

From: Alana Rafter <Alana.Rafter@ablawyers.com.au>
Sent: Monday, 13 April 2026 4:20 PM
To: Chambers - Hatcher J <Chambers.Hatcher.J@fwc.gov.au>
Cc: Nigel Ward <Nigel.Ward@ablawyers.com.au>
Subject: MS2026/1 - TWU & ARTIO application for a road transport contractual chain order – fuel cost recovery | Re: Documents handed up by Mr Ward

Dear Associate,

I **attach** a copy of the Explanatory Memorandum referred to by Mr Ward, page 452 contains the paragraph referred to during closing submissions.

Additionally, I **attach** a copy of the proposal document with marking “A” that was provided to the Bench during Mr Ward’s closing submission.

Yours faithfully,

Alana

Alana Rafter

Senior Associate

Australian Business Lawyers & Advisors

8 Chifley Square, Sydney NSW 2000

Dir: [02 9466 4563](tel:0294664563) | Mob: [0482181223](tel:0482181223)

Tel: [1300 565 846](tel:1300565846) | Web: ablawyers.com.au | [in: LinkedIn](#)



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2022-2023

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**FAIR WORK LEGISLATION AMENDMENT
(CLOSING LOOPHOLES) BILL 2023**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment and Workplace Relations,
the Hon Tony Burke MP)

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FAIR WORK LEGISLATION AMENDMENT (CLOSING LOOPHOLES) BILL 2023

OUTLINE

The Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Bill) would amend the *Fair Work Act 2009* (FW Act) and related legislation to improve the workplace relations framework by:

- Improving job security by replacing the existing definition of ‘casual employee’ with a fair and objective definition and by introducing a new employee choice pathway for eligible employees to change to permanent employment if they wish to do so.
- Addressing anomalous consequences of the small business redundancy exemption in insolvency contexts by providing an exception to its operation when a larger business downsizes to become a smaller business employer due to insolvency.
- Making targeted amendments to the bargaining framework by:
 - Enabling multiple franchisees to access the single-enterprise stream;
 - Allowing supported bargaining and single interest employer agreements to be replaced by single-enterprise agreements at any time if certain conditions are met;
 - Authorising the Fair Work Commission (FWC) to make and vary enterprise agreement model terms for flexibility, consultation and dispute resolution in place of the existing provisions according to which these terms are made by regulation.
- Protecting bargained wages in enterprise agreements from being undercut by the use of labour hire workers who are paid less than those minimum rates.
- Supporting workplace delegates by providing a framework for delegates’ rights and including protections for workplace delegates when seeking to exercise those rights.
- Establishing a new protected attribute in the FW Act to improve workplace protections against discrimination for employees who have been, or continue to be, subjected to family and domestic violence.
- Changing the defence to misrepresenting employment as an independent contractor arrangement, known as ‘sham contracting’ from a test of ‘recklessness’ to one of ‘reasonableness’.
- Enabling a registered organisation to obtain an exemption certificate from the FWC to waive the 24 hours’ notice requirement for entry if they reasonably suspect a member of their organisation has been or is being underpaid.
- Empowering the FWC to take action in relation to the future issue of such exemption certificates if those rights are misused (for example, by imposing conditions, or banning their issue for a specified period).

- Increasing maximum penalties for underpayments by amending the civil penalties and serious civil contravention frameworks, and adjusting the threshold for what will constitute a serious contravention.
- Clarifying that Fair Work Ombudsman (FWO) compliance notices can require an employer to calculate the amount of an underpayment that is owed to an employee, and that a court can order the recipient of the notice to comply with its terms.
- Repealing amendments made by the *Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Act 2020*, relating to the withdrawal of parts of amalgamated organisations (de-merger).
- Introducing a new criminal offence for wage theft, which applies to intentional conduct.
- Inserting into the FW Act an interpretive principle for determining the ordinary meanings of ‘employee’ and ‘employer’ for the purposes of the FW Act. This would enhance fairness by requiring consideration of the real substance, practical reality and true nature of the relationship by reference to the totality of the relationship between the parties.
- Allowing the FWC to set fair minimum standards for ‘employee-like’ workers, including in the gig economy.
- Allowing the FWC to set fair minimum standards to ensure the Road Transport Industry is safe, sustainable and viable.
- Allowing the FWC to deal with disputes about unfair terms in services contracts to which an independent contractor is a party.
- Repealing a sunsetted clause regarding applications to vary modern awards if already being dealt with in a four yearly review.
- Extending the functions of the Asbestos Safety and Eradication Agency to address silica related diseases.
- Introducing a presumption according to which first responders covered by the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) who sustain post-traumatic stress disorder (PTSD) will not have to prove their employment significantly contributed to their PTSD for the purpose of their workers’ compensation claim.
- Introducing a new offence of industrial manslaughter in the *Work Health and Safety Act 2011*, reflecting recommendations 23b of the *Review of the Model Work Health and Safety Laws – Final Report* (Boland Review) and 13 of the *They Never Came Home Report* (Senate Inquiry), and significantly increasing the penalties for the existing Category 1 offence.
- Aligning the WHS Act offence framework with recent changes to the Model WHS Law by indexing the penalties for existing offences to the Consumer Price Index.

FINANCIAL IMPACT STATEMENT

The measures in the Bill have a financial impact of \$18.9 million over four years to 2026–27. The Government has committed \$104.7 million over four years to 2026–27, to support implementation of measures in the Bill. Revenues of \$85.8 million over four years to 2026-27 are expected to be returned through measures in the Bill, including penalties.

REGULATION IMPACT STATEMENT

The impact statements for the following amendments are attached at the end of this explanatory memorandum:

- Standing up for casual workers (OBPR22-02412);
- Closing the labour hire loophole (OBPR22-02409);
- Minimum standards and increased access to dispute resolution for independent contractors (OBPR22-02873).

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

1. The Fair Work Legislation Amendment (Closing Loopholes) Bill (Bill) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

2. The Bill would amend the *Fair Work Act 2009* (FW Act) and related legislation to close loopholes to protect Australian workers and strengthen the work health and safety (WHS) framework.

Casual employment

3. Part 1 of Schedule 1 to the Bill would amend existing section 15A of the FW Act to implement an objective definition of ‘casual employee’ to determine when an employee can be classified as a casual employee.
4. The new definition would be characterised by the presence or absence of a firm advance commitment to continuing and indefinite work, to be assessed against various factors that indicate the real substance, practical reality and true nature of the employment relationship. Assessment of the true nature of the employment relationship reflects the common law approach to defining casual employment before the High Court of Australia’s decision in *WorkPac Pty Ltd v Rossato* [2021] HCA 23 (*Rossato*).
5. The factors would include whether there is a mutual understanding or expectation between the employer and employee, whether the employee can elect to accept or reject work, the future availability of continuing work, whether there are other employees performing the same work who are part-time or full-time employees, or whether there is a regular pattern of work.
6. The Bill would also amend the National Employment Standards (NES) at Part 2-2 of the FW Act to provide casual employees with two pathways to change their employment status – by exercising a choice via a new notification procedure, or through the existing casual conversion procedure. The amendments would also establish a robust new framework for dealing with disputes about employment status.
7. The Bill would respond to findings of the Review of the *Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Act 2021* (Cth) (Statutory Review) by:
 - strengthening the existing dispute resolution framework in the FW Act, including by allowing the Fair Work Commission (FWC) to determine, by mandatory arbitration, whether an employer had reasonable grounds to refuse to make an offer or decline a request for casual conversion;
 - introducing new civil remedy provisions prohibiting employers from misrepresenting employment as casual employment, making misrepresentations to

engage an employee as a casual employee, and dismissing an employee to re-engage them as a casual employee in certain circumstances; and

- requiring employers to provide the Casual Employment Information Statement to casual employees at the start of their employment and at 12 months.
8. Casual employment forms a significant proportion of the Australian labour market, and suits the needs of many employees and employers.
 9. Nonetheless, there are identified issues with casual employment. The Senate Committee on Job Security Report noted that the common characteristics of casual employment support a proposition that casual workers are less secure¹ and although casual employees are generally entitled to receive a loading to compensate for a lack of paid leave entitlements, casual employees generally earn less on average than permanent employees, both in terms of weekly and hourly earnings.²
 10. The amendments made by this Part of the Bill would provide casual workers with a greater ability to make a choice about their employment status, by providing a pathway to move to permanent employment if they wish. Under the amendments, an employee would have the opportunity to move from casual employment where they are in fact working like a permanent employee. The choice to change status would rest with the employee; no employee would be forced to change employment status. Rather, the amendments would strengthen the pathway to permanent work for employees who choose it.

Small business redundancy exemption

11. Part 2 of Schedule 1 would address the anomalous consequences of the small business redundancy exemption in insolvency contexts by providing an exception to its operation when a larger business downsizes to become a smaller business employer due to insolvency.

Enabling multiple franchisees to access the single-enterprise stream

12. Part 3 of Schedule 1 would allow multiple franchisees of the same franchisor or related bodies corporate of the same franchisor or any combination to make a single-enterprise agreement, while retaining the ability to make a multiple-enterprise agreement.

Transitioning from multi-enterprise agreements

13. Part 4 of Schedule 1 would introduce provisions facilitating the transition from a single interest employer agreement or supported bargaining agreement to a single-enterprise agreement.
14. Part 4 would provide that where a single-enterprise agreement is made and an existing single interest employer agreement or supported bargaining agreement (whether or not nominally expired) applies to at least one of the employees covered by the single-enterprise agreement, the better off overall test (BOOT) would be modified. Any

¹ Senate Committee on Job Security Report, page 79,
https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024780/toc_pdf/Thejobinsecurityreport.pdf;fileType=application%2Fpdf.

² ABS, Characteristics of Employment, August 2022.

employee to whom a single interest employer agreement or supported bargaining agreement applies must be better off under the single-enterprise agreement than the supported bargaining agreement or single interest employer agreement (as the case may be) that applies at test time.

Model terms

15. Part 5 of Schedule 1 would change the process for determining the model flexibility, consultation and dispute resolution terms for enterprise agreements and the model term for settling disputes arising under a copied State instrument. Currently, these model terms are prescribed in the *Fair Work Regulations 2009* (FW Regulations). The proposed amendments would replace the existing requirements with requirements that the FWC, as Australia's expert and independent workplace relations tribunal, determine the model terms.

