labour platform operator will also have limited capacity to communicate with a contractor in circumstances where they nonetheless need to deal quickly with a suspected serious issue (such as concerns about unsafe practices on the road, unsafe or unlawful engagement with the public or fraud). Consequently, decisions will need to be made in a very different context to that which applies in relation to employees or even long-term '*tied*' contractors in the road transport sector.

In our submission, a cautious approach should be taken, that being, to only establish an unfair deactivation and unfair termination jurisdiction that provides access to reactivation and reinstatement, respectively (if such as jurisdiction is to be created). The absence of an ability to seek financial remedies strikes a more reasonable balance between the interests of the parties.

The removal of access to financial remedies will also avoid the unfortunate, but entirely foreseeable risk, of parties seeking to make speculative claims in the hope of securing a financial settlement from a contracting party that is faced with the alternate prospect of shouldering the cost of responding to a claim.

In advancing these submissions, we note that the two proposed schemes are very similar to the provisions of the NSW IR Act which deals with applications for reinstatement of contracts of carriage. Our experience is that this jurisdiction has been very cumbersome and costly for principal contractors to navigate, but that it is nonetheless available in much narrower circumstances than the schemes envisaged by the Bill. Relevantly, claims can only be brought by a union. Undoubtedly this has the effect of limiting (although unfortunately not entirely preventing) access to the jurisdiction by parties seeking baseless claims. The Government's proposed scheme would have much broader application.

The removal of regulation-making powers which can significantly and substantially change the scope and application of the new employee-like work and road transport industry jurisdictions

Part 16 of the Bill currently contains the following provisions which confer regulation-making powers for the Minister to significantly and substantially change the scope and application of the new employee-like and road transport industry jurisdictions, which we consider to be problematic:

- **Section 40E**: The ability to prescribe any other matters that the Road Transport Advisory Group (**RT Advisory Group**) may advise the FWC on, including matters that are not related to the road transport industry. In our submission, the RT Advisory Group should only advise the FWC in relation to matters relating to the road transport industry, and the possibility that they can advise on any other matters should not be contemplated by the making of regulations.

- **Section 40H**: The ability to prescribe other requirements to meet the definition of a '*road transport industry contractual chain participant*'. In our submission, this definition should not extend beyond the existing requirements that the person be connected with the road transport industry and either a national system employer/employee, constitutional corporation, or road transport contractor/business. In our submission, the power to regulate supply chain participants is already incredibly broad and the Bill should not leave open the possibility that this jurisdiction could be further expanded by regulations. We highlight further specific issues regarding the potential implications with seeking to regulate supply chains further below in our submissions.

- **Section 15L(2):** The ability to prescribe any online enabled application, website or system for the purposes of the definition of a digital labour platform. In our submission, there should be no ability for regulations to expand this definition to cover, quite literally, *any* online enabled application, website or system (including those which do not operate in a manner which meets the definition of a digital labour platform as set out in s.15L(1)).

- **Section 15N(1)(b):** The ability to prescribe any work for the purposes of the definition of digital platform work. In our submission, there should be no ability for regulations to expand this definition to cover, quite literally, *any* work (including work that does not meet the definition of digital platform work as set out in s.15N(1)).

- **Sections 15P(1)(e)(iv) and 15P(3):** The ability to prescribe any characteristic for the purposes of the definition of an employee-like worker and for any person to meet all, some or '*only*

one' of the prescribed characteristics. In our submission, there should be no ability for regulations to expand the definition of an employee-like worker to, quite literally, *any* characteristic of a person – particularly, in circumstances where the listed characteristics in s.15P(1)(e) are already incredibly broad.

- **Section 15C**: The ability to prescribe the '*contractor high income threshold'*. In our submission, the Bill should set out the relevant elements which must be considered by the Minister in determining and revising the contractor high income threshold. The Bill should also set out how the threshold is to be calculated (having regard to those elements), how often and when the threshold will be revised. A clear understanding amongst regulated businesses as to how this threshold will be determined is vital, as they need certainty as to which cohorts of workers may be able to advance a claim against it in relation to an unfair deactivation or termination claim. It is also, in our view, not appropriate to leave the determination of the threshold entirely to regulations, as the threshold is a key element in the scope of the new jurisdictions.

- **Section 15R(1)(b**): The ability to prescribe any constitutional corporation or class of constitutional corporations as a road transport business. We flag here that the inclusion of the word '*or'* in s.15R(1)(a) would appear to be a typographical error, and that the word '*and'* was likely the intended operative word instead. If that is indeed a typographical error, then we do not have an issue with regulation-making power to prescribe a class of constitutional corporations for the purposes of meeting the definition of a road transport business.

- **Sections 15S(1), 15S(1)(f) and 15S(2**): The ability for regulations to modify the definition of the relevant terms identified in the modern awards listed in s.15S and to prescribe any other industry for the purposes of the road transport industry definition by applying, adopting or incorporating any matter in a modern award. In our submission, the definition of the road transport industry, as derived from the various terms in the listed modern awards is already quite broad and there should be no further regulation making power to expand or modify the scope of the new road transport industry jurisdiction.

Having regard to the broad regulation-making powers that has been conferred to significantly and substantially change the scope and application of the new employee-like and road transport industry sectors, we submit that such powers are unwarranted for the specific reasons identified above, but also because, as a general proposition, regulated businesses must be provided with certainty as to:

- whether they are covered by a particular jurisdiction;

- which workers they engage would fall within or outside either jurisdiction;

- what processes will be followed by the FWC in relation to certain matters;

- what obligations the business is required to comply with and follow; and

- what terms and conditions the business must provide to certain workers.

Simply put, regulated businesses, contractors and supply chain participants need certainty as to where the boundaries of the new respective jurisdictions are and where they may overlap with existing regulatory regimes. The contemplation and possibility that, even despite the incredibly broad potential application of many of the provisions and definitions identified above, such provisions can be further expanded or varied by regulations, fails entirely to deliver a reasonable level of certainty regulated businesses regarding their potential compliance requirements.

The regulation-making provisions identified above should be deleted or otherwise changed in the manner we have proposed.

The definition of employee-like worker and road transport contractor – the measure of significant majority of work performed

Subsections 15P(1)(b) and 15Q(1)(b) set out a requirement that a person '*performs all, or a significant majority, of the work to be performed under the services contract'* as part of the definition of an employee-like worker and road transport contractor, respectively.

It is unclear how the performance of a '*significant majority*' of work will be measured. For example, will this be measured by the time spent performing the work under the services contract, the value of the work under the services contract, or by some other measure. Further, over what time period should this be assessed? This element of the proposed definition of an employee-like worker and road transport contractor is clearly problematic.

As we understand, the reference to '*significant majority of work performed*' is intended to limit the extent to which the new jurisdiction captures contractors that are not themselves employing entities. If that understanding is correct, we submit that subsections 15P(1)(a)-(b) and 15Q(1)(a)-(b), should be modelled to reflect Chapter 6 of the NSW IR Act, namely s.309(1)(a)-(c) as relating to the definition of a '*contract of carriage*' and the associated exemptions to those provisions as set out in reg 34 of the *Industrial Relations (General) Regulation 2020* (NSW).

Digital labour platform operators and road transport businesses should not be able to be specified by name in an MSO

Subsections 536KH(4)(a) and 536KH(3)(a), provides an ability for digital labour platform operators and road transport businesses to be specified by name in an employee-like MSO and road transport MSO specifically. The consequence of such an approach is that platform operators and road transport businesses will be left susceptible to claims that target certain operators/businesses and not others.

Operators/businesses that are specified by name will be at a competitive disadvantage, as they would be required to comply with an MSO that covers them, whilst for their competitors who may be in the same '*class'* as them, would not be required to comply with such orders (even if such workers perform work for both operators/businesses). In addition, the operators/businesses that are specified by name would also be put to the costs, time, and resources in responding to an application for an MSO that another operator/business that is not otherwise specified, would not.

There is also the potential for the proposed system to enable unions to take targeted action against certain businesses/operators, threatening to make an application specifying them but not their competitors in order to pressure businesses/operators to accede to certain demands/requests. For those reasons, we submit that MSOs and MSGs should only be able to specify businesses/operators within a certain class, and not by name.

Industrial action

The Bill proposes to introduce:

- A new definition of industrial action in relation to regulated workers in s.19A.
- A new element of adverse action, that is, industrial action taken by an employee-like worker against a digital labour platform operator in s.342(1)6A.
- Industrial action as a '*workplace relations matter*' that is capable of being reviewed under the new unfair contract terms jurisdiction.

It is unclear what is intended to be achieved by the inclusion of the abovementioned proposed provisions in the Bill. The Explanatory Memorandum also does not provide any clarity as to either the intention underpinning these provisions or the potential impacts that these provisions may have on regulated businesses and workers.

Based on our reading of proposed s.19A, the new definition of industrial action for regulated workers would appear to extend an existing protection afforded to employees if they do not engage (or propose not to engage) in industrial action (ss.346(c) and 347(f)). If that is indeed the effect of the Bill, and the Bill does not provide a regulated worker with the ability to engage (or propose to engage) in industrial action, we would not be opposed to this. However, this is not at all clear. Further, in extending the definition of industrial action to regulated workers, such an approach creates a significant level of uncertainty as to what other existing provisions in the FW Act could also apply to regulated workers and businesses. The following example clearly highlights this issue.

Section 19A(5)(b) of the Bill introduces a definition of a '*lock out*' that is undertaken by a digital labour platform operator, which arises where the operator '*modifies, limits or suspends*' an employee-like worker's access to the platform. First, not only is it entirely unclear what the intended purpose of this provision is (in circumstances where it is understood that industrial action in any form, by any party would not be permitted under the new jurisdictions), it is also uncertain how this definition would interact with the new unfair deactivation jurisdiction, which defines deactivation as '*modified, suspended or terminated*' (s.536LG(b)). If an employee-like worker's access to the platform is modified or suspended, have they been deactivated or locked out, or both?

If there is no intent for the Bill to permit the taking of industrial action by regulated workers and businesses, then this needs to be made expressly clear by way of a prohibition on such action. The prohibition should state, in unambiguous terms, that the taking of industrial action by regulated workers is not permitted, and that if such provision is contravened, a civil penalty will apply. In addition, there should be a provision which provides regulated businesses with the ability to seek injunctive relief if industrial action is being taken or threatened by a regulated worker. This approach would not only provide certainty to regulated businesses that industrial action in any form will not be permitted under the new jurisdictions, but that there will also be clear

protections and remedies available to them if such action is threatened or taken against them. The proposed extension of the definition of industrial action (s.19A) and adverse action (s.342(1)(6A)), simply does not express in clear terms, what we and many of our members understand to be the intent of the Government, i.e. industrial action in any form will not be permitted by the new employee-like and road transport jurisdictions.

In the absence of a clear prohibition against the taking of industrial action, unions entitled to represent regulated workers will undoubtedly take coercive action to pressure regulated businesses in not only the new MSO stream, but also the new collective agreements stream (which is intended to be entirely voluntary). Similar practices already occurs in NSW, where unions coordinated industrial action principal contractors in pursuit of the making and variation of contract determinations and agreements. Whilst the Bill in s.536JT(4)(b) does preserve the anti-boycotting protections provided by the *Competition and Consumer Act 2010* (Cth), based on our experience in NSW, such provisions simply do not prevent coercive action from being taken (or organized) by the TWU.

The employee-like worker jurisdiction – specific issues

We note the following major deficiencies in the proposed employee-like provisions in Part 16 of the Bill:

- The unduly broad definitions of digital platform work and digital labour platform operators.
- The unduly broad definition of employee-like workers.
- The same consultation requirements (as that found for the making of a road transport MSO) be introduced for the making of an employee-like MSO.
- The scope of eligibility for the making of an unfair deactivation claim be confined in a more appropriate and balanced manner.

The definition of digital platform work and digital labour platform operators

The Bill proposes very broad definitions for the terms '*digital platform work*' and '*digital labour platform operators*' (ss.15L and 15M).

In effect, '*digital labour platform'* is broadly defined so as to capture any '*online enabled application, website or system operated to arrange, allocate or facilitate the provision of labour services*' that:

- engages independent contractors directly or indirectly through or by means of the application, website or system; or
- acts as an intermediary for or on behalf of more than one distinct but interdependent sets of users who interact with the independent contractors or the operator via the application, website or system; and

processes aggregated payments referable to the work performed.

An operator that enters into or facilitates a services contract under which work is performed by an employee-like worker is a '*digital labour platform operator*'.

The Explanatory Memorandum states that the definition of digital labour platform is '*intended to be deliberately broad to ensure that it can capture new market structures and forms of work as they emerge. It is not intended to capture online classifieds where there is not a payment processed, or digital platforms that facilitate the sale of goods*.'

In our view, the approach of seeking to capture all operators that use an online platform to arrange, allocate or facilitate labour services, with only one qualifying element, that being the processing of payments by the platform, is highly problematic. In endeavouring to prevent operators that would allegedly seek to restructure their platforms to avoid or circumvent the new jurisdiction if narrower definitions were adopted, the Bill has, as a consequence, cast the net too wide. The definitions as proposed would capture, for example:

- Sectors of the traditional road transport industry that use online delivery or courier allocation systems which also processes payments made to drivers.

  As earlier submitted, whilst the Bill attempts to limit the overlap between these two new jurisdictions based on the characteristics of an individual contractor (s.15Q(1)(e)), the Bill does not however prevent a traditional road transport business from being captured by orders made under the employee-like jurisdiction.

- Operators that provide an online platform for users to book, pay for, and undertake experiences which are offered up by individuals for a set price. Such experiences could range from walking tours, bike tours, car and boat cruises, party setups, photography shoots, to sporting activities such as surfing lessons.

  The reference to the '*provision of labour services*' in s.15L is apt to confuse as nearly all services have some form of '*labour'* component involved. In the example above, a labour component is involved in providing a guided bike tour, although one could reasonably characterise such service as the provision of an experience or activity.

  It is also reasonably arguable that the operator *itself* is not in fact arranging, allocating or facilitating the provision of labour services, but rather, advertising a range of services offered by individuals that may tangentially involve labour services.

  It is therefore unclear whether the provision of labour services is assessed by reference to the platform operator, or the services of the independent contractor themselves, or both. It would seem from the Explanatory Memorandum that the answer to this question is that it is assessed by reference to the operator, as '*online classifieds*' and '*digital platforms that facilitate the sale of goods*' are carved out. If that is indeed the case, this should be made expressly clear in either ss.15L or 15M of the Bill and the uncertainties identified above be resolved by further clarification and explanation in a supplementary Explanatory Memorandum.

Furthermore, it is unclear whether online platforms that may facilitate both the sale of goods *and* labour services would be captured by the new jurisdiction. For example, would an online retailer

that sells televisions using an online platform but also provides delivery and installation services for the television through independent contracting arrangements be considered a digital labour platform operator if they process payments to the driver? Or would they be considered a road transport business? Or neither?

The uncertainties and issues identified above demonstrate a clear need to provide for more targeted and confined definitions of a '*digital labour platform*' and '*digital labour platform operator*'. More broadly, these issues clearly demonstrate there is a need for a fundamental reconsideration of the scope of this jurisdiction to provide a reasonable level of clarity to those that may be potentially covered and/or affected by this new jurisdiction. As framed, the Bill should not be passed.

Consultation requirements for the making of an employee-like MSO

The Bill does not expressly require consultation by the FWC with parties that may be affected by a proposed employee-like MSO.

This approach is a striking contrast to the approach taken in relation to the proposed regulation of the road transport industry. The difference in approach is entirely unjustifiable. Employee-like workers and digital labour platform operators deserve the same protections from potentially unforeseen or unintended adverse consequences of novel FWC action as those that operate in the road transport industry.

In our submission, there is no apparent reason why the consultation requirements applicable to the making of a road transport MSO should not also apply to the making of an employee-like MSO. In particular:

(a) Proposed s.536JF(3) which prescribes a minimum 24 month consultation period for the making of a road transport MSO, should be expanded to include the making of an employee-like MSO.

(b) Proposed ss.536KB to 536KF (inclusive), which sets out the process the FWC must follow before making a road transport MSO, should also be applied by the FWC in making an employee-like MSO.

Unfair deactivation

Eligibility period – 6 months for employee-like workers versus 12 months for road transport contractors

It is unclear why the Bill has proposed a 6 month eligibility period in order for an employee-like worker to make an unfair deactivation claim (s.536LD(c)), whilst a 12 month eligibility period is proposed for a road transport contractor in respect of an unfair termination claim (s.536LE(c)).

In our submission, the same 12 month eligibility period for road transport contractors should apply to employee-like workers.

We also flag that the proposed 6 month eligibility period would not provide a wholistic assessment

of whether an employee-like worker has been performing digital platform work on a '*regular basis*', particularly as there will be seasonal factors which affect the availability or requirement for such work in certain periods of the year. A 12 month eligibility period would overcome this issue and would provide a more wholistic picture as to whether the employee-like worker has been performing digital platform work on a regular basis.

Unduly broad definition of the term '*deactivated*'

The Bill proposes an unduly broad definition of the term '*deactivated*' as including modifications, suspensions, and terminations (s.536LG).

