MINERALS COUNCIL OF AUSTRALIA

‘FAIR WORK LEGISLATION AMENDMENT (CLOSING LOOPHOLES) BILL 2023’

SUBMISSION TO SENATE EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE

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EXECUTIVE SUMMARY - KEY FLAWS IN THE BILL

Summary of the Minerals Council of Australia's position on the Bill

- The *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* should not be passed by Parliament.
- The Bill should be withdrawn and substantially re-written after a prolonged and genuine consultation process with Australian business.
- The federal Government's proposed industrial relations changes are fundamentally flawed and will inflict immense harm to business and workers and compound cost of living pressures on households.
- The proposed changes will compound the pressures on Australians who are struggling to pay their household bills, cover the cost of their mortgage or rent and the added complexity will increase costs for Australian businesses.
- The Bill contains no measures that enhance productivity, boost investment, increase competition, or spur job creation.
- At a time when there are multiple challenges for the entire Australian economy with high inflation, high interest rates, flagging productivity and overseas competition for investment, now is not the time to introduce workplace relations changes that do nothing to meet these challenges.
- The Bill includes several unrelated and non-controversial measures that should never have been attached to such a contentious bill in the first place. These should be removed from the Bill and passed as separate legislation.

Casual employment

- The definition of 'casual' is three pages long. It includes 15 factors that must be considered.
- It includes new fines and back pay for businesses that get it wrong.
- All casuals already have the right to convert to 'permanent' status after 12 months if they work 'regular' hours. The Bill will add a new right after six months, with a new conversion system that will be in addition to the existing one.

'Same Job, Same Pay'

- Contrary to the government's claims, this applies well beyond just labour hire. It will cover millions of workers in businesses that provide services to other businesses.
- The starting point of this proposal is that any employer will be captured if they supply, either directly or indirectly, one or more employees to a 'regulated host' to perform work <u>and</u> the host has a 'covered employment instrument' (i.e. an enterprise agreement).
- The Fair Work Commission (FWC) <u>must</u> make a 'same job, same pay' order, unless it is satisfied that it is not 'fair and reasonable' to do so. But what is 'fair and reasonable' is highly uncertain and will be highly litigious.
- Broad definitions of 'same job' and 'same pay' mean that a worker with decades of experience will, by law, have to be paid the same as a labour hire worker new to the business.

- These rules will force businesses to take away bonuses and incentives that reward their people for hard work and experience.

Regulating 'employee like' work

- Independent contractors, such as self-employed tradespeople and owner-driver truck businesses, will be forced into the IR system and lose the freedom to be their own boss.
- The FWC will be given the power to 'approve' agreements between big business and unions that fix prices in commercial contracts throughout supply chains and impose commercial terms and conditions on small businesses.
- The Bill also suspends the *Competition and Consumer Act 2010* in relation to such agreements. Conduct that would otherwise be illegal price fixing or market rigging under competition law will suddenly be legalised by workplace law.

Union powers

- Unions would have more powers than police to enter workplaces and conduct search and seizures. These would extend to any workplace and any office of a business.
- Every workplace (even non-union workplaces) would be required to pay for union delegates to attend 'training' and undertake union work during work hours. One union leader has said this should just be 'the cost of doing business'.
- These plans were never part of the government's election policies and there is no case for them.

Reducing Australia's international competitiveness

Reducing labour market efficiency by arbitrarily increasing the risks and costs associated with routine commercial arrangements (not just labour hire) will have a sustained negative impact on Australia's international competitiveness.

In the mining industry, projects compete globally for scarce capital, with investors weighing up the risk and possible returns on potential investments. Such assessments take account of the engineering and technical challenges, the expected returns, the commodity outlook, and crucially, risks and costs associated with regulatory settings. While Australia's natural resources endowment makes the nation well positioned to attract global mining investment, a high tax and royalty burden, lengthy uncertain approval processes, and an already complex workplace relations system reduce out attractiveness.

The mining industry is a critical driver of Australia's productivity growth. Over the last decade, mining contributed $2.7 trillion in resources export revenue, $246 billion in mining wages and accounted for 21 per cent of Australia's GDP growth.

Mining also supports high-paying, secure jobs especially in regional Australia. The industry pays more on average than any other industry in Australia – $151,500 per year compared to $98,400 across all industries. For the mining industry to sustain its large contribution to the economy, including to government revenues, companies must be willing to keep taking risks on investment in exploration, new projects, and the operation and extension of existing mines.

By overturning settled commercial arrangements, particularly through 'same job, same pay', the Bill will create unsustainable cost pressures and uncertainty for many businesses, while reducing Australia's competitiveness as an investment destination.

THE BILL MUST BE BLOCKED AND THE GOVERNMENT MUST GO BACK TO THE DRAWING BOARD

A fundamentally flawed piece of legislation

On 4 September 2023, the Albanese government introduced the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* into Parliament, which proposes significant amendments to the workplace relations framework governed by the *Fair Work Act 2009*.

If enacted, the Bill would create unprecedented levels of administrative complexity that would undermine the business models of many businesses, threaten jobs and business viability, and massively increase costs.

The proposals reverse the direction of workplace reforms since the early 1990s and are likely to cause significant economic damage to employees and businesses.

The proposed changes are not 'modest' or 'housekeeping'. Nor are they about 'closing loopholes'. They do not apply to a limited number of businesses. They create a complex maze of obligations and new legal hurdles.

They redefine what it means to be an employee or to be running your own business. In many cases they fundamentally threaten established business models.

The combined effect of the 2022 legislative changes and further changes in this Bill will be to overturn three decades of progress towards a more enterprise-level system and impose significant economic damage without a productivity dividend.

It is unfair for businesses and workers who are operating under one set of rules to then have their arrangements upended. Further, it is economically irresponsible to overturn fundamental economic principles in the hope that the economic fallout will be minimal.

The Bill must not be passed. It cannot be redeemed through amendments

As outlined in this submission, the Bill contains a range of fundamental flaws that are the result of bad policy and sham consultation. Moreover, they are so poorly drafted and inordinately complex that it will be impossible for most businesses – especially smaller businesses – to understand, let alone comply with.

The Bill is a deliberate attack on a number of entirely legitimate working arrangements that are integral to the Australian economy, including:

- **Casual employment**, which will be rendered so complex as to become unviable in many cases. Those who will be most hurt will be casual workers, who will either lose their 25 per cent casual loading (at best) or lost their job opportunities completely (at worst)
- **Labour hire**, which is being targeted under the false guise of 'closing a loophole.' The contents of the Bill are a complete repudiation of the government's previous public comments that labour hire is both a legitimate form of employment and plays an important role in the economy
- **Self-employed tradespeople**, who are an essential part of the Australian economy and culture, who invest their lives and livelihoods in their own businesses. They choose to be self-employed yet risk being captured by the IR system on the pretext they are 'employee-like'
- **Owner-driver truck businesses**, who are being deliberately targeted by the Bill, to rope them into a new version of the disastrous 'Road Safety Remuneration Tribunal', which would have devastated tens of thousands of owner-driver family business if it had not been abolished in 2016.

A flawed process

The Bill was introduced to the House of Representatives on Monday 4 September. On Thursday 7 September the Senate voted to extend the reporting timeframe for the Committee to 1 February 2024.

Notwithstanding this decision of the Senate, the Committee announced on Thursday 14 September that the closing date for submissions would be Friday 29 September, some four months prior to the reporting date.

Such a truncated timeframe is highly disrespectful to the will of the Senate, as expressed in the 7 September vote, and openly contemptuous of the thousands of Australian businesses who will be adversely impacted by the Bill, yet will have only a perfunctory opportunity to contribute to the Committee process.

Complex and chaotic

Far from simplifying the law for businesses and workers:

- The Bill to 'close loopholes' is 284 pages long
- The explanatory memorandum is 521 pages long
- The definition of 'casual employee' is 3 pages long, with 15 different factors in its new legal test
- The 'Same Job, Same Pay' provisions are 28 pages long
- The 'Employee-like' provisions are 102 pages long
- The 'Same Job, Same Pay' test has 12 factors in its new legal test
- There are 13 separate commencement dates.

Unrelated and uncontentious measures should not be in the Bill

It is extremely disappointing that the Government has attempted to conflate uncontentious measures, including enhanced support for victims of domestic violence and first responders with work-related medical conditions, by also including them in the Bill.

These are worthwhile measures to support vulnerable people, which should never have been packaged in a highly contentious Bill such as this.

The MCA would strongly support any moves by the Senate to remove these measures from the Bill and pass them quickly as separate legislation. Specifically, this could include the following Schedules, which ought never have been included in the Bill in the first place:

Schedule 1, Part 2	Small business redundancy exemption
Schedule 1, Part 8	Strengthening protections against discrimination
Schedule 2	Amendment of the *Asbestos Safety and Eradication Act 2013*
Schedule 3	Amendment of the *Safety, Rehabilitation and Compensation Act 1988*

THE PURPORTED ‘LOOPHOLES’ DO NOT EXIST

Casual employment – the problem has been solved

Following amendments to the Act made in 2021, it is no longer lawful for an employer to keep an employee as a ‘casual’ against their will after 12 months, if they work regular hours.

The purported ‘permanent casual’ loophole has been closed. This issue is considered in greater detail below.

The definition of ‘employment’ – no problem to solve

Both the Fair Work Act and its predecessor legislation have never included a statutory definition of ‘employment’, as it was never considered necessary. The fact that the Act contained no such definition was not a ‘loophole’.

The only apparent rationale for this amendment is to reverse two High Court decisions in which the union parties did not get their way. This issue is explored in greater detail below and in *Appendix A: Overturning High Court decisions – contempt for the independent umpire.*

Commercial contracting – not a ‘loophole’ at all

Under the pretext of ‘closing the labour hire loophole’, the Bill radically extends its coverage to also regulate commercial contracts for service contractors. One business contracting to another to provide a service (i.e. not labour hire) is not a ‘loophole’, nor does such conduct have anything to with any purported ‘labour hire loophole’.

Related entity arrangements – neither ‘labour hire’ nor a ‘loophole’

The ‘same job, same pay’ measures that capture not just labour hire and service contractors also capture related entities within a corporate group.

Workers or services provided within a corporate group or joint venture arrangement are also improperly regarded the same as ‘labour hire’. This would capture an almost unlimited array of conventional employment practices, across the private and public sectors.

These are routine and entirely legitimate commercial arrangements used by almost all large Australian businesses. They are nothing like ‘labour hire’ and are certainly not a ‘loophole’.

The attack on self-employed Australians – being your own boss is not a ‘loophole’

Under the guise of regulating low-paid gig workers who are ‘employee-like’ the Bill extends this new regime to also cover a range of independent contractors who are neither ‘employee-like’, nor the subject of a ‘loophole’.

These measures would capture self-employed owner drivers in the road transport industry and self-employed tradespeople in the construction industry to be captured by the IR system against their will. Further, they could also be captured by so-called ‘collective agreements’ to which they are not a party and to which they did not agree, which would them impose the terms and conditions on which they must supply their services, with substantial penalties for non-compliance.

The freedom for an individual to run their own business and be their own boss is an essential element of the Australian economy, and an essential principle of Australian life. It is crucial to the prosperity and sense of self of hundreds of thousands of Australians. It is not a ‘loophole’.

Using ‘same job, same pay’ to destroy Australia’s system of enterprise bargaining

A system of enterprise bargaining that results in differing terms and conditions in different workplaces of different employers is not a ‘loophole’. It is exactly what they system was designed to encourage.

Yet the impact of the ‘same job, same pay’ measure in the Bill is to reverse three decades of bipartisan progress towards a de-centralised, enterprise-based system of employment arrangements and return to centrally-imposed uniform conditions, whether or not the businesses and workers agree.

The ‘same job, same pay’ slogan is in fact a ‘trojan horse’ for spreading the terms of one enterprise agreement to many other employers and employees, including those that have their own agreements in place.

The imposition of ‘same job, same pay’ on other businesses makes a mockery of the fundamental elements of the enterprise bargaining system. The enterprise bargaining system is premised on the notion that enterprises innovate and reward employees based on the capacity and fortunes of the enterprise, as embodied in the objects of the Act itself:

> ‘achieving productivity and fairness through an emphasis on enterprise level collective bargaining…’ (emphasis added)[1]

The changes in the Bill are not about ‘closing a loophole’ – they are, in reality, an attempt to reverse a fundamental tenant of the system. In practice, they are likely to remove the ‘enterprise’, the ‘bargaining’ and the ‘agreement’ elements of Australia’s system of enterprise bargaining agreements, which has served business and workers well for a generation.