Closing the labour hire loophole

16. Part 6 of Schedule 1 to the Bill would insert new Part 2-7A into the FW Act, which would allow employees and organisations entitled to represent their industrial interests to apply to the FWC for a regulated labour hire arrangement order. The FWC would not be required to make the order if satisfied that it was not fair and reasonable, having regard to submissions from affected businesses and employees.
17. If the FWC made such an order, labour hire providers would generally be required to pay their employees no less than what they would be entitled to be paid under the host business' enterprise agreement (or other employment instrument) if the employee were directly employed by the host. Host businesses would also be required to provide certain information to labour hire providers on request to assist them in meeting their payment obligations.
18. Certain exemptions would be built into the framework, including where a labour hire employee is engaged for a short-term period or where a training arrangement applies to the employee. The provisions also will not apply where the host is a small business employer as defined in the FW Act.
19. The provisions would be supported by an anti-avoidance framework to prevent businesses from adopting certain practices with the intention of avoiding obligations under new Part 2-7A.
20. The FWC would be able to resolve disputes about the operation of Part 2-7A, including by mandatory arbitration, and may determine an alternative protected rate of pay for a labour hire employee where it would be unreasonable for an employer to pay the employee the protected rate under Part 2-7A.

Workplace delegates' rights

21. Part 7 of Schedule 1 would insert statutory workplace rights for workplace delegates to support their role in representing workers and a general protection for workplace delegates to facilitate the exercise of these rights. It would also provide for modern awards and enterprise agreements to detail the specific requirements for various industries, occupations and workplaces.

Strengthening protections against discrimination

22. Part 8 of Schedule 1 would amend the FW Act to protect employees who have been, or continue to be, subjected to family and domestic violence (FDV) from discrimination within the workplace by making it a protected attribute in the FW Act. The amendments would prohibit a national system employer from taking adverse action against an employee or prospective employee on that basis. The amendments would also prohibit employers who are not covered by Part 3-1 of the FW Act from terminating an employee's employment on the basis of subjection to FDV.
23. Further, the amendments would prohibit modern awards and enterprise agreements from including terms that discriminate against employees because of, or for reasons including, their subjection to FDV. The amendments would also require the FWC, when performing functions or exercising its powers under the FW Act in relation to a matter, to take into account the need to respect and value the diversity of the workforce by helping to prevent and eliminate discrimination on the basis of subjection to FDV.

Sham arrangements

24. Part 9 of Schedule 1 would change the defence to misrepresenting employment as an independent contracting arrangement, known as 'sham contracting', in subsection 357(2) of the FW Act from a test of 'recklessness' to one of 'reasonableness'. The new test would provide that an employer would not contravene the prohibition on sham contracting in subsection 357(1) of the FW Act if the employer reasonably believed that the contract was a contract for services. The burden of proof would rest with the party who made the representation, consistently with the existing defence.

Exemption certificates for suspected underpayment

25. Part 10 of Schedule 1 would enable an organisation to obtain an exemption certificate from the FWC to waive the minimum 24 hours' notice requirement for entry if they reasonably suspect a member of their organisation has been or is being underpaid. It would also protect permit holders who are exercising rights in accordance with Part 3-4 from improper conduct by others and empower the FWC to impose conditions on a permit, as an alternative to revoking or suspending an entry permit in the circumstances set out in section 510 of the FW Act.

Penalties for civil remedy provisions

26. Part 11 of Schedule 1 would increase the maximum civil pecuniary penalties that apply to contraventions (including serious contraventions) of wage exploitation-related provisions by five times (and 10 times for non-compliance with a compliance notice). It would also enable the maximum penalty for a contravention to be determined by reference to three times the value of the underpayment (if able to be determined) in certain circumstances. It would also amend the scheme for 'serious contraventions' in section 557A so that it applies to knowing and reckless contraventions of the relevant provisions, rather than to knowing and systematic contraventions.

Compliance notice measures

27. Part 12 of Schedule 1 would clarify that a compliance notice issued to a person may require the person to calculate and pay the amount of any underpayment; and a relevant court may make an order requiring compliance with a notice (other than an infringement notice) issued by a Fair Work Inspector or the FWO.

Withdrawal from amalgamations

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

Wage theft

29. Part 14 of Schedule 1 would introduce a new criminal offence for wage theft (including ‘related offence provisions’ that deal with ancillary liability), which applies to intentional conduct. It would provide for ‘safe harbour’ by way of compliance with a voluntary small business wage compliance code or a cooperation agreement if the relevant requirements are met. It would also require the FWO to publish a compliance and enforcement policy, including guidelines relating to the circumstances in which the FWO will or will not accept or consider undertakings.
30. It would enable the Commonwealth Crown (but not other Australian Governments) to be liable to be prosecuted for the new criminal offence for wage theft or a ‘related offence provision’. It would also clarify that the Crown in each of its capacities (that is, all Australian Governments) and to the extent the Commonwealth’s legislative power permits, is liable to be the subject of proceedings for a contravention of a civil remedy provision (this reflects the status quo.) It would also include provisions of a machinery nature setting out how liability may attach in these circumstances.

Definition of employment

31. Part 15 of Schedule 1 would insert a new section 15AA into Part 1-2 of the FW Act. New section 15AA would require that the ordinary meanings of ‘employee’ and ‘employer’ be determined by reference to the real substance, practical reality and true nature of the relationship between the parties. This would require the totality of the relationship between the parties, including not only the terms of the contract governing the relationship but also the manner of performance of the contract, to be considered in characterising a relationship as one of employment or one of principal and contractor.
32. The amendments respond to the High Court’s decisions in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 (*Personnel Contracting*) and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 (*Jamsek*). These decisions require that where the parties have comprehensively committed the terms of their relationship to a written contract the validity of which is not in dispute, the characterisation of that relationship proceeds by reference to the rights and obligations of the parties under the contract. Except in limited circumstances, a wide-ranging review of the parties’ subsequent conduct is inappropriate. Prior to *Personnel Contracting* and *Jamsek*, it was broadly believed that the correct approach was to apply the ‘multi-factorial’ test.

33. The intention of the amendments is to facilitate a return to the ‘multi-factorial’ test previously applied by courts and tribunals in characterising a relationship as one of employment or of principal and contractor.

Provisions relating to regulated workers

34. Part 16 of Schedule 1 would implement amendments to the FW Act and associated legislation to ensure that certain independent contractors are entitled to greater workplace protections than they are currently. The majority of the amendments are targeted at independent contractors who are either:

- employee-like workers performing digital platform work; or
- engaged in the road transport industry.

35. The amendments would:

- provide a framework for the FWC to exercise functions and powers that relate to the road transport industry;
- insert a new jurisdiction enabling the FWC to set minimum standards orders and minimum standards guidelines in relation to employee-like workers performing digital platform work and regulated road transport industry contractors;
- enable digital labour platform operators and road transport businesses to make consent-based collective agreements with registered employee organisations;
- empower the FWC to deal with disputes over an employee-like worker’s unfair deactivation from a digital labour platform, or the unfair termination of a road transport contractor’s services contract by a road transport business;
- enable independent contractors earning below a specified contractor high income threshold to dispute unfair contract terms in the FWC; and
- ensure the *Independent Contractors Act 2006* (IC Act) continues to apply in respect of independent contractors performing work that is remunerated at an amount that exceeds the new contractor high income threshold.

Amendment of the Asbestos Safety and Eradication Agency Act 2013

36. Schedule 2 to the Bill would amend the *Asbestos Safety and Eradication Agency Act 2013* (ASEA Act) to broaden ASEA’s functions which are currently confined to asbestos.
37. The increase in silicosis and other silica-related diseases is deeply concerning and has raised the need for urgent coordinated national action to reduce rates of silica-related diseases and to support affected workers and their families. This Bill would expand the functions of the well-respected Asbestos Safety and Eradication Agency (ASEA) to include coordinating action on silica safety and silica-related diseases. This would include developing, promoting and reporting on a Silica National Strategic Plan which will coordinate and track the progress of jurisdictions against nationally agreed targets. ASEA would be renamed the Asbestos and Silica Safety and Eradication Agency (Agency) to reflect these changes. The renamed Agency’s functions will include

responsibility for coordination, awareness raising, research, reporting and providing advice to the government on silica.

38. Establishing and appropriately resourcing the renamed Agency as a national coordination mechanism for action on silica-related diseases acts on the recommendations of the National Dust Disease Taskforce (NDDT). The NDDT was established in 2019, and in June 2021 submitted a final report to the then Minister for Health and Aged Care recommending a national approach to the prevention, early identification, control and management of silicosis and other occupational dust diseases in Australia. An All of Governments' response to the NDDT's Final Report was published in April 2022.
39. The Bill would expand the membership of the current Asbestos Safety and Eradication Council (ASEC) to include appropriate representation from employee and employer representatives and an expert in asbestos or silica-related matters. ASEC would be renamed the Asbestos and Silica Safety and Eradication Council (Council) to reflect these changes. Eligibility would also be broadened to allow for persons with lived experience to be appointed to the Council.

Amendment of the *Safety, Rehabilitation and Compensation Act 1988*

40. Schedule 3 to the Bill implements presumptive liability provisions for first responders covered by the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) who suffer from PTSD. The proposed amendments are consistent with the recommendation of the Senate Education and Employment References Committee report, *The people behind 000: mental health of our first responders* and reflect epidemiologist Professor Tim Driscoll's advice in his December 2021 review of Safe Work Australia's Deemed Diseases List which recommended that PTSD be listed as a deemed disease for police officers, ambulance officers including paramedics, and firefighters.
41. Schedule 3 would amend the SRC Act to provide a rebuttable presumption that PTSD suffered by specified first responders was contributed to, to a significant degree, by employment. The presumption will apply to employees of the Australian Federal Police, firefighters, ambulance officers (including paramedics), emergency services communications operators and other persons engaged under the Australian Capital Territory's *Emergencies Act 2004*.

Amendment of the *Work Health and Safety Act 2011*

42. Schedule 4 to the Bill would strengthen the offences and penalties framework in the *Work Health and Safety Act 2011* (WHS Act). A new offence of industrial manslaughter would be introduced. This would align Commonwealth WHS laws with the model Act which was recently amended to provide for industrial manslaughter within the model framework. The model Act does not prescribe the exact provisions of the model offence to enable each jurisdiction to implement (or maintain) an offence tailored to the criminal law framework of the jurisdiction. However, the model Act provides for an industrial manslaughter offence via a jurisdictional note and accompanying model penalties for the offence. The offence in this Bill reflects recommendations 23b of the *Review of the Model Work Health and Safety Laws – Final*

Report (Boland Review) and 13 of the *They Never Came Home Report* (Senate Inquiry).