There should be a new subsection in s.536LG which carves out temporary (i.e. 14 days or less) modifications or suspensions that have been implemented for legitimate and necessary purposes such as those set out below. We propose the following changes in this regard:

Proposed changes to the Bill

Vary the proposed s.536LG such that the existing clause is framed as subsection (1).
Insert a new subsection (2) to read as follows:

'(2) Notwithstanding subsection (1), a person has not been deactivated from a digital labour platform, where the person's access is modified or suspended for a period of 14 days or less, because of a reason relating to:

(a) the health and safety of a user of the digital labour platform or member of the community, including to enable an investigation to be conducted by the digital labour platform operator, regulator or law enforcement;

(b) suspected fraud, misrepresentation, or falsification of information provided to the digital labour platform operator, including to enable an investigation to be conducted by the digital labour platform operator, regulator or law enforcement;

(c) non-compliance with a digital labour platform operator's terms and conditions of use, including licensing and accreditation requirements; or

(d) a software update or technical issue which has inadvertently modified, suspended or terminated a person's access to the digital labour platform.

(3) A modification or suspension will be taken to be for one of the reasons identified in subsection 536LG(2) where it is based on a reasonable belief or concern of the digital labour platform operator.'

Road transport industry – specific issues

Despite the issues and concerns raised by various elements of the road transport industry, as well as by Ai Group during the consultations with DEWR, the Bill nevertheless proposes to introduce an RSRT-like jurisdiction within the FWC.

This includes empowering the FWC to set mandatory minimum freight rates for the road transport

industry in a manner akin to the powers afforded to the RSRT.

It must be noted that such a profound regulatory change was not foreshadowed by the Government as part of its election commitments.

Ai Group remains strongly opposed to the introduction of an RSRT-like jurisdiction within the FWC as proposed by the Bill. The FWC should not be empowered to set mandatrory freight rates.

The mistakes of the RSRT should not be repeated

The issues relating to the RSRT which operated between 2012 to 2016 are widely reported and are detailed in two independent reviews[46] which concluded that there was limited evidence of a link between safety and remuneration and that the RSRT had not delivered any tangible safety benefits. In addition to the $13.4 million of funding that was expended by the Australian Government at that time, it has been estimated that the orders made by the RSRT had a financial impact on the broader economy that exceeded $2 billion.

Ai Group has filed a detailed submission in May 2023 to DEWR as part of the consultations for this Bill which sets out our various concern over with the reintroduction of an RSRT-like jurisdiction, as well as numerous submissions in various review processes relating to the RSRT which we have **attached** to this submission again for reference:

- Ai Group's submissions to the '*Review of the Road Safety Remuneration System*' process in January 2014. Those submissions set out the issues and impacts the RSRT had on the road transport industry (**Annexure A**).

- Ai Group's submissions to the Queensland Government's '*Inquiry into the Industrial Relations and Other Legislation Amendment Bill 2022'*, which responds to various submissions made by Professor Emeritus Peetz, including the extent of the adverse impacts of the RSRT. We refer specifically to page 7 of those submissions (**Annexure B**).

Whilst we do not propose, in this submission, to repeat the vast number of issues identified in the submissions referenced above, we simply highlight that the example of the RSRT is a salient demonstration of the risk of how ill-conceived regulations, intended to assist road transport contractors, can ultimately operate to their detriment.

The Bill does not contain adequate measures to avoid the disaster that was beginning to unfold as a consequence of the operation of the RSRT. This included the prospect that vast numbers of owner drivers were set to have their likelihoods destroyed as a consequence of being priced out of work.

[46] '*Review of the Road Safety Remuneration System'*, Jaguar Consulting, 16 April 2014; '*Review of the Road Safety Remuneration System – Final Report'*, PricewaterhouseCoopers, January 2016.

The road transport industry is already extremely heavily regulated

It is also trite to observe that the road transport industry is already one of the most heavily regulated sectors of our economy.

This includes, in particular, specialised legislation such as that based in the Heavy Vehicle National Law.

In the industrial context, there are already different regulatory regimes that have been implemented and operate in various states which deal with the engagement of certain contractors, including in NSW, WA, Vic.

The engagement of Employees is the sector is already comprehensively regulated by the FW Act.

The reintroduction of an RSRT-like jurisdiction within the FWC will add to the regulatory burden on road transport businesses. Given the approach taken in the Bill, it is entirely foreseeable that businesses will be left grappling with how the new RSRT-like jurisdiction will interact with the new employee-like jurisdiction, and with existing regulatory regimes that are currently in place. There is already significant uncertainty related to how the current regimes interact, even without the newly proposed jurisdictions. Ai Group urges the Parliament to not make an already problematic situation worse by introducing a further layer of unnecessary regulation.

The Explanatory Memorandum to the Bill does not provide any clarity as to why Chapter 6 of the NSW IR Act and the *Owner Drivers and Forestry Contractors Act 2005* (Vic) have not been ousted from concurrent application with the newly proposed road transport jurisdiction (see proposed s.536JP(3)).

If Chapter 16 of the Bill is to be introduced (notwithstanding our strong opposition against it), it should cover the field in relation to industrial regulation of contractor arrangement in the road transport sector (it should operate to the exclusion of the NSW, Victorian and WA systems and Qld System ought not be permitted to commence operation). To do otherwise would result in a patch-work approach to the regulation of the road transport industry. Any approach that further adds to the already significant regulatory burden and compliance costs faced by road transport businesses ought to be avoided.

Again, if notwithstanding our strong opposition, the Government nonetheless proceeds to re-introduce an RSRT-like jurisdiction in the FWC, we set out the various issues with specific provisions of the Bill as currently proposed:

- The proposed jurisdiction is strikingly similar to the RSRT.
- The road transport objective must be fit for purpose, reflective of, and tailored to the uniqueness of work in the road transport industry.
- The regulation of road transport supply chains arrangements through the FWC is entirely inappropriate and highly problematic.

- The need for the Road Transport Advisory Group to operate in a manner that is fair, just, open and transparent.

The proposed jurisdiction is strikingly similar to the RSRT

The road transport industry jurisdiction proposed by Part 16 of the Bill, bears a number of strikingly similar elements to the RSRT.

Firstly, although the RSRT was a separate tribunal to the FWC, the RSRT sat in the FWC's premises and was largely comprised of members of the FWC. Indeed, its President was also a Senior Deputy President of the FWC. This is not dissimilar to the composition of the proposed RT Expert Panel, which comprises of the FWC President, Vice President or Deputy President (as appointed by the FWC President to be the Chair of the Panel), and just one '*Expert Panel Member or other FWC Member who has knowledge of, or experience in, the road transport industry*' (s.620(1)(D).

Secondly, the RSRT issued orders following years of proceedings and deliberations that included engagement with unions and industry parties, the receipt of lay and expert evidence, and the RSRT itself commissioning expert assistance in the calculation of proposed minimum rates. It was open to industry participants (i.e. parties directed affected by the orders made by the RSRT) to participate in these proceeding and indeed many did). These are strikingly similar processes to the '*safeguards'* that have been proposed in this Bill. It must therefore be noted that notwithstanding the processes followed by the RSRT and the repeated indications of the parties as to the extensive adverse consequences that would ensue if the orders were made, the RSRT nevertheless proceeded to issue those orders.

Thirdly, the parties appearing before the RSRT included the major industrial parties (such as the TWU and major road transport industry associations) and the proceedings unfolded in a manner that was strikingly like the conduct of FWC proceedings. The establishment of this new jurisdiction within the FWC will mean that simialr processes as that followed by the RSRT will also apply to this new jurisdiction.

Having regard to the similarities between various aspects of Part 16 of the Bill and the RSRT, we note here that the problem with the RSRT was not the processes implemented by the Tribunal, but the inherent difficulties with setting mandatory rates for such a diverse and broad industry. In this regard, Ai Group is strongly of the view that many of the '*safeguards'* proposed by the Bill, including the consultation period and process for making an MSO, and the establishment of the RT Expert Panel and the RT Advisory Group, are insufficient to prevent the mistakes of the RSRT from being repeated, as many of these safeguards had already been applied (in practical terms) by the RSRT.

The road transport objective

The Bill proposes a road transport objective that the RT Expert Panel must take into account in performing a function or exercising a power under the FW Act (s.40D).

We have identified a number of issues with the road transport objective, as proposed by the Bill:

- **Section 40D** - The introductory sentence of this section references a need for the RT Expert Panel to take into account the need for an appropriate safety net of minimum standards for regulated road transport workers and '*employees in the road transport industry*'. The reference to employees in s.40D is not required as this is already dealt with in the modern awards objective (s.134 of the FW Act). Minimum terms and conditions for employees should in the road transport sector should be set based on the same considerations as all other sectors.

- **Subsection 40D(b)** – This subsection does not currently require the FWC to take into account the need to avoid unreasonable adverse impacts upon '*parties that rely upon or utilise the services provided by road transport industry participants, including the affects upon the availability and costs of services provided to such parties*'. Such parties might include supply chain participants and users/consumers. The inclusion of this additional objective in s.40D(b)(iv), should be implemented to ensure that the FWC takes a holistic approach to assessing the impacts of a minimum standard, particularly given the significant extent to which the road transport industry is integrated into the national economy. Specifically, it is also appropriate for the FWC to assess the impacts such orders will have on parties within the supply chain, given that the FWC may be empowered to make road transport industry contractual chain orders (which we deal with in the following section below).

  The impacts upon users/consumers are also an important consideration, as the setting of minimum standards should not adversely impact the availability, supply or cost of services provided for end users/consumers, including if this occurs as a result of increased administrative and compliance costs associated with the imposition of a new order. In that regard, further to the insertion of the proposed objective in s.40D(b)(iv) (outlined above), the words '*and users*' should also be added to the end of existing s.40D(b)(iii) as follows:

  > '*(iii) administrative and compliance costs for road transport industry participants <u>and users</u>.'* (Emphasis added)

Regulation of road transport industry supply chains

Section 40J: The Bill provides that '*regulations may make provision for and in relation to matters relating to the road transport industry contractual chain or road transport industry contractual chain participants*'.

The broad regulation making power must not be passed by Parliament. There has been an almost complete lack of consultation with industry participants and there representative that could be affected by this radical proposal.

The FWC and the Fair Work system more broadly are not the appropriate forums in which the potential regulation of supply chains should be developed, as such matters would largely relate to commercial arrangements that apply between businesses. The FWC and its predecessors have

never been empowered to make orders or to deal with commercial arrangements between businesses.

FWC members are appointed for their workplace relations experience in respect of employees, not their experience related to the operation of commercial arrangements in the road transport industry, their experience with contractors within that industry, or their understanding of the often complex market dynamics that are at play within supply chains. The regulation of supply chains are more appropriately dealt with through specialised legislative schemes such as the Heavy Vehicle National Law or through the *Independent Contractors Act 2016* (Cth).

It is also unclear:

- Whether, under proposed s.536NB of the Bill, a supply chain participant (whether covered by a supply chain order or not) may be able to make an unfair contracts claim.

- Whether minimum terms and conditions set by a supply chain order can be used as a baseline / point of comparison for the FWC in examining whether a services contract as between two supply chain participants is fair under the '*any other matter the FWC considers relevant*' limb of proposed s.536NB(1)(f) of the Bill.

- Why the making of a supply chain order should not be subject to the same '*safeguards*' that have been provided for the making of an MSO. These '*safeguards*' instead appear to be left open to regulations, which may not in fact be made (see for example the matters set out in s.40J(2)(b) to (f) of the Bill).

- Why there are not clear parameters as to: what terms supply chain orders must, must not, and can include; who can and cannot apply for such orders; how such orders are made, varied or terminated; how disputes regarding the terms of such orders will be dealt with; and how such orders will interact with other instruments including the new MSOs and MSGs as well as a modern award. The approach taken in leaving these essential matters up to the regulations does not provide any certainty to the parties that may be affected by such orders and is not at all appropriate.

The RT Advisory Group – Concerns over its operation and limits on its effectiveness

Given the role of the FWC in arbitrating matters that would potentially have very significant impact on parties, there is a concerning lack of rigor around the way in which members of the RT Advisory Group that would be established by s.40E are appointed, the manner in which the group will operate and the way in which it will engage with the FWC.

There is also a similar lack of rigour around the appointment of subcommittee members. The RT Advisory Group must, before advising the FWC in relation to a matter relating to the road transport industry (as set out in s.40E(2)(a)-(c)) or another matter prescribed by regulations (s.40E(2)(d)), consult any relevant subcommittee established under s.40G. Section 40G of the Bill provides that a subcommittee '*may include persons who are not members of the [RT] Advisory Group, but a subcommittee must be chaired a member*'. The Bill should include provisions which address how such individuals may be appointed to a subcommittee (as well as by whom) in order to ensure that this occurs in a fair open and transparent manner. It is equally important that

members of the subcommittee are properly appointed as they will have a role in advising the FWC, albeit indirectly, through the RT Advisory Group.

It would be highly inappropriate for the RT Advisory Gorup to be able to have anything less than open and transparent engagement with members of the FWC that are arbitrating contested matters that could have a material bearing on parties. The Bill does not however appear to prevent this from occurring.

In assessing the utility of the formation of such a group, it must be remembered that the RSRT only issued its widely condemned orders after detailed engagement with industry and after affording parties numerous windows to advance submissions and evidence in proceedings before it and after commissioning expert advice. The RSRT members were also comprised of senior members of the FWC and persons with relevant expertise and/or knowledge of the road transport industry. The problems created by the RSRT where not merely a consequence of flaws in the process, but rather the inherent impossibility of setting sustainable uniform mandatory freight rates, given various factors such as the variability of the freight work and the market dynamics at play within the road transport industry.

If the Bill is passed, the appointment of a RT Advisory Group will not avert the devastating consequences the remuneration orders issued by the RSRT had on the industry from arising again.

The newly proposed unfair contracts jurisdiction

Part 3A-5 of the Bill proposes to introduce an unfair contracts terms jurisdiction in the FWC for independent contractors.

The new jurisdiction would enable independent contractors earning below the contractor high income threshold, principal contractors, or an organisation entitled to represent the interests of a party to the services contract, to make an unfair contracts claim.

It is not yet known what the contractor high income threshold will be set at. Consequently, the scope of this new jurisdiction is still not fully known. Absent such detail the Parliament should not contemplate passing the proposed Bill.

The FWC would be empowered to review terms relating to '*workplace relations matters*' in a services contract. If the FWC finds that a term is unfair, it may set aside all or part of a services contract, or amend or vary a part of a services contract.

Whilst this jurisdiction is intended to be low-cost as compared to the existing jurisdiction under the *Independent Contractors Act 2006* (Cth) (**IC Act**), it is not likely to be experienced by parties who engage contractors and that have a claim brought against them. Given the potentially significant ramification for parties (principal contractors) of having a claim being brought against them in the new jurisdiction, and the likely complexity of matters, many will undoubtedly be put to the expense of seeking legal or other professional advice and representation when responding to such claims, including meritless claims that are advanced by independent contractors who believe (potentially erroneously) that a term in their services contract is unfair.

Given that this new jurisdiction would effectively be a no-cost jurisdiction, there would be no incentive for independent contractors to advance reasonably arguable claims and claims which satisfy the various jurisdictional requirements – such as the fact that only terms relating to '*workplace relations matters*' can be reviewed. Claims that are not advanced properly or that are made in circumstances where the claim goes beyond the FWC's jurisdiction, would still put principal contractors to costs that they are unlikely to recover. Principal contractors may also be pressured to settle claims (even those claims that are not reasonably arguable) in favour of being put to the time and expense of having to respond or the uncertainty over what approach a member of the FWC with potentially limited experience dealing with commercial contracting arrangements may take in relation to such matters.

If the risk of the impacts described above do materialise through the passage of the Bill, principal contractors would also be less prepared to engage independent contractors work. This would have major adverse effects on a range of industries (including the building, construction and road transport industries) where contracting arrangements are long established, and in many cases favoured by all parties, including workers. There is a real risk that the introduction of this jurisdiction, whilst designed to assist independent contractors, would ultimately undermine their viability and livelihoods.

For reasons including those set out above, Ai Group is opposed to the introduction of an unfair contracts jurisdiction in the FWC.

To the extent that the justification for making these changes is said to be the relatively limited use of the current jurisdiction under the IC Act, it should also be noted that the Report of the Inquiry into the Victorian On-Demand Workforce was critical about the current lack of advice and support available for those wishing to access the unfair contracts provisions in Part 3 of the IC Act:

> *'1168 It is not clear who is responsible for providing advice and support to independent contractors about their right to seek a remedy or how to do it. Repeated approaches to the FWO and Commonwealth Attorney-General's Department did not reveal any clear or concerted government support in this regard.*
>
> *1169 The Inquiry put questions to the Commonwealth Attorney-General's Department about the nature and extent of support available to people seeking to access the unfair contracts jurisdiction under the IC Act, including resources. Their response referred to the FWO's role in providing advice about workplace laws.*
>
> *1170 When asked about the resources allocated to supporting the administration of the IC Act, the same department told the Inquiry there are practical limits to the information available to share with the Inquiry; one being the fact that it is held across multiple agencies.*
>
> *1171 The FWO advised the Inquiry that 'taking into account the provisions of both the IC Act and the FW Act, FWO does not consider that our agency's statutory functions include*

advising on or enforcing the unfair contract provisions in the IC Act'. The ACCC is responsible for administering the ACL and the Director of Consumer Affairs, Victoria for the mirror state laws.'[47]

It is not surprising that the provisions in Part 3 of the IC Act have been underutilised given the lack of education and support provided by Government Departments and regulators to those wishing to access that jurisdiction. This can and should be addressed in favour of moving to establish an entirely new jurisdiction.