Overturning High Court decisions – not ‘closing loopholes’ but attacking the judicial system

The Bill includes measures that are deliberately designed to overturn four decisions of the High Court in which a union litigant did not achieve its desired outcome:

- *Workpac v Rossato & Ors,* dealing with casual employment[2]
- *Bendigo TAFE v Barclay*, dealing with union delegates rights[3]
- *CFMMEU v Personnel Contracting Pty Ltd,* dealing with independent contractors in the construction industry[4] and
- *ZG Operations Australia Pty Ltd v Jamsek*, dealing with independent contractors in the road transport industry.[5]

These are decisions of our highest court. Decisions of the High Court are not ‘loopholes’.

This issue is explored in greater detail below and in *Appendix A: Overturning High Court decisions – Contempt for the judicial system.*

1 FW Act, s 3(f)
2 [2021] HCA 23
3 [2012] HCA 32.
4 [2022] HCA 1
5 [2022] HCA 2

IF THE GOVERNMENT WAS SERIOUS ABOUT 'CLOSING LOOPHOLES'

'Wage theft' – jail for businesses that steal from workers, but nothing for unions that steal from members?

The Bill includes new criminal sanctions for businesses that engage in deliberate 'theft' of employee entitlements to the detriment of workers. Workplace laws have traditionally not included criminal sanctions for such conduct. The government has cited recent examples of particularly egregious conduct by certain employers to justify such sanctions.

However, the Bill does not include equivalent sanctions for officials of employee organisations that also engage in deliberate theft of money from their organisations – members' money that is entrusted to them and for which they have significant ethical and legal obligations as fiduciaries.

The government's inconsistent approach is curious, given the recent history of egregious theft from employee organisations that have been punished under the criminal law, but for which no criminal sanctions exist under workplace law, for example:

- A former national president of the Australian Labor Party and union secretary, who was convicted of stealing almost $1 million from the Health Services Union.
- A former Labor Party MP and union secretary, who was convicted of counts of stealing money from the Health Services Union.

Falsifying records – jail for businesses with fraudulent wage records but no jail sanctions for union 'member theft' based on fraudulent records?

The new criminal sanctions for 'wage theft' in the Bill include criminal sanctions where a business has deliberately falsified its employment records in order to underpay its employees.

However, the government's approach to the falsification of records is selective. Whilst the government asserts a need for stronger sanctions and greater deterrents in relation to fraudulent conduct by business, the Bill includes no such measures to deal with fraudulent conduct by unions. It cannot be said that no problem exists, nor can it be said that the existing sanctions have been sufficient to deter such conduct, as two recent examples demonstrate:

- In 2022, the Australian Workers Union was revealed to have inappropriately inflated its membership by around 24,000 between 2006 and 2017. The AWU itself admitted that it had *'identified 24,064 potential contraventions of s.172 of the RO Act in 2006-2017'*.[6]
- In 2018, the Transport Workers Union was fined $270,000 by the Federal Court for falsely inflating its membership by 21,000 which included, amongst other findings, that *'the TWU's NSW branch inflated its numbers when submitting its membership figures to both auditors and the ALP's NSW branch'* between the years of 2009-12.[7]

The integrity agency that uncovered and prosecuted these examples of 'member theft' – the Registered Organisations Commission – has now been abolished by the government.

Tougher penalties for law-breaking businesses but lower penalties for law breaking unions

The government's purported justifications for increasing sanctions under the Bill is selective and inconsistent, given the following history:

6 'AWU concedes 24,000 breaches of membership-reporting laws', Workplace Express, 7 April 2023: https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=61046
7 'TWU's 'large systemic failure' earns $27,000 fine', Workplace Express, 2 February 2023: https://www.workplaceexpress.com.au/nl06_news_print.php?selkey=56446

- In 2017, the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* increased the maximum penalty for companies for a 'serious contravention' to $630,000 per breach - 10 times the previous maximum penalty.
- In 2022, penalties for construction unions in breach of workplace laws were reduced by two thirds.
- In 2022, the two government integrity agencies that enforced workplace laws against both businesses and unions, the Australian Building and Construction Commission and the Registered Organisations Commission, were abolished. The grounds for their abolition, as asserted by the government, was that it disliked the fact that they had enforced workplace laws against unions.

The Bill proposes to further increase sanctions against businesses that breach workplace laws with no corresponding increase to penalties that apply to unions – while at the same time greatly expanding the powers and presence of union delegates in the workplace.

‘SAME JOB, SAME PAY’ – 12 FUNDAMENTAL FLAWS WITH THE BILL

1. **It is much broader than just labour hire**
    - It also applies to service contractors.
    - It also applies to related entities within a corporate group.
    - ‘Labour hire’ is not even defined in the Bill.
2. **It is not limited to employees doing ‘the same’ work**
    - It can apply whenever an enterprise agreement applies to the host and the work is ‘substantially’ the same – whether or not the host actually has someone doing that work.
3. **It is not limited to employees ‘working side by side’**
    - Instead, the legislation states that ‘it does not matter on what basis the employees are or would be employed’.
4. **‘Same pay’ is not just the rate of pay**
    - It is the ‘full rate of pay’ as defined in section 18 of the Act, which also includes incentives, bonuses, loadings, etc.
5. **‘Exemptions’ for service contractors are not exemptions at all**
    - Whilst the bill includes an express ‘exclusion’ for small business employers, it does not do so for service contractors.
    - Instead, the issue of whether a business is a service contractor is simply one of the 12 factors that must be taken into account to determine whether a ‘same job, same pay’ order is made.
6. **Related entities within a corporate group are captured**
    - Related entity arrangements are commercial arrangements that are nothing like labour hire. They should be excluded from the Bill.
    - The practical effects will be absurd. For example, if Big W seconds a staff member to Woolworths they will be captured.
7. **Unions can pick and choose which EBA to apply for the purposes of ‘same pay’**
    - ‘Same pay’ does not have to be the pay under the EBA that would apply to direct employees of the ‘host’ who do ‘the same’ work at the same workplace.
    - Under the Bill, it will be possible for unions to pick any EBA from within the corporate group – not just the host – that ‘could’ apply to the workers. This includes expired enterprise agreements that may not cover any existing workers.
8. **Double dipping – unions can come back for a ‘second bite’ after orders are made**
    - If a union secures a ‘same job, same pay’ order, another union will still have the right to apply for replacement order, if it thinks it can get a better outcome from another enterprise agreement – an ‘alternative protected rate of pay order’.
    - This will destroy certainty for businesses and lead to even more litigation and disputes.

9. The exemption for ‘training arrangements’ is neither clear nor comprehensive

- The FWC can still make ‘same job, same pay’ orders covering training providers such as group training organisations and registered training organisations.
- The order can then only exempt employees who are subject to ‘training arrangements’ that meet the definition of such arrangements under the Act.

10. It applies down contractual chains to ‘indirect’ supply of workers

- The Bill applies to the ‘supply’ of workers ‘either directly or indirectly’.
- Businesses in commercial relationships two or more levels down a contractual chain could be captured and forced to apply the ‘same pay’ as the host, even though they have no direct contractual relationship with the host.

11. ‘Protected rate of pay’ test – even more complex than the ‘better off overall test’

- Determining the protected rate of pay (PROP) will require businesses and the FWC to undertake detailed calculations to determine the ‘Full Rate of Pay’ based on a designated agreement, whether or not it is the agreement that ‘would’ apply if the employees were directly applied.
- This will be even more complex than the ‘better off overall test’ (BOOT), which ‘only’ requires a comparison with terms set out in an award. The PROP will require a wider range of conditions to be considered and require a nominal value to be put on non-financial benefits.
- The FWC has been known to take up to a year to apply the BOOT to agreement approvals. It could take even longer with an even more complex PROP test.

12. ‘Same job’ and ‘same pay’ could be based on hypotheticals

- One of the factors the FWC must take into account in making a PROP order is whether the host employer ‘could’ employ the workers itself.
- This is entirely open-ended – a large business *could* conceivably employ anyone in any role.
- Orders could be made on the basis of hypothetical scenarios that do not exist.
- This is no longer ‘same job, same pay’, it is a speculative hypothetical job, speculative hypothetical pay.

SAME JOB SAME PAY – UNWORKABLE IN PRACTICE

It's not about 'labour hire' and it's not about 'loopholes'

'Closing labour hire loopholes' is the term used to describe Schedule 7 to the Bill, which rebrands and significantly extends the reach of the government's 'Same Job, Same Pay' proposal.

The current proposal goes well beyond the government's previously stated intention:

> 'The Government's Same Job, Same Pay measure seeks to address the limited circumstances in which host employers use labour hire to deliberately undercut the bargained wages and conditions set out in enterprise agreements made with their employees' (emphasis added)[8]

Nothing in the government's current proposal reflects its own previous acknowledgements that:

> 'Many labour hire firms across Australia operate in a fair way and exist for a good reason. We have no issue with them', [9]
>
> 'It's not to get rid of labour hire. There are lots of appropriate uses for labour hire'. [10]

In fact, contrary to the government's previous commitments, the Bill creates a complex and uncertain regulatory regime that can apply to any employee – not just a labour hire worker – who works with another employer in any capacity.

The Bill introduces a legislative maze that could capture any business that employs its own staff to provide a service to another business, as opposed to simply providing just labour.

The impact of changes cannot be wished away by painting the reforms as modest when the terms of the legislation demonstrate that this is not the case.

The 'Same Job, Same Pay' proposal – according to the government

In December 2021, the ALP introduced the *Fair Work Amendment (Same Job, Same Pay) Bill 2021* to implement its 'same job, same pay' policy. In his second reading speech for the 2021 Bill, the then Opposition Leader, the Hon Anthony Albanese MP, provided a rationale for the ALP's policy position, saying:

> 'Many labour hire firms across Australia operate in a fair way and exist for a good reason. We have no issue with them.
>
> But there are unscrupulous ones making a quick buck off the backs of working people, providing workers to major companies at lower wages than if the companies had hired them directly. And, therefore, changing the competitive nature between companies within the one industry.…
>
> You end up with two Australians working side by side, doing the same hours and the same job, with the same qualifications; yet one gets paid less and has less security than the other.…
>
> Labor will uphold the principle that if you work the same job, you should get the same pay. It's not complex'.

In June this year, the Minister for Employment and Workplace Relations, the Hon Tony Burke MP clarified it was not the intention of the government to:

- Interfere with the engagement of services contractors
- Inhibit the use of labour hire for surge capacity, or
- Prevent employers from rewarding employees with more experience.[11]

8 'Same Job, Same Pay Consultation Paper', DEWR, April 2023: https://www.dewr.gov.au/workplace-reform-consultation/resources/same-job-same-pay-consultation-paper.
9 The Hon Anthony Albanese, Fair Work Amendment (Same Job, Same Pay) Bill 2021, Second Reading Speech, 22 November 2021. https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F25170%2F0151%22
10 The Hon Tony Burke address to National Press Club, 31 August 2023.
11 The Hon Tony Burke, Sky News Interview, 5 June 2023: https://ministers.dewr.gov.au/burke/interview-sky-news-andrew-clennell-0.

Rather, Minister Burke said that the proposal was about 'closing loopholes'.

> 'Where you have an enterprise agreement, and a business has agreed this is the fair rate of pay that you shouldn't then be able to just go to labour hire and say okay now we have agreed to it we are going to undercut it anyway'.[12]

In June 2023, the Prime Minister explained the 'same job, same pay' policy as

> 'Because if you have the same experience, same skills, wear the same uniform and do the same work to the same standard for the same company if you do the same job, of course you deserve the same pay.' [13]

The many assurances provided by the government both through its public statements and consultation paper are clearly not reflected in the Bill.

The 'same job, same pay' proposal – according to the Bill. Businesses are captured unless they can litigate their way out

The starting point of the proposed regime is that a union, or even one disgruntled employee, can apply to the FWC for a 'Regulated Labour Hire Arrangement Order' and the FWC must make the order if it is satisfied that an employer supplies or will supply (either directly or indirectly) one or more employees to the regulated host, and a covered industrial instrument (e.g. an enterprise agreement) would apply to the employee if they were employed by the host.[14]

The orders will provide an overlay above all other obligations under statute, awards or enterprise agreements and will displace agreements arrived at through enterprise bargaining. The provisions are complex and will lead to widespread unintended consequences.