43. The existing Category 1 offence and State and Territory general manslaughter offences may also apply when a worker or other person is killed at a workplace. A specific industrial manslaughter offence responds to community concern that the WHS framework requires stronger penalties for the most egregious breaches of WHS duties that result in workplace fatalities.
44. Schedule 4 would also:
 - repeal and replace provisions dealing with criminal liability for bodies corporate, the Commonwealth, and public authorities. These amendments reflect recent changes to the model Act, with appropriate modifications and additional provisions where necessary;
 - clarify that the Category 1 offence applies to officers of persons conducting a business or undertaking (PCBUs);
 - significantly increase Category 1 penalties; and
 - increase all penalties in the WHS Act by 39.03 per cent (excluding Category 1 – see discussion below) and provide for future indexing (giving effect to recommendation 22 of the Boland Review).

Human rights implications

45. The definition of ‘human rights’ in the *Human Rights (Parliamentary Scrutiny) Act 2011* relates to the core seven United Nations human rights treaties. The Bill engages the following rights:
 - the right to the enjoyment of just and favourable conditions of work under Articles 6 and 7 of the *International Covenant on Economic Social and Cultural Rights* (ICESCR);
 - the right to social security, including social insurance under Article 9 of the ICESCR;
 - the right to protection and assistance for families under Article 10(2) of the ICESCR;
 - the right to the highest attainable standard of physical and mental health under Article 12 of the ICESCR;
 - the right to an effective remedy under Article 2(3) of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 2 of the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) and right to a fair hearing under Article 14(1) of the ICCPR;
 - the right to presumption of innocence and other guarantees in relation to criminal charges under Article 14 and Article 15 of the ICCPR;
 - the right to privacy and reputation under Article 17 of the ICCPR;

- the right to freedom of association, including the right to form and join trade unions under Article 22 of the ICCPR and Article 8 of the ICESCR;
 - the right to equality and non-discrimination under Article 2 of the ICCPR and Article 2 of the ICESCR and Article 26 of the ICCPR;
 - the right of women not to be discriminated against based on gender under Articles 2, 3 and 11 of the CEDAW and Article 26 of the ICCPR; and
 - the rights of parents and children in Articles 3 and 18 of the *Convention on the Rights of the Child* (CRC) and Article 5 of the CEDAW.
46. The content of the right to work, the right to just and favourable conditions of work and the right to freedom of association in the ICESCR and ICCPR can be informed by specific obligations in treaties of the International Labour Organisation (ILO), such as the *Right to Organise and Collective Bargaining Convention 1949* (No. 98) (ILO Convention 98), which protects the right of employees to collectively bargain for terms and conditions of employment, the *Freedom of Association and Protection of the Right to Organise Convention 1948* (No. 87), which provides employer and employee organisations with protection for their organisational autonomy, and the *Occupational Safety and Health Convention 1981* (No. 155), which requires the adoption of a coherent national policy on occupational safety, occupational health and the working environment.
47. The content of the right to equality and non-discrimination in the ICESCR and ICCPR can be informed by specific obligations in the *Discrimination (Employment and Occupation) Convention 1958* (ILO Convention 111) and, when it comes into force for Australia, the *Violence and Harassment Convention 2019* (ILO Convention 190).

Rights to work and rights in work

48. Article 6 of the ICESCR requires the State Parties to the Covenant to recognise the right to work and to take appropriate steps to safeguard this right. The United Nations Committee on Economic, Social and Cultural Rights has stated that the right to work in Article 6(1) encompasses the need to provide the worker with just and favourable conditions of work.
49. The United Nations Committee on Economic Social and Cultural Rights in General Comment 18 has also stated that the right to work includes:
- the right not to be deprived of work unfairly. This definition underlines the fact that respect for the individual and his dignity is expressed through the freedom of the individual regarding the choice to work, while emphasizing the importance of work for personal development as well as for social and economic inclusion.*
50. There can also be no discrimination in access to and maintenance of employment on the grounds enumerated in Article 2(2) of the ICESCR.

51. Article 7 of the ICESCR requires the State Parties to the Covenant to recognise the right of everyone to the enjoyment of just and favourable working conditions.

Casual employment

52. The amendments at Part 1 of Schedule 1 to the Bill would positively engage the right to the enjoyment of just and favourable working conditions by providing for a fair and objective definition of casual employee. The amended definition would require an objective assessment of the absence or presence of a firm advance commitment to continuing and indefinite work, having regard to the real substance, practical reality and true nature of the employment relationship. The amended definition would ensure employees are not able to be misclassified as casual, simply because of the label attached to their contract of employment, and ensure those employees receive the correct entitlements and working conditions, based on the true nature of their employment relationship.
53. This change to how casual employment is defined reflects the findings of the Statutory Review that consideration should be given to whether the definition should focus solely on the terms of the initial offer and acceptance, and ‘not on the basis of any subsequent conduct of either party’ as per existing subsection 15A(4) of the FW Act.
54. The amendments would also prohibit sham arrangements, whereby employers unreasonably misclassify employees as casual, dismiss a permanent employee to engage them as casual or make a misrepresentation to engage an employee as a casual. This ensures that the same protections are afforded in relation to casual employment as are provided in relation to independent contracting by the existing sham contracting provision in the FW Act, and gives effect to a finding of the Statutory Review.
55. These amendments would further promote rights in work by strengthening the dispute resolution framework, ensuring that employers and employees can resolve disputes that could not be resolved at the workplace level in a way that is accessible and informal.
56. The measures would also promote rights to work by making it fairer and easier for the FWC to deal with disputes about employee choice and casual conversion brought by employees. The current framework does not empower the FWC to deal with disputes by mandatory arbitration. Rather, parties must consent to the FWC arbitrating the matter, forcing employees to prosecute their claim in the Federal Circuit and Family Court if their employer does not consent to the arbitration. Under the new framework, employees will be able to access flexible and timely pathways to permanent employment, supporting employee choice about employment status, engaging Article 7 of the ICESCR.
57. The measures are aimed at achieving the legitimate objective for the purposes of international human rights law of promoting full, productive, and freely chosen employment (Article 1 of the ILO Convention 122).

Small business redundancy exemption

58. The amendments to the FW Act in Part 2 of Schedule 1 would promote the right to just and favourable conditions of work by addressing an anomaly which arises in the pre-existing small business redundancy exemption. This anomaly causes some employees to lose their legal entitlement to redundancy pay under the NES in the context of a business downsizing from a larger business to a smaller business due to insolvency.
59. The pre-existing small business redundancy exemption is a longstanding feature of the workplace relations framework under the FW Act. It encourages employment by small businesses by relieving them of NES redundancy pay obligations, which can be a significant contingent cost of employing staff. To qualify for the exemption, businesses must employ fewer than 15 staff.
60. An unintended anomaly arises in the operation of the small business redundancy exemption, in some insolvency contexts. When a larger employer incrementally downsizes due to insolvency, either in the period leading to liquidation or bankruptcy, or afterwards, they may fall below the 15-employee threshold and become a small business employer before the final few staff are made redundant. These final employees, who often stay on to assist in the orderly wind-up of the business, lose the entitlement they previously would have had to redundancy pay under the NES, accumulated over years of continuous service with their employer.
61. The amendments would provide an exception to the operation of the small business redundancy exemption in such downsizing contexts, thus preserving an employee's redundancy pay entitlement in a range of scenarios in which the employer may have become a small business employer due to insolvency. This ensures an employee's legal entitlement to redundancy pay is not taken away based on when they were made redundant.

Enabling multiple franchisees to access the single-enterprise stream

62. Part 3 of Schedule 1 engages the right to just and favourable conditions of work. It is intended that Part 3 would strengthen the ability of franchisees and their employees to bargain for just and favourable conditions of work by facilitating franchisees' access to the single-enterprise agreement stream, thereby allowing them access to the full range of bargaining streams under the FW Act. For example:
 - Part 3 would enable franchisees to bargain as if they were a single enterprise, including conducting any ballot to approve an agreement as if they were a single enterprise.
 - Employees of franchisees would be able to obtain a majority support determination where a majority of employees who would be covered by the proposed agreement wish to bargain, without needing to establish that each employer has at least 20 employees.

63. By making bargaining more accessible for franchisees and their employees, the employees of franchisees have a greater ability to influence their conditions of work and to achieve just and favourable conditions of work.

Transitioning from multi-enterprise agreements

64. Part 4 of Schedule 1 would support rights in work by allowing employers and their employees to make a single-enterprise agreement to replace a single interest employer agreement or supported bargaining agreement prior to its nominal expiry date. This would allow employers and their employees to come to an agreement on terms and conditions of employment that are suited to their specific circumstances.
65. Part 4 requires a replacement agreement to be compared with the existing agreement for the purposes of the BOOT. In doing so, it promotes the right to just and favourable conditions of work by preventing conditions in single-enterprise agreements that replace a multi-enterprise agreement regressing overall, even if they are still more beneficial than those in the underlying modern award.
66. Safeguards would be provided by the amendments to the BOOT and by requirements for the employer to receive the consent of employee organisations or to be permitted by a voting request order before taking a replacement single-enterprise agreement to vote. These safeguards would ensure that the amendments allowing for the transition from multi-enterprise agreements to single-enterprise agreements support the rights to just and favourable conditions of work.

Model terms

67. The amendments in Part 5 of Schedule 1 would be compatible with and promote the right to just and favourable working conditions of work and collective bargaining. The model terms act as a safety net ensuring that compliant terms dealing with consultation, flexibility and dispute resolution are included in all enterprise agreements, and a compliant term dealing with dispute settlement is included in copied State instruments. The model terms would not override terms agreed to between the parties to an agreement or instrument where the terms meet the requirements of the FW Act, minimising any concern that the model terms would limit the capacity of employees to determine just and favourable conditions.
68. The amendments empowering the FWC to determine the model terms for enterprise agreements and copied State instruments require the FWC to consider ‘best practice’ workplace relations and whether all persons and bodies have had a reasonable opportunity to be heard and make submissions before making the determinations. It is intended that this would ensure the ongoing relevancy of the model terms as well as facilitating greater public consultation in the determination of the model terms.
69. In mandating considerations of best practice workplace relations and public participation in the process of determining model terms, individuals are empowered to participate in the determination of up-to-date and relevant terms that may form part of the terms and conditions of their employment. In doing so, the amendments support the right to just and favourable conditions of work.