[47] *Report of the Inquiry in the Victorian On-Demand Workforce*, June 2020, p.167.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak employer organisation representing traditional, innovative and emerging industry sectors. We are a truly national organisation which has been supporting businesses across Australia for nearly 150 years.

Ai Group is genuinely representative of Australian industry. Together with partner organisations we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our members are small and large businesses in sectors including manufacturing, construction, ICT, transport & logistics, engineering, food, labour hire, mining services, the defence industry and civil airlines.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

OFFICE ADDRESSES

NEW SOUTH WALES

Sydney
51 Walker Street
North Sydney NSW 2060

Western Sydney
Level 2, 100 George Street
Parramatta NSW 2150

Albury Wodonga
560 David Street
Albury NSW 2640

Hunter
Suite 1, "Nautilos"
265 Wharf Road
Newcastle NSW 2300

VICTORIA

Melbourne
Level 2 / 441 St Kilda Road
Melbourne VIC 3004

Bendigo
87 Wil Street
Bendigo VIC 3550

QUEENSLAND

Brisbane
202 Boundary Street Spring Hill
QLD 4000

ACT

Canberra
Ground Floor,
42 Macquarie Street
Barton ACT 2600

SOUTH AUSTRALIA

Adelaide
Level 1 / 45 Greenhill Road
Wayville SA 5034

WESTERN AUSTRALIA

South Perth
Suite 6, Level 3 South Shore Centre 85
South Perth Esplanade
South Perth WA 6151

www.aigroup.com.au

REVIEW OF THE ROAD SAFETY REMUNERATION SYSTEM

AUSTRALIAN INDUSTRY GROUP

January 2014

SUBMISSION TO THE REVIEW OF THE ROAD SAFETY REMUNERATION SYSTEM

1. Introduction

Ai Group welcomes the opportunity to comment in relation to the Review of the Road Safety Remuneration System (RSR System).

We make this submission on behalf of the road transport industry plus the industries which are users of road transport (ie. virtually all industries).

Ai Group and its members are committed to improving safety in the road transport industry. However, improving safety in the industry requires a whole-of-government approach rather than a narrow focus upon the method and quantum of remuneration. It requires an approach which has broad support, including the support of the Federal Government, State and Territory Governments, and industry.

The RSR System does not have broad support. It is a flawed system which was implemented by the previous Government in response to the Transport Workers Union's *Safe Rates, Safe Roads* industrial campaign.

The RSR System is distracting Government and industry attention resources away from the measures which are widely recognised as improving safety, towards a regime which is not widely supported nor underpinned by robust economic modelling.

For the reasons set out in the submission, the RSR Act should be repealed and the RSR Tribunal should be disbanded without delay.

2. About Ai Group

Ai Group is the leading industry organisation representing employers in the transport, manufacturing, engineering, construction, automotive, food, information technology, telecommunications, labour hire, printing, defence, mining equipment, aviation and other industries. Together, Ai Group and its affiliates represent the interests of approximately 60,000 businesses which employ in excess of 1.2 million staff.

Significantly, Ai Group represents the industrial interests of the ATA NSW, the peak trucking body in NSW.

Our submission follows consultation with employers and principal contractors as well as participants in the broader supply chain regarding not only the deliberations of the Road Safety Remuneration Tribunal (RSR Tribunal) but also the preceding development and implementation of the *Road Safety Remuneration Act 2011* (RSR Act) and *Road Safety Remuneration Regulation 2012* (RSR Regulation)

The submission is also informed by our involvement in Australia's workplace relations system as a registered organisation of employers for more than a century. In the context of the road transport industry, Ai Group has played a major role in the development of the relevant modern awards and the recent review of such instruments by the Fair Work Commission (FWC).

We are also represented on the Transport Industry Council in Victoria and are recognised as a State Peak Council under the New South Wales legislation governing owner drivers in that State, the *Industrial Relations Act 1996* (NSW). Within the NSW jurisdiction, Ai Group plays a leading role in proceedings relating to the setting and variation of minimum rates and conditions for the owner drivers.

Ai Group regularly represents and advises businesses in the road transport industry in relation to matters involving employee drivers and owner drivers.

We have appeared in and made submissions in all significant proceedings before the RSR Tribunal. We also participated in the House Standing Committee on Infrastructure and Communications inquiry into the *Road Safety Remuneration Bill*.

Given the above experience, we are well placed to comment on practical matters associated with the operation of the RSR system including the utility of maintaining the RSR system in light of other regulatory responses aimed at improving safety in the industry and the potential for the RSR system to damage or disturb key elements of other regulatory regimes applicable to the industry.

3. Introductory comments

The establishment of the RSR System was the product of a long running TWU campaign. It represents a very significant re-regulation of elements of the Australian economy and Australia's workplace relations system.

Ai Group and its members are strongly committed to measures that improve road safety. Nonetheless, the contention that tangible improvement in safety outcomes can be achieved through a narrow focus on paying drivers more or differently is flawed. The proposition is overly simplistic and aspirational at best.

The road transport industry is already one of the most heavily regulated sectors of the Australian economy. To a very significant extent elements of the RSR System have the potential to duplicate or overlap with other regulatory measures already in place.

The new system risks undermining the good progress that is being achieved through other initiatives and to distract industry participants and Government from pursuing measures that likely to continue to result in tangible improvements in safety.

Under the RSR System the Tribunal is afforded the power to regulate both the road transport industry and the broader supply chain. Its decisions will potentially have major impacts on road transport companies, businesses which use road transport in industries such as manufacturing, construction and retail, and on Australian consumers.

There is a risk that orders flowing from the Tribunal will result in specific adverse effects including;

- Interfering with normal commercial arrangements between transport companies and their clients;
- Imposing increased costs upon road transport companies;
- Imposing increased transport costs upon the manufacturing, construction, retail and other industries;
- Imposing higher prices for transported goods upon the community;
- Distracting industry and Government attention and resources away from the measures which are widely recognised as improving safety, such as: risk identification and control, improved roads, fatigue management, education and training, drug and alcohol policies, use of technology, and strong compliance mechanisms;
- Undermining the integrity of the National Employment Standards (NES) in the *Fair Work Act 2009* (FW Act);
- Undermining the integrity of modern awards in providing a fair and relevant safety net for employees;
- Undermining the enterprise agreement making system;
- Conflicting with key objects of the FW Act such as the need to promote economic prosperity, economic growth, productivity and flexibility;

- Imposing an unreasonable compliance and red tape burden upon road transport companies and/or businesses which use road transport;
- Undermining the integrity, objectives and operation of a raft of State laws and initiatives relating to relating to matters such as work health & safety and general transport regulation and industrial/contractual conditions of contractor drivers/owner drivers; and
- Undermining the Heavy Vehicle National Law.

Ai Group has consistently raised strong concerns regarding the implementation and operation of the RSR System.

Our submissions in relation to the development of the reforms in response to the "Safe Rates, Safe Roads Directions Paper" released on behalf of the previous Commonwealth Government and our comprehensive contributions to the House Standing Committee on Infrastructure and Communications inquiry into the *Road Transport Safety Remuneration Bill* and the *Road Safety Remuneration (consequential Amendments and Related Provisions) Bill 2011 detail our concerns*. These are attached at **Annexures A, B and B1**. Given that the final form of the RSR Act is very similar to the initial Bill, these submissions remain highly relevant to the Review.

Ai Group has made a series of submissions to the RSR Tribunal regarding the setting of its 1st and 2nd Annual Work Program. These submissions provide an insight into the operation of the Tribunal and the RSR System. They are attached at **annexures C, D, E, J and K.**

Finally, Ai Group has made a number of detailed submissions to the RSR Tribunal regarding various proposed Road Safety Remuneration Orders (RSROs). These submissions are attached at **Annexures F, G, H and I.**

4. Relevant preliminary considerations for the Review

The incidence of road safety accidents is of course tragic and it is important that Governments implement appropriate measures to tackle this persistent problem.

All industry participants are anxious to see continued improvement in the safety performance of the road transport industry and its associated supply chain. However, Ai Group believes that the central premise underpinning the establishment of the RSR System, the notion that this can be achieved by paying drivers more or differently, is flawed.

Any assessment of whether the RSR System represents an effective, efficient and appropriate means of delivering safety improvements must be considered in the context of statistical evidence of the causes of crashes. It should also involve consideration of whether there is evidence that similar regulatory regimes have been effective in addressing such matters.

The Review should also involve careful analysis of the broader regulatory environment. The road transport industry is already one of the most heavily regulated sectors of the economy. It is subject to specific laws addressing work health and safety but also subject to specific laws addressing safety in the road transport context (i.e. State based transport regulation embracing concepts such as the 'chain of responsibility'). Moreover there is a raft of measures that address the industrial or contractual entitlement of drivers, be they employees or contractors. The RSR System cannot be regarded as an appropriate regulatory response if it unnecessarily or inappropriately duplicates or overlaps with such regimes. Nor can it be said to represent an appropriate response if it risks undermining the integrity and operation of other legislation, such as the FW Act.

Any assessment of the RSR System must involve a critical review of the RSR Tribunal, including its operations, structure and the powers which are afforded to it under the RSR Act.

Given the RSR Act does little to directly regulate the terms and conditions of road transport drivers, but instead largely relies upon the operation of the Tribunal it creates, the Review should consider whether the RSR Act places appropriate parameters around the Tribunal's operation so as to ensure that it delivers balanced regulation likely to improve safety without also resulting in disproportionate negative consequences for industry along with the broader community and economy.

Moreover, consideration should be given to whether the RSR Tribunal is necessarily the best placed or structured entity to perform this role or whether other specialised bodies, such as the Heavy Vehicle National Regulator, is better placed to develop measures aimed at improving safety in the industry.

A key element of the RSR System is the Tribunal's capacity to make RSROs and to conduct 'annual work programs'. The Tribunal's actions to date in relation to such matters should be carefully considered.

The Review should also consider the utility and operation of other elements of the RSR System including:

- The disputes jurisdiction;
- Road Safety Collective Agreements;
- Research functions to the Tribunal; and
- The system's reliance upon the Fair Work Ombudsman as the relevant enforcement body.

Finally, it should be borne in mind that the terms of reference for the Review squarely place the emphasis on considerations relating to improvements in safety. This is appropriate as a key purported justification for the RSR System was its alleged capacity to delivering improvements in safety.

The RSR Act does not place a sufficient emphasis on the achievement of improvements in safety. It encompasses industrial considerations distinct from safety. This has led to significant concern within industry that the system has been structured to regulate industrial conditions for road transport drivers rather than to achieve a meaningful improvement in safety. The Review should assess the RSR System's capacity to deliver tangible improvements in safety.

Ai Group believes that when the abovementioned matters are properly considered they reveal that the RSR System constitutes a highly deficient regulatory response to safety issues in the road transport sector.

5. The lack of evidentiary justification for the implementation of another layer of regulation

There is an inadequate evidentiary basis for implementing the RSR System.

There is significant uncertainty regarding the nature of any causal connection between remuneration and safety. Indeed a causal connection has not been definitively established. As the Regulatory Impact Statement accompanying the Road Safety Remuneration Bill succinctly noted:

> *"There is some research to suggest that the remuneration for drivers is a factor in safety outcomes, however data at this point in time is limited and being definitive around the causal link between rates and safety is difficult. For example, speed and fatigue are often identified as the primary cause*

for a crash but is a much harder task to prove that drivers were speeding because of the manner or quantum of their remuneration."

Doubts have been publically cast on the evidentiary justifications for the regime by a former senior employee of the TWU. In an article published in the Australian Financial Review, Seth Tenkate, a former TWU employee who allegedly reported to the Union's National Secretary Tony Sheldon for nearly four years as his press secretary, policy writer and on the lobbying campaign that led to the establishment of the tribunal indicated in relation to the formation of the Tribunal that there was:

"…barely a specific case study where a death is involved to support [the link between rates of pay and safety]"[1]

He is reported to have observed that;

"The safe rates legislation is so broad it can effectively regulate costs in up to 14.5 per cent of GDP, yet it exists on the premise that the main link between heavy vehicles and the rate of deaths on our roads is solely linked to rates of pay."

"It largely ignores other evidence, including the roles of trucking finance companies, workplace and sustainable business training for drivers and improvements in truck safety, and puts the onus of individual driver behaviour on someone who isn't in the cab."

"Since 2007, there has been a raft of changes across the industry, from award modernisation, Fair Work Australia and the introduction of the National Heavy Vehicle regulator – all which could have looked at this issue but instead you see another layer of regulation on a critical part of the economy"

[1] Ex-union official slams 'safe rates', published in the Australian Financial review on 3 May 2013

The above quoted former TWU employee raises salient points for the Review's consideration.

Much if not all of the analysis of any purported link between remuneration and safety was carried out prior to the commencement of Australia's current workplace relations system, the newly harmonised work health and safety laws and the development of the Heavy Vehicle National Law.

A great deal of the academic analysis routinely relied on by supporters of the RSR System is attributable to a relatively small number of individuals and to an extent is based on overseas studies of doubtful relevance to the Australian context. Other support or purported evidence is often comprised of anecdotal or hearsay assertions by individuals, repeated TWU rhetoric or surveys conducted with doubtful rigour by unions.

Moreover, there is a clear absence of data demonstrating a positive impact on safety resulting from past measures to regulate the remuneration or conditions of drivers, such as those adopted in NSW, Victoria and WA. This was identified in the regulatory impact statement accompanying the *Road Safety Remuneration Bill*:

> *"Implementation of the WA and Victorian legislation which include guideline rates as industry codes, has occurred recently and evaluations have not been undertaken, so drawing any firm conclusions regarding their impact would be difficult. Victoria has experienced a decline in relative fatality numbers since 2004. The regulatory system took effect in December 2006. There is currently no data or analysis on compliance with the guideline rates or take-up of other aspects of the legislation in that state. There is also no obvious trend of improved fatality performance since the commencement of the regulatory framework in WA (in WA, legislation was enacted in 2007 and came into effect 1 August 2008 (with the Code of Conduct taking effect from the 1 July 2010).*

NSW has for many years operated a system of contract determinations under its industrial relations system, setting rates other employment like conditions for independent contractors in the transport industry, resulting in drivers being provided with award-style protections. The NW System applies only to the intrastate or short haul sector (covering a diverse array of transport activities from refrigerated transport to courier services) and only to owner drivers of a single vehicle operation.

While the NSW industry has had its rates subject to determination by an industrial tribunal, available data does not allow for a meaningful analysis of performance. In 2007, NSW accounted for 32.4 per cent of fatalities involving articulated trucks but only 20.5 per cent of kilometres travelled by articulated trucks."[2]

(Emphasis added)

In light of the absence of such data there can be little justification for seeking to replicate any of the State regimes on a National basis. Ai Group called on the RSR Tribunal to inquire into such matters in its first annual work program and has effectively echoed such calls in relation to the Tribunal's second annual work program. Such proposals have been repeatedly opposed by the TWU in the course of proceedings before the Tribunal.[3] Unfortunately, the Tribunal did not give detailed consideration to these matters in its first annual work program and has not identified these matters in its second annual work program.

Even if a causal connection between remuneration and unsafe practices is presumed to exist it does not follow that establishing higher minimum rates or prohibiting certain methods of payment will result in drivers changing their unsafe practices. Rather, if it is accepted that an individual's on-road behaviour is influenced by the quantum of their remuneration it is conceivable that increased rates may

[2] Regulatory Impact Statement accompanying the *Road Safety Remuneration Bill* p13.
[3] See TWU submissions pertaining to the setting of the first annual work program

further incentivise individuals to engage in behaviours such as the working of excessive hours in order to reap greater rewards. Similarly, other unsafe practices such as drivers who fail to undertake maintenance of their vehicles in order to make savings, may simply continue regardless of their level of remuneration.

Regrettably, the RSRT has not sought to grapple with these underlying issues as threshold considerations in any meaningful way. Instead it has focused on undertaking a process aimed at facilitating the development of an RSRO.