For the purposes of making an order, it is irrelevant whether:

- The supply of employees is the result of an agreement, or one or more agreements
- Who any such agreement(s) is between, or
- Whether the host and the provider are related entities.

The Regulation Impact Statement grossly underestimates the number of affected workers

The Regulation Impact Statement for the Bill guesses the proportion of affected workers is 66,446, based on a methodology that fails to account for the scope of the policy.

The methodology assumes that the affected workers are limited to employees in the labour hire industry as defined by the Australian Bureau of Statistics. However, given that the coverage of the policy extends to service contractors, this is incorrect.

Second, the estimate reduces the number of affected employees significantly based on the assumption that only employees who are both labour hire and working at a business under an enterprise agreement are affected by the policy. This is patently false because:

- The number of workers potentially impacted is open-ended and impossible to estimate the range of businesses that can be captured under the 'same job, same pay' policy is not limited by location, size, or type of the business
- A small maintenance contractor with under 15 employees that repairs components such as shovels or other heavy equipment, and whose employees do not even work at the mine site, could be captured because they 'perform work for' the mine site operator.

The policy scope of the measure is not limited to any part of the economy, or to workers who are vulnerable. It could cover call centre operators, professional service providers, parts providers, logistics operators, security or cleaning contractors – any business that supplies its employees to perform work wholly or principally for the benefit of the 'host' business, whether directly or indirectly.

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12 The Hon Tony Burke, Sky News Interview, 5 June 2023: https://ministers.dewr.gov.au/burke/interview-sky-news-andrew-clennell-0.

13 The Hon Anthony Albanese, speech to Victorian Labor Party conference, 17 June 2023.

14 Bill, s 306E.

In other words, it is not limited to labour hire. The Bill makes no distinction between labour hire, service contractors or related entities. All of them are treated the same way. Indeed, the Bill does not even define ‘labour hire’.

The multi-multi factor test

The FWC must make the order unless the business can satisfy it that the order would not be ‘fair and reasonable’ to do so.

The onus is on the business to show why it should escape, not the union who makes the application. This is a reverse onus to show it would not be ‘fair and reasonable’. The process is clearly weighted in favour of the union that roped the business in.

The ‘fair and reasonable’ test has 12 factors.[15] Even if a business could satisfy the FWC that it is a service contractor, the FWC may consider it reasonable to make the order having regard to some other factor in the test.

Small businesses are not exempt

The Government has claimed that ‘small businesses will be exempt from this change’. This is not correct.

‘Small businesses’ employers (less than 15 employees) are only excluded if they are ‘host’ businesses.[16] But how many businesses of this size engage labour hire or service contractors?

Small businesses will not be exempt as providers of labour and will suffer the most. Many large businesses will be forced to cancel their contracts with smaller contractors due to the complexity and commercial risk of being captured by ‘same job, same pay’.

Smaller businesses will be the ones least likely to be able to:

- Litigate their way out to avoid capture
- Understand the various and vague multi-factor tests
- Calculate the ‘PROP, or
- Deal with the inordinate amount of red tape that will apply every time they seek work from a larger business.

Complexity upon uncertainty

The concepts involved in the various multi-factor tests and reverse onus are fraught with uncertainty. In most large workplaces, work is performed by a wide range of persons who may be employed by service providers to the business.

There is no existing legislative meaning or case law on the notion of ‘directly or indirectly supplying employees to a host to perform work’. Whenever a service or product is provided by a business to another business, the employees of one contractor supply its employees to perform work for the other contractor to some extent. For example, a maintenance contractor, call centre operator, professional service provider, parts provider, logistics operator, security or cleaning contractor all supply their employees to perform work for the other contracting business.

The possibility of multiple ‘host’ businesses

One seemingly unintended consequence is that it is possible that two contracting businesses can both be hosts. A security contractor provides its security employees to a manufacturer and the manufacturer provides its security supervisor to the security contractor’s business, all in the course of

15 Bill, s 306E(8).
16 Bill, s 306E(1)(c).

normal contracting arrangements. It would be open to a union to seek orders against either the 'direct' or 'indirect' host in such cases.

Equally, the proposed benchmark of the host's employment instrument is broad and arbitrary. It is not necessary that the host employs maintenance employees, cleaners, drivers, forklift drivers, widget makers or accountants. So long as an enterprise agreement can be said to apply to a person if they were employed by a host, then the employer can be required to comply with another employer's enterprise agreement.

How 'same job' is determined – not the 'same job' at all

The application of 'same job, same pay' is not limited to employees doing 'the same' work in the same workplace. It allows for any enterprise agreement within a wider corporate group that could cover the work to be used as the benchmark – even if no employees are actually performing 'the same' job at the actual workplace.

What is 'the same' is a broad concept – it is any work that could be covered by an enterprise agreement classification. The focus on classification descriptions in enterprise agreements is highly problematic, given that such descriptions are often very broad, referring to general concepts such as service with the employer, duties and/or qualifications, rather than actual tasks.

Many are expressed to apply to all employees or a substantial proportion of employees and have classification definitions based on the sophistication of the role, through systems like the Hay Methodology, which operates on a point system.

The focus on enterprise agreement 'classifications' guarantees complexity, and guarantees that different jobs are treated as the 'same job'.

It is common for enterprise agreements to contain broad classification descriptors such as 'General Classification 1', 'General Classification 2' and so on which are designed to capture staff by reference to their skills, experience, seniority and role requirements, rather than their specific role. Consider the following classification framework, taken from a major Australian company's enterprise agreement:

- **Accountability and Authority** – An employee is accountable for the work of the role as a member of a team and to demonstrate expected team behaviours as required by the Company. Roles can entail basic service or operational work. Numeracy and literacy requirements must be met for entry to the role, but no previous experience and little training is necessary.
- **Knowledge and Experience** – Tasks are very routine and repetitive and require basic operational knowledge of standard procedures.
- **Problem Solving** – Very limited discretion is involved though there may be some very limited choice from standard procedures and solutions.
- **Guidance and Feedback** – Close supervision is generally a feature (e.g. usually several times a day).
- **People Skills Required** – Ordinary courtesy and effective day to day communication with the supervisor and the rest of the team is required.
- **Scope/Impact** – An understanding is required of how the role fits in with the immediate team.

There is a real risk that any worker — irrespective of whether the host employs people in that job and no matter how ill-fitting the agreement is to their work, occupation or industry — will be entitled to all of the benefits provided under this agreement, regardless of their experience or skill level, a factor which is omitted from the FWC's 12 factor multi-factor assessment of whether an order is 'fair and reasonable'.

Using the above classification structure as an example, where the host employer engages only skilled professional workers, based on the classification descriptions, those rates of pay could be applied to a cleaner, security guard or the barista that works in the on-site café.

At the very least, the applicability of enterprise agreement classifications to particular roles would lead to endless arguments and disputes about whether various role can be deemed to fit under an agreement classification.

How 'same pay' is determined – actual pay, retrospective, or even hypothetical

The FWC may also consider whether, in practice, the host's employment instrument has ever applied to an employee at a classification, job level or grade that would be applicable to the regulated employees. Problematically, this is likely to mean that employers will be captive to past arrangements, regardless of their current viability. It may even be the case that employers who have expired agreements, which do not cover any current employee, will find themselves in a situation where those agreements apply to their contractor's workers by virtue of a RLHA Order.

For example, in 2010, a company engaged public relations professionals directly, however, the business has since expanded and now engages a public relations firm to provide this support in order to leverage their global perspective. Employees of the public relations firm could be subject to an RLHA Order because the company, 13 years ago, had an enterprise agreement which covered employees with similar skills.

Of particular concern is the FWC's ability to consider the extent to which the host 'could employ' employees to whom the host employment instrument would apply. This is a broad factor which encompasses any entity in the host's corporate group. It could conceivably be applied in any application for a 'same job, same pay' order.

Many employers 'could' employ a particular class of worker but do not because it has engaged the services contractor to provide its expertise and widespread industry knowledge in the delivery of a service or product.

For example, a business is launching a new 'app'. Of course, the business *could* employ an IT worker to design and build the app but that worker will not bring with it the industry knowledge, cutting edge technology, or the guarantee of prompt delivery, in the same way a major IT firm, specialising in app development could.

So, instead, the business engages a market leading IT firm, who has launched many successful apps and can leverage the knowledge, skill and capacity of its entire workforce to deliver the product efficiently and promptly. That firm has appointed a senior manager as a liaison between the firm and the client to ensure the client's needs are met. Under this proposal, that liaison would be captured.

Mining haul truck drivers: overlapping duties does not equate to a 'same job'

The problems associated with comparing jobs against enterprise agreement classifications can be illustrated by the example of haul truck drivers in the mining industry.

One labour hire provider supplies haul truck drivers to a mining client in NSW. The client has its own haul truck drivers classified as 'Level 3' mineworker under the client's enterprise agreement. While the mineworkers can operate plant and equipment other than haul trucks, the labour hire haul truck drivers do not.

When they are both driving haul trucks, it may seem like the labour hire haul truck driver and the mineworker are doing the 'same job' – but the mineworker brings greater value to the business with the added skills they can provide.

The government's proposal to define a 'same job' by reference to 'substantial' alignment to a classification in an enterprise agreement will create uncertainty about the level of similarity needed between a role and a classification. This would have to be worked out for each employee to which an 'same job, same pay' order applies.

Service contractors treated the same as labour hire

The Bill does not include a definition of 'labour hire'. Rather, it treats labour hire and service contractors in the same way.

In doing so, the Bill ignores the crucial distinction between labour hire (where workers are employed by a labour hire agency to work 'in and as part of' a host business), and service contracting (which involves the provision of a service from one business to another). In the mining industry, where service contractors provide secure jobs and a vital part of the industry's dynamism, this measure will generate unnecessary risk, cost and complexity, undermining arrangements that are currently working well.

Service contractors and labour hire allow businesses to adapt and evolve

Service contractors and labour hire help mining companies respond to unexpected problems.

For one Australian mining company the cumulative impact of two years of above average rainfall, Covid-19-related disruption and operational constraints resulted in the 'pre-strip' at its mines falling to critical levels, endangering mine production.

Access to labour hire and service contractors allowed the company quickly mobilise a dedicated crew of 44 operators. These workers were permanent or on maximum-term arrangements and paid well above award rates.

The result was a win-win outcome: an efficient and cost-effective solution to a problem caused by unforeseen events that enabled the continuity of operations – while the crew could grow their skills and experience working at a major mine.

The Bill would threaten the ability to adapt and evolve, due to need to factor in the risk of 'same job, same pay' orders, creating a barrier whenever a business seeks services outside its own business.

Service contractors are captured unless they can litigate their way out. Even if they can satisfy the FWC that they are a service contractor, this does not mean that they will escape. It is simply one element of the 12 factor multi-factor test.[17]

Within this 12 factor multi-factor test, there is another 'test within the test – a six factor multi-factor test to determine whether a business is a service contractor that provides a service, rather than just labour. Under this test, the FWC can 'have regard to' whether the performance of the work is, or will be, wholly or principally for the provision of a service, rather than the supply of labour, to the host, having regard to:

(a) the involvement of the employer in matters relating to the performance of work,[18]

(b) the extent to which the employer directs, supervises or controls the regulated employees when they perform the work, including by managing rosters, assigning tasks or reviewing the quality of the work,[19]

(c) the extent to which the regulated employees use system, plant or structures of the provider to perform the work, [20]

(d) the extent to which the work is of a specialist or expert nature, [21]

(e) 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, [22] and

17 Bill, ss 306E(2) and 306E(8).
18 Bill, s 306E(8)(b)(i).
19 Bill, s 306E(8)(b)(ii).
20 Bill, s 306E(8)(b)(iii).
21 Bill, s 306E(8)(b)(iv).
22 Bill, s 306E(8)(b)(v).

(f) the extent to which, in the circumstances, the host employs, has previously employed or could employ employees to whom the host employment instrument applies, applied or would apply. In other words, hypothetical scenarios can be used.[23]

As such, instead of exempting services contractors (as Minister Burke promised), the Bill simply makes this critical matter merely one factor in a broad, wide-ranging 'fair and reasonable' test.

As a result, any company whose staff perform work for another business, either 'directly or indirectly', could be captured.

Service contracting and labour hire in the mining industry

Service contractors should never have been captured by the Bill and their inclusion in the Bill is directly contrary to previous assurances of the government.

Labour hire in mining involves a labour hire business providing the services of a worker to work 'in and as part of' a mining business with the labour hire business remaining the employer of the worker, and workers performing work at the direction of the host.