Closing the labour hire loophole

70. Part 6 of Schedule 1 to the Bill would positively engage the right to the enjoyment of just and favourable working conditions by protecting bargained rates in enterprise agreements, or other employment instruments (see item 72 of the Bill), from being undercut by the use of labour hire. While many employers negotiate enterprise agreements with their employees that set minimum rates, the FW Act currently allows employers to engage workers through a labour hire company, who are often paid less than those agreed rates.
71. Several inquiries have shown that labour hire is used in a range of industries with the result of undercutting bargained rates. For example, a Senate inquiry into labour hire considered these labour hire issues in the mining, agriculture, and transport and distribution sectors. The Victorian Inquiry into the Labour Hire Industry also found that because host enterprise agreements do not generally apply to labour hire workers, this results in lower pay for some workers who work alongside directly engaged employees.
72. To close this loophole, the Bill would enable employees and organisations entitled to represent their industrial interests, as well as host businesses, to apply to the FWC for an order that would require labour hire employees to be paid no less than what they would receive if they were directly employed by the host business and paid in accordance with the host's enterprise agreement or other employment instrument. These provisions would therefore enable labour hire employees to be paid at least the same as their directly employed counterparts who are performing the same work and paid under the host's enterprise agreement. Labour hire workers who are paid higher rates than directly employed workers would not be affected.
73. Certain exceptions would be built into the framework, which are reasonable and proportionate. A default three-month exemption period would apply to avoid impacting labour hire arrangements for surge work or where a short-term replacement is needed. The FWC would be able to hear from parties who wish to extend or shorten that exemption period, on a case-by-case basis.
74. Employees on training arrangements also would not be impacted by this measure to avoid impacting training arrangements regulated by State or Territory laws.
75. To minimise the impact on small businesses, the measure would not apply where a host business is a small business employer within the meaning of the FW Act.

Workplace delegates' rights

76. Part 7 of Schedule 1 would positively engage the right to the enjoyment of just and favourable working conditions by improving access to representation for workers, and the ability of workplace delegates to provide such representation. These provisions engage and promote operative articles of the *Workers' Representative Convention, 1971* (No. 135) of the ILO (ILO Convention 135), which Australia has ratified.
77. Currently, the FW Act provides limited protection to workplace delegates of an employee organisation acting within the workplace. Divisions 3 and 4 of Part 3-1 of the

FW Act prohibit adverse action against employees who are officers or members of industrial associations, and allows for freedom of association and involvement in lawful industrial activities. However, these protections do not provide workplace delegates with positive rights that protect and enable them to exercise their roles in the workplace. A key function of a workplace delegate is to be a point of contact for members within the workplace and to represent the concerns of workers to the employer or business. The Bill would positively engage the right to just and favourable conditions of work by ensuring that workplace delegates have substantive rights to represent the industrial interests and concerns of their and their fellow workers.

78. The Bill would further support this right by requiring that the details of various supporting rights for workplace delegates be included in modern awards and enterprise agreements, which would allow them to be tailored to particular industries and enterprises. The introduction of a new general protection to enforce these rights would also positively engage rights in work, including by implementing Article 1 of the ILO Convention 135.
79. Introducing rights for workplace delegates would also positively impact the right to just and favourable conditions of work for all workers in a workplace. By providing explicit rights for workplace delegates, other workers in the workplace are empowered to raise workplace concerns to the workplace delegate and therefore improve their ability to cooperatively resolve any disputes that may arise in the workplace. Workers can also more effectively engage in bargaining to negotiate fair wages and conditions.

Stronger protections against discrimination

80. Subjection to FDV can be a significant impediment and disruption to workforce participation and an employee's right to work. Current protections within the FW Act do not explicitly protect employees or prospective employees who are subjected to FDV against adverse action by their employer, such as being dismissed or refused employment. Part 8 of Schedule 1 would positively engage the right to work by clearly prohibiting employers from engaging in adverse action such as dismissing or refusing to employ a person because they are subjected to FDV. This Bill would also prohibit employers who are not covered by Part 3-1 of the FW Act from terminating an employee's position of employment on the grounds of their subjection to FDV.
81. FDV can also be a significant impediment and disruption to favourable work conditions. Under existing arrangements in the FW Act, an employee who is subjected to FDV is not necessarily protected from employer adverse action within the workplace unless it is connected to the exercise of the employee's workplace rights (that is, accessing paid FDV leave) or it can be argued to be protected by another attribute, such as sex. An employee's subjection to FDV therefore could be a source of discrimination within the workplace, for example resulting in a reduction of work hours or a demotion. This Bill would promote the right to just and favourable conditions of work, and prevent discrimination in access to and maintenance of employment, by ensuring employees and prospective employees who have been, or continue to be, subjected to FDV are protected from adverse action.

82. Modern awards and enterprise agreements must not include terms that discriminate against employees on the basis of a range of protected attributes. By including this additional protected attribute, this Bill would ensure that employees who are subjected to FDV are also afforded equal, favourable conditions of work within the terms of modern awards and enterprise agreements. For example, if the FWC is considering whether to approve a new enterprise agreement, the amendments would require the FWC to be satisfied that the agreement does not include any terms that discriminate against employees on the basis of their subjection to FDV. The Bill would further promote the right to just and favourable conditions of work by requiring the FWC to take into account the need to prevent and eliminate discrimination on the basis of subjection to FDV when exercising its powers and performing its functions.

Sham arrangements

83. Sham contracting results in employees being wrongly classified as contractors, which may limit employees' access to employment protections and entitlements, including minimum or award wages and leave entitlements. Under the existing provision in the FW Act, employers are not liable for misrepresenting employment as independent contracting if they prove that, when the representation was made, they did not know, and were not reckless as to whether, the contract was a contract of employment rather than for services.
84. The amendments that would be made by the Bill to section 357 of the FW Act would promote the right to just and favourable conditions of work by ensuring a more objective test applies when determining whether an employer can make out the defence to sham contracting. This new test would require employers who have misrepresented employment as independent contractors to prove they reasonably believed that the employee was an independent contractor, not merely that they were not reckless as to the employee's correct status. This change will provide further incentives for employers to correctly classify workers from the outset, ensuring employees receive their proper entitlements.

Exemption certificates for suspected underpayment

85. Part 10 of Schedule 1 would positively engage the right to the enjoyment of just and favourable working conditions by improving access to representation for members, by enhancing entry rights and protections for entry permit holders exercising entry under Part 3-4 of the FW Act. Entry to investigate a suspected contravention of the FW Act, or a term of a fair work instrument, requires at least 24 hours' notice (section 487). While provision is made to waive the notice requirement, by application to the FWC for an exemption certificate (section 519), the bar for obtaining such exemption certificates is high, so rarely used. That is, the FWC must reasonably believe that advance notice of the entry might result in the destruction, concealment or alteration of relevant evidence.
86. The Bill would expand the grounds for the issue of an exemption certificate under section 519, so the notice period may also be waived 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 entitled to represent and who performs work on the premises. This measure would be subject to comprehensive safeguards against misuse of the entry powers.

87. Existing safeguards that will continue to apply, include:
- the obligation for the permit holder to give a copy of the exemption certificate to the occupier of the premises (or their apparent representative), any affected employer (or their apparent representative), before or as soon as practicable after entering the premises (section 487(4));
 - the obligation to comply with reasonable work health and safety requirements (section 491);
 - prohibitions on intentionally hindering and obstructing any other person when exercising rights of entry, or otherwise acting in an improper manner (section 500);
 - restrictions on the unauthorised use or disclosure of information or documents (section 504); and
 - existing dispute resolution mechanisms in the FW Act (sections 505 and 505A).
88. The proposed amendments would enhance access to the workplace for permit holders to effectively investigate suspected contraventions (involving underpayments) and exercise powers under Part 3-4 including interviewing relevant persons and inspecting relevant records and documents.
89. In addition, the measure will protect permit holders exercising rights under Part 3-4 against people acting in an improper manner towards them.
90. For these reasons, the measure positively engages the right to the enjoyment of just and favourable working conditions.

Penalties for civil remedy provisions and wage theft

91. The FW Act currently has a civil (not criminal) framework for the enforcement of workplace rights and entitlements under the Act. This means that underpaid workers may seek recovery of any underpayments, pecuniary penalties (except in small claims proceedings) and other civil remedies.
92. Despite recent Government action to address underpayments, non-compliance remains a persistent problem. Several inquiries, including the Migrant Workers' Taskforce and the Senate Inquiry into Unlawful Underpayment of Employees' Remuneration, have recommended the introduction of a criminal offence for wage theft to further deter wage underpayments.
93. Part 14 of Schedule 1 proposes amendments to the FW Act to introduce a new criminal offence for wage theft (new section 327A), which would apply to intentional conduct. It would rely on Parts 2.4 and 2.5 of the Schedule 1 to the *Criminal Code Act 1995* (Criminal Code) to establish pathways for prosecuting ancillary and corporate criminal

liability relating to the new offence. Provision would be made for the Commonwealth to be liable for an offence, and for the FWO to investigate suspected underpayment crimes (including of ‘related offence provisions’ as defined, which are provided for under the Criminal Code).

94. This measure aims to encourage compliance with the relevant workplace laws and further deter wrongdoing, particularly where the conduct is intentional.
95. Compliance outcomes would be further improved (as proposed by Part 11 of Schedule 1) by increasing civil pecuniary penalties for contraventions of civil remedy provisions involving worker exploitation. Details of the proposed civil pecuniary penalty increases are set out in more detail below.
96. The proposed new offence for wage theft (and related provisions), coupled with proposed increases to relevant civil pecuniary penalties, would promote the right to just and favourable conditions of work by improving compliance with the relevant workplace laws. Criminalising wage theft will further deter deliberate underpayments, and higher civil pecuniary penalties for contraventions involving worker exploitation would help promote a robust ‘compliance culture’ in relation to workplace laws across Australian businesses.

Definition of employment

97. Part 15 of Schedule 1 would positively engage the right to the enjoyment of just and favourable working conditions by ensuring that a fairer test applies when determining the ordinary meanings of ‘employee’ and ‘employer’ for the purposes of the FW Act.
98. The Bill would ensure the totality of the relationship, including the terms of the employment contract and the manner of performance of the contract, must be considered when characterising a relationship as one of employment or one subject to a contract for services. The provision is intended to address the existing common law test as set out in the High Court’s decisions in *Personnel Contracting* and *Jamsek*, which provides that the question of whether an individual is an employee or independent contractor is to be determined with reference *only* to the terms of the written contract (if there is one), with limited exceptions.
99. Expanding the frame of reference for the categorisation of a work relationship would positively engage rights in work by enhancing fairness. Fairness will be enhanced by requiring that the question of a workers’ status be determined by reference to all relevant aspects of the relationship. These amendments would ensure workers are correctly categorised, even in the face of a carefully drafted contract which may not fully reflect how the contract is performed in practice.
100. The new interpretive principle is consistent with the approach set out in Article 9 of the ILO’s *Employment Relationship Recommendation, 2006* (No. 198) (ILO Recommendation 198), which seeks to promote an objective of decent work and provides that:

For the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties.