Such an outcome is a foreseeable product of the unbalanced nature of the RSR Act and an unsurprising practical consequence of the establishment of the RSR Tribunal. This risk was foreshadowed in Ai Group's submissions regarding the RSR Bill:

> *"The Explanatory Memorandum accompanying the Bill specifies that the Tribunal will:*
>
> > *"…be empowered to inquire into sectors, issues and practices within the road transport industry and, where appropriate, determine mandatory minimum rates of pay and related conditions for owner drivers."*
> >
> > *As argued elsewhere in our submissions, we are concerned that the Bill impinges upon the Tribunal's capacity to determine whether it is genuinely necessary or 'appropriate' to make such orders and effectively dictates certain outcomes.*
>
> *We also doubt the practical likelihood that a Tribunal which is established to create orders addressing remuneration will determine that its role is redundant by exercising a purported discretion not to make such orders. Our concern regarding the potential nature of the Tribunal's operation is illustrated by the High Court's observation regarding the nature of tribunals of limited jurisdiction in the Kirk Case (at 122):*

> *"So too courts set up for the purpose of dealing with a particular mischief can tend to exalt that purpose above all other considerations, and pursue it in too absolute a way. They tend to feel that they are not fulfilling their duty unless all, or almost all, complaints that mischief has arisen are accepted. Courts which are "preoccupied with special problems", like tribunals or administrative bodies of that kind are "likely to develop distorted positions."*[4]

(Emphasis Added)

The Capacity for the RSR System to deliver safety improvements must be considered in the context of existing evidence of the precise nature of the causes of crashes. Driving is an inherently risky activity and drivers are disproportionately exposed to such risks. Similarly crashes involving heavy vehicles are of course likely to serious outcomes, such as fatalities. However the extent to which they could be attributed to the manner that a driver is paid should not be overstated. The Regulatory Impact Statement contained the following pertinent observation in relation to the causes of fatalities involving heavy vehicles:

> *"..in terms of fatalities involving heavy vehicles, most accidents are not primarily the fault of the truck driver. In fatal heavy vehicle crashes involving other vehicles, the other driver was at fault in 82 per cent of the accidents."*[5]

It is unclear how altering truck driver remuneration would address these situations.

There is also significant evidence that the safety performance in the road transport industry is improving. As identified by the Regulatory Impact Statement:

[4] Ai Group submission to the House Standing Committee on Infrastructure and Communications concerning the *Road Safety Remuneration Bill* (Annexure B);*Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v Workcover Authority of New South Wales (Inspector Child)* [2010] HCA 1 (3 February 2010).
[5] Regulatory Impact Statement Accompanying the Road Safety Remuneration Bill Pxix

"The Australian road transport industry generally has a strong safety performance and key safety initiatives, such as CoR and fatigue management laws which are being bedded down, so further improvements in road safety can be expected to continue. Important initiatives including the NHVR and the National Road Safety Strategy should have a positive effect on road safety. Governments are also continuing to invest in road infrastructure, including quality rest stops, divided roads and improved freight corridors, which the NTC put forward as major catalysts for a safer road transport industry."[6]

Ai Group agrees with these observations, although we would add to this initiatives such as the new harmonised work health and safety laws, the implementation of the Heavy Vehicle National Law (HVNL) and the introduction of the FW Act.

Ai Group does not raise these matters to suggest that this progress is sufficient or that there is not reason to strive for further progress. Nonetheless such improvements suggest existing measures are having a beneficial impact and cast doubt on the utility of adopting the narrow approach reflected in the RSR System.

6. The impact to date of the Tribunal on the road transport industry and its safety performance

The RSR System has been in force since 1 July 2012. It would be difficult to assert that, to date, the RSR System has delivered any identifiable positive impact on safety in the road transport industry. Its first RSRO is yet to commence.

Nonetheless, we note that the system has resulted in a significant level of uncertainty and anxiety within industry regarding the potential changes to the regulatory environment that may flow from the Tribunal's operation. Such uncertainty

[6] Regulatory Impact Statement accompanying the Road Safety Remuneration Bill 2012,Pxxvi.

undermines business confidence and productivity. It undermines industry's capacity to make and implement relevant decisions regarding their operations, and it undermines safety. Improved safety is not furthered by complexity and confusion.

The implementation of the RSR System has already imposed a significant burden and distraction on industry. It has been forced to come to terms with an entirely new legislative regime that interacts with existing laws in an extremely complex manner.

Moreover, industry has been obliged to attempt to engage with the new RSR Tribunal concerning the making of RSROs with the potential to impose significant and problematic new obligations. Unfortunately, this burden has been insurmountable for the vast majority of stakeholders. Very few employers have directly participated in the Tribunal's operations.

The increased regulatory burden imposed on industry by the RSR System comes at a time when industry is still grappling with the implementation of important reforms to work health and safety laws and Transport Regulation along with successive and ongoing changes to the workplace relations system (both in the legislative context and in relation to the content of relevant modern awards).

The burden will be exacerbated by the recent release of the Tribunal's first RSRO which will commence on 1 May 2014. Ai Group submissions regarding the similarly worded provisions of the Tribunal's Draft RSRO highlighted a raft of problem. We urge the Review to give consideration to these submissions. While the RSR Tribunal modified its final orders in important respects, it is still likely to have significant adverse consequences for industry, with little if any improvement in safety.

7. The operations of the RSR Tribunal

7.1 RSROs

During the first annual work program there were only four applications for RSROs. Two of these were from unions. The most comprehensive proposal was provided by the TWU. All of these application were filed in response to an invitation and timetable for the first annual work program released by the Tribunal. No party has sought the making of a RSRO outside of the scope of the Tribunal's work program.

On17 December 2013 the Tribunal issued its first RSRO. The order applies to drivers engaged in long distance operations and engaged in the provision of transport services relating to the 'supermarket sector'. It purports to impose requirements on associated employers, hirers and supply chain participants (as defined in the RSR Act).

The RSRO does not seek to broadly regulate remuneration. More specifically, it does not set minimum rates of pay. Instead it deals with a raft of broader issues. It addresses:

- Dispute resolution
- Adverse conduct protection
- Written contracts for road transport drivers
- Other contracts
- Payment times
- Safe driving plans
- Training
- Drug and alcohol policy

The Tribunal has indicated that the issue of rates of pay will be the subject of a conference conducted by the President of the RSR Tribunal. This has been listed for 10 February 2014.

The Provisions of the RSR Act failed to ensure that, in making the first Road Safety Remuneration Order, the RSR Tribunal engaged in sufficient consultation with Industry.

The making of a RSRO represents a sweeping regulatory reform and warranted an extremely cautious approach, as called for by Ai Group.[7]

The Tribunal released its draft order on the 12 July 2013 and expected submissions and evidence by 26 July. Similarly short time frames were afforded to provide written material in response to submissions and evidence filed by other parties. Given the complexity of issues being considered and the sheer volume of material submitted in the proceedings (e.g. the TWU filed over 3000 pages of material) such time frames were not procedurally fair.

On at least two occasions' parties, including Ai Group and 8 other industry bodies, implored the Tribunal to significantly extend the time frame for consideration of the Draft RSRO. Our requests were not granted to any meaningful extent.

Similar concerns over the level consultation were raised by the NSW Small Business Commissioner.[8]

Ai Group consulted with many employers who wished to contribute to the conduct of the Tribunal's annual work program but were simply not in a position to do so given the expedited time frame imposed by the Tribunal.

[7] This has been raised in a number of Ai Group submissions to the Tribunal, see for example annexure C.
[8] Submissions concerning the draft road safety remuneration order dated the 18th of August 2013.

The approach of the Tribunal severely limited industry's involvement in the making of the first RSRO.

In contrast to the development of the first RSRO, the Heavy Vehicle National Law and harmonised work health and safety laws were the product of extensive and detailed consultation and input from a very broad array of industry participants over several years. This represents a far more effective approach to the development of safety regulation.

Disappointingly, the Tribunal appears to have approached the task of conducting its first annual work program with a presumption that the making of an RSRO was inevitable. Relevantly, it commenced its first annual work program by calling for draft or suggested RSROs. Crucially, this approach provided little scope for any consideration of contentious threshold issues such as the nature of the connection between remuneration and safety or for a critical assessment of complimentary regulatory regimes.

The RSR Tribunal's decision making the first RSRO reveals that the Tribunal has concluded that it has power through the making of RSROs to regulate far more than remuneration. This expanded view of the Tribunal's power is not appropriate or consistent with the rational for its implementation. If effectively means that Tribunal is afforded a very broad capacity to regulate both the road transport industry along with its supply chain and issues of safety generally.

The broad scope of the Tribunal's power does not accord with indications by the previous Government that the Tribunal would deal with matters associated with 'pay and pay related issues'. Nor does it appear to accord with the nature of reform contemplated by the regulatory impact statement accompanying the *Road Safety Remuneration Bill* which stated:

"The economic framework in this RIS responds directly to answering the key economic question, namely:

> *'will the societal benefits from improved road safety offset the expected increase in the resource cost and productivity of freight and cost to government from establishing and implementing a road safety remuneration system for owner and employee drivers?[9]"*

The regulatory impact statement's presumption that the RSR System would focus on remuneration is also reflected in the following extract:

> *"PricewaterhouseCoopers (PwC) was engaged by the Department of Education, Employment and Workplace Relations (DEEWR) to prepare a Regulation Impact Statement (RIS), including a Cost Benefit Analysis (CBA), for establishing a Road Safety Remuneration Tribunal (tribunal) for employee and owner drivers in the road transport industry. The tribunal's approach to setting pay and/or pay related conditions would be research focused and evidence based. The tribunal would have discretion to set rates of pay and/or pay related conditions for drivers operating in sectors of the road transport industry, where necessary to improve safety outcomes.*
>
> *The tribunal would also have discretion not to set a rate or remuneration related conditions*."[10]

There is no consideration in the RIS accompanying the *Road Safety Remuneration Bill* of actions undertaken by the Tribunal in imposing mandatory contracting requirements, Safe Driving Plans and compulsory training or of the development of what is in effect an expanded general protections regime. The Tribunal appears to operating in a manner that was not contemplated by Parliament.

[9] Regulatory Impact Statement Accompanying the Road Safety Remuneration Bill, p.v
[10] Regulatory Impact Statement Accompanying the Road Safety Remuneration Bill

Similarly, the Tribunal's broad interpretation of its powers does not accord with the preamble to the RSR Act which describes the purpose of the legislation as: *"An Act to make provision in relation to remuneration-related matters to improve safety in the road transport industry, and for related purposes."*

The RSR Tribunal's broad interpretation of its powers greatly expands the potential for overlap between the RSR System and other regulatory regimes.

7.2 Annual Work Programs

The Tribunal did not specifically identify the matters it was proposing to inquire into in the first annual work program or define the sectors it was inquiring into. Although it identified certain purported 'sectors' of the road transport industry, it did not provide any precise definition of what these constituted. Consequently many industry participants were unaware or uncertain of the scope or potential impact or the Tribunal's inquiries. Such uncertainty operated against promoting their involvement.

Ultimately, very few employees or industry participants sought to formerly engage with the Tribunal except through the medium of their relevant industry body. The limited level of meaningful consultation with industry typified by the conduct of the first annual work program will result in negative consequences not contemplated by the Tribunal.

We acknowledge that the Tribunal did undertake a number of visits to transport and logistics sites as part of its first annual work program. Nonetheless, such visits would have, at best, provided a very limited insight into the highly diverse nature of the industry. There is also a risk that they would have provided a potentially skewed perspective as the Tribunal's invitation to suggest sites to be visited appears to only have been formerly extended by the Tribunal to parties that proposed a road safety

remuneration order.[11] Also, while the visits were announced on the Tribunal's website, the details of the visits were often only published very shortly before the visits were undertaken. This difficulty has been identified by others.[12] Significantly, the Tribunal visited very few facilities of the participants in the supply chain who would be impacted by the RSRO which it made in December 2013.

During the first annual work program The Tribunal conducted 'facilitative discussions' involving several industry associations along with a small number of large employers and owner drives. This culminated in the production of a report which was prepared by a Member of the Tribunal and provided to the Tribunal for the purpose of deliberations relating to the issuing of a draft.

The discussions were conducted prior to any consideration of jurisdictional issues associated with the scope of the Tribunal's powers or consideration of threshold issues associated with the nature of the connection between remuneration and safety. Instead the discussions focussed on proposals put forward by certain parties. Moreover they were conducted in an extremely expedited manner.

A review of the facilitative discussions report reveals that it closely resembled elements of the proposals put forward by the TWU and a single large transport company, Linfox, although it is acknowledged that there were significant modifications that were made as a product of the discussions. Nonetheless, the facilitative discussions reflected an attempt to achieve a level of consensus around the content of an RSRO rather than a process for considering whether such regulation would be effective in addressing safety outcomes.

The content of the report was not broadly supported by industry bodies involved in the proceedings and representing the largest proportion of industry participants, such as Ai Group, ATANSW or NatRoad, among others. Regrettably, this was not fully

[11] See RSR Tribunal's decision regarding the making of first annual work program; [2012] RSRTFB3.
[12] Business SA submissions to the Tribunal's second annual work program dated 26 November 2013

reflected in the terms of the Report. Ai Group's concerns about the report were addressed in submissions to the Tribunal.

Ai Group is concerned that the conduct of the first annual work program was not undertaken in accordance with the technical requirements and time frames contemplated by the RSR Act. Such issues were ventilated in our submissions to the first annual work program[13] and its second annual work program.[14] These concerns arise from the lack of certainty or specify in the terms of the first annual work program and the proper commencement date for the respective work programs. Such issues cast doubt over the validity of the RSRO made pursuant to the first annual work program.

7.3 The Tribunal's dispute resolution function

The RSR Act requires the Tribunal to report certain statistical information regarding its operation. The Tribunal has released a series of reports which are available on its website.

A review of the reports released by the Tribunal reveals an extremely limited utilisation of the Tribunal's dispute resolution functions. It appears that, throughout Australia, there have only been 5 applications seeking to access the Tribunal's dispute resolution services and that the Tribunal has not issued a decision in relation to any dispute.

We note that it is not possible to verify whether these disputes raised issues of any particular significance or merit. It is also not possible to verify whether they were properly within the jurisdiction of the Tribunal or whether they could have been dealt with through other previously existing forums, such as through the various mechanisms established under the FW Act or under the relevant State jurisdictions

[13] See annexures C,D and E
[14] See annexures J and K

dealing with independent contractors. There is significant overlap between such forums.

Nonetheless, it is clear that there is very limited demand for the Tribunal's dispute resolution services.

7.4 Approval of Road Safety Remuneration Collective Agreements

The Tribunal has not yet approved any Road Safety Remuneration Collective Agreement.

Nonetheless, Ai Group is aware that the TWU has approached a number of road transport businesses seeking that they enter into such agreements.

7.5 The performance of the Tribunal' research function

Section 80 of the RSR Act provides that one of the functions of the Tribunal is:

> *"… to conduct research into remuneration-related matters that may affect safety in the road transport industry."*

The RSRT has published a range of information regarding rates of remuneration and conditions for road transport drivers. It has published such information on its website in accordance with the requirements of the RSR Act. It appears that all such published information was already publically available through other sources.

The Tribunal has not undertaken any independent qualitative research regarding the connection between remuneration and safety, the operation of existing complementary regulatory regimes or ways to improve safety in the sector. Nor has it commissioned any such research, to our knowledge.

The research undertaken by the Tribunal is of very limited assistance in seeking to identify ways of improving safety in the road transport industry. It sheds little light on how remuneration-related matters may affect safety.

8. The appropriateness of the Tribunal model as a means of addressing safety performance in the road transport industry

As discussed above Ai Group doubts the capability of the Tribunal to facilitate tangible improvements in safety. We also have significant concerns regarding the nature of the Tribunal established under the RSR Act and the manner in which the Act regulates the Tribunal's operation. To a significant extent our concerns have been borne out by the Tribunal's limited activities to date.

The model of empowering a Tribunal to regulate the remuneration and condition of drivers, complemented by dispute resolution functions, is by no means unprecedented or even novel. The NSW industrial relations system has regulated the remuneration for contract drivers for decades. The relevant provisions are currently reflected in the provisions of Chapter 6 of the *Industrial Relations Act 1996* (NSW). There are many similarities between the NSW system and that created under the RSR Act.

The NSW system has culminated in the establishment of a raft of detailed industrial instruments known as 'contract determinations.' The NSW Commission is also empowered to exercise more interventionist dispute resolution functions than contemplated by the RSR Act.

If the Tribunal model represented an appropriate, effective or efficient means of addressing safety performance of the road transport industry this would have been borne out through tangible improvements in safety outcomes in NSW. Sadly, this is simply not the case.

9. Concerns over appointments

Additional concerns arise from the specific appointments to the RSR Tribunal. The Tribunal is comprised of dual members of the Fair Work Commission (FWC) along with part-time industry participants.

The dual appointees from the FWC undoubtedly have significant experience in the regulation of the employment relationship. However they do not have significant experience dealing with the regulation of independent contractors. More specifically they do not have experience dealing with the often complex diverse commercial and contractual arrangements in play within the road transport industry.

It is not desirable or appropriate that individuals accustomed to considering matters of industrial regulation through the prism of the employment relationship be appointed to regulate the terms and conditions of commercial parties involved in an independent contractor relationship. It is even less appropriate for such individuals to be empowered to develop regulation that interferes with commercial arrangements between businesses in the supply chain.

It must also be borne in mind that members of the FWC predominantly focus on matters of an industrial character rather than dealing with the regulation of matters associated with safety or the performance of on-road activities. In contrast, specialised bodies such as the National Heavy Vehicle Regulator and Safe Work Australia are far better placed to tackle issues associated with safety issues.

Further concerns arise from the part-time appointments to the Tribunal. We set these out below but please note that we do not seek in any way to impugn the integrity of the individuals appointed.

9.1 The appointment of a current representative of an industrial association with a significant interest in the operations of the Tribunal

Mr Ryan is the National Industrial Advisor for the ARTIO, a body that has made submissions to, and appeared before, the RSR Tribunal. This includes proceedings in which Mr Ryan was a Member of the RSR Tribunal Bench.