Service contractors perform specialist tasks, ranging from underground development work, overburden removal, to planned shutdown maintenance and providing catering services. Service contracting delivers highly paid, secure jobs, with service contractor workforces generally party to enterprise agreements between employers and unions. Their workers typically have their own management structures, under which workers report to their own managers, rather than those of the 'host'.

Service contractors enhance productivity by providing labour, plant and equipment, safety systems and expertise, which enables new entrants to the mining industry to secure finance and increase production. In fact, almost all major mining projects in Australia have started through the work of service contractors.

Historical business arrangements treated as the 'same job'

A further factor in the multi-factor test that the FWC must consider is the 'history of industrial arrangements' that have applied to the host and the provider.[24]

Consequently, businesses are likely to be stuck in the past, being forced to replicate past industrial arrangements even though circumstances may have changed. Invariably, this will stymie productivity, innovation, and the ability to evolve in response to changes in customer demand or technology.

Related corporate entities are also treated no differently to labour hire

The relationship between the host and the employer, including whether they are related bodies corporate or engaged in a joint venture or common enterprise, is just another factor in the multi-factor test.

The outcomes will be perverse and absurd.

For example, an award-covered manager earning above the high-income threshold is seconded into a subsidiary of its employer to act as an interim director following a sudden resignation. That subsidiary has an enterprise agreement with broad classifications.

Under the Bill, the manager could be captured. This means that they would still receive the benefits provided for by way of their contract plus any additional benefits provided for in the subsidiary's enterprise agreement.

23 Bill, s 306E(8)(b)(vi).
24 Bill, s 306E(8)(b)(c).

'Terms and nature of the arrangement' – vague concepts that must also be litigated

Another factor in the multi-factor test is the terms and nature of the arrangement under which the work will be performed,[25] including:

- The period for which the arrangement operates
- The location of the work performed under the arrangement
- The industry in which the host and the employer operate, and
- The number of employees of the employer performing work for the host under the arrangement.[26]

These factors must all be considered by the FWC. In practice, it must be required to consider almost anything. This means that a business could be caught in litigation in which it must argue about almost anything.

The end result is litigation, industrial disputes and commercial chaos

Under the Bill, an open-ended discretion is vested in the FWC to determine what is fair and reasonable without any real guidance on how the circumstances may or may not be considered fair and reasonable.

In every case, there is likely to be contested evidence about the circumstances, and conflicting submissions as to whether a circumstance weighs for or against a particular conclusion. None of the factors or circumstances are conclusive and the weight and significance of the circumstances are open to a wide variety of conflicting personal judgments and biases.

For example, a manufacturer may have ceased to employ electricians five years ago but has recently renewed its enterprise agreement that contains a 'legacy' classification for tradespersons. Does the history of industrial arrangements suggest that it is fair or unfair to impose the host's enterprise agreement on an electrical contractor? Competing submissions will be made and different FWC members will view the circumstances differently. During bargaining, if the employer sought to amend its agreement to remove the legacy classifications, so it reflected its current operations – an entirely legal and legitimate bargaining claim – would this be considered to be an unlawful 'scheme' for the purpose of the anti-avoidance provisions?[27]

What is and isn't 'fair and reasonable'?

In addition to the factors set out in the Bill, the FWC can consider any other matter it considers relevant for the purpose of determining what is and isn't 'fair and reasonable'.[28]

- Does a $10 per week differential suggest fairness or unfairness? Where is the dividing line between a differential that is fair and one that is not?
- Is it fair that a new business, with benefits well above the award which has won contracts on the basis of its cost structure, be required to pay higher amounts when it contracts to a larger, higher-paying host but not when the same employees are deployed to work for a smaller host? Will the FWC place significance on whether the contractors pay rates are the result of an enterprise agreement or contractual over award payments?
- Will the FWC place significance on the administrative nightmare of imposing different agreements when engaged on different contracts and having to calculate accrued entitlements on the full range of obligations?

25 Bill, s 306E(8)(b)(e).
26 Bill, s 306E(8)(e).
27 Bill, s 306S.
28 Bill, s 306E(8)(f).

These examples only serve to demonstrate that it is inevitable that the discretion vested in the FWC will be applied in an inconsistent and arbitrary manner. As a result, the Bill will inevitably result in perverse and inconsistent outcomes.

It should also be noted that merely participating in the process of litigation for an order will be highly complex, lengthy, and expensive for any business. Contrary to statements made by the Minister, unless there is an expensive well-prepared opposition to a union application, the making of an order will be virtually automatic, as the FWC must make an order[29] unless the business can persuade it that it would not be 'fair and reasonable'.[30]

Even with strong opposition, the outcome cannot be predicted because the discretion is arbitrary and open-ended.

There is no precedent in the Act, or any other legislation, for important obligations to be imposed through such an arbitrary and uncertain process. The design and practical impact of the proposed reforms are fundamentally flawed.

The 'protected rate of pay' test: same job, more pay?

Where a RLHA Order is made, it must state:

- who is covered by it,
- the host industrial instrument which applies, and
- its period of operation.

Crucially, if a RLHA Order is made, the employer must pay the employee(s) specified in the order at no less than the 'protected rate of pay' (PROP) for the employee(s) in connection with the work they perform.[31]

The PROP will be determined by the FWC. It is akin to the 'better off overall test' but with even more elements.

The RLHA Order will not set out the PROP in respect of each employee. Rather, the employer will need to determine the PROP for each employee covered by the RLHA Order. This will be a complex task. The PROP is the 'full rate of pay' (within the meaning of the Act) that would be payable to the employee if the host employment instrument, this could include performance-based bonuses, for example.

Calculating the PROP will invariably be an onerous and complex exercise. The practical outcome is that contractor workers may receive more pay and will be eligible to receive entitlements derived from both their own industrial arrangements and the host's.

'Same job, same pay' and 'protected rate of pay' – undermining incentive and reward for effort

A large critical mineral mining company has a workforce of over 5,000 across its Australian operations.

As is typical in the mining industry, approximately half the workforce is made up of workers from diversified service contractors that bring specific capabilities to its operations.

These service contractors are diverse, and may have their own enterprise agreements, organisational values and cultures, management, business systems and remuneration structures.

The mining company's direct employees receive generous remuneration and benefits under enterprise agreements that substantially exceed the Mining Industry Award. Benefits include

29 Bill, s 306E(1).
30 Bill, ss 306E(2) and(8).
31 Bill, s 306F(2).

performance incentives, salary packaging options, location-based allowances or bonuses, entitlements to share-based compensation, salary continuance and more.

If the company is captured by a 'same job, same pay' order, service contractors would need to determine, based on information supplied by the mining company, the PROP for each separate employee covered. This would inevitably involve guesswork regarding the nominal value of bonuses, salary packaging, access to share schemes and the like. There is no exemption from the substantially increased 'wage theft' penalties under the Bill for employers who miscalculate 'same job, same pay'.

The inevitable result over time is that businesses will reduce their risk by reverting to enterprise agreements that offer simplistic 'one size fits all' pay and remuneration structures. This will mean that employees ultimately are worse off and will lose access to bonuses and other terms that are too difficult to replicate under a 'same job, same pay' regime.

The implications – uncertain, inconsistent, and unfair

This concept is also fraught with difficulty and unfairness. Assuming that the host's enterprise agreement contains benefits in addition to pay, as most enterprise agreements do, the rate of pay paid by the contractor must be higher than the rate of pay paid to direct employees. This will then flow through to accrued entitlements and other benefits in a way that guarantees that using a service provider will be far more expensive than directly hiring an employee. Therefore, the reform is a form of ratcheting up the costs of indirect employment and service delivery that renders the entire concept of same job, same pay a misnomer.

In addition, the requirement to impose 'the same' remuneration based on an agreement classification only will not allow for different remuneration based on skill level, experience or output. This is inherently unfair and will take away reward for effort and experience.

Cost blowouts in supply chains due to unnecessary complexity and risk

There is no requirement in the 'same job, same pay' measure for an employee to be working 'side by side' or even at the same site as a comparable worker of the 'host'. A worker does not even need set foot on the 'same site' to be captured.

A small engineering business located in a regional community that employs 30 workers as machinists and other trades who repair mining equipment.

It has won numerous contracts (with a longer than three-month duration) from major mines in its region, for repair work it undertakes at its factory.

Even though this arrangement has nothing to do with labour hire and the employees of the engineering business do not even work at the mine site, the Bill's provisions are so broad that its employees can be captured.

It is sufficient that it 'indirectly' supplies machinists to 'perform work' that is 'principally for the benefit of' the mining company.

If the mine 'were to employ' an equivalent employee under its enterprise agreement, that employee would be employed as a 'Mining Industry Maintenance Trade Employee' (the relevant classification in the Mining Industry Award, which is incorporated into the mine's enterprise agreement). The performance of maintenance work on mining equipment is enough to make the work 'work of the kind' performed under the relevant classification in the enterprise agreement.

To further complicate matters, since the engineering business has more than 15 employees it could be deemed to be a host to other suppliers, impacting certainty in its relationships with other firms further down the supply chain.

As more orders are made, the consequences will be felt in increased cost, complexity and risk – with resulting cost inflation for the consumers of products made in Australia.

What happens to casual employees?

Further difficulties arise when one considers the Bill's stipulation that, if the provider supplies casual employees, and the host employment instrument does not cover casual employees, then the PROP will be the base rate that would be applicable if the employee was engaged on a permanent basis plus 25 per cent (and plus any amounts reasonably equivalent to non-monetary benefits).

However, it is common for agreements to contain rolled-up rates or 'all-in' rates of pay for casuals, which account for allowances, loadings and other separately identifiable amounts falling outside of the statutory concept of 'base pay'. How is an employer to disaggregate the rolled-up rate so as to identify the 'base rate' component on which the 25 per cent is to be paid? Unfortunately, no methodology is provided. In these circumstances, will the casual receive the loaded rate in the host's EA plus an additional 25 per cent?

No doubt there will be countless other inconsistencies, anomalies and ambiguities under the framework, which will simply be – as the government says – 'a matter for the Commission'.

No exemptions – unless the employer can prove 'exceptional circumstances'

If the employer intends to use the employee covered by the order for a discrete period, it can apply to the FWC for an exemption to the PROP, however, these can only be granted in 'exceptional circumstances'.[32]

The FWC can only make an exemption if it has regard to:

- Whether the exemption related to satisfying a seasonal or short-term need for work[33]
- The circumstances of the host and employer
- The relevant industry, the views of the relevant union(s),[34] and
- The principle that the longer the period to be specified, the greater the justification required. [35]

In setting such a high hurdle, which can only be overcome through the application of yet another vague multi-factor test, and even more litigation, the Bill will mean that, in practice, exemptions will be almost impossible.

The implications for business – litigation is their only hope

Contrary to Minister Burke's assurances that businesses will not need to 'litigate themselves out of the same job same pay system',[36] business will be left with no choice but to try to find a way to convince the FWC that it is not 'fair and reasonable' for them to be captured, based on the 12 factor multi-factor test.

Crucially, a finding by the FWC that a business is not actually 'labour hire' will not be enough.

No matter how justified or pressing the need for an external contractor to provide a service, businesses will be forced to 'lawyer up' and take their chances through litigation in the FWC.

Given that labour hire and service contractors are often engaged in urgent or time critical circumstances — for instance, due to maintenance issues, a safety incident or where employees are absent — this will be entirely impractical.

32 Bill, s 306L (4).
33 Bill, s 306L (4)(a).
34 Bill, s 306L (4)(c).
35 Bill, s 306L (4)(d).
36 The Hon Tony Burke address to National Press Club, 31 August 2023.

Increased risk for Indigenous and regional businesses

According to the 2021 Census, the mining workforce has a higher proportion of Aboriginal and Torres Strait Islander employees than any other sector, making it a vital contributor to Indigenous employment.

In addition, the industry is also a major customer of Indigenous businesses and has contributed significantly to Indigenous Australian long-term wealth creation through agreement-making.

Contracting with Indigenous businesses allows mining companies to provide business and career opportunities for Traditional Owners and Indigenous Australians across Australia, and mining companies have committed hundreds of millions of dollars towards Indigenous procurement.

Many large mining businesses have their own procurement policies designed to prioritise the engagement of locally-based and Indigenous businesses in the regions in which they operate.

An unintended consequence of the ‘labour hire loopholes’ measure will be that such businesses could face additional barriers and compliance burdens and unsustainable wage costs, slowing the effort to improve the economic wellbeing of Australians. The government’s Regulation Impact Statement fails to address this possibility in any level of detail.