101. Whether a worker is categorised as an employee or as an independent contractor under a contract for services has significant implications for the rights and protections to which they are entitled. For the most part the FW Act confers rights and imposes obligations on, and in respect of the relationship between, an employer and an employee.
102. This Bill would result in some persons who are currently purportedly engaged as independent contractors becoming employees for the purposes of those parts of the FW Act where ‘employee’ and ‘employer’ are expressed to have their ordinary meaning. This would promote rights in work by extending to those workers who become employees by operation of the amendments a range of entitlements and protections only conferred on individuals who come within the meaning of ‘employee’ and work under arrangements reflective of a contract of service.

Provisions relating to regulated workers

103. Part 16 of Schedule 1 would promote the right to work and rights in work as it would provide the FWC the ability to make minimum standards for employee-like workers and regulated road transport contractors, collectively ‘regulated workers’.
104. The right to just and favourable conditions of work, as set out in the ICESCR, is not limited to workers within an employment relationship. By extending certain minimum standards to regulated workers, these provisions of the Bill engage and promote Article 7 of the ICESCR.
105. **Part 3A-2 – MSOs and MSGs:** Under new Part 3A-2 the FWC would be empowered to make either binding (MSOs) or non-binding (MSGs) minimum standards for regulated workers, which could include (but not be limited to) payment terms, deductions, working time, record-keeping, insurance, consultation, representation, delegates’ rights and/or cost recovery.
106. Given regulated workers do not currently have a simple, fair and relevant safety net of minimum terms and conditions, this measure would clearly promote the rights of these workers to just and favourable conditions of work.
107. **New road transport objective and minimum standards objective:** Part 16 would introduce a minimum standards objective (new section 536JX) and a road transport objective (new section 40D) into the FW Act.
108. New section 536JX would promote the right to just and favourable conditions by requiring the FWC to take into account the need for an appropriate safety net of

minimum standards for regulated workers when performing functions or exercising its powers under Part 3A-2 that, among other things:

- deals with minimum rates of pay;
- takes into account all necessary costs for regulated workers covered by an MSO or MSG;
- ensure that workers covered by an MSO or MSG receive pay comparable to the pay and conditions that employees performing comparable work would receive.

109. This would go towards ensuring fair wages and comparable remuneration for work of similar value.
110. When performing a function or power in relation to certain matters relating to the road transport industry, new section 40 would also require the FWC to also take into account the road transport objective, which would include the need for standards that ensure that the road transport industry is safe, sustainable and viable. Ensuring the road transport industry is safe, sustainable and viable would promote the right to work for people working in that industry, including by helping to ensure safe and healthy working conditions.
111. **Part 3A-4 – collective agreements for regulated workers:** Part 3A-4 would further promote the right to the enjoyment of just and favourable conditions of work by providing a simple, flexible and fair framework that enables consent-based collective agreement making between regulated businesses (that is, digital labour platform operators and road transport businesses) and registered employee organisations.
112. Collective agreements would be able to be made about the terms and conditions under which regulated workers perform work, and how agreements operate.
113. Expanding access to collective bargaining would promote the right to enjoyment of just and favourable conditions of work by enabling organisations representing workers to collectively secure safe, healthy and fair conditions.
114. Interaction rules would further promote a regulated workers' rights in work and ensure no regulated worker is worse off, by ensuring a term of a collective agreement would have no effect in relation to the extent that the term is detrimental to a worker in any respect, when compared to an applicable MSO or a State or Territory law that deals with the same matter.
115. **Part 3A-3–Unfair deactivation and unfair termination:** The right to work includes the right to not be deprived of work unfairly. Part 16 would insert new Part 3A-3. This would provide new protections for employee-like workers and road transport contractors against unfair deactivation and unfair termination respectively. Reactivation or reinstatement would be the primary remedy for unfair deactivation or termination respectively. These new protections would go towards ensuring these people are not deprived of work unfairly, thus promoting the right to work.

Amendment of the Asbestos Safety and Eradication Agency Act 2013

116. The prevention of occupational diseases is a fundamental aspect of the right to just and favourable conditions of work. Its realisation requires the adoption of a national policy for the prevention of diseases, minimising hazards in the working environment and ensuring broad participation in its formulation, implementation and review, in particular of workers and employers and their representative organisations.
117. The policy should also promote the collection and dissemination of reliable and valid data on the fullest possible range of occupational diseases and include appropriate enforcement provisions and adequate penalties for violations.
118. Schedule 2 to the Bill would promote the right to safe and healthy working conditions by expanding the current remit of ASEA to include prevention of silica-related occupational diseases. The amendments would enhance the promotion of safe and healthy working conditions by setting out the priority matters for the Silica National Strategic Plan. These would include, eliminating or minimising exposure to respirable crystalline silica, raising silica safety awareness, and improving research and national data.
119. Workplace exposure to respirable crystalline silica is a serious issue threatening the lives of Australian workers. The increase in silicosis and other silica-related occupational diseases has raised the need for urgent national action and coordination. Silica reform is complex and sits across multiple portfolios and jurisdictions. ASEA's role as a coordinating agency reflects the jurisdictional nature of addressing asbestos, and now silica.
120. The Bill would expand the Agency's functions to include a focus on silica safety and coordination, awareness raising, reporting and providing advice to government on silica safety and silica-related diseases. Further, this Bill would promote and assist current efforts to manage silica risks in the workplace and eliminate silica-related diseases.
121. The Council's functions would also be broadened to reflect these changes. The addition of members with silica-related knowledge or experience, and its expanded silica-related functions, would effectively contribute towards ensuring safe and healthy working conditions.
122. The Bill would promote the right to safe and healthy working conditions for those working with respirable crystalline silica as it would establish a cross-jurisdictional governance mechanism for national silica action, with aims to eliminate silica-related diseases by preventing exposure to respirable crystalline silica.
123. The Bill would also promote Article 7 through facilitating the new Agency's data collection, analysis and reporting functions to inform about the jurisdictional efforts to implement the national silica and asbestos strategic plans.

Amendment of the Work Health and Safety Act 2011

124. Rights to work and rights in work are engaged by Schedule 4 to the Bill as it strengthens the offences and penalties framework in the WHS Act, providing greater

deterrence for poor safety management in workplaces. The United Nations Committee on Economic Social and Cultural Rights has stated that the right to work in Article 6(1) of the ICESCR includes the element that ‘the right to work should be protected, by providing the worker with just and favourable conditions of work, in particular to safe working conditions...’. Article 7 of the ICESCR provides that everyone has the right to the ‘enjoyment of just and favourable conditions of work, which ensure, in particular...[s]afe and healthy working conditions’. Similarly, the ILO recognises a safe and healthy working environment as a fundamental right at work, within the framework of the *Declaration on Fundamental Principles and Rights at Work 1998*, as amended in 2022.

125. The prevention of occupational accidents and diseases is a fundamental aspect of the right to just and favourable conditions of work. Its realisation requires the adoption of a national policy for the prevention of accidents and work-related injuries by minimising hazards in the working environment and ensuring broad participation in its formulation, implementation, and review, in particular by workers, employers, and their representative organisations.
126. This Bill promotes the right to safe and healthy working conditions by:
- strengthening the Commonwealth WHS offences regime by introducing a new industrial manslaughter offence to punish and deter the most egregious breaches of WHS duties;
 - including provisions to allow for corporate and Commonwealth criminal liability through attribution of conduct engaged in on behalf of a body corporate or the Commonwealth by defined persons to these entities – that is, the conduct is taken to have been engaged in by the body corporate or the Commonwealth;
 - increasing penalty amounts across the WHS Act by 39.03 per cent (excluding Category 1 – see discussion below), and inserting a mechanism to increase penalties annually in line with national CPI so penalties maintain their real value over time; and
 - significantly increasing penalties for the Category 1 offence to reflect the seriousness of a breach of that provision.
127. Strengthening the Commonwealth WHS framework through these measures would promote the right to safe and healthy working conditions by deterring non-compliance with WHS laws and facilitating more effective prosecutions of bodies corporate and the Commonwealth.

Right to protection and assistance for families

128. Article 9 of the ICESCR provides for the right of everyone to social security, including social insurance. Elaborating on Article 9, the Committee on Economic, Social and Cultural Rights provided in General Comment 19 that ‘States parties should ... ensure the protection of workers who are injured in the course of employment or other

productive work’.³ Workers’ compensation is analogous to social insurance in that it provides payment of wages and medical costs to employees for injuries occurring as a result of their employment.

129. The right to protection and assistance to families in Article 10(2) of the ICESCR, recognises protection should be accorded to mothers during a reasonable period before and after childbirth.

Amendment of the Safety, Rehabilitation and Compensation Act 1988

130. The amendments to the SRC Act at Schedule 3 to the Bill are intended to improve the physical and mental health outcomes for first responders covered by the SRC Act by simplifying their access to workers’ compensation if they are suffering from PTSD. Employment will be presumed to have significantly contributed to PTSD suffered by first responders for the purposes of workers’ compensation.
131. If a person does not satisfy the requirements of subsection 7(11) of the SRC Act (for example, by not meeting the definition of ‘first responder’), it remains open for the employee to otherwise establish, on the balance of probabilities, that the disease was contributed to, to a significant degree, by the employee’s employment.

Right to physical and mental health

132. Article 12 of the ICESCR requires that State Parties to the Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The UN Committee on Economic, Social and Cultural Rights has stated that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, extending to underlying determinants of health such as safe and healthy working conditions.
133. The steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for:

...

- (b) The improvement of all aspects of environmental and industrial hygiene;
- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; ...

Amendment of the Asbestos Safety and Eradication Agency Act 2013

134. Schedule 2 to the Bill would positively engage this right. Promoting ‘industrial hygiene’ involves taking steps to protect the work environment by reducing workers’ exposure to substances that impact upon human health including where workplace exposure to respirable crystalline silica results in people developing serious health conditions. New Part 1A and Item 15 would provide the Agency with functions related to silica safety and coordination and monitoring of jurisdictional efforts to eliminate silica-related occupational diseases.