Further, Mr Ryan has continued to represent ARTIO in proceedings before the FWC while appointed to the RSR Tribunal. There is significant overlap between matters likely to be considered by both Tribunals.
Obvious concerns regarding potential conflict of interest arise in the above described circumstances.

9.2 The Appointment of Professor Williamson

Concerns also arise in relation to the appointment of Professor Williamson. In proceedings before the RSR Tribunal the TWU has relied on research undertaken by the Professor in support of their claims.

Professor Williamson was a Member of the Bench conducting the first annual work program. In such circumstances inevitable concerns arise regarding apprehended bias.

9.3 Concerns regarding the collective experience of the part-time Members

The remaining members of the Tribunal comprise, Steve Hutchins, a former State Secretary of the TWU and a Labor Senator, as well as Tim Squires, a small business owner affiliated with a State based trucking association.

There does not appear to be a part-time Member with significant experience working in or representing the interests of the broader supply chain. Instead there appears to

be a narrow range of experience focused on matters associated with the conduct of trucking operations. This is not reflective of the broad powers of the Tribunal to impose obligations on all parties in the supply chain.

Similarly, there does not appear to be any part-time Member that has any particular economic expertise. Indeed the RSR Act does not even identify this as a relevant consideration for the appointment of part-time Members. This is concerning given the potential for orders issued by the Tribunal to have a sweeping impact on not only the economic viability and performance of elements of the road transport sector but also Australia.

10. The Tribunal's capacity to perform research functions

As well as performing arbitral functions the Tribunal is empowered to undertake research activities.

The dual members of the Tribunal are accustomed to the adversarial system of the FWC. Accordingly they are not necessarily well placed to perform research based activities as contemplated by section 80 of the RSR Act. This is perhaps best demonstrated by the very limited research that has been undertaken by the Tribunal to date.

11. The capacity of the FWO to enforce RSROs

The effectiveness of the operation of the Tribunal model is also limited by its reliance upon the Fair Work Ombudsman (FWO) as the body primarily responsible for enforcing any order created by the system. Ai Group has significant doubts about the capacity of the FWO to perform this role effectively. It is a body well versed in enforcing employment regulation. It is not well placed to enforce the regulation of

independent contractors or the commercial arrangements between other participants within the supply chain.

Difficulties associated with enforcement were recognised in the Regulatory Impact Statement accompanying the RSR Bill.[15] Similarly, experience of the NSW jurisdiction of contract determinations highlight the limited capacity for Government inspectorates to effectively enforce comparable regulation.

12. Regulatory overlap and complexity, and the burden this imposes on industry

The potential level of overlap between the RSR System and other laws is very significant. The continued operation of the RSR System risks direct regulatory collision with the following laws and instruments:

- The FW Act and associated regulations;
- Modern awards and enterprise agreements;
- Orders and determinations of the Minimum Wages Panel of the FWC;
- Work health and safety laws in place throughout Australia, including but not limited to:
    - *Work Health and Safety Act 2011*;
    - *Work Health and Safety Act 2011* (NSW);
    - *Occupational Health and Safety Act 2004* (Vic);
    - *Work Health and Safety Act 2011* (QLD);
    - *Occupational Safety and Health Act 1984* (WA);
    - *Occupational Health, Safety and Welfare Act 1986* (SA);

[15] Regulatory Impact Statement Accompanying the Road Safety Remuneration Bill 2012 at pxl

- *Workplace Health and Safety Act 1995* (Tas);
- *Work Health and Safety Act 2011* (ACT);
- *Work Health and Safety (National Uniform Legislation) Act 2011* (NT);

- The *Independent Contractors Act 2006*;
- The *Corporations Act 2001*;
- The *Competition and Consumer Act 2010*;
- State based laws relating to employment matters such long service leave, jury service leave, workplace surveillance and workers' compensation;
- The *Industrial Relations Act 1996* (NSW) (along with the array of industrial instruments created pursuant to this legislation);
- The *Owner Drivers and Forestry Contractors Act 2006* (Vic);
- The *Owner Drivers (Contracts and Disputes) Act 2007* (WA)
- Various Industry codes of practice and accreditation schemes currently in place.

However, it is difficult to outline the precise nature of such matters in a comprehensive way because it will in part be dependent on what future action is taken by the RSR Tribunal and in particular what content is ultimately included in RSROs.

It is important to recognise that the current RSRO is potentially only the first of many orders to be made by the new Tribunal.

While the RSR Act is intended to operate concurrently with existing laws, both the legislation and instruments or orders made under it will have the capacity to override existing Commonwealth and State laws. Sections 10, 11, 12, 13 and 14 of the RSR

Act govern the interaction between the RSR System and other Commonwealth and State laws.

Section 10 of the RSR Act indicates the intent that the legislation will operate concurrently with other laws. The provision states:

> ***"10 Concurrent operations generally intended***
>
> *(1) This Act is not intended to exclude or limit the operation of any other law of the Commonwealth or any law of a State or Territory that is capable of operating concurrently with this Act.*
>
> *(2) In particular, this Act is not intended to exclude or limit the operation of:*
>
> *(a) the Fair Work Act 2009; or*
>
> *(b) the Independent Contractors Act 2006 (but see section 14); or*
>
> *(c) Chapter 6 of the Industrial Relations Act 1996 of New South Wales (and any other provision of that Act to the extent that it relates to, or has effect for the purposes of, a provision of Chapter 6); or*
>
> *(d) the Owner Drivers and Forestry Contractors Act 2005 of Victoria; or*
>
> *(e) the Owner-Drivers (Contracts and Disputes) Act 2007 of Western Australia; or*
>
> *(f) a law of a State or Territory that is specified in regulations made for the purposes of this paragraph, to the extent that the law is so specified.*
>
> *(3) However, this section is subject to the other provisions of this Subdivision."*

Section 10 makes it clear that the RSR Act is intended to *add* to the level of regulation imposed on the industry. The Act is not an attempt to necessarily cover the field in relation to any matter it regulates. In particular it is not intended to completely oust the operation of the laws identified in Subsection 10(2).

Notwithstanding section 10, the provisions of the RSR Act will override any State laws to the extent of actual or direct inconsistency as contemplated by section 109 of the *Commonwealth of Australia Constitution Act 1901*. Section 10 also only relates to the operation of the Act itself, not the enforceable instruments made by the RSR Tribunal.

Sections 11, 12, 13 and 14 deal with the interaction of enforceable instruments made under the RSR System and other laws. The sections provide for varying and complex rules relating to the interaction with different types of laws. The provisions state:

> ***"11 Interaction of enforceable instruments with State and Territory laws***
>
> *An enforceable instrument prevails over a law of a State or Territory, to the extent of any inconsistency.*
>
> ***12 Interaction of enforceable instruments with other Commonwealth instruments (employees)***
>
> *(1) A term of a modern award, an enterprise agreement, an FWC order or a transitional instrument has no effect in relation to a road transport driver to whom an enforceable instrument applies to the extent that the award, agreement, order or instrument is less beneficial to the driver than a term of the enforceable instrument.*
>
> *(2) In this Act:*

enterprise agreement *means an enterprise agreement made under the Fair Work Act 2009.*

FWC order *means an order of the Fair Work Commission made under the Fair Work Act 2009.*

transitional instrument *means a transitional instrument within the meaning of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009.*

13 Interaction of enforceable instruments with road transport contracts (independent contractors)

A contractor driver is entitled to be provided, by the required provider under an enforceable instrument that applies to the driver, with at least the remuneration and related conditions in the enforceable instrument, regardless of the terms of any road transport contract to which the driver is party.

14 Interaction with the Independent Contractors Act 2006

For the purposes of paragraph 15(1)(d) of the Independent Contractors Act 2006, an enforceable instrument that applies to a road transport driver whose services contract is being reviewed under that Act is a matter the Court under that Act might (but is not required to) think relevant."

Given that the RSR Tribunal has adopted a very broad view of the scope of matters that can be regulated through RSROs there is significant potential for enforceable instruments made by the Tribunal to override and oust the operation of other regulatory regimes.

There is also capacity for the interaction provisions of the RSR Act to lead to substantial uncertainty and complexity for industry parties faced with the challenge of determining which elements of respective laws apply to them. This will be a particularly confronting task for the small businesses that constitute the majority of

the road transport industry. The problem will be magnified by the fact that RSROs are likely to apply in a piecemeal manner and potentially only at certain times, based on the nature of work being performed. Consequently parties may move in and out of the coverage of the relevant systems.

The difficulties flowing from the nature of sections 11 and 12 of the RSR Act have been addressed in detail in previous Ai Group submissions.[16] In broad terms the negative outcomes flowing from the RSR System's interaction with other regimes can be summarised as follows;

- Increase in the burden and complexity of regulation in an already highly regulated sector of the economy
- The creation of significant uncertainty and ambiguity regarding applicable laws within the road transport industry and
- An undermining of the integrity, operation and objectives of existing relevant Commonwealth, State and Territory Laws
- The opportunity for individuals and unions to forum shop, by selecting the jurisdiction in which they will likely receive a more favourable outcome;
- Significant increases in the cost of engaging road transport drivers, thereby indirectly increasing costs for end user of the transported goods.

The interaction between enforceable instruments and the laws applicable to employees referred to in section 12 is particularly problematic. The section necessitates a potentially subjective assessment of the 'benefit' of the relative terms. It also appears to dictate that the test must be applied in the context of "…*a particular driver*." Accordingly the test must be applied to the specific circumstances of individuals. Depending on the terms of RSROs that may ultimately be developed by the RSR Tribunal there is the potential for section 12 to result in very uncertain and varying outcomes.

[16] See in particular annexures B, C and paragraphs 29 to 38 of annexure F

The relevant modern awards already comprehensively regulate employee remuneration. It is unclear how section 12 of the RSR Act will apply in situations where an enforceable instrument may be made setting a rate of pay for the performance of a particular activity while an award or enterprise agreement might set a level of remuneration, such as a cents per kilometre rate, that takes the performance of such activities into account without prescribing that they attract separate payment. For example, the *Road Transport (Long Distance Operations) Award 2010* sets kilometre rates that take into account that drivers often perform additional duties and have additional responsibilities such as arranging loads, purchasing spare parts, tyres etc. but does not prescribe a separate payment for such activities.[17] It would be very difficult to determine which term was more or less beneficial. Indeed the answer may vary in differing circumstances.

It should be acknowledged that section 20(1) of the RSR Act incorporates a measure aimed at requiring the Tribunal to consider issues associated with regulatory overlap and regulatory burden imposed on industry when deciding if a particular RSRO should be made. In deciding whether to make a road safety remuneration order, the Tribunal must have regard to certain listed considerations in deciding whether to make an RSRO including:

> *"(g) the need to avoid unnecessary overlap with the Fair Work Act 2009 and any other laws prescribed for the purposes of this paragraph;* "

and

> *"(i) the need to minimise the compliance burden on the road transport industry"*

However, the provision falls well short of an obligation on the Tribunal to ensure there is no overlap with obligations under other laws or instruments, or of imposing a positive obligation on the Tribunal to develop an RSRO which would have the effect

[17] See clause 14.1 of the Award

of reducing the level of regulation imposed on industry. Moreover, such considerations are merely factors to be balanced against other relevant considerations. The Tribunal is afforded significant discretion to determine how much weight will be placed on such matters.

12.1 Overlap and interference with the workplace relations system

One of the most significant and problematic areas of overlap arises in relation to the regulation of terms and conditions of employment for employees. In particular, there is a risk that the RSR System will undermine key elements and objectives of the FW Act.

Employee drivers, like other employees covered by the FW Act, are already protected by a detailed and comprehensive system and enjoy fair, relevant and modern terms and conditions of employment. Together the National Employment Standards (NES) and modern awards provide a safety-net of minimum terms and conditions that apply to employee drivers. The minimum conditions enshrined within the NES are the same for all employees in Australia and the terms of the modern awards which cover the road transport industry were the subject of an extensive deliberation process during the award modernisation process by the Australian Industrial Relations Commission, the predecessor to the FWC.

In addition to this safety-net of minimum conditions, employee drivers' conditions can be enhanced through the creation of enterprise agreements under the FW Act. This process allows any modification of the employees' wages and conditions to be negotiated and agreed at the enterprise level subject to the employee being better off overall. These arrangements have been one of the centrepieces of Australia's workplace relations system for the past two decades.

The RSR System threatens the relevance of enterprise bargaining in the road transport industry given the ability for the RSR Tribunal to centrally fix remuneration

and remuneration related conditions at a level above the safety net. This is a very retrograde step.

It is clear that the remuneration and remuneration related conditions of employee drivers (and employees more generally), are adequately dealt with under the FW Act. The RSR Act, although expressed to operate concurrently with the FW Act, overrides and undermines the FW Act and the FWC, given the power of the RSR Tribunal to issue orders which override modern awards and enterprise agreements.

There has been no evidence that the FW Act and modern awards provide an unfair or inadequate safety net for employee drivers. Indeed, if these allegations are made it is appropriate that they are raised and dealt with as part of the major reviews of the Fair Work system which will occur in 2014, ie. the Productivity Commission's inquiry into the FW Act and the FWC's 4 Yearly Review of Modern Awards.

Any argument that the wages and conditions for employees in the road transport industry are not fair, relevant or safe is an argument that the FW Act and the modern award system have not delivered fairness. Such an argument conflicts with numerous public statements made by the previous Federal Government, and conflicts with the award modernisation and Annual Wage Review decisions of the FWC.

The introduction of the RSR Act was portrayed by the former Federal Government's as its response to the *Safe Payments, Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry* report and the associated Quinlan and Wright Report. However it is crucial to recognise that these reports were published in 2008 and, accordingly pre-date the FW Act and the modern award system. Therefore, the Reports' recommendations relating to employee drivers do not take into account the protections and entitlements which now exist for employees in the road transport industry.

The creation of an additional layer of regulation to apply to employee drivers is not justified and will result in further complexity and cost for employers.

The NES

The NES provide a legislative set of 10 minimum conditions which apply to Australian employees.

The NES include maximum weekly hours and prohibit employers from requiring an employee to work more than *reasonable additional hours*. This protection is relevant in the context of fatigue management as it prohibits employees being pressured to work hours which are unreasonable. In determining whether additional hours are reasonable, the Act requires that *"any risk to employee health and safety from working the additional hours"* be taken into account.[18]

The NES also includes various forms of leave to enable employees to be absent from work in certain circumstances and to have periods of rest and relaxation each year.

Enterprise agreements

Australia's workplace relations system gives priority to enterprise bargaining in setting the wages and employment conditions of employees. This principle is equally relevant and important in the road transport industry.

Enterprise agreements under the FW Act must not exclude the NES and must pass a better off overall test against the relevant modern award/s. Also, agreements must be approved by the FWC. These requirements ensure that enterprise agreements contain wages and conditions which are fair to employees.

[18] Section 62(3) of the FW Act.

General Protections

The General Protections in the FW Act prohibit adverse action being taken against an employee because the employee has a workplace right. A "workplace right" is defined to include entitlements under laws, modern awards and enterprise agreements. The General Protections also prohibit coercion, undue pressure or misrepresentations by employers in relation to various employment entitlements. These provisions of the FW Act provide a high level of protection to employees, contractors and other persons in the road transport industry. Large penalties and unlimited damages can be imposed by a court if the General Protections are breached.

Modern awards

The *Road Transport & Distribution Award 2010* and the *Road Transport (Long Distance Operations) Award 2010* are the principal modern awards which operate in the road transport industry. The methods and levels of remuneration specified in these modern awards have been determined by the Australian Industrial Relations Commission (now FWC) during the award modernisation process.

Moreover, the FWC is currently concluding an exhaustive 2 review of the modern awards which commenced in 2012. In the case of the road transport industry this has been an extremely comprehensive process with numerous conferences and hearings relating to the *Road Transport & Distribution Award 2010* and the *Road Transport (Long Distance Operation) Award 2010*.

A further '4 Yearly Review' of the awards has just commenced which is scheduled to continue for the next 18 months.

The *Road Transport & Distribution Award 2010* and the *Road Transport (Long Distance Operations) Award 2010* contain fair and relevant wages and employment

conditions. Fairness and relevance were key tests which the FWC was required to ensure when modern awards were created and reviewed.

Any party who wished to argue that the wages or conditions in any modern award were not fair or relevant had the ability to make an application to the FWC to vary the award or pursue changes during the 2 Year Review of awards. Indeed the TWU did raise a number of its purported concerns in the context of the Review. A further opportunity will be afforded to such parties during the 4 Yearly Review.