In 2018 Supply Nation (the peak body for Aboriginal and Torres Strait Islander businesses) commissioned a report in 2018 The Sleeping Giant where the following was noted:

- For every dollar of revenue, an Aboriginal or Torres Strait Islander business creates $4.41 of economic and social value
- Aboriginal or Torres Strait Islander businesses employ more than 30 times the proportion of Aboriginal and Torres Strait Islander people than other businesses
- Owners of Aboriginal or Torres Strait Islander businesses reinvest revenue in their communities.

THE ATTACK ON CASUAL EMPLOYMENT

What is the problem? The issue has already been resolved

In 2021, the Parliament passed enhanced casual conversion rights in the National Employment Standards (NES) and a clear objective definition of 'casual employee'. Those rights provide a pathway for casual employees to become permanent employees after 12 months where they work regular hours and required all employers of casual employees to notify casual employees of their rights to convert. Some employees took up offers to convert while the vast majority, who favoured their current arrangements, did not.

It is now no longer possible for an employer to keep an employee as a long-term 'permanent casual' against the employee's wishes.

The new definition of 'casual employee' – more complex, much more uncertain

The Bill contains a new casual employment regime which fundamentally alters the definition. It makes a critical shift from the historic approach to distinguishing casual from permanent based on the terms of the contract ('engaged and paid as such'), to an assessment based on the 'practical reality'[37] of the arrangements, which has regard to a variety of factors including the subsequent conduct of the parties.

This new definition, which is designed to reverse the decision of the High Court in the *Rossato* case,[38] where union parties did not get their way, will remove the certainty and clarity achieved by the 2021 amendments.

The new definition in detail

Under the new definition, the 'general rule' is that an employee is a casual employee <u>only if</u>:

- The employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work, and
- The employee would be entitled to a casual loading or a specific rate of pay for casual employees under the terms of a fair work instrument or under a contract of employment.[39]

However, these are only two elements of a seven factor multi-factor test.

While the 'absence of a firm advance commitment' to continuing and indefinite work is a feature of the current definition of casual employment, the Bill makes a significant departure from how that commitment is to be assessed. Rather than relying on the intent of the parties (i.e. the employment contract), the proposed definition focusses on the character of the employment relationship, providing that the assessment must have regard to the 'real substance, practical reality and true nature of the employment relationship' (i.e. the subsequent conduct of the parties).[40]

This definition is inherently fluid and can fluctuate according to the employee's patterns of work and the subjective expectations of the parties. These could change from week to week.

In practice, it means that an employer and employee may enter into a contract of employment on the basis that the employee is engaged on a casual basis because regularity cannot be guaranteed, yet that contractual agreement can be undermined at a later date simply because the work becomes more regular. By simply working more regular hours, the legal status of the arrangement is cast into doubt.

The obvious impact is that the new regime will discourage regularity and promote insecure and irregular hours.

37 Bill, 15A(2)(a).
38 *Workpac v Rossato & Ors* [2021] HCA 23.
39 Bill, s 15A(1).
40 Bill, s 15A(2)(a).

The Bill represents a significant departure from the current statutory definition of casual employment, which will create uncertainty on a number of levels:

Feature	Current definition	New definition
Relies on central concept of firm advance commitment	Yes	Yes
Focusses on written terms of the contract	Yes	No
Allows for consideration of post-contractual conduct	No	Yes
Gives legal effect to mere understandings / expectations falling short of a contractual promise	No	Yes
Uses a multi-factor test	No	Yes

The various factors in the multi-factor test

By rendering the terms of the contract practically irrelevant, the employee's legal status is instead to be determined by reference to various fluid factors relating to how the engagement plays out in practice. There are four factors which must be considered in determining whether there is a 'firm advance commitment' to continuing and indefinite work, as follows:

- Whether the employee has the ability to elect to offer work, or an inability to accept or reject work (and whether this occurs in practice)[41]
- Whether, having regard to the nature of the employer's enterprise, it is 'reasonably likely' that there will be future availability of continuing work in that enterprise of the kind usually performed by the employee[42]
- Whether there are full-time employees or part-time employees performing the same kind of work in the employer's enterprise that is usually performed by the employee[43]
- Whether there is a regular pattern of work for the employee.[44]

Basing the definition on such an unclear multi-factor test focussing on the totality of the relationship will, inevitably, cause considerable uncertainty and give rise to significant misclassification risks. The uncertainty will be compounded by the requirement to apply the test through the prism of the 'practical reality' of the relationship, rather than the written terms of the contract. This uncertainty will deter businesses from employing casual employees, who are crucial in many industries.

The traditional award definition of a casual was an employee 'engaged and paid as such'. It operated satisfactorily because the parties knew the basis of their employment from commencement and could operate on a clear and predictable basis. The 2021 definition expanded and clarified the underlying concepts behind casual employment as a safeguard against contrived 'permanent casual' arrangements combined with enhanced casual conversion rights.[45]

All of this will be upset by the new definition. The fine balance between fairness and clarity will be destroyed – for no good reason.

Punitive sanctions for those who get it wrong

The definition of 'casual employee' in the Bill will operate in such a way as to prohibit anyone from being engaged as a casual if they work 'regular' hours. A court can order that the employee was 'always' not a casual from the time of their engagement.[46]

41 Bill, s 15A(2)(c)(i).
42 Bill, s 15A(2)(c)(ii).
43 Bill, s 15A(2)(c)(iii).
44 Bill, s 15A(2)(c)(iv).
45 FW Act, s 15A.
46 Bill, s 548(1C).

This also applies retrospectively ‘in relation to employment relationships entered into before, on or after, commencement‘ of the Bill.

Under the Bill, employers who engage casual workers could be exposed to ‘misclassification’ claims.

They will also be exposed to civil penalties for contravening the Act – the Bill introduces a new penalty provision into the Act[47] – with maximum penalties of 300 penalty units (i.e. $93,900) per breach (i.e. per employee).

Whilst there is an ‘exemption’ if the employer ‘reasonably believes’ they got it right, there is a reverse onus on the employer to prove it acted ‘reasonably’.

The new definition will create less secure work

As explained above, under the proposed definition a ‘firm advance commitment’ need not rise to the height of a contractual term. Instead, a commitment may stem from a mere ‘understanding’ or ‘expectation’ – concepts which have never been legally enforceable in a court for obvious reasons.

Concerningly, such an ‘understanding’ or ‘expectation’ may arise from matters over which the parties have no control, including the nature of the employer’s enterprise and the likelihood of the availability of continuing work.

Some employers, for example, will avoid engaging casuals for any extended period of time, and will seek to ensure shifts are sporadic and irregular. The constant turnover of staff will foster organisational instability. Unpredictable shifts will deprive casuals of the opportunity to perform other work or attend to family or carer responsibilities. Most importantly, workers will be forced into greater job insecurity. Those who wish to remain employed in regular hours will be forced to receive a 25 per cent pay cut.

A new casual conversion regime – in addition to the existing one

In addition to redefining casual employment, the Bill proposes to introduce a second casual conversion regime which confers casual employees a right to request conversion to permanent employment every six months, including where the employee believes they no longer meet the statutory test of ‘casual employee’.

The employer must then conduct an assessment and may only refuse the request if the employee still meets the definition of casual employee,[48] if conversion would be impractical,[49] or if conversion would result in non-compliance with another law.[50] Detailed reasons must be provided,[51] and the employer must advise the employee in writing that they can refer the dispute to the FWC, [52] which can then arbitrate the dispute by making binding orders.[53]

However, the current 12-month casual conversion regime is still preserved. There will be two parallel regimes covering the same thing, based on different legal tests with different obligations on employers.

This creates a burdensome ‘dual compliance’ scenario for employers of all sizes. The imposition of two concurrent regimes covering the same subject matter, and imposing different obligations on the employer, will invariably lead to confusion and increased compliance costs.

47 section 359(A)(1) of
48 Bill, s 66AAC(4)(a).
49 Bill, s 66AAC(4)(b).
50 Bill, s 66AAC(4)(c).
51 Bill, s 66AAC(2)(c).
52 Bill, s 66AAC(2)(d).
53 Bill, s 66M(6)(b).

NEW DEFINITION OF 'EMPLOYMENT' – REPLACING CERTAINTY WITH CHAOS

While asserting that its proposals regarding independent contractors are confined to the broadly defined 'gig economy' the government is in fact going well beyond that by proposing to fundamentally alter who qualifies as an 'employee' in the first place, through a new statutory test.[54]

This is a very far-reaching proposal because it expands the application of other statutory provisions, awards and enterprise agreements to cover persons who are not currently covered by those provisions because they are independent contractors, not employees.

The new test changes the lens through which a worker's legal status is to be viewed, providing that this is 'to be determined by ascertaining the real substance, practical reality and true nature of the relationship between the individual and the person'. The proposed provision then goes on to confirm that, for the purposes of ascertaining the 'real substance, practical reality and true nature' of the relationship:

- The totality of the relationship between the individual and the person must be considered,[55] and
- In ascertaining the totality of the relationship between the individual and the person, regard must be had not only to the terms of the contract governing the relationship but also to other factors relating to the totality of the relationship including, but not limited to, how the contract is performed in practice.[56]

This represents a deliberate attempt to change the current common law meaning of 'employee', the foundational concept on which the entire safety net of minimum standards rests.

Under the common law approach, settled by the High Court in its rulings in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*[57] and *ZG Operations Australia Pty Ltd v Jamsek*[58], the key determinant of the character of a work relationship as one of 'employer-employee' or 'principal-contractor' is to be found in the terms of the contract (whether written, oral or a combination thereof) between the parties. According to the Court, there is no reason why legal rights in a contract should not determine the relationship between the parties (and every reason why they should).

The Court's decisions ensured certainty with respect to a relationship of such fundamental importance. They will now be overturned by the government's proposals. Further, the changes are inherently unfair because they will significantly impact on arrangements that were implemented in good faith under the current legal regime.

The proposed test will create misclassification risks

As with the government's proposed amendments to casual employment, placing the 'practical reality' of the relationship at the core of the test will mean that businesses are constantly exposed to the risk of misclassification.

The misclassification risks are compounded by the application of the new test to relationships entered into prior to commencement. The Bill clearly states that the pre-commencement conduct and arrangements are to be taken into consideration in assessing whether the person is an employee.

The proposed test will unleash complexity

The proposed departure from the common law meaning of employment will result in the emergence of two different tests for an 'employee': the proposed statutory test under the Act and Fair Work

54 Bill, s 15AA.
55 Bill, s 15AA(2)(a).
56 Bill, s 15AA(2)(b).
57 [2022] HCA 1.
58 [2022] HCA 2.

instruments, and the common law test for any other statute dealing with 'employees' at the Commonwealth, State or Territory level.

This will create a range of anomalies, for example:

- State long service leave legislation provides entitlements for 'employees' in the common law sense
- State anti-discrimination law (e.g. Equal Opportunity Act 2010 (Vic)) provides one set of protections for 'employees', and another set of protections for contractors
- It is common for legislation to impose regulatory requirements in relation to a relevant company's 'employees' (e.g. under the Gambling Regulation Act 2003 (Vic), gaming industry employees must be licensed, but not contractors), and
- The Corporations Act 2001 imposes various duties on employees (for example, under Chapter 2D).

This problem will be further complicated by special rules under:

- Federal superannuation legislation (which entitles certain contractors to compulsory employer contributions under the superannuation guarantee scheme)
- State payroll tax legislation (which deems certain contractors to be employees for tax purposes), and
- Work health and safety legislation (which applies to 'workers').

The government has no mandate

Redefining 'employee' was never put to the voting public.

To date, the focus of the government's agenda has been on the gig economy and the road transport industry. The Department of Employment and Workplace Relations' consultation paper, 'employee-like' forms of work and stronger protections for independent contractors', set out the government's commitments as follows:

> 'In the lead up to the 2022 Federal Election, the Government committed to giving the Fair Work Commission, Australia's national workplace tribunal, new powers to set minimum standards for workers in 'employee-like' forms of work, including the gig economy.…
>
> At the Jobs and Skills Summit held in September 2022, the Government announced that an area of further work would be to 'amend relevant legislation to give workers the right to challenge unfair contractual terms.…
>
> Another Jobs and Skills Summit outcome was to 'consider allowing the Fair Work Commission to set fair minimum standards to ensure the road transport industry is safe, sustainable and viable'.[59]

There was no mention of any proposal to fundamentally amend the definition of employment. Instead, the government's intention, as stated in the Bill, is to overturn decisions of the High Court in *Jamsek* and *Personnel Contracting* cases, in which the Court settled and clarified the law, but in which the union parties did not get their way.