³ Committee on Economic, Social and Cultural Rights, *General Comment 19: The Right to Social Security (art. 9)*, U.N. Doc E/C.12/GC/19 (2008), [17].

135. New section 5B and paragraphs 8(1)(b) and 8(1)(d) would confer on the Agency various functions in relation to the Silica National Strategic Plan. In new section 5B, the definition of the term ‘Silica National Strategic Plan’ specifically refers to supporting *workers* who are affected by silica-related diseases’ and ‘eliminating or minimising the exposure to respirable crystalline silica in *workplaces*’. These provisions would require the Agency to focus on addressing matters which would result in improving industrial hygiene in Australian workplaces.
136. Further, it is likely that conditions such as mesothelioma, asbestosis and silicosis are diseases for the purposes of Article 12(2)(c).
137. The Bill would promote the right to health by broadening the object of the ASEA Act to include elimination of silica-related diseases. One of the Agency’s key objectives would be to lead coordinated and national action to eliminate asbestos and silica-related diseases by collaborating with States, Territories and local governments, and other relevant persons on the development of the Asbestos National Strategic Plan and Silica National Strategic Plan. The Agency would also be required to undertake various activities in relation to encouraging, coordinating and monitoring implementation of the plans and collaborating with governments about asbestos and silica safety and related diseases.
138. New subsection 8(1) would provide that the Agency’s functions would broadly include eliminating or minimising exposure to respirable crystalline silica, raising silica safety awareness, and improving research and national data. Therefore, the Bill would promote the right to health as the Agency’s functions would be directed towards preventing and eliminating asbestos and silica-related diseases.

Amendment of the Safety, Rehabilitation and Compensation Act 1988

139. By simplifying the workers’ compensation process for first responders suffering PTSD, the amendments to the SRC Act promote access to those first responders suffering PTSD to rehabilitation and compensation, embracing their right to the highest attainable standard of mental health.

Amendment of the Work Health and Safety Act 2011

140. The right to physical and mental health expressed in Article 12 of the ICESCR is engaged by this Bill as the United Nations Committee on Economic Social and Cultural Rights has stated that the right to health concerns safe and healthy working conditions. Guidance from the Attorney-General’s Department clarifies that where Article 12(2)(b) mentions ‘industrial hygiene’ this ‘refers to the minimisation, so far as is reasonably practicable, of the causes of health hazards inherent in the working environment’.
141. This Bill promotes the right to physical and mental health by strengthening the offences and penalties framework which accompany a person’s duty to minimise the causes of health hazards inherent in the working environment. The Bill achieves this by amending the WHS Act to better deter non-compliance with WHS duties.

Right to an effective remedy and right to a fair hearing

142. Article 2(3) of the ICCPR and Article 2 of the CEDAW provides the right to an effective remedy for persons who have suffered human rights violations by Australian authorities, as well as persons who have suffered discrimination perpetrated by Australian authorities. The United Nations Human Rights Committee has stated that the right to an effective remedy encompasses an obligation to bring to justice perpetrators of human rights abuses, including discrimination, and also to provide appropriate reparation to the persons who have suffered human rights abuses. Reparation can involve measures including compensation, restitution, rehabilitation, public apologies, guarantees of non-repetition and changes in relevant laws and practices.
143. Article 14(1) of the ICCPR provides that, in the determination of rights and obligations in a suit at law, all persons have a right to a fair and public hearing before a competent, independent and impartial court or tribunal established by law.

Casual employment

144. Part 1 of Schedule 1 would positively engage the right to a fair remedy by implementing a new dispute resolution framework for the FWC to deal with disputes between employers and employees about employee choice and casual conversion.
145. Part 1 would require the parties to first attempt to resolve the dispute at a workplace level. If this is unsuccessful, the amendments would allow employees to make applications to the FWC to deal with disputes as it considers is appropriate, including by mediation, conciliation, making a recommendation or expressing an opinion, or mandatory arbitration.
146. The Bill would further promote the right to an effective remedy by enabling the FWC to make binding orders, having regard to what is fair and reasonable. Parties can also, on application, have the dispute heard in the small claims jurisdiction of the Federal Circuit and Family Court of Australia.

Closing the labour hire loophole

147. Part 6 of Schedule 1 would positively engage the right to a fair remedy by creating a new low-cost dispute resolution mechanism by allowing an affected party to apply to the FWC to resolve a dispute and by providing for parties to be represented by an organisation entitled to represent their industrial interests.
148. Consistently with other dispute resolution processes in the FW Act, the parties would be required to attempt to resolve the dispute at the workplace level before applying to the FWC. If these discussions did not resolve the dispute, the FWC would be required to first deal with the dispute other than by arbitration, such as by mediation or conciliation.
149. If mediation or conciliation were unsuccessful, and the parties agree to the FWC arbitrating the dispute, the FWC's order could apply to work performed before and after the order is made. If the parties do not consent to arbitration, the order could only apply prospectively in relation to work performed after the order is made. The FWC

would not be able to make the order unless satisfied it is fair and reasonable. This is consistent with the scope of the FWC's power as an administrative tribunal rather than a court.

Workplace delegates' rights

150. Part 7 of Schedule 1 would positively engage the right to a fair hearing by creating a right for workplace delegates to represent members who are in dispute with their employer or relevant regulated business. This would improve the ability for workers to access representation by their workplace delegates. The proposed rights to reasonable communication with members and reasonable access to the workplace would also support the efficacy with which workplace delegates can perform their roles. Although disciplinary or dispute processes in the workplace do not rise to the level of a hearing before a court or tribunal, the outcomes of these processes can have a substantial impact on the workers involved. Improving the ability for workers to seek assistance from a workplace delegate, and removing barriers to delegates providing such representation or assistance, would help to maintain the procedural fairness of these processes.
151. The Bill would also positively engage the right to an effective remedy by establishing a process for workplace delegates, in new sections 350A and 350B, to challenge behaviour that is inconsistent with the rights of delegates provided for by the new section 350C. Although the FW Act acknowledges their existence, there is currently limited legislative protection for workplace delegates. In some circumstances, workplace delegates might be able to avail themselves of the protections for participating in industrial activities (Division 4 of Part 3-1 of the FW Act), however there are currently no rights specific to workplace delegates. Establishing a purpose-built protection against unreasonably hindering or obstructing a workplace delegate would complement the existing protections and ensure that workplace delegates are able to enforce the proposed positive rights.

Provisions relating to regulated workers

152. Part 16 of Schedule 1 relating to standard setting for regulated workers would positively engage the right to an effective remedy by:
 - requiring MSOs for regulated workers and collective agreements to include terms providing a procedure for settling disputes; and
 - allow for regulations to be made to empower the FWC to conduct an internal merits review of a decision to make or vary an RTMSO.
153. Part 3A-3 establishes quick, flexible and informal procedures for the resolution of unfair deactivation and termination claims that address the needs of both the regulated businesses and regulated workers, thereby promoting the right to an effective remedy. The associated remedies under the new provisions would further enhance this right, by enabling the FWC to make a variety of orders, with reactivation/reinstatement being the primary remedy. The efficient and effective resolution of disputes, and therefore the promotion of the right to a fair hearing, would be assured by empowering the FWC to

determine whether it is appropriate to hold a conference or a hearing, taking into account the differences of the parties' circumstances and their wishes.

154. This measure would allow the FWC to make an order for costs against a party in a matter arising under new Part 3A-3 (unfair deactivation or unfair termination of regulated workers). While this could be construed as having the potential to limit a person's access to justice (if the risk of costs acts as a disincentive), this provision should not bar access to the FWC in relation to new Part 3A-3. Costs could only be awarded under the new provision if a party's unreasonable act or omission relating to the conduct or continuation of the matter caused the other party to incur costs. This is targeted towards litigants who pursue or defend unfair termination or unfair deactivation claims in an unreasonable manner. This would also disincentivise a party with 'deeper pockets' from acting unreasonably to increase the other party's own costs in an attempt to discourage parties from bringing proceedings against them or encourage a party to settle on unfavourable terms. In this respect the measure will enhance the right to a fair hearing.
155. **Part 3-5–Unfair contract terms:** A remedy under Part 3-5 would only be available to independent contractors who earn below a high income threshold. This measure is targeted at people with low bargaining power and lower pay for whom the costs of going to court could act as a disincentive or outright bar to seeking a remedy. For those applicants, the lower costs and increased accessibility of the FWC as compared to the federal courts would enhance their right to an effective remedy.
156. Independent contractors with incomes above the contractor high income threshold would continue be able to access the existing unfair contracts protections under the IC Act, ensuring that they would still have the right to an effective remedy.
157. This Part would prevent people from 'double dipping' by pursuing or obtaining multiple remedies in relation to the same services contract. However, to ensure that a person would still be able to obtain an effective remedy, they could still commence proceedings under Part 3-5 or another law so long as the applicant discontinued the other proceedings, or the proceedings failed for lack of jurisdiction.
158. Appropriate transitional and application provisions in Part 17 of Schedule 1 would further ensure that no litigants or potential litigants under the IC Act are disadvantaged, confused or suffer delays because of the commencement of the FWC's new jurisdiction. Proceedings currently before the courts and applications relating to contracts entered into prior to commencement would be able to be conclusively determined under the IC Act.

Criminal process rights

159. Articles 14 and 15 of the ICCPR protect criminal process rights:

- Article 14(1) provides that all persons shall be equal before the courts and tribunals, and that in the determination of any criminal charge against a person, that person is entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law;

- Article 14(2) provides that those charged with a criminal offence are presumed innocent until proven guilty according to the law;
- Article 14(3) sets out a range of guarantees that each person shall be entitled to in the determination of any criminal charge against them. This includes the right not to be compelled to testify against themselves or to confess guilt;
- Article 14(7) protects against the risk of double punishment; and
- Article 15(1) protects against criminal penalties applying retrospectively.

Casual employment

160. Part 1 of Schedule 1 in relation to casual employees do not directly engage rights in relation to criminal process, but these amendments do propose to enact several civil remedy provisions.
161. New civil remedy provisions would be included in relation to contravening an order of the FWC or engaging in sham casual arrangements. The maximum penalty for these contraventions would be 300 penalty units. Contravention of an FWC order will often result in underpayments due to misclassification. This penalty is consistent with other underpayment-related penalties, and for sham casual arrangements is consistent with increased penalties for sham arrangements in relation to independent contractors.