The *Road Transport (Long Distance Operations Award) 2010* provides the option for employee drivers to be remunerated by means of a cents per kilometre rate of pay. During the award modernisation proceedings the TWU opposed both the creation of the *Road Transport (Long Distance Operations Award) 2010* and the inclusion of a cents per kilometre remuneration option. Relevantly in its award modernisation decision (*[2009] AIRCFB 345)* the Full Bench of the Tribunal stated:

> **"*[181]*** *The TWU submissions about this award both before and after the exposure draft were that long distance driving should not be paid by reference to cents per kilometre driven and that there was no justification for a separate modern award applying to long-distance operations; they should be contained in the RT&D Modern Award. The union made no submissions about the provisions contained in the exposure draft. Each of the employers maintained that a separate award should be made and the cents per kilometre method of remuneration, as well as other methods of remuneration that had always been in the award, should continue. We have not been persuaded to incorporate long-distance operations into the RT&D Modern Award. The long distance sector of this industry has been regulated federally for many years under a separate award and we accept the submission of the employers that it should continue to do so…."*

(Emphasis added)

The FWC has incorporated the following elements into the *Road Transport (Long Distance Operations Award) 2010* to ensure fairness to employees and to address safety considerations:

- Although the award permits employees to be remunerated on a cents per kilometre basis, this payment method is underpinned by a minimum fortnightly rate of pay which must be provided to employees.
- The cents per kilometre rates include an overtime component and an industry allowance designed to compensate drivers for the various disabilities and other features of long distance operations. It is not accurate to portray cents per kilometre rates as low rates.
- The award provides for payment to drivers engaged in loading and unloading work.
- There are restrictions placed on the hours that drivers can be required to work both in a fortnight and on any one day. These supplement the provisions of the NES.
- The award provides meal / rest break provisions.

Accordingly, employee drivers in the road transport industry enjoy a comprehensive safety net of fair and relevant minimum wages and employment conditions, under the FW Act and modern awards, and have the ability to negotiate enterprise agreements.

Employee truck drivers often work closely with other employees such as storespersons, forklift drivers, crane drivers, maintenance employees, production employees and administrative staff. It is essential that the responsibility for determining the minimum wages and conditions of all award covered employees remain with the FWC. The transfer of responsibilities to another Tribunal, or the

duplication of responsibilities, is not sensible or desirable.

It is highly preferable that only one Tribunal be responsible for setting the minimum safety net of employee terms and conditions in order to avoid the risk of forum shopping that will undoubtedly occur if both the FWC and RSR Tribunal continue to retain the capacity to set minimum rates and conditions for employees. It is inevitable that parties will seek to pursue changes to the minimum rates or conditions of drivers in the jurisdiction they believe is most likely to deliver a favourable outcome for them. Alternatively parties dissatisfied with the outcome in one jurisdiction may seek to re-agitate such claims in the other jurisdiction. These problems have already occurred with parties effectively seeking to agitate claims in the RSR Tribunal which they agreed not to pursue in the course of the 2 Year Review proceedings before the FWC.

Ensuring only one Tribunal has capacity to set minimum rates and conditions of employees will also ensure that any proposal to alter such matters is considered in a comprehensive manner. For example, the *Road Transport (Long Distance Operations) Award 2010* currently provides rates of pay that are structured to include compensation for a raft of disabilities and activities associated with the performance of work on long distance operations. If there was a proposal for an RSRO to provide separate entitlements to drivers when undertaking activities such as waiting for vehicles to be loaded or unloaded then this would potentially also justify or indeed necessitate examining and revisiting current rates in a comprehensive manner. This would not necessarily occur if such matters were simply dealt with through the imposition of an RSRO.

12.2 State laws relating to independent contractors' terms and conditions

There are a suite of existing laws applying to independent contractors operating in the road transport industry. The RSR System and the orders made pursuant to its operation will overlap, duplicate and override elements of these laws. The RSR

System gives rise to increased complexity and a greater compliance burden on parties as they are forced to apply a further level of overarching regulation.

The difficulties are demonstrated by consideration of the interaction between the RSR System and the system of contractor regulation that operates in NSW pursuant to the *Industrial Relations Act 1996*.

There is a strong risk that significant and problematic inconsistencies will develop between the operation of RSROs and the industrial instruments in force in the NSW jurisdiction known as Contact Determinations or Contractor Agreements, both of which are effectively approved by the NSW Industrial Relations Commission (NSW IRC). These instruments set the minimum levels of remuneration and other conditions of owner divers. The Contract Determinations have been developed over a period exceeding 30 years and are aligned to the operation of niche sectors of the road transport industry or even individual principal contractor's operations. Such instruments are typically relatively complex and are a product of both negotiation and arbitrated proceedings.

RSROs will potentially override elements of Contract Determinations and Contractor Agreements where there is overlapping coverage. The capacity for this to occur in a piecemeal manner will undermine the integrity of such instruments and impose additional unforseen and unfair costs on principal contractors. In some instances this will potentially disturb longstanding industrial arrangements.

The content of the first RSRO already calls into question the continuing validity of elements of the *Mutual Responsibility for Road Safety Contract Determination* which deals with similar matters relating to the implementation of safe driving plans and drug and alcohol policies.

Further potential for overlap exists in relation to RSR Tribunal's dispute settlement functions and the operation of the NSW IRC's dispute settlement functions under

Part 4 of the *Industrial Relations Act 1996* and the NSW IRC's capacity to order reinstatement of contracts of carriage pursuant to section 314 of the Act.

There is also overlap between the Road Transport Collective Agreements provided for under the RSR Act and the system of Contractor Agreements applicable under part 3 of Chapter 6 of the *Industrial Relation Act 1996*.

Ai Group has many concerns regarding the operation of the NSW system but the operation of the RSR Act does not of itself oust the operation of the jurisdiction. Instead RSROs, Road Safety Collective Agreements and the capacity for the RSR Tribunal to perform certain dispute settlement functions give rise to complex questions and uncertainty regarding the continued validity of elements of the NSW system.

The Victorian and Western Australian laws

Both Victoria and Western Australia have existing regimes applying to independent contractors operating in the road transport industry. Similar observations to those outlined above regarding NSW can be made in relation to the RSR System's interaction with the Victorian and Western Australian Systems.

The key content of the Victorian system is set out in the submissions to the RSR Tribunal of the Victorian Department of Treasury and Finance concerning the draft RSRO.[19] These submissions highlight potential adverse implications of the RSRO for that system and demonstrate the risks of retaining the RSR System.

To a large extent the both the Victorian and Western Australian systems operate around the regulation of individual contractual arrangements and in particular through either mandating or prohibiting certain types of provisions. They also afford

[19] Submissions are dated the 8th of August and available on the RSR Tribunal's website; http://www.rsrt.gov.au/index.cfm/remuneration-orders/all-rsros/draft-pr350280/submissions-pr350280/

owner drivers forums to seek enforcement of entitlements or to challenge the conduct of the parties that engage them in relation to such matters. There are differences between the respective systems but it is important to recognise that neither imposes a system of specific minimum rates of remuneration.

The regulation of individual contractual arrangements through an RSRO combined with the broader provisions of the RSR System, such as the Tribunal's dispute resolution and collective agreement making jurisdiction, has implications for the continuing operation of both systems. The operation of section 11 of the RSR Act raises complex questions about the validity of elements of State systems and the utility in maintaining State systems. At the very least, the continued operation of the RSR System will likely result in further complexity and uncertainty for parties that operate in such jurisdictions. The significance of these issues will of course be magnified by any subsequent RSROs that may be made and which may more squarely deal with matters of remuneration. Should an RSRO impose specific mandatory rates it would be directly inconsistent with the central approach adopted in each of these States.

12.3 Potential overlap with the federal *Independent Contractors Act 2006*

In addition to the abovementioned State laws, the *Independent Contractors Act 2006* (Cth) (IC Act) already provides significant protections to owner drivers. As identified by the *Safe Rates; Safe Roads* Directions Paper which was released prior to the passage of the RSR Act:

> "*The IC Act allows for the Federal Court or the Federal Magistrates Court to review contracts, and to vary, or set aside, the contract if it is found to be unfair or harsh. In deciding whether a contract is unfair or harsh, the Court may consider the following;*
>
> - *the terms of the contract and when it was made*

- *the relative bargaining strengths of the parties to the contract*
- *any undue influence, pressure or unfair tactics which may have been used*
- *whether the total remuneration paid to the independent contractor is less than an employee doing the same work would have received; and*
- *any matters*

Every owner driver in Australia has access to the unfair contracts regime under the IC Act, provided their service contract falls within the scope of the Act. Owner Drivers in Victoria, New South Wales and Western Australia may have additional unfair contract protections created under specific state-based, owner driver legislation."[20]

(Emphasis added)

Given the operation of the IC Act it cannot be argued that the conditions of engagement for contractors were not already regulated at the Federal level prior to the implementation of the RSR System. It is simply that they were not regulated in the prescriptive manner which will result from the continued operation of the RSR System.

The IC Act provides an avenue for contractor drivers to address any perceived unfairness in their contracts.

12.4 The *Competition and Consumer Act 2010* and collective bargaining

The *Competition and Consumer Act 2010* already permits independent contractors to bargain with principal contractors on a collective basis, with authorisation from the

[20] Safe Rates Safe Roads Directions Paper, p. 36.

ACCC. This capacity has previously been utilised by the TWU to collectively bargain on behalf of owner drivers.

The RSR Act establishes a federal regime of enforceable collective agreements covering contractor drivers. The RSR Act also sets out certain exemptions from provisions of the *Competition and Consumer Act 2010* in relation to the conduct of parties.

The collective agreement making provisions of the RSR System enable a principal contractor to avoid the operation of an RSRO applicable to contractor drivers covered by the agreement. However, the utility of such instruments to principal contractors will be limited given any subsequent RSRO will override the agreement if the agreement is "less beneficial" than any subsequently made RSRO.

The utility of such provisions will also be undermined by the fact that the Tribunal's approval of an agreement ceases to have effect upon the expiry of the agreement. This will expose principal contractors to very significant industrial pressure to renegotiate such agreements if they have used the agreement to implement operational arrangements contrary to a RSRO. The approach is very different to the concept of 'nominal expiry dates' adopted under the FW Act in relation to enterprise agreements for employees.

The collective agreement making jurisdiction of the RSR System is likely to be predominantly utilised by the TWU to pursue an industrial agenda rather than to result in improvements in safety. It is telling that the test for approval of such collective agreements and the rules for their interaction with subsequently implemented RSROs focus on an assessment of the relative benefits of the RSRO to drivers rather than the safety implications. There is no capacity to implement a collective agreement displacing an RSRO even if it would result in drivers being

safer, unless it can also be established that the industrial conditions of the majority of drivers covered by the agreement would be "better off overall".[21]

The collective agreement making jurisdiction of the RSR System must be viewed as a means of delivering drivers more beneficial industrial conditions. It may also operate to the benefit of the TWU which will undoubtedly promote its role in representing drivers in negotiating such instruments as a means of increasing its membership. The jurisdiction is unlikely to be effective in improving safety.

12.5 State and Territory work health and safety laws

There are sophisticated regulatory regimes already in place throughout Australia which deal directly with work health and safety.

Crucially, significant developments have been made in recent years to develop harmonised State and Territory work health and safety laws. These initiates are extremely important and are likely to have a positive impact on improving the safety performance of the road transport industry over the years ahead.

Given the operation of section 11 of the RSR Act, there is significant potential for the RSR System to override and undermine State and Territory work health and safety regimes. The level and extent of potential overlap cannot be considered to be limited to the content of the first RSRO alone.

A key rational for the implementation of harmonised laws was to reduce the complexity of the regulatory environment. It is concerning that this has been undermined by the imposition of another layer of regulatory burden through the RSR System.

[21] See section 34 of the RSR Act.

The prescriptive approach within the first RSRO, and its provisions in relation to Safe Driving Plans in particular, are inconsistent with the modern approach to the regulation of work health and safety. The modern approach involves imposing broad duties on parties while leaving the parties to identify the best manner in which to meet those duties (an approach based on what is known as the Robens Principles).

It is industry participants that are best placed to identify the measures within their specific and diverse operating environments that will effectively address safety. Not only does the RSRO's prescriptive approach represent a deficient manner of regulating safety, it is likely to have a negative impact on productivity.

There is the capacity for existing work health and safety laws (and indeed relevant transport regulation) to be further supported by the development of appropriate codes of practice to provide additional guidance to parties.

Existing work health and safety laws represent a far more balanced and effective response to safety. Crucially, this includes the capacity to impose obligations on employers and principals as well as on employee drivers and contractor drivers. In contrast, under the RSR Act, RSRO are not able to impose obligations on drivers.

Ai Group does not deny that employers, principal contractors and supply chain participants can impact on road safety and accordingly should be the subject of appropriate regulation. So too can drivers. Accordingly, it is appropriate that drivers should have a level of personal responsibility imposed upon them. Instead, the RSR System only seeks to address safety by regulating the behaviour and actions of parties not actually driving. This represents an extremely unbalanced and unfair approach.

At a practical level the inability for a RSRO to impose obligations on drivers also undermines the effectiveness of the RSR System. This can be demonstrated by the likely impact of the RSRO provisions relating to Safe Driving Plans. While the

Tribunal's first RSRO requires that transport operators undertake certain actions in relation to completing or following such plans, there is no obligation under the order for the driver to cooperate with such matters. This has the potential to significantly undermine the practical application of this element of the RSRO. Many Ai Group members have expressed significant doubt about the likelihood of contract drivers in particular filling out, returning or complying with instructions on a Safe Driving Plan.

12.6 Transport regulation – including initiates such as the Heavy Vehicle National Law and the National Heavy Vehicle Regulator

There is significant overlap between the operation of the RSR System and both existing and soon to commence transport regulation, as well as associated initiatives.

These concerns are reinforced by important developments such as the establishment of the National Heavy Vehicle Regulator and the impending commencement of the Heavy Vehicle National Law (HVNL).

The HVNL represents a far more effective and efficient means of improving road safety than the RSR System. The implementation of the HVNL negates any utility and desirability for continuing the operation of the RSR System.

The HVNL and associated regulations are planned to commence on 10 February 2014 in Queensland, New South Wales, Victoria, South Australia and Tasmania. The Australian Capital Territory and Northern Territory will commence the national law at a later date. Western Australia will not commence the HVNL at this time but has its own separate regime.

The HVNL was developed through extensive consultation with relevant stakeholders over several years. This contrasts sharply with the expedited process associated

with the development of the RSR Act and the development of the first RSRO by the RSR Tribunal.

The establishment of the HVNL, coupled with the establishment of the National Heavy Vehicle Regulator, represents a major step towards simplifying the regulatory burden on industry by achieving a greater degree of national consistency. Such initiatives should be supported and given time to work rather than undermined by the continued operation of the RSR System.

One of many major flaws of the RSR System is that it does not specifically require the RSR Tribunal to have regard to the HVNL when considering whether to make an RSRO. While the Explanatory Memorandum accompanying the *Road Safety Remuneration Bill* foreshadowed that a reference to the HVNL would be included in the relevant Regulations, so as to require this, to date this has not eventuated. Consequently the RSR Tribunal has issued an RSRO with very wide ranging application absent such an obligation.

A review of the Decision of the RSR Tribunal Full Bench concerning the making of the first RSRO suggests surprisingly little consideration was given to the role of the HVNL by the Tribunal.

Ai Group encourages the Review to give significant consideration to the HVNL in considering the extent to which the HVNL constitutes a far more effective and efficient regulatory response to improving safety than the RSR System, as Ai Group asserts. Particular regard should be had to chapters 5 and 6 which specifically address the underlying issues of speed and fatigue, factors that are commonly identified as contributing to unacceptable safety outcomes. We do not propose to set these provisions out in full but note that the preliminary sections of these respective chapters succinctly identify the purpose of these provisions and their main features.

Relevantly, in relation to measures to address speeding the legislation states;

"202 Main purpose of Ch 5

The main purpose of this Chapter is to improve public safety and compliance with Australian road laws by imposing responsibility for speeding by heavy vehicles on persons whose business activities influence the conduct of the drivers of heavy vehicles.

203 Outline of the main features of Ch 5

This Chapter—

(a) requires persons who are most directly responsible for the use of a heavy vehicle to take reasonable steps to ensure their activities do not cause the vehicle's driver to exceed speed limits; and

(b) requires anyone who schedules the activities of a heavy vehicle, or its driver, to take reasonable steps to ensure the schedule for the vehicle's driver does not cause the driver to exceed speed limits; and

(c) requires loading managers to take reasonable steps to ensure the arrangements for loading goods onto and unloading goods from a heavy vehicle do not cause the vehicle's driver to exceed speed limits; and

(d) requires particular persons who consign goods for transport by a heavy vehicle, or who receive the goods, to take reasonable steps to ensure the terms of consignment of the goods do not cause the vehicle's driver to exceed speed limits; and

(e) prohibits anyone from asking the driver of a heavy vehicle to exceed speed limits and from entering into an agreement that causes the driver of a heavy vehicle to exceed speed limits; and

(f) imposes liability on persons who are most directly responsible for the use of a heavy vehicle for offences committed by the vehicle's driver exceeding speed limits."

In relation to measure to address fatigue the legislation states:

220 Main purpose of Ch 6

(1) The main purpose of this Chapter is to provide for the safe management of the fatigue of drivers of fatigue-regulated heavy vehicles while they are driving on a road.

(2) The main purpose is achieved by—

(a) imposing duties on drivers of fatigue-regulated heavy vehicles and particular persons whose activities influence the conduct of drivers of fatigue-regulated heavy vehicles in a way that affects the drivers' fatigue when driving on a road; and

(b) imposing general duties directed at preventing persons driving fatigue-regulated heavy vehicles on a road while impaired by fatigue; and

(c) imposing additional duties directed at helping drivers of fatigue-regulated heavy vehicles to comply with this Chapter, which are imposed on particular parties in the chain of responsibility; and

(d) providing for the maximum work requirements and minimum rest requirements applying to drivers of fatigue-regulated heavy vehicles; and

(e) providing for recording the work times and rest times of drivers, amongst other things.