Those decisions clarified and simplified the law by giving primacy to the terms of the contract, which gives greater certainty and simplicity to all. Now, the government wishes to reverse the ruling of the High Court, without providing any clear reasoning of its own.

59 'Employee-like' forms of work and stronger protections for independent contractors', DEWR, April 2023, p 7.

REGULATING 'EMPLOYEE-LIKE' WORKERS – THE ATTACK ON SELF-EMPLOYED AUSTRALIANS

Minimum standards for gig workers – plus much, much more

Prior to the 2022 election, the ALP promised to introduce minimum standards for gig platform workers Since the election, Minister Burke has described such work as a 'cancer' on the economy:

> Gig work drives down wages and has been spreading like a cancer through the economy, extending into the care economy, into aged care, the NDIS, into industries like security.[60]

Minister Burke emphasised that protections were necessary for vulnerable workers at risk of exploitation by large digital platforms:

> There's no way you can put a visa worker who delivers pizza on a second-hand bike in the [independent contractor category].[61]

However, the proposed solution under the Bill goes far beyond providing protections for the most vulnerable workers. Instead, the Bill would empower the FWC to make Minimum Standards Orders (MSOs) in relation to 'employee-like' workers engaged through a 'digital labour platform', with a view to extending certain employee rights such as minimum wages, unfair 'deactivation' protections and superannuation to them. Under the Bill, a person is an employee-like worker if they meet various requirements in a new multi-factor, which include the following:

'Employee-like' workers – a new legal maze	
Criterion	**Description**
Party to a services contract[62]	The person must be an individual who is party to a services contract; a director of a body corporate that is party to a services contract; a trustee of a trust that is party to a services contract; or a partner in a partnership that is a party to a services contract. Even though no issues have been identified in relation to the regulation of partnerships — which are typically highly profitable arrangements — the government nonetheless proposes to cast the 'employee-like' net in sufficiently broad terms to capture them. In any event, there are serious questions as to the constitutional validity of the purported federal regulation of partnerships in Western Australia.
Majority of the work[63]	The person must perform all, or a majority of, the work to be performed under the services contract.
Digital labour platform[64]	The work is performed through a 'digital labour platform', being an application, website or system operated to arrange, allocate or facilitate the provision of labour services. As a result, any 'digital platform' — whether 'vertical' (eg. Uber) or 'horizontal' (e.g. Mable) in nature — may fall within the potential ambit of the scheme. Further, the definition is, on its terms, broader than the conventional meaning of a 'digital platform', such that it could capture any system for arranging, allocating or

60 The Hon Tony Burke, Speech TWU Delegates Conference, 26 August 2022.
61 Phillip Coorey, 'Government working on next wave of IR changes' 29 November 2022 < https://www.afr.com/politics/federal/government-working-on-next-wave-of-ir-changes-20221129-p5c261>.
62 Bill, s 15P.
63 Bill, s 15P(1)(b).
64 Bill, s 15P(1)(d).

	facilitating the provision of labour (such as an electronic rostering system). It will apply well beyond just digital platforms.
No employment[65]	The person does not perform any work under the services contract as an employee, noting that the new definition of 'employee' in the Bill will apply
Vulnerability[66]	The person satisfies one or more of the following: • The person has low bargaining power in negotiations in relation to the services contract under which the work is performed • The person receives remuneration at or below the rate of an employee performing comparable work, or • The person has a low degree of autonomy over the performance of the work. These characteristics go beyond targeting those vulnerable workers in the category of the 'visa worker delivering pizzas' referred to by Minister Burke. Merely having a low degree of autonomy over the performance of work, even though the worker is well-paid and enjoyed a strong bargaining position, would suffice to attract the application of the MSO scheme.

These criteria are intentionally broad. They provide no guarantee that the scope of the new jurisdiction will be 'limited'.

Instead, it seems to be deliberately designed to capture a very wide range of platform workers. Clothing the scope with broad discretions is almost guaranteed to lead to a moving feast of interpretations and capture. This not an 'unintended consequence'.

Once a worker falls into this category, the FWC will be able to make an MSO imposing a broad range of minimum standards.

65 s 15P(1)(d).
66 Bill, s 15P(1)(e).

ROAD SAFETY REMUNERATION TRIBUNAL 2.0

The provisions of the Bill relating to the road transport industry will attack productivity and increase costs for any business in Australia, including mining, that relies on road transport anywhere in its supply chain.

The RSRT sequel is even worse than the original

The government proposes to effectively resurrect the failed Road Transport Remuneration Tribunal (RSRT), which was abolished in 2016 after less than four years. However, the proposed RSRT 2.0 under the Bill will be far more powerful and pervasive than its predecessor.

Specifically, the Bill would create a new statutory framework covering 'regulated road transport contractors and road transport businesses', for whom the FWC can set minimum standards by making MSOs.[67]

These amendments are intended to achieve the two-pronged 'Road Transport Objective' set out in the Bill.[68] The first limb of this objective asserts the 'need for standards that ensure that the road transport industry is safe, sustainable and viable',[69] while the second recognises the 'need to avoid unreasonable adverse impacts' upon:

- Sustainable competition among Road Transport Industry (RTI) participants
- RTI business viability, innovation and productivity, and
- Administrative and compliance costs for RTI participants.[70]

These changes are not about safety, sustainability and viability – they create an even more powerful RSRT 2.0 *<u>and</u>* the ability for big companies to engage in anti-competitive conduct that would hit entire supply chains. It will have enormous ramifications for inflation since it will affect prices for everything transported by road – including groceries, fuel, clothing and building supplies.

RSRT 2.0 would have even more powers than the previous RSRT, including power over awards, mandatory standards that apply to the entire industry ('Minimum Standards Orders') and anything the Minister may choose to include in regulations.

The RSRT 2.0 – an enshrined voice for the Transport Workers Union

The RSRT 2.0 will include two components:

- A new Road Transport Advisory Group (RTAG),[71] and
- An 'Expert Panel' for the Road Transport Industry within the FWC.[72]

Each of these bodies will have guaranteed representation from the Transport Workers Union.

The function of RTAG is to broadly 'advise the FWC in relation to matters that relate to the RTI'.[73] In particular, the President of the FWC must have regard to the views of RTAG when determining the priorities for its work in relation to RTI matters. This role also includes influence in decisions about the making and varying of awards, road transport MSOs (which are mandatory for those to whom they apply), and anything else the Minister might decide to include in regulations.[74]

The RTAG will be made up of members appointed by the Minister and must consist of persons who are either members of or nominated by organisations that are entitled to represent the interests of one

67 Bill, s 536JY.
68 Bill, s 40D.
69 Bill, s 40D(a).
70 Bill, s 40D(b).
71 Bill, s 40E.
72 Bill, s 620 (1E).
73 Bill, s 40E(2).
74 Bill, s 40E(2).

or more regulated road transport contractors or road transport businesses.[75] This will effectively enshrine a TWU voice to the RTI Expert Panel of the FWC, empowering the union to directly shape the regulation of the sector. The transport industry is notorious for having divergent views between large 'majors' on the one hand, and owner-drivers and small transport businesses on the other. The disastrous RSRT arose because of arrangements between some businesses and the TWU that were highly damaging to owner-drivers. This legislation repeats the same error.

As there is no requirement for the Minister to ensure that RTAG membership is representative of all parts of the industry, it is unclear what regard will be had at all to industry views and priorities, including those of small businesses, in the course of the RTI Expert Panel's work.

The Road Transport 'Expert Panel' – not independent and not a proper tribunal

The proposed RTI Expert Panel of the FWC will consist of a Presidential Member of the FWC, and at least one FWC member with knowledge or experience in the RTI.[76] This will invariably include a representative from the TWU. This Panel will have exclusive jurisdiction to make, vary and revoke any modern award that the President of the FWC considers relates to the RTI, as well as to make any:

- Road Transport MSO,
- Employee-like worker MSOs which relate to the RTI,
- Associated guidelines, and
- Any other instruments set out in regulations that the President considers 'might relate' to the RTI.

The Bill makes it clear that a matter can 'relate' to the RTI even if it also relates to another sector. As such, it appears that matters incidental to the RTI may nonetheless be captured by the RTI Expert Panel's exclusive jurisdiction. As the Panel must have regard to the views of RTAG, this will allow for the TWU to further its agenda in relation to workers outside of its coverage. It is entirely foreseeable that the TWU will seek to influence any decisions relating to warehouse and logistics workers, for example, even though those matters only have marginal relevance to the road transport sector.

Inherent conflicts-of-interest between RTAG and the 'Expert Panel'

The Bill allows for the Chair of the RTAG to also be a member of the RTI Expert Panel. The President of the FWC may also appoint a member of the Expert Panel to chair the RTAG.[77] The Chair of the RTAG can therefore provide 'advice' to himself, or herself, in their capacity as a member of the 'Expert Panel'.

The result is the potential for an inherent conflict in the exercise of the RTI Expert Panel's powers, as the RTAG's primary function is to advise the Panel in that exercise. As a result, the Bill risks allowing important decision-making relating to the RTI to be bound up in a tight cabal of decision-makers, with no apparent safeguards to ensure transparency or impartiality.

These special arrangements are not replicated for any other industry under the Act, which remain subject to the FWC's standard rules, processes and powers, which are crucial in preserving the independence and credibility of the FWC.

The Minister can arbitrarily expand the jurisdiction of the RSRT 2.0

The Bill also includes regulation-making power whereby the Minister may make regulations relating to the 'road transport industry contractual chain' (RTICC), and to RTICC participants.[78] The potential

75 Bill, s 40F.
76 Bill, s 620(1E).
77 Bill, s 40F(6).
78 Bill, s 40J.

scope of these regulations is entirely open-ended yet RTICC participants will face potential fines of $187,800 for breach of requirements that have not even been set out in the legislation.[79]

These regulations may also be extremely broad and can be used to further expand the powers of the RTI Expert Panel, at the behest of the TWU.

The Bill provides that, without limitation, these regulations could empower RSRT2.0 to:

- Make RTICC orders that confer rights on RTICC participants
- Impose obligations on RTICC participants
- Deal with disputes between parties covered by RTICC orders, and
- Enforce RTICC orders. [80]

Again, any such powers would be exercised by the 'Expert Panel' subject to its obligations to consider RTAG's views. For example, such regulations could empower the RTICC to:

- Revoke or vary an order that TWU does not like
- Require RTICC orders to require contributions to TEACHO (the TWU-controlled education and training fund), as many enterprise agreements with the TWU do currently, or to undertake certifications or training conducted by TWU-liked organisations, or
- If the Minister was so inclined, order the RSRT 2.0 to make no further orders, and revoke existing ones.

All it would take is one direct communication from the TWU to the Minister to issue a regulation to engineer an outcome of the supposedly 'independent' RSRT 2.0.

The Minister also has power to unilaterally determine which workers and which businesses are affected by the provisions, with no limit on who might be captured. The Bill provides that a 'road transport business' can be any business named or prescribed by class in the regulations[81] and that 'road transport industry' includes any industry prescribed by the regulations.[82] This is an incredible breadth of power given to the Minister to determine substantive rights of workers with no advance warning and little scrutiny. If a Minister has a close relationship with the TWU, then this is yet another way in which the TWU can control this new system.

As the jurisdiction of the RSRT 2.0 relating to the RTICC can be varied in accordance with regulations drafted by the Minister, its potential powers are virtually endless. The proposal also risks undermining a fundamental tenet of our Constitution and of any free democratic society, being the separation of powers between the executive and judicial arms of government.

The Government has failed to learn from the failed RSRT

The practical impact of RSRT 2.0 is not difficult to predict. It can be seen from the history of the original RSRT introduced by the Gillard government in 2012, and later abolished in 2016.

The *Road Safety Remuneration Act 2012* (Cth) established the RSRT, which was broadly empowered to inquire into sectors, issues and practices within the RTI and, where appropriate following public consultation, make 'road safety remuneration orders' which established mandatory minimum rates of pay.