Closing the labour hire loophole

162. The amendments to close the labour hire loophole would not directly engage rights in relation to criminal process but they do provide for civil remedies. This includes penalties where a labour hire provider fails to pay an employee in accordance with Part 2-7A where a regulated labour hire order is in place, where a regulated host does not provide certain information to an employer on request, or where a party contravenes an order of the FWC.
163. The maximum penalty a court could order would be 600 penalty units for a serious contravention or otherwise 60 penalty units. This is consistent with the maximum penalty that currently applies under the FW Act in relation to similar conduct, for example, contravening an equal remuneration order. This penalty is proportionate to the seriousness of the contravention, noting that the measure is directed towards preventing the undercutting of bargained rates.
164. Appropriate safeguards are built into the new civil penalty provisions. For example, an employer who does not pay a regulated employee the protected rate of pay in accordance with Part 2-7A will not be liable to a civil penalty if they reasonably relied upon information provided by a regulated host and the information was incorrect.
165. The anti-avoidance provisions would apply retrospectively, with application from the date the Bill is introduced in the Parliament. This means penalties may apply in relation to conduct engaged in before the Bill commences. This is reasonable and proportionate to prevent businesses from taking steps to avoid obligations under new Part 2-7A

before the Bill commences. Parties will be on notice about their obligations as the legislation will be publicly available when it is introduced.

Workplace delegates' rights

166. Part 7 of Schedule 1 providing for specific workplace delegates' rights do not directly engage rights in relation to criminal processes, but they do provide for civil remedies. Specifically, the Bill would introduce a new protection against employers and regulated businesses unreasonably failing or refusing to deal with a workplace delegate, knowingly or recklessly making a false or misleading representations to a workplace delegate, or unreasonably hindering, obstructing or preventing the exercise of a workplace delegate's rights.
167. The protection would not apply when an employer or regulated business has acted reasonably. The onus would be on the employer or regulated business to prove their conduct was not unreasonable, as the employer or regulated business is best placed to provide evidence about the reasons and intent behind the actions they took (or did not take).
168. This protection would also not be engaged if the employer or regulated business is taking actions required under a Commonwealth or State or Territory law.
169. The maximum pecuniary penalty for contravening this new civil remedy provision would be 60 penalty units for an individual, or 300 penalty units for a body corporate. This is consistent with the maximum penalties which apply to contraventions of existing civil remedy provisions in Part 3-1 of the FW Act, including the protections against adverse action and coercion. The new civil penalty provisions will only apply to conduct which occurs after the date the respective Divisions commence. This positively engages the protection against retrospective application of penalties in relation to civil remedies.
170. In some circumstances, action by an employer which obstructs a workplace delegate might contravene both the proposed civil remedy provisions, and the existing civil penalty provision prohibiting adverse action taken because an employee has exercised, or proposes to exercise, a workplace right. This will not expose employers or regulated businesses to a risk of double punishment. Section 556 of the FW Act prevents a court from ordering that a person pay a pecuniary penalty if a pecuniary penalty has already been imposed under another provision of a law of the Commonwealth in relation to the same conduct.
171. Overall, this measure would have a neutral impact on criminal process rights.

Sham arrangements

172. The prohibition of certain sham contracting arrangements in subsection 357(1) of the FW Act does not directly engage rights in relation to criminal processes, but does provide for civil remedies.

173. The existing provision in section 357 of the FW Act places the onus on an employer to prove they have a defence to sham contracting. Whilst the new provision changes the nature of the defence to sham contracting, it does not change this burden of proof. The burden is on the employer because it is a defence and the burden of proving a defence usually rests with the party seeking to rely on it. Further, the employer is best placed to provide evidence about the belief they held when making the representation.
174. There is a legitimate objective to this evidential burden and it is confined within reasonable limits considering the question to be answered. The provision does not impose criminal penalties, for the reasons articulated at paragraph 177 below. However, to the extent that section 357 may limit criminal process rights those limitations are reasonable, necessary and proportionate

Penalties for civil remedy provisions

175. The Parliamentary Joint Committee on Human Rights (PJCHR) Practice Note 2 provides that civil penalty provisions may engage criminal process rights under Articles 14 and 15 of the ICCPR, regardless of the distinction between criminal and civil penalties in domestic law. A penalty may be considered ‘criminal’ where it:
- is classified as criminal under Australian law;
 - is intended to punish or deter, and applies to the public in general (rather than being restricted to people in a specific regulatory context); or
 - includes imprisonment or a substantial pecuniary sanction.
176. When a provision imposes a civil penalty, an assessment is required as to whether it amounts to a criminal penalty for the purposes of ICCPR.
177. **New civil remedy provisions should not be considered criminal penalties:** The Bill includes several new civil penalty provisions. The penalty provisions of the FW Act are expressly classified as civil penalties (section 549). These provisions create pecuniary penalties in the form of a debt payable to the Commonwealth or other person. The civil penalty provisions do not impose criminal liability, and do not lead to the creation of a criminal record. There is no possibility of imprisonment for failing to pay a penalty (section 571).
178. The purpose of the civil penalty provisions is to encourage compliance with the FW Act, which supports the implementation of Australia's obligations under international law. The penalties would generally apply to defined classes of employers and not the public in general. While the FWO has enforcement powers, proceedings may also be brought by an affected employee or union. In addition, the civil remedy provisions would apply in the regulatory environment for industrial relations, rather than to the public at large. These factors all suggest that the civil penalties imposed by the FW Act are civil rather than criminal in nature.
179. The severity of the relevant civil penalties should be considered low. They are pecuniary penalties (rather than a more severe punishment like imprisonment) and there

is no sanction of imprisonment for non-payment of penalties. The penalties are generally at or below the level usually considered to be severe enough to be classified as criminal (that is, below 60 penalty units for individuals).

180. As the proposed new civil penalties would reasonably be characterised as not being criminal in nature, the specific criminal process guarantees in Articles 14 and 15 of the ICCPR would not apply. In any event, however, new civil penalties, and the civil penalty regime in the FW Act more broadly, comply with the requirements of Articles 14 and 15 in that they would not apply retrospectively (Article 15(1)), the presumption of innocence applies (Article 14(2)), and there is no risk of double punishment as there are no comparable criminal penalties (Article 14(7)).
181. On this basis, the proposed new penalties should not be considered criminal for the purposes of human rights law.

Wage theft

182. The Bill proposes amendments to introduce a new criminal offence for wage theft (new section 327A), which would apply to intentional conduct. It would rely on Parts 2.4 and 2.5 of the Criminal Code to establish pathways for prosecuting ancillary and corporate criminal liability relating to the new offence. Provision would be made for the Commonwealth to be liable for an offence, and for the FWO to investigate suspected underpayment crimes (including of ‘related offence provisions’ as defined, which are provided for under the Criminal Code).
183. Criminalising wage theft engages criminal process rights. The proposed offence provision, if enacted, would sit within the broader Commonwealth criminal framework, including the Crimes Act and Criminal Code, which guarantees criminal process rights as provided for in Articles 14 and 15. Further comments relating to Article 14(3) are made below.
184. In addition to these rights:
- the FW Act provides for an appeals process from decisions of eligible State or Territory courts (section 565);
 - the FW Act protects against criminal/civil double jeopardy (section 552), and would protect an accused while criminal proceedings are on foot, by staying any related civil proceedings against the person (where a pecuniary penalty order is sought) (section 553); and
 - proposed transitional arrangements for the proposed new offence for wage theft (new section 327A) would make clear that the new offence provision applies prospectively, that is to conduct that occurs after commencement.
185. **Absolute liability elements:** The Bill limits the presumption of innocence by imposing absolute liability for certain offence elements. The application of absolute liability limits the presumption of innocence to the extent that it allows for the imposition of criminal liability without requiring the prosecution to prove fault in the defendant.

186. According to the Guide to Framing Commonwealth Offences, absolute liability may be acceptable where an element is essentially a precondition of an offence and the state of mind of the defendant is not relevant. For the new offence for wage theft (new section 327A), absolute liability would attach to 2 preconditions for the offence, that is:
- the employer is required to pay an amount (a required amount) to, on behalf of, or for the benefit of, an employee under (new paragraph 327A(1)(a)):
 - a. the FW Act; or
 - b. a fair work instrument; or
 - c. a transitional instrument (as continued in existence by Schedule 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*); and
 - the required amount is not (new subparagraph 327A(1)(b)):
 - a. a contribution payable to a superannuation fund for the benefit of the employee; or
 - b. an amount covered by subsection (2).
187. It is also appropriate to apply absolute liability to paragraph 327A(1)(b), because this is a jurisdictional element. New paragraph 327A(1)(b) does not relate to the substance of the offence, but marks a boundary between matters that are within scope for the offence and those that are not. The Commonwealth Guide to Framing Offences explains that applying absolute liability to a particular physical element of an offence may be justified where the element is jurisdictional, rather than one going to the essence of the offence.
188. Further, the absolute liability measures are proportionate in that they only apply to elements of the offence and not to the offence as a whole. In this respect, the prosecution will still be required to prove, beyond a reasonable doubt, all other elements of the offence including fault elements.
189. The substance of the offence is in new paragraphs 327A(1)(c) and (d), for which the fault element is intention (paragraph 327A(3)(b)):
- For new paragraph 327A(1)(c), the prosecution will have to prove beyond a reasonable doubt that the defendant intentionally engaged in the relevant conduct.
 - For new paragraph 327A(1)(d), the prosecution will have to prove beyond a reasonable doubt that the defendant intended that their conduct would result in a failure to pay the required amount to, on behalf of, or for the benefit of, the employee in full on or before the day when the required amount is due for payment. For there to be an offence, the person must mean to bring about the result (that is, a failure to pay the required amount), or be aware that result will occur in the ordinary course of events (refer to s 5.2 of the Criminal Code).
190. These fault elements ensure that only serious conduct involving underpayments is caught by the offence provision, which justifies the corresponding sanctions.