It is important for the Review to appreciate that the HVNL imposes obligations on the entire supply chain. This builds on the concept of the 'Chain of Responsibility' already commonly embraced by existing transport regulation.

The HVNL also has the capacity to address purported economic pressures that may be imposed on drivers by their hirers, employers or other supply chain participants. Any contention that this is a role which can only played by the RSR Tribunal is obviously incorrect.

Importantly, the HVNL prohibits parties from making requests or entering into contracts or agreements which would cause or incentivise speeding or driving whilst fatigued.

The legislation also imposes appropriate and tailored positive obligations on parties to address issues of speed and fatigue. This includes imposing different obligations on employers, prime contractors, consignors/consignees, employers, schedulers, loading managers and drivers.

There are very significant penalties for a contravention of the HVNL. Section 742 of the HVNL has the effect of rendering contracts contravening the HVNL void.

The approach within the HVNL of setting broad obligations on parties but leaving it to them to determine the best way to achieve compliance with such matters (in a manner consistent with the Robens Principles that have long underpinned modern safety laws) is a far superior approach to the highly prescriptive and likely impractical obligations imposed by the first RSRO in relation to matters such as Safe Driving Plans and Contacts. The approach within the RSRO is likely to undermine the operation of the HVNL by fostering a culture of mere compliance with the express obligations within the RSRO.

The HVNL operates in a far more flexible and instructive way than the first RSRO. For example, many provisions of the HVNL are expressed to require parties to take '*reasonable steps'* to achieve certain outcomes or to prohibit certain conduct if a party would '*know, or ought reasonably to know*' it would have a particular effect'. The legislation provides guidance as to what factors may be taken into consideration

in deciding whether such obligations have been complied with. As such, the HVNL ensures a level of practicality in the legislation's operation. The Tribunal's first RSRO generally adopts a far less sophisticated approach to regulating safety.

The RSR System undermines the benefits of regulatory simplification flowing from the move towards a single rule book (the HVNL), administered and overseen to a great extent by a single regulatory body, the National Heavy Vehicle Regulator.

If there is a concern that there are deficiencies in existing transport regulation or the HVNL they should be considered in the review of the chain of responsibility regime which is currently being conducted by the National Transport Commission at the initiation of the Standing Council of Transport and Infrastructure of the Council of Australian Governments.

13. The negative consequences and feasibility of establishing a regime of specific minimum rates for contract drivers

The first RSRO did not generally address matters of remuneration, or more specifically, it did not address the issue of rates of pay.

Nonetheless, there remains a very real likelihood that the RSR Tribunal may implement an order prescribing minimum rates of pay in the near future. Such matters have been pursued by the TWU in proceedings before the Tribunal and related issues are to be the subject of a conference convened by the President of the Tribunal on the 10th of February this year.

Ai Group opposes the development of a new federal regime for the setting of mandatory rates of remuneration for contract drivers. We are not convinced of the utility of such measures as a means to improve safety or of the practicality of developing and enforcing such a regime.

Ai Group supports the principle that businesses need to have the freedom to enter into legitimate and efficient commercial arrangements. Governments should not lightly or unnecessarily intervene into the contractual arrangements between commercial entities. The approach reflected within the RSR System profoundly and substantially disturbs this principle, not only in respect of the contractual arrangements entered into between owner drivers and their hirers, but also between transport companies and their clients.

As explained in Bills Digest No. 88, 2011-12, pertaining to the proposed Bill, a previous House Standing Committee on Communications, Transport and the Arts inquiry into fatigue in the transport industry in 2000 concluded that Governments could do little to intervene in commercial matters in respect of setting freight rates:

> *"It is simply not feasible for governments to make and impose decisions about optimal staffing levels within individual transport companies; or about the rates of payment in haulage contracts or about payment methodologies. These are matters which the industry itself needs to resolve."*

It is doubtful that any federal tribunal charged with setting mandatory rates and related conditions for contract drivers could adequately address the diverse nature of the Australian freight task or the varied nature of the road transport industry. It would need to account for variables ranging from differing operating costs associated with the type, model and age of vehicles and equipment utilised across the industry as well as the highly varied nature of the tasks performed by specific sectors of the road transport industry. For example, it would necessitate taking account of very different cost and operational considerations associated with the businesses undertaking long distance work, short-haul work, the transportation of goods such as quarried materials, refrigerated items, dangerous goods, plus those businesses providing specialised services such as occurs in the car carrying sector.

The differing tax concessions available depending on the structure of the contractor's business (i.e. its corporate status) would also need to be considered. It is also unclear as to how the Tribunal would accommodate the reality that unlike employees who generally only perform work for a single employer, contractors may be engaged by multiple hirers. This may include simultaneously transporting goods for multiple hirers. The Tribunal has an impossible task when trying to ascertain from these factors the development of an order that relates to safety and remuneration. The risk for the industry is that a "one size fits all model" will be imposed which substantially increases costs, but fails to improve safety.

Due to the nature of engagement of owner drivers the power to ensure compliance and enforceability of orders made pursuant to the terms of the RSR Act are highly questionable. Such concerns were reflected in the Regulatory Impact Statement accompanying the RSR Bill :

> "*Although the rate set by the Tribunal will be mandatory for owner drivers and supply chain businesses, in practice achieving 100 per cent compliance may be difficult. Truck drivers are very mobile and will not necessarily have the documentation or records necessary to demonstrate compliance or take action up the supply chain to ensure payment of the safe rates. With only some sectors and some trips covered by the safe rate, industry participants and compliance officers may have difficulty confirming whether or not a mandatory rate set by the tribunal applies to their work,*[22]*"*

Ai Group is very concerned that the RSR Act will give rise to a system of regulation which is similar to that in place in New South Wales. The New South Wales system is deeply flawed and amongst industry participants there is significant concern regarding widespread non-compliance with the regime. This problem was

[22] Regulatory Impact Statement, p.xl.

acknowledged in a Review of the operation of the New South Wales system in 2002. The Review identified that:

> *"….there is reason to believe that the rates specified in contract determinations and agreements are not actually paid in practice. Certainly, compliance with the determination rates varies from market segment to market segment.[23]"*

Such illegal behaviour from some operators results in significant hardship for reputable operators who comply with the law but are subject to competitors undercutting their position. The RSR System will potentially result in a replication of these problems at a national level.

As discussed earlier in this submission, the setting of minimum rates and/or conditions for contract drivers is not a new initiative. In NSW such regulation has been in place for over 30 years. If such measures comprise an effective mechanism for addressing safety it would be reasonable to expect that there would have been a notable increase in safety outcomes in those States. Ai Group is unaware of any evidence to suggest that such benefits have been realised. The continued persistence of unsatisfactory road safety outcomes within States which already contain mechanisms regulating owner driver rates and conditions demonstrates the limited capacity of industrial relations mechanisms to improve road safety.

14. Importance of a competitive road transport industry and associated economic considerations

The maintenance of a globally competitive road transport industry is of crucial strategic importance to the Australian Economy. It is estimated that the industry

[23] NCP Review of Chapter 6 of the NSW Industrial Relations Act, p.51.

contributes approximately 1.7 per cent of Australia's total gross domestic product and approximately 2.3 per cent of the total Australian employment.[24]

The significance of the road transport industry however is not a product of its size but also of its linkages with other sectors of the economy. The overwhelming majority of Australia's freight task is moved by road transport at some time. Accordingly when one talks about the 'supply chain' in reference to the road transport industry there are virtually no industries which are not included.

Any significant increases in road transport costs are likely to damage the competitive position of the businesses in 'the supply chain', particularly those which face international competitive pressures, including the already struggling manufacturing and retail sectors which are highly reliant upon road transport services.

Rural and regional areas are likely to experience a disproportionately onerous cost burden given their very heavy reliance on road transport as the mechanism by which products are delivered to these regions. The Regulatory Impact Statement (RIS) supports this view and identifies:

> *"Businesses in regional areas may be particularly affected because of the impact of safe rates on backhaul arrangements. In the current system, owner drivers will accept significantly lower rates on backhaul trips, given they are making that return trip anyway. The introduction of mandatory rates/and or conditions may mean that drivers could not carry loads on backhaul trips for rates below the 'safe rate'. This would increase the costs for businesses in regional areas that provide goods to larger markets."*[25]

[24] Regulatory Impact Statement; p.v.
[25] Regulatory Impact Statement, p.xliii.

Additionally, it must not be presumed that given the current reliance that many industries have on road transport, that any increase in costs will merely be accepted by these sectors. Indeed such sectors may simply be unable to sustain such costs.

The progressive implementation of RSROs will potentially have an extremely damaging effect on the road transport industry, including negative employment / engagement effects on owner drivers and employee drivers. Employee drivers can often be readily substituted for owner drivers and accordingly ill-conceived regulation puts the livelihood of owner drivers in jeopardy. Similarly, road transport services often compete with other modes of transport, such as rail, air and shipping. Excessive road transport cost increases are likely to lead to a shift to other forms of transport with a consequent adverse effect on the road transport industry and the people employed / engaged in the industry.

The implementation of the RSR System was not supported by robust economic modelling. This was effectively acknowledged by the Regulatory Impact Statement accompanying the Bill:

> *"This RIS has attempted to model a range of scenarios to illustrate the potential direct costs and benefits of different actions by the tribunal. The CBA results need to be treated with caution due to a wide range of assumptions in the face of incomplete and uncertain data. The scenario modelling results are purely illustrative and are highly sensitive to the assumptions adopted."*[26]

To an extent this was inevitable as the approach adopted within the RSR Act largely leaves the responsibility for developing specific regulatory measures in the hands of the RSR Tribunal.

The limited economic modelling that was undertaken raises significant doubts about whether the RSR System can be regarded as an efficient regulatory measure from

[26] RIS p.liv

an economic perspective. In considering the implementation of a 'mandatory system' like the RSR System, the RIS stated;

> *"The indicative CBA results indicate that the direct costs outweigh the direct benefits for Option 2 (voluntary system) and Option 3 (mandatory system)."*

This alone should casts doubt over the appropriateness of the RSR System. Although it is acknowledged that there are substantial limitations on the weight that can be afforded to the RIS, due to its reliance on numerous assumptions.

The Tribunal is not well placed to assess the economic consequences of its orders. Moreover, Ai Group believes the RSR Act places insufficient obligation on the Tribunal to have regard to the economic ramifications of any potential RSROs. Alarmingly, section 20 of the Act does not place any express obligation on the Tribunal to take into account the impact on the road transport supply chain. Even in relation to the road transport industry, the RSR Act merely requires the Tribunal to have regard to the likely impact of any order on the 'viability' of such businesses, as opposed to their profitability.

There is no obligation on the Tribunal to have regard to the potential impact of a proposed RSRO on employment.

The RSR System represents a risky and inappropriate approach to regulating safety with the potential for very significant and potentially unforeseen adverse consequences for the Australian Economy and the broader community.

15. Considerations arising from limitations on the coverage of the RSR System

The effectiveness of the RSR System is undermined by the limited constitutional

capacity of the Commonwealth Government to regulate the activities of the road transport industry and, in particular, remuneration and related conditions for independent contractors.

A significant proportion of owner drivers remain outside the potential scope of the RSR System. Such limitations are exacerbated by likely difficulties associated with enforcement.

The Regulatory Impact Statement accompanying the Bill estimated, for the purpose of its modelling, that the proposed system would cover 60% of owner drivers:

> *"For the purposes of scenario modelling in this RIS, coverage of the new owner driver legislation is assumed to be 60 per cent across the entire owner driver industry, with no variation in different segments of the industry. In practice, coverage is likely to differ by segment, for example it is expected that the legislation will achieve greater coverage of interstate long haul drivers than intrastate short haul drivers. However, 60 per cent coverage is assumed for consistency as there is limited evidence available that enables more precise estimation of coverage for the new legislation within the owner driver industry.*
>
> *Again, for the purposes of scenario modelling this RIS, it is assumed that compliance with a mandatory rate of owner driver remuneration set by a tribunal is 90 per cent. Although the rate set by the tribunal will be mandatory for owner drivers and supply chain businesses, in practice achieving 100 per cent compliance may be difficult. Truck drivers are very mobile and will not necessarily have the documentation or records necessary to demonstrate compliance or take action up the supply chain to ensure payment of the safe rate. With only some sectors and some trips covered by the safe rate, industry participants and compliance officers*

may have difficulty confirming whether or not a mandatory rate set by the tribunal applies to their work."[27]

The limits on the scope of the RSR System's coverage represent a significant limitation on its effectiveness.

16. Any preferred approaches to addressing road safety concerns in the road transport industry

Addressing unsatisfactory road safety outcomes is a complex and multifaceted challenge.

Ai Group has set out preferred approaches to addressing road safety concerns in the road transport industry in its response to the *Road Safety Remuneration Bill*, and in our prior submissions in response to the *Safe Rates, Safe Roads* Directions paper released on behalf of the previous Commonwealth Government.[28]

Addressing road safety requires a whole of Government approach. It also requires engagement and support from relevant stakeholders. The focus should be on achieving compliance with existing laws and instruments which directly address safety and on the performance of road transport operations. This must involve greater efforts to promote education and strong enforcement of existing laws, particularly the FW Act, the HVNL and work health and safety laws.

We also seek to draw the Review's attention to the detailed content of the *National Road Safety Strategy 2011-2020* published by the Australian Transport Council and committed to by all State, Territory and Commonwealth Governments.[29] This sets out an appropriate and detailed plan to address road safety outcomes. It represents the commitment of the Governments to an agreed set of national road safety goals,

[27] Regulatory Impact Statement accompanying the Road Safety Remuneration Bill, PIiv
[28] National Road Safety Strategy 2011 – 2020, Australian Transport Council
[29] ibid

objectives and action priorities. The strategy does not identify the need to change the way truck drivers are paid.

Rather than maintaining the operation of the RSR System, the Federal Government and industry should focus on identifying ways to support measures that directly address safety outcomes and which are widely supported and accepted as effective. This should include:

- Promoting better education and stronger enforcement of existing laws;
- Supporting the role of the NHVR;
- Promoting better use of technology to address safety risks and removing barriers to the implementation of such initiatives. This includes initiatives adopted by transport operators, such as in-vehicle monitoring systems using telematics. It also includes better use of technology by governments, such as Safe T Cams and implementation of point to point speed monitoring;
- Safer roads and associated infrastructure;
- Safer vehicles;
- Increasing seatbelt usage by heavy vehicle drivers;
- Supporting and promoting accreditation schemes, such as TruckSafe;
- The development of further codes of practice to underpin the operation of relevant work health and safety laws and transport regulation; and
- Considering the development of additional information, training and support services for owner drivers to ensure they are in a position to make appropriate decisions regarding the operation of a viable business

The RSR Act and associated regulation should be urgently repealed and the RSR Tribunal disbanded so that Governments, regulatory bodies and industry can focus on implementing strategies more likely to result in real improvements in safety. The

Federal Government should not pursue a narrow focus on regulating the amount and manner in which truck drivers get paid as a means of addressing the complex and multifaceted challenge of improving the road transport industry's safety performance.

Crucially, any further regulation of the industrial conditions of road transport drivers must be preceded by a rigorous analysis of the utility of existing regimes in regulating the terms and conditions of drivers. Additional intervention in this area would only warrant consideration if a consensus among Federal and State / Territory Governments and industry is achieved regarding both the existence of a problem warranting such reforms, identification of the deficiencies of current initiatives and the appropriate form of any new measures. Moreover any such approach should be structured in a manner which would simplify the existing significant regulatory burden on the road transport industry rather than adding to it, as the RSR System has done.

17. Conclusion

For the reasons set out in the submission, the RSR Act should be repealed and the RSR Tribunal should be disbanded without delay.

Industrial Relations and Other Legislation Amendment Bill 2022

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Ai GROUP SUBMISSION

Queensland Government – Education, Employment and Training Committee

Inquiry into the Industrial Relations and Other Legislation Amendment Bill 2022: Response to submission of Professor Emeritus Peetz

29 July 2022

Response to the Submission of Professor Emeritus David Peetz

Ai Group has been invited to respond to a late submission lodged by Professor Emeritus David Peetz (**Prof. Peetz**) which addressed various issues raised in Ai Group's submissions. We do so in the submissions below.

The idea that a state government should not regulate in this area as it would facture or pre-empt a national system

Prof. Peetz raises various brief arguments in response to the position that the State government should refrain from regulating in this area as it would fracture or pre-empt a national system of regulation. He states that "should the Albanese Commonwealth government wish to legislate in this area, it can easily overcome any inconsistencies with state legislation by denying or qualifying such exemptions". We urge the Queensland government to appreciate that the complexities of overlapping systems that can themselves serve as a detriment to principal contractors, as they have for employers in the past.

The Albanese Labor Government has flagged, with a high degree of certainty, the introduction of further regulation of terms and conditions of gig workers. On 29 June 2022, Tony Burke issued a media release categorically stating:

The Albanese Labor Government will legislate to give the Fair Work Commission new powers to set minimum standards for gig workers.