The RSRT was established on the false and highly offensive assumption that owner-driver work was inherently less 'secure' and therefore less safe than the same work done by employees, and that

79 Bill, s 40J(2).
80 Bill, s 40J(2).
81 Bill, s 15R(1)(b) and (c).
82 Bill, s 15S(1)(f) and (2).

owner-drivers drove unsafe vehicles and took drugs. The then government justified it on the following grounds when it was first established in 2012:

- The Road Safety Remuneration Tribunal will have the power to set pay and conditions for truck drivers to reduce the economic pressures on truck drivers to meet unfair and unrealistic deadlines which risk their own lives and the lives of others
- Minister for Workplace Relations Bill Shorten said around 250 people are killed and more than 1,000 suffer serious injuries each year in accidents involving trucks
- We know some truck drivers are pressured to cut corners on safety and maintenance and feel they need to take illicit substances to keep them awake just to get to destinations on time.[83] (emphasis added)

During its four years of operation, the RSRT issued only one order regarding minimum payments in December 2015. This Payments Order applied exclusively to owner-drivers within the RTI, without any impact upon employee-drivers. As a result, the Payments Order had a discriminatory impact upon non-unionised enterprises, pushing out small, mum-and-dad businesses, with devastating and life-destroying effect.

A 2016 inquiry by the Australian Small Business and Family Enterprise Ombudsman found that most owner-truck drivers experienced a range of negative consequences as a result of the Payments Order, which included financial hardship from loss of work, reduced equipment values, and widespread uncertainty in the sector.[84] The order was also found to have caused significant stress on the families, relationships and mental health of road transport workers.[85]

The inquiry further concluded that:[86]

- The Payments Order resulted in owner drivers in the long distance and supermarket distribution sectors being made uncompetitive
- Some owner drivers found they were unable to cope with further hardship caused by the Payments Order and took their own lives (emphasis added)
- The Payments Order was discriminatory in its application to owner drivers and small family businesses and this discrimination was not based on a sound and sufficient evidence base
- The Tribunal's processes were adversarial and overly legalistic with an absence of flexibility extended to owner drivers to accommodate their lack of legal representation and limited understanding of tribunal and court-like processes
- Owner drivers who appeared before the Tribunal were not treated with due respect and felt that the Tribunal lacked independence and impartiality
- Tribunals are suited to resolving disputes; they are not appropriate vehicles for developing complex industry-wide regulation that intervenes in market forces.

The RSRT was abolished in 2016, as a result of its disastrous impact upon owner-drivers. On any measure, it was a catastrophic policy failure.

Yet the Bill would see more expansive powers being conferred on the RSRT 2.0 than the original RSRT – MSOs in relation to road transport contractors may extend not only to pay and allowances, but also to other employee-like conditions such as leave, compulsory insurance and agreement termination.

83 Minister for Employment and Workplace Relations, media release, National road safety tribunal to improve safety for Australian road users, 30 June 2012.
84 Australian Small Business and Family Enterprise Ombudsman, Inquiry into the effect of the Road Safety Remuneration Tribunal's Payments Order on Australian small businesses, 2016.
85 Australian Small Business and Family Enterprise Ombudsman, Inquiry into the effect of the Road Safety Remuneration Tribunal's Payments Order on Australian small businesses, 2016.
86 Australian Small Business and Family Enterprise Ombudsman, Inquiry into the effect of the Road Safety Remuneration Tribunal's Payments Order on Australian small businesses, 2016, page 4.

Furthermore, whilst the RSRT was required to consult on and publish a draft order,[87] the Bill would bolster the TWU's ability to influence orders through the advisory function of RTAG, without any apparent need to take into account to the interests of non-unionised independent contractors.

As such, it is inevitable that RSRT 2.0 will have a similar, if not more severe, impact upon the 40,000 plus owner-drivers operating within the RTI than that which was inflicted by the first RSRT.

87 RSR Act, ss 22-23.

‘COLLECTIVE AGREEMENTS’ – NEITHER COLLECTIVE, NOR AGREED

On top of the new MSO system, the Bill also allows ‘collective agreements’ between digital platforms and their employee-like workers (or road transport businesses and road transport contractors).

These ‘agreements’ can also apply to other businesses simply by stating that they apply to them, regardless of whether those other businesses have agreed. It is not a ‘collective agreement’ but a ‘collective imposition’.

These are not genuinely ‘collective’, as the workers have no right to vote on them and no ability to object to their terms. Nor are they genuine ‘agreements’, as their scope can cover multiple businesses in a supply chain, who are not required to agree to them (or even be aware of them).

‘Collective agreements’ are not consent-based. They allow one union and one major company to make an agreement that then applies to an entire supply chain. There is no consent needed from anyone else covered by the agreement and those subcontractors automatically covered have no avenue to object to its content. They hardly even have a right to notice of the agreement – the Bill simply requires the negotiating parties to make ‘reasonable efforts’ to give notice, which could be as simple as a line in an email.

The FWC has no discretion to reject a collective agreement if it meets the scope and documentation requirements in the Bill. It will act as a ‘rubber stamp’.

Collective ‘agreements’ – without agreement, or even knowledge

The Bill includes a weak requirement to provide notice to affected businesses – each negotiating entity must ‘make reasonable efforts to give notice’ to ‘each other regulated road transport contractor for the proposed collective agreement’. The Fair Work Commission must approve an agreement provided it relates to relevant parties and only contains permitted content as set out above.

There is no redress available for businesses who are ‘roped in’ to the agreement and/or do not receive notice of it.

COMPETITION LAWS ARE SUSPENDED – MARKET RIGGING AND PRICE FIXING BECOMES LEGALISED

The Bill states that once an MSO is made, or a 'collective agreement' is rubber stamped by the FWC, it is automatically exempt from a range of anti-competitive conduct prohibitions in the *Competition and Consumer Act 2010*.[88]

The Bill specifically exempts collective agreements (which can be imposed on entire supply chains) from competition laws relating to price fixing, and other anti-competitive abuses of market power. By doing so the Bill permits unions and big head contractors to dominate markets by applying conditions and prices to entire supply chains that would push small (especially owner driver and labour hire) operators out of the market.

Competition laws exist for a very good reason – to protect consumers, workers and small businesses from abuses of power by big business and big unions. Whenever anti-competitive conduct is allowed, it is consumers and small businesses who are the losers, through higher prices, poorer service and higher cost-of-living.

Over-riding the *Competition and Consumer Act 2010*

The Bill provides:

> For the purposes of s 51(1) CCA, anything done in accordance with a minimum standards order, minimum standards guidelines or a collective agreement is specifically authorised by this Act.

The Bill explicitly gives authority to big unions and dominant corporates to engage in what would otherwise be anti-competitive conduct. This occurs in two contexts:

- It expressly excludes certain provisions of the *Competition and Consumer Act 2010* (CCA) relating to restrictive trade practices, including corporate conduct that would substantially lessen competition, and
- It expressly allows for a collective agreement to include terms and conditions that apply to subcontracted road transport contractors, with minimal notice required.

These provisions give effect to the longstanding ambition of certain unions to rig prices in their industry, increasing their power. This ambition is made explicit in TWU enterprise agreements, such as the following with one of the largest corporate players, Toll:[89]

> (h) Toll will engage constructively with the Union on removing any potential barriers that may exist within competition laws, that may prevent the parties from being able to establish obligations and guidelines that provide for safe and fair conditions for Owner-Drivers and Outside Hire operators.

Such arrangements will be used to push smaller players in various industries – such as self-employed tradies in the construction industry and owner drivers in the road transport industry – out of business, while also inflating prices leading to higher costs for homes, renovations, offices, groceries, fuel and other consumables.

The consequences – what is currently illegal becomes legal

Taking account of the above exemptions, the Bill means that the following conduct (amongst others) would be legalised:

- A corporation entering agreements or engaging in concerted practices that substantially lessen competition (s 45)
- A union engaging in a secondary boycott on the basis that two or more of its members or employees engage in conduct in concert with each other (s 45DC)

88 Bill, s 536JT.
89 Toll - TWU Enterprise Agreement 2021-2023 clause 45(h).

- A corporation with substantial market power engaging in conduct that has the purpose or likely effect of substantially lessening competition (s 46)
- A corporation engaging in exclusive dealing, i.e. using corporate transactions to determine who or where goods or services should be sold and thereby (or along with other conduct) substantially lessening competition (s 47)
- Resale price maintenance (s 48), and
- A corporation directly or indirectly acquiring shares or assets that would or be likely to substantially lessen competition (s 50).

If not for the Bill, persons engaging in this conduct face penalties of up to $10 million for a body corporate or $500,000 for other persons (s 76 CCA).

Allowing the TWU to rig entire supply chains

The Bill also allows collective agreements to be made unilaterally by a head contractor and union but then applied to any subcontractors.

The Bill provides for 'road transport businesses' and unions, or one or more 'regulated road transport contractors' to make collective agreements.

A collective agreement may cover:

a) the terms and conditions to which regulated road transport contractors covered by the collective agreement perform work under services contracts to which the road transport business is a party;, and
b) how the collective agreement will operate.

The only exception to this broad scope for permitted content is that terms will have no effect

> 'to the extent that it deals with matters that are primarily of a commercial nature that do not affect the terms and conditions of engagement of regulated workers covered by the agreement'.

However, this will be of no use at all to owner-drives. The terms 'of a commercial nature' cannot be separated from the 'terms of engagement' – for owner-drivers and self-employed tradespeople they are the same thing.

Specific provisions of the *Competition and Consumer Act 2010* that will be suspended

Example scenario	Potential competition law contraventions which would be exempted
Multiple transport companies enter into an agreement with the TWU requiring them to pay drivers an hourly rate of more than $50	• The fact that the agreement involves multiple companies that would compete to acquire contractor drivers (not employees) would mean it is likely to constitute price fixing cartel conduct (s45AD(2) CCA) which is a criminal offence. • It is also likely that this would be seen as an agreement that fixes or controls the price at which they supply services in competition with one another, or that substantially lessens price competition for the supply of those services – both of which would also be likely to breach the CCA (s45AD(2) and 45 CCA).

A single but major transport company enters into an agreement with the TWU requiring them to pay drivers an hourly rate of more than $50, which would then apply to the entire supply chain	• Even where the agreement does not involve competing acquirers or suppliers of services, where a transport company with a major position in the market enters into such an agreement or where it would apply to the whole supply chain, this could raise risks of breaching the prohibitions in the CCA on misuse of market power (s46) or agreements which substantially lessen competition (s45), by removing price competition from a material part of the market. • There is a risk that this could amount to what is referred to as a 'hub and spoke cartel' by requiring all contractors in the supply chain to comply with to it (s45AD(2)).
A major supermarket chain agrees with the TWU that it will not engage owner drivers where the hourly rate provided to owner drivers is less than $50 an hour for the owner drivers' services	• This could result in a substantial lessening of competition in contravention of section 45 of the CCA, by having the effect of removing price competition. • If more than one supermarket were party to the same agreement, this could result in price fixing cartel conduct (s45AD(2) CCA).
A major transport company enters into an agreement with the TWU to only engage owner drivers who have, for example, a particular safety accreditation (to be acquired from the TWU) or who are members of a particular superannuation fund.	• This could amount to third line forcing (s47) or otherwise an agreement that has the purpose or effect of substantially lessening competition. • This would depend on the impact on the transport market and the impact on the market for superannuation coverage.

NEW UNION POWERS – UNION DELEGATES

Union delegates in every workplace – even non-union ones

The Bill will enshrine in the Act a new workplace right to be a 'workplace delegate', and to impose on every business compulsory 'delegates rights terms'.[90]

A workplace delegate is a person appointed or elected in accordance with the rules of a union, to be a delegate or representative for members of the organisation who work in a particular enterprise.[91]

The Bill provides that a workplace delegate is entitled to represent the industrial interests of union members and any other persons eligible to be future members. [92] The Bill explicitly extends these representational rights to disputes with the employer, enshrining workplace conflict and allowing union representatives to abruptly absent themselves from work to attend to their representative functions in their capacity as a delegate.

Any disciplinary measures taken against union delegates will need to be framed extremely carefully, to avoid the risk of the delegate claiming they were 'discriminated' against.

One self-appointed 'delegate' gets to 'represent' every worker

The Bill will allow a single union member in a workplace to require both direct employers and 'host' employers to negotiate with them as if they represented all other workers who are *eligible to be* (even if not actually) members of their union, and for those employers to provide them with access to all other staff.

This is nonsensical since the delegate does not actually represent any of the workers who choose not to be union members (which in most cases would be the majority of eligible workers).

Rights to 'reasonable communication'– during work time

Workplace delegates will have a new right to 'reasonable communication' with union members and other persons eligible to be union members, in relation to their industrial interests.[93]

This entitlement appears to directly target — and overturn — the High Court's decision in *Board of Bendigo Regional Institute of Technical and Further Education and Advancement v Barclay*.[94]

The right to 'reasonable communication' will provide immunity from discipline for misconduct (including bullying and harassment) undertaken in the exercise of that right in the course of representative functions. Employers will be less able stamp out unsafe workplace behaviours and thereby discharging their duties to protect other workers under discrimination and work health and safety laws.

Overturning the *Barclay* High Court decision

Mr Barclay was an Australian Education Union (AEU) official and Bendigo TAFE employee who was subject to disciplinary action for widely distributing an email containing vague and inappropriate allegations of fraud against staff to fellow AEU staff members.

The High Court recognised the right of employers to take such action against union delegates and employees engaging in misconduct, even though that misconduct was in the course of industrial activity.

90 Bill, s 149E and 205A.
91 Bill, s 350C(1).
92 Bill, s 350C(2).
93 Bill, s 350C(3).
94 [2012] HCA 32.

Right to access to the employer's facilities – during work time

The Bill provides that workplace delegates are entitled to 'reasonable access to the workplace and workplace facilities, for the purpose of representing the industrial interests of members'. Other than 'reasonableness',[95] no other limitation is placed to this entitlement.

'Access to facilities' will mean access by delegates to tightly controlled areas (such as factories and control rooms) that may have serious implications for safety and security.

Right to paid union training leave – paid for by the business, not by the union

In addition, the Bill provides workplace delegates with a new paid leave entitlement for when the delegate undertakes union training to assist with representing industrial interests.[96]

The Bill therefore produces an absurd result whereby employers will be required to pay for union activities, both directly (by paying leave entitlements) and indirectly (by shouldering costs incurred by the delegate's absenteeism).

Compulsory 'delegates rights' terms in every award and agreement

The Bill requires that every award and enterprise agreement – even non-union agreements – must include a compulsory 'delegates rights term'.[97]

Even if an agreement does not cover any union members, it must contain the term. Similarly, even if there is no enterprise agreement in existence (for example, in a small business), compliance with the term of the award is still required.

95 Bill, s 350C(3)(b)(i).
96 Bill, s 350C(3)(b)(iii).
97 Bill, s 149E and 205A.

NEW UNION POWERS – RIGHT OF ENTRY

No notice required for entry to businesses

The Bill amends the right of entry regime under the Act to allow union officials who have a right of entry permit to enter a workplace to investigate suspected wage underpayments, without providing the currently required 24-hour notice.[98]

The Bill expands the circumstances in which the FWC can issue an exemption certificate to not require advance notice. Under this change, exemptions will be 'rubber stamped' by the FWC.

The Bill requires that the FWC must issue an exemption certificate where the organisation has applied for the certificate, if:

> '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 intended to represent and who performs work on the premises'.[99]

No reasons required for entry to businesses

The Bill dramatically modifies the right of entry safeguards that are currently in the Act. These provide that unions must give 24 hours' notice of entry to investigate a 'suspected breach' of a workplace law, and that the notice must also 'specify the particulars of the suspected contravention'.[100]

Under the Bill, neither of these safeguards will apply. The 'exemption certificate' process will be a 'rubber stamp', as the union will not be required to provide the 'particulars of the suspected contravention' to the FWC. All it needs to do is assert to the FWC that the supposed 'contravention' relates to an 'alleged underpayment'. The FWC need not be satisfied that the suspicions are reasonably or genuinely held.

Unions to have more powers than police

Under the Bill, unions will have more powers than police to enter premises to conduct search and seizures.

Police can only enter premises on suspicion an offence has been committed, and can only access certain documents with a warrant. They can only access those documents specified in the warrant. They cannot go 'fishing'.

Police officers are also subject to extensive training and professional standards to prevent abuses of power. They are also subject to a more rigorous chain of command and disciplinary processes, which also limits the potential for abuses.

No safeguards and nothing to prevent abuse

Whilst the government has claimed that the existing restrictions on access to non-union members' details will be retained, this will not be an effective safeguard in practice. By being able to turn up without notice, unions will have broad powers to rifle through company and worker records. There will be nothing to stop them 'accidentally' stumbling upon non-member information.

The new entry rights will be vulnerable to abuse, further entrenching workplace conflict and disruption by unions. It is unclear how such changes benefit the workers that the unions claim to represent.

98 Bill, s 591(1)(b)(ii)
99 Bill, s 519(1)(b)(ii).
100 FW Act, 518(2).

APPENDIX A: OVERTURNING HIGH COURT DECISIONS – ATTACKING THE JUDICIAL SYSTEM

A concerning feature of the Bill is that in several measures it is designed to overturn High Court decisions on employment and industrial law.

The High Court of Australia is comprised of the finest legal minds in the country. The Court's landmark employment and industrial decisions in recent years have comprehensively addressed several key legal concepts in the workplace relations framework.

Several elements of the Bill are at odds with the established legal framework and run the risk of creating significant uncertainty and imbalance.

It is fundamentally inconsistent with the role of an 'umpire' for any government (or any union) to simply legislate to overturn its decisions when they do not go their way. Business, government and unions all speak of the need for a 'balanced' workplace relations system. But 'balance' involves all side to accept the decisions of umpires, whether or they like them or not. It is inherently unbalanced if one side simply reverts to legislation to overturn an umpire's decision if they do not like the outcome.

1. Casual employment – the *Rossato* decision

The law on casual employment has undertaken significant change in recent years. The traditional award definition of a casual employee is 'one engaged and paid as such'. While being understood an applied in practice for many decades, the notion was questioned by Federal Court decisions concerning casuals who were engaged as such but subsequently provided with regular working rosters.

Both the legislature and the High Court resolved these uncertainties in 2021. As a result, the so-called 'permanent casual' loophole was closed.

In the 2021 case of *Rossato*, the High Court, in a 7-0 unanimous decision, rejected union arguments on how to determine whether an employee is a casual, stating that those arguments do not accord with elementary notions of freedom of contract.

The dispute arose when Robert Rossato, a labour hire worker engaged under his contract as a 'casual', was rostered to work on a 7-on/7-off roster which was set a year in advance. The union had argued that an employee's status should be assessed not by reference to the terms of the contract of employment, but by looking at the subsequent conduct of the parties and the 'totality' of the relationship in practice.

In a controversial 2020 decision, the Federal Court accepted this approach and found that Rossato was a permanent employee under the applicable enterprise agreement on the basis that his actual rostered hours and pattern of work demonstrated a 'firm advance commitment' to ongoing work. As well as giving rise to an entitlement to backpay in respect of leave entitlements as a permanent employee, the Federal Court also found that Rossato was entitled to 'double-dip' and retain the casual loading he had received to compensate for the loss of his leave entitlements.

The Federal Court's decision attracted significant criticism, given the uncertainty, costs and unfairness to which it gave rise.

In early 2021, the then government introduced a new definition of 'casual employee' into section 15A of the Fair Work Act to address this problem. The changes reduced the uncertainty regarding the status of long-term casual employees and their entitlements to paid leave on top of casual loadings and provided balance through enhanced casual conversion rights after 12 months. The section provides that whether an employee is a 'casual' is to be determined by reference to a defined list of factors centring around the absence of a firm advance commitment to continuing and indefinite work according to an agreed pattern of work in the offer of employment. The definition expressly directs attention to the nature of the offer of employment and not subsequent conduct of the parties.

Significantly, this amendment provided universal casual conversion rights to all casual employees that were more generous than typical award terms.

Shortly thereafter, the High Court clarified the common law meaning of a casual employee in a way that is consistent with the newly enacted statutory definition. It said the focus on *actual hours* and *patterns of work* was wrong and involved 'obscurantism'. The Court instead adhered to the fundamental principle that legal work relationships should be characterised by enforceable contractual promises, rather than imprecise notions such as *expectations, practices* or *hopes*. The Court's decision provided a welcome degree of clarity.

In contrast, the bill introduces a tortuous and complex definition of 'casual' that is intended to overturn the High Court's clearer and more workable definition. The bill's definition runs to almost three pages and includes no less than 14 separate factors that an employer (even the smallest family businesses) will need to apply. If they do not apply the definition correctly then they are breaking the law. This example shows how overturning High Court decisions is not only bad policy, it also leads to infinitely worse legislation.

2. Independent Contractors - *Jamsek* and *Personnel Contracting*

In the 2022 decisions of *Jamsek* and *Personnel Contracting*, the High Court again affirmed the primacy of the terms of the contract, in preference to other, less certain, factors.

These decisions concerned workers engaged as independent contractors. In *Personnel Contracting*, a worker was engaged under an agreement with a labour hire firm to be supplied on an as-needs basis to clients of the firm to work on their construction sites; and in *Jamsek*, two truck drivers were engaged variously as independent contractors or as partners of various successor companies. The issue was whether those workers were in fact 'employees'.

In determining this issue, lower courts initially devoted significant attention to the manner in which the parties actually conducted themselves, on the basis that a proper characterisation of their relationship required consideration of how their contract played out in practice.

The High Court rejected this approach, and chose to follow its reasoning in Rossato, ruling that there was no reason 'why the approach taken in Rossato should not be applied where the issue is whether the relationship in question is one of employment'. The Court ruled that the key determinant of the character of a work relationship as one of 'employer-employee' or 'principal-contractor' is to be found in the terms of the contract (whether written, oral or a combination thereof) between the parties.

According to the High Court, there was no reason why legal rights in a contract – which, fundamentally, was the only matter of any legal significance in the circumstances – should not determine the relationship between the parties (and every reason why they should). The Court said its task was to promote certainty with respect to a relationship of such fundamental importance, which its decisions ensured.

The bill is brazen in its intent to overturn the effect of these decisions. Once again, the result will be more complex and uncertain legal framework, particularly for those contractors who are at risk of being automatically 're-classified' as employees, whether or not they want to be.

3. Union delegates – the *Barclay* decision

In the 2012 case of *Bendigo TAFE v Barclay*, a senior manager at a TAFE college who was also a union official, engaged in 'industrial activity' by sending out an email to union members employed at the college. The email contained vague and unparticularised allegations of corrupt behaviour by management at the college. Bendigo TAFE consequently initiated disciplinary action against the employee for his conduct, which breached his employment obligations (including the relevant code of conduct).

The CEO's evidence that the action was only taken because of those breaches was accepted at first instance. However, a Full Federal Court (by majority) nonetheless held that the fact that the policy

breaches amounted to ‘industrial activity’ meant this protected attribute *subconsciously* infected the CEO’s decision. The Court said that the ‘real reason’ for adverse *action* ‘may be conscious or unconscious, and where unconscious or not appreciated or understood, adverse action will not be excused simply because its perpetrator held a benevolent intent’. The Court also commented that where adverse action is taken in response to an employee’s industrial activity, then it becomes ‘impossible for the employer to dissociate or divorce from that conduct its reason for taking the adverse action’.

The High Court unanimously overturned the Federal Court decision. The High Court said that the central question – ‘Why was the adverse action taken?’ – is one of fact. The task is to determine the actual reason(s) motivating the decision-maker, and the Court is not required to determine whether some proscribed reason must have subconsciously influenced the decision-maker. If the decision-maker presents reliable testimony that they took the action solely for non-proscribed reasons, this is capable of discharging the employer’s burden of proof. As the CEO’s testimony was unchallenged, Bendigo TAFE discharged the burden cast upon it to show that the reason for the adverse action was not a prohibited reason (and that the employee’s union position and activities were not operative factors in the decision to take that action).

In doing so, the High Court unanimously confirmed that disciplinary measures may be taken against union delegates who engage in misconduct while performing their duties as a union delegate. The High Court recognised the fundamental right of employers to take such action against employees who engage in misconduct, without discrimination in favour of union delegates and against everyone else.

The High Court’s decision provided welcome clarity to the operation of the general protections jurisdiction generally.

The *Barclay* test provides critical protection against anti-social or unacceptable behaviour being given legal protection and has significance well beyond the context of the case.

Overturning *Barclay* will provide union delegates with a legal shield unfairly them from liability for wrongful action. The proposal to introduce greater protection for employee conduct occurring in the context of industrial activity would effectively be a ‘green light’ to engage in objectively unreasonable conduct that otherwise breaches accepted standards of conduct in the workplace (including conduct that amounts to bullying or sexual harassment). For example, an employee making racially abusive or sexually harassing comments on a picket line or in industrial emails. Such a proposal runs directly contrary to the Government’s other reforms which seek to stamp out such behaviour.