…

*This **will deliver a national approach** that gives the Commission the scope and flexibility it needs to deal with "employee-like" forms of work.*

…

The Government has already begun work to develop legislation and we look forward to working with the union movement and the gig platforms to deliver this important change.

The Federal Government's intentions with respect to delivering a national approach should not be frustrated by development of a patchwork of State schemes across the nation. With the introduction of Chapter 10A into the IR Act, a new jurisdiction will commence and broadly cover a significant segment of the transport industry in Queensland. The subsequent introduction of regulation at the State level would cause significant issues for principal contractors for reasons that include:

- Overlapping regulation may develop confusion as to the degree to which the Federal legislation is intended to 'cover the field'. It is not unheard of for State and Federal

regulation to co-exist in respect of the same subject matter, causing substantial confusion across industry;

- The coverage of the schemes developed at the Federal and State level may not be identical. If this is the case, the dividing line between the two schemes may be difficult for businesses and workers to comprehend;

- Penalties and enforcement under the different schemes may be different. This may cause unions and employers to prefer one system over another and lead to forum shopping;

- Entitlements and conditions introduced under one scheme may quickly transfer to the other leading to 'leapfrogging' of entitlements – similar to the inflationary outcomes which occurred in the Federal and State systems prior to the nationalisation of the industrial relations system.

Legal complexity and disputation can and often does arise over the boundary line between Federal and State jurisdictions. Prior to the introduction of the simplified national system of workplace relations which we currently operate under, the complexity and duplication that was part and parcel of the overlapping systems of State and Commonwealth regulation of labour was one of the most heavily criticised elements of our industrial relations system. We urge the Queensland Government to consider the real costs and complexity which would arise from overlapping schemes.

Even if the Queensland Government were to introduce the jurisdiction established under Chapter 10A and its operation was subsequently curtailed entirely by a new federal system of regulation, the substantial compliance efforts undertaken at the workplace level in order to grapple with the new scheme and contribute to the development of new instruments (such as contract determinations or contractor agreements) would be largely wasted. Principal contractors would also potentially be required to 're-invent the wheel' by building enterprise knowledge of the new framework after spending significant outlay and directing substantial resources toward compliance with a defunct system.

Ai Group has already expressed the view in past submissions that the jurisdiction to be introduced by Chapter 10A would be harmful and unnecessary. However, we here emphasise that businesses should not be saddled with the burden of building internal systems in response to a jurisdiction that is unlikely to operate for very long.

Prof Peetz argues that the "greatest danger to effective national action in this area would be for the Queensland Parliament to withdraw these provisions, because doing so would raise doubts about the appropriateness of any action". This submission is, with respect, misguided. The Albanese Government has made abundantly clear its intentions with respect to the regulation of employee-like forms of work. If the Queensland Government were to remove Chapter 10A from

the IR Amendment Bill, this would demonstrate a considered and measured response to impending regulation at the Commonwealth level.

The idea that the Bill would discourage bargaining

Prof. Peetz disagrees with Ai Group's concern that the Bill would discourage bargaining. He asserts that, "…there is nothing in the Bill that requires the QIRC to demine actual rates of pay at a rate above the equivalent of comparable minimum award rates after allowing for costs".[1]

We note that s.406F(1) provides:

> *(1) In exercising its powers under this chapter, the commission must ensure a contract instrument provides for remuneration and working conditions for independent couriers, for the work performed to provide services transporting goods under the instrument, that—*
>
> *(a) are fair and just; and*
> *(b) are comparable to the remuneration and working conditions an employee would receive under an industrial instrument or this Act for performing similar work; and*
> *(c) <u>generally reflect the prevailing minimum remuneration and working conditions of independent couriers covered, or to be covered, by an Instrument</u>*

(Emphasis added)

Section 406 requires a consideration of more than comparable award rates. Although it is not entirely clear what would be meant by the phrase 'prevailing minimum conditions' adopted in s.406F(1), it may be construed as requiring a consideration of the actual rates of pay and conditions provided in industry. If this is the case, we are concerned that the section would mean the legislation would not serve to set a 'minimum safety net of terms and conditions' in a manner analogous to the approach adopted in modern awards, but would rather entrench market rates in contact determinations. We accordingly remain very concerned that the operation of s.406F(1) would leave little room for enterprise level agreement making.

Moreover, it is not clear that s.406F(1), or the Bill more broadly, would confine the QIRC to setting rates that reflect comparable award rates and costs of contractors (as appears to be suggested by the professor). Prof. Peetz does not identify any terms of the Bill that would have this effect.

The professor's assertion that, "*As Ai Group does not claim that the existence of minimum award rates is antithetical to the existence of collective bargaining does amongst employees, it cannot legitimately claim that minimum rates for owner-drivers would be antithetical to the existence of collective bargaining amongst them"* does not account for the very different approach taken in the scheme of the *Fair Work Act 2009* compared to the proposed provisions relating to setting the mandatory term and conditions under the Bill. Prof. Peetz' submission ignores the careful manner

[1] At point 6 in page 9

in which the Fair Work Act has been designed to ensure awards represent a base level safety net that merely underpinsenterprise bargaining.

Awards made under the *Fair Work Act 2009* are intended to operate as a genuine minimum safety net. They are not intended to reflect market rates or to be set by reference to any prevailing rates or working conditions. Indeed, the legislation tightly constrains the discretion of the Commission and by requiring can only terms and conditions to the extent necessary to achieve the "modern award objective".[2] At that heart of that objective is the setting of a "minimum safety net" of terms and conditions "taking into account the need to encourage collective bargaining".[3] This was succinctly explained in the following comments by a Full Bench of the Fair Work Commission in *Appeal by Restaurant and Catering Associatio of Victoria* [2014] FWCFB 1996:[4]

> *Importantly, it [the modern awards objective] requires a consideration of the level of the minimum safety net - not the actual entitlements of employees. The minimum safety net is the set of minimum terms and conditions that underpin actual rates and conditions that may otherwise apply by way of enterprise agreements, over-award payments, performance payments and gratuities.*

The Bill adopts a very different approach.

For completeness, we also observe that Chapter 6 of the IR Act does not mandate that contract determinations reflect a minimum safety net of terms and conditions in a manner comparable to the approach taken under the Fair Work Act. Indeed, some of the contract determinations that apply across sectors of the industry have not been set by reference to strict process of assessing comparable award rates and operating costs minimum award rates plus operating costs. Even to the extent that rates in the contract determinations have been set by reference to a 'cost recovery' principle, there are significant assumptions that have needed to be made about the costs incurred by contract carriers. The level of abstraction that has been required in such a process means there is significant potential that they artificially inflate the rates that need to be paid. The flawed approach adopted in NSW should not be replicated in Qld. The above considerations have contributed to regulated rates under some contract determinations being excessively high.

The idea that there would not be adverse employment effect from the Bill

Prof. Peetz contests Ai Group's concern that that Bill will lead to job losses in Qld.[5] He essentially argues that there is no evidence that Chapter 6 has led to significant job losses.

Ai Group's concern is based, to a signficant degree, on our deep experience of the operation of Chapter 6 of the *Industrial Relations Act 1996* (**IR Act**) and the regulatory regime that underpinned the operation of the Road Safety Remuneration Tribunal (**RSRT**). A consideration of the operation

[2] See s.134 and s.138
[3] Fair Work Act s.134
[4] *Appeal by Restaurant and Catering Associatio of Victoria* [2014] FWCFB 1996, [279].
[5] Under point 5 at page 9

of both schemes provides a relevantly illustrative example of what could be expected from the implementation of the Bill.

We observe, for context, that Ai Group has had extensive engagement with industry in NSW in relation to the operation of Chapter 6. We have long played a leading role in proceedings in the NSW Industrial Relations Commission relating to the formation and variation of the major contract determinations and regularly advise individual operators in relation to the NSW system. We were also heavily involved in virtually all proceedings before the RSRT during its several years of operation and directly advised and assisted many operators who were subject to the orders that it issued.

Through our experience of Chapter 6, we have observed that the legislation, and the contract determinations made under it, have discouraged businesses from adopting operating models that involve the engagement of contract carriers.

One impact of Chapter 6 is that it has contributed to a decision by some principal contractors to shift to the engagement of relatively small transport businesses that themselves engage multiple drivers (contractors or employees) to provide the contracted transport services in preference to contract carriers falling under the direct protection of the legislation. These are commonly referred to as engaging 'fleet providers'. Such fleet providers fall outside the definition of a "contract carrier" in the IR Act and as such their engagement, and the amount they must be paid, is not regulated by the contract determinations.

The system has also created an incentive for some principal contractors to use their own employees in preference to contract carriers. Relevantly, it is common for principal contractors to utilise 'mixed fleets' of contractor and employee drivers so that they use their own fleets for the core of their work and then merely refer work to contractors if there is an overflow requirement. This practice is pursued most aggressively in circumstances where the rates in the relevant contract determination are perceived to be unjustifiably high by principal contractors.

Prof. Peetz contends, in effect, that the fact that owner drivers continue to be involved in the Chapter 6 processes suggests that Chapter 6 has not led to thousands of job losses.[6] Such a submission is overly simplistic. We are not suggesting that Chapter 6 has resulted in the complete abandonment of the use of contract carriers. It has however discouraged their use in some contexts and has undoubtedly reduced the volume of work that many principal contractors allocate to contract carriers.

It is not possible to point to precise evidence of the extent of the adverse consequences of the operation of Chapter 6 as no robust assessment of its operation has been undertaken. It would be prudent for there to be a detailed review of the NSW system before any further legislative scheme is adopted based on its framework. It should not be simply assumed that it is working well because it has existed for a long time.

[6] At page 9

Response to submissions addressing the idea that previous regulation in this area was a disaster

Prof. Peetz' submissions appear to seek to downplay the extent to which the operation of the Road Safety Remuneration Tribunal (**RSRT**) could be viewed as illustrative of the risks that could flow from the passage of the Bill. They also address the operation of Chapter 6.

Response to Prof. Peetz submissions regarding the operation of the RSRT

The operation of the RSRT cannot be regarded as anything other than a disaster.

It is difficult to overstate the level of alarm that the RSRT's first order setting minimum rates created in industry. The order threatened to trigger a crisis in the road transport sector. It was in various respects unworkable and would have made the engagement of contract drivers to undertake certain work commercially unviable overnight.

The level of industry concern was demonstrated by the significant protests by owner drivers in response to the order, and the hundreds of submissions that were ultimately filed in the RSRT in opposition to it.

Ai Group maintains its view that the operation of the RSRT and the impact of its first order setting minimum rates provide a powerful demonstration of the potent adverse consequences that a regulatory scheme setting mandatory rates can have for contract drivers and industry more generally.

It is important to appreciate that the RSRT was in operation for years. It conducted extensive proceedings culminating in the making its first highly controversial order setting minimum rates for contract drivers. Such rates applied to drivers undertaking long distance work and/or operating in the retail industry supply chain.

The failure of the RSRT cannot be overlooked on the basis of the Professor's submission that it "…did not have time to correct early short comings" in its order.[7] This neglects the fact that the making of the order followed very lengthy proceedings considering how rates should be structured. Concerns over the potential for the proposed rates to undermine the viability of contract carriers and the importance of ensuring backloading arrangement were well ventilated in the proceedings, but not addressed.

Although the proposed Bill does not directly replicate the legislative provisions underpinning the operation of the RSRT, it does have the potential to create similar problems. At the very least, the experience of the RSRT highlights the complexity and risks of seeking to directly regulate the rates paid to contract drivers in a prescriptive manner.

[7] Page 11

Response to the Prof. Peetz' submission regarding the operation of Chapter 6

Prof Peetz' submissions provide a very high-level overview of aspects of the operation of Chapter 6, the history of the legislation's evolution and his view as to its merits.[8]

We respectfully suggest that Prof. Peetz' opinions do not accord with those of industry. Nor do they accurately reflect the manner in which the jurisdiction has operated in practice. Key assertions by Prof. Peetz about the merits of the scheme and its practical effect are not supported by evidence or indeed identification of his own experience of its operation or application.

We acknowledge that Prof. Peetz accurately identifies that the jurisdiction has been in place for over 40 years, but this should not be taken to suggest that it is operating in an effective or desirable manner. There has not been a recent review of the scheme's operation or any assessment of the extent to which it provides a workable model for regulation of the gig sector.

In practice, there is a widespread lack of awareness and understanding of aspects of the legislative scheme and the contract determinations made under it. The problem of non-compliance with the regime is notorious. There has also been little by way of effective efforts by the TWU to seek its enforcement or compliance with the system beyond businesses outside of major transport operators with unionised yards, and even less by government inspectors (indeed there is virtually no visible efforts by such bodies to enforce the instruments' provisions).

Prof. Peetz' hypothesis that the system reduces a race to the bottom and has prevented existing operators from being substantially undercut by new entrants to the market is unduly optimistic and not supported by any evidence. This certainly does not accord with the experience of Ai Group members in various sectors.

Prof. Peetz' submissions as to merits of Chapter 6 also overlook the fact that the contract determinations have often become ludicrously out of date and out of step with contemporary circumstances. Most relevantly for current purposes, we observe that the rates in the 'Courier and Taxi Truck Contract Determination; were not increased for approximately 15 years. Other examples could be provided.

The Prof. Peetz also ignore problems related to the complexity of the system; the administrative and regulatory burden that it imposes upon industry; the tendency for the system to result in disputation over the content and interpretation of the terms of contract determinations and the difficulty, delays and cost experienced by interested parties of seeking to engage in legal proceedings directed at updating or amending the contract determinations. In relation to this last problem, we note that this has contributed to several of the major contract determinations not

[8] This is dealt with under point 7 at pages 11 to 13

adequately evolving to reflect contemporary circumstances (such as the rise of the 'on-demand' or 'gig' sector).

Chapter 6 certainly does not provide a workable precedent for the regulation of new and rapidly developing sectors such the gig or platform industry.

Prof' Peetz' submissions regarding the impact of Chapter 6 and safety outcomes

Prof. Peetz' submissions effectively contend, albeit in an extremely guarded and somewhat speculative manner, that there may be an association between the operation of Chapter 6 and improvement in road safety outcomes in NSW.[9] This opinion is based largely on data relating to fatal crashes involving articulated trucks (which are unlikely to be commonly used by contractors undertaking what is commonly regarded as 'courier work). He relevantly concludes that, "It seems likely that the occupational safety in heavy road transport improved with the entrenchment of Chapter 6." Prof. Peetz' conclusion should not be accepted.

The evidence available simply does not establish a causal connection between improved safety outcomes in NSW and the operation of the legislation.

Prof. Peetz properly acknowledges that there are limitations on the conclusions that can be drawn from available data canvassed in his submissions.

The submissions do not however also acknowledge the limited geographic and sectorial application of contract determinations in place in NSW over the period analyzed. To put it bluntly, minimum rates only applied to a limited cohort of contract drivers in NSW under the NSW system during this period. In this respect we observe that the 'Transport Industry General Carriers Contract Determination', which is the contract determination of broadest coverage, only applied to the County of Cumberland (metropolitan Sydney) and to contracts of carriage undertaken within a 50km radius of a principal contractor's depot until 2017. At that time, the coverage of the instrument was expanded so that it applied throughout NSW, but the minimum rates provisions in the instrument still only regulated the County of Cumberland. It was amended with effect from 1 January 2019 so that the minimum rates obligations in the instrument also applied to certain freight corridors between metropolitan Sydney and the Wollongong and Newcastle regions.[10] However, it still does not set minimum rates obligations in relation to work undertaken more broadly throughout NSW. Further, there are a range of specialised vehicles that are excluded from its coverage.

Prof. Peetz' submissions also fail to account for the potential significant level of non-compliance with contract determinations during the relevant period.

[9] This is dealt with under point 8 and 9, at pages13 to18
[10] Clause 19.1 and clause 19.2 of the Contract Determination.

Prof. Peetz' speculative conclusions regarding the impact of Chapter 6 on improved safety cannot be accepted.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak employer organisation representing traditional, innovative and emerging industry sectors. We are a truly national organisation which has been supporting businesses across Australia for nearly 150 years.

Ai Group is genuinely representative of Australian industry. Together with partner organisations we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our members are small and large businesses in sectors including manufacturing, construction, ICT, transport & logistics, engineering, food, labour hire, mining services, the defence industry and civil airlines.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and we support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

OFFICE ADDRESSES

NEW SOUTH WALES

Sydney
51 Walker Street
North Sydney NSW 2060

Western Sydney
Level 2, 100 George Street
Parramatta NSW 2150

Albury Wodonga
560 David Street
Albury NSW 2640

Hunter
Suite 1, "Nautilos"
265 Wharf Road
Newcastle NSW 2300

VICTORIA

Melbourne
Level 2 / 441 St Kilda Road
Melbourne VIC 3004

Bendigo
87 Wil Street
Bendigo VIC 3550

QUEENSLAND

Brisbane
202 Boundary Street Spring Hill
QLD 4000

ACT

Canberra
Ground Floor,
42 Macquarie Street
Barton ACT 2600

SOUTH AUSTRALIA

Adelaide
Level 1 / 45 Greenhill Road
Wayville SA 5034

WESTERN AUSTRALIA

South Perth
Suite 6, Level 3 South Shore Centre 85
South Perth Esplanade
South Perth WA 6151

www.aigroup.com.au