191. For these reasons, it is appropriate to attach absolute liability to the preconditions to the offence in new paragraphs 327A(1)(a) and (b).
192. **Abrogating the privilege against self-incrimination:** The Bill would expand the circumstances in which Fair Work Inspectors may exercise their existing powers, as they would be able to investigate suspected wage theft under the proposed new offence provision and ‘related offence provisions’. A number of minor or technical amendments (explained elsewhere) are proposed to ensure that outcome.
193. Sections 713 and 713A abrogate the privilege against self-incrimination in the specified circumstances. With some exceptions, subsection 713(2) and section 713A of the FW Act generally provide that if an individual produces a document or record in compliance with specified provisions, that record or document, and any evidence obtained as a direct or indirect consequence of inspecting that document or record, is not admissible in evidence in criminal proceedings. The immunity is different in the case of an individual who gives information, or produces a record or document, or answers a question, under a FWO notice (see subsection 713(3)).
194. Items 228 to 230 of the Bill would provide that the immunities conferred by subsections 713(2) and (3) and section 713A do not apply to two classes of documents. The first is an employee record that is required to be made and kept under section 535 of the FW Act. The second is a copy of a pay slip that has been created in relation to an employee (see section 536 of the FW Act).
195. As a result of the amendments, these employee records and copies of pay slips may be used in evidence.
196. To the extent that these amendments limit the rights under Article 14 of the ICCPR, those limitations are reasonable, necessary and proportionate.
197. Sections 535 and 536 of the FW Act require employers to keep the employee records and issue pay slips to employees. If an employer is lawfully required to produce and keep (or issue) these documents and records, then it is not reasonable for their use in evidence to be prevented.
198. Records required to be kept and pay slips required to be issued under sections 535 and 536 of the FW Act are often central to establishing that an underpayment has occurred in civil proceedings. The immunities conferred by subsections 713(2) and (3) and section 713A would significantly impair Fair Work Inspectors’ ability to effectively investigate the new wage theft criminal offence.
199. Further, the records and documents must only be produced in limited circumstances: the documents may only be produced and inspected/copied while a Fair Work Inspector is on the premises or following the provision of a notice.
200. To the extent these amendments limit the rights under Articles 14 and 15 of the ICCPR, they are appropriate as they seek to achieve the legitimate objective of protecting employee entitlements, recovering underpayments and prosecuting criminal non-compliance. The commencement and application provision, and the operation of

existing sections 552 and 553 of the FW Act, operate to reduce any conflict with the relevant Articles 14(3)(g) and 15(1).

Amendment of the *Work Health and Safety Act 2011*

201. Measures in Schedule 4 of the Bill engage and limit criminal process rights.
202. **Part 1 of Schedule 4:** There will be no limitation period for bringing proceedings for an industrial manslaughter offence (Item 7). New subsection 30A(5) states that for the purposes of alternative verdicts, the general limitation period of 2 years which otherwise applies to Category 1 and 2 offences (with some exceptions – see existing section 232) is displaced (Item 1).
203. The absence of limitation periods for industrial manslaughter and alternative verdicts could limit a defendant's right to a fair trial. This is particularly relevant to the right in Article 14(3)(c) of the ICCPR that everyone is entitled to be tried without undue delay and the principle of 'equality of arms' in Article 14(1), which requires that all parties to a proceeding must have a reasonable opportunity of presenting their case under conditions that do not disadvantage them as against other parties to the proceedings. Where no limitation period applies it could be difficult for an officer to defend themselves years after the fact. People with relevant knowledge may have moved on and evidence may be difficult to access.
204. Any limitation on the right to a fair trial arising from not applying limitation periods to the industrial manslaughter offence and alternative verdicts is justifiable because it would be necessary to pursue a legitimate objective and is reasonable, necessary and proportionate.
 - A limitation period would be inappropriate for an offence as serious as industrial manslaughter. The absence of a limitation period is consistent with other manslaughter offences.
 - Disapplying limitation periods in relation to alternative verdicts seeks to ensure the accused does not escape punishment on technical grounds. This would mean that if the prosecution commenced industrial manslaughter proceedings outside the limitation period that applied to, for example, a Category 2 offence (2 years after the offence first comes to the notice of the regulator or 1 year after a coronial finding – see section 232 of the WHS Act), it would not impact the ability of a court to find the accused guilty of a Category 2 offence in the alternative.
205. **Reasonable excuse:** The Category 1 offence is drafted to align with the model Act and therefore includes a 'reasonable excuse' defence in paragraph 31(1)(b). The reasonable excuse defence imposes the evidential burden on the defence to establish that a reasonable excuse justifying their conduct existed.
206. The reasonable excuse defence contained in section 31 of the WHS Act enlivens the presumption of innocence in Article 14(2) of the ICCPR. As explained above, a reverse onus provision will not necessarily violate the presumption of innocence provided the law is not unreasonable in the circumstances and maintains the rights of the accused.

Such a provision may be justified if the nature of the offence makes it very difficult for the prosecution to prove each element, or if it is clearly more practical for the accused to prove a fact than for the prosecution to disprove it. To the extent section 31 limits the presumption of innocence, that limitation is justified on the basis that it is more practical for the accused to bear the evidential burden in relation to whether a reasonable excuse for their conduct existed.

207. **Legal burden for defence like provisions in new sections 244B, 244C, 245B and 245C:** New subsection 244B(2) would create defences that provide paragraphs 244B(1)(b) and (c) do not apply if the body corporate proves it took reasonable precautions to prevent the conduct, authorisation, or permission of the conduct. New subsection 244B(2) requires the defendant to discharge the legal burden in relation to that matter, that is, they must positively prove that such reasonable precautions were taken. Section 13.5 of the Criminal Code provides that a legal burden imposed on the defendant must be discharged on the balance of probabilities. This reversal of the burden of proof is necessary because the steps taken to prevent WHS breaches are peculiarly within the knowledge of the defendant. Also, the inside access to specialised information and corporate knowledge available to the body corporate as to the actual steps taken, and the context for those choices, would mean that it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.
208. Additionally, the conduct proscribed by WHS offences poses a grave danger to public health or safety. Conduct constituting a WHS breach often poses a such danger.
209. New sections 244C, 245B and 245C are substantially the same as new section 244B and the explanation above applies.
210. **Strict liability:** The Parliamentary Joint Committee on Human Rights has noted the imposition of strict or absolute liability will not violate Article 14(2) where it pursues a legitimate aim and is reasonable and proportionate to that aim.
211. The Bill would introduce an industrial manslaughter offence which would include strict liability elements. Importantly, the offence also requires the prosecution to prove either negligence or recklessness and that the conduct was intentional. Strict liability only applies to certain elements.
212. Most offences in the WHS Act include strict liability elements or are strict liability. Strict liability as a feature of WHS Act offences was carefully considered when the WHS Act was first introduced. The presumption of innocence can be seen to be impinged by removing the requirement for the prosecution to prove fault in relation to one or more physical elements of an offence. However, WHS strict liability offences arise in a regulatory context where, for reasons such as public safety, and the public interest in ensuring that regulatory schemes are observed, the sanction of criminal penalties is justified.
213. WHS offences also arise in a context where a defendant can reasonably be expected, because of their professional involvement, to know the requirements of the law, and the

mental, or fault, element can justifiably be excluded. The rationale is that people who owe WHS duties such as employers, persons in control of aspects of work, and designers and manufacturers of work structures and products, as opposed to members of the general public, can be expected to be aware of their duties and obligations to workers and the wider public. The industrial manslaughter offence would apply to PCBU's, and 'officers' (the most senior persons in an organisation).

214. The legitimate aim of strict liability for WHS offences, to ensure defendants operating in the WHS regulatory context are held accountable for breaches of their positive duties to ensure a safe and healthy workplace, is proportionate to any limitation it places on the presumption of innocence.

Right to privacy and reputation

215. Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy, family, home and correspondence. This includes respect for informational privacy, including in respect of storing, using, and sharing private information and the right to control the dissemination of personal and private information. Privacy guarantees a right to secrecy from the publication of personal information. It also prohibits unlawful attacks on a person's reputation.

Exemption certificates for suspected underpayment

216. The FW Act establishes a right of entry scheme for entry permit holders, including entry to investigate suspected contraventions (section 481) which is subject to (among other things) at least 24 hours' notice. Provision is made to waive the 24 hour-notice period by applying to the FWC for an exemption certificate, with a view to preventing the possibility of destruction, concealment or alternation of relevant documents and records (section 519).
217. It is proposed that the grounds for the issue of an exemption certificate should be expanded, so the notice period may also be waived 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 entitled to represent and who performs work on the premises. This measure would be subject to comprehensive safeguards against misuse of the entry powers.
218. There may be concerns that this measure may engage the right to privacy. However, there is no proposal in this measure to change either the grounds for entry, or to modify the existing limits and protections for entry scheme under Part 3-4. This means that the existing framework will continue to:
- limit the exercise of the relevant entry rights to workplaces and working hours only (subsections 481(1), 490(1));
 - limit access to member records as set out in section 482, subject to the existing application process in section 483AA;

- prohibit entry permit holders from intentionally hindering and obstructing any other person when exercising rights of entry, or otherwise acting in an improper manner (section 500);
- restrict the unauthorised use or disclosure of information or documents (section 504); and
- prohibits an entry permit holder from entering any part of premises that is used mainly for residential purposes (section 493).

219. For these reasons, the proposed measure does not engage the right to privacy.

Provisions related to regulated workers

220. Section 712AA would be consequentially amended by Part 16 of Schedule 1 to provide that the FWO may apply to a nominated AAT presidential member for an FWO notice in relation to the underpayment of monetary entitlements under an MSO, the unfair deactivation of an employee-like worker or unfair termination of a regulated road transport contractor.
221. A FWO notice may require a person to give information, produce documents or attend before the FWO and answer questions relevant to an investigation. The person who is given a FWO notice must comply with the notice, and if they do not, they could be subject to a civil penalty.
222. By extending the circumstances under which a person can be required by a FWO notice to produce documents, give information or attend an examination to answer questions, this provision would limit the right to privacy.
223. The objective of this measure is to ensure that the FWO would be able to secure positive investigation outcomes in relation to underpayment of monetary entitlements under an MSO or the unfair deactivation of an employee-like worker or unfair termination of a regulated road transport contractor.
224. The limitation on privacy would be necessary, reasonable and proportionate. The ability to use these powers would be particularly important where there are no relevant documents that appear to be available and subsequently the investigation into these matters has stalled. These powers would also be important to enable the FWO to establish whether a contravention of an MSO would constitute a serious contravention by determining whether the conduct was deliberate.
225. These powers are currently available for investigations into matters such as the underpayment of wages or other monetary entitlements of employees, and the unfair dismissal of employees. The FWO should have the same powers in investigations into similar matters involving regulated workers, otherwise this would perpetuate the disadvantage already faced by these workers.
226. Extending the FWO notice regime to breaches of MSOs and collective agreements would ensure the FWO's coercive powers would continue to only be used for the

intended purpose of facilitating investigations into the exploitation of vulnerable workers, specifically in relation to underpayments and entitlements.

227. Additionally, the FWO notice regime has adequate safeguards, including:

- The requirement that the FWO believes on reasonable grounds that a person has informational documents relevant to an investigation and is capable of giving evidence and sets this out in an affidavit.
- The requirement that an AAT member can only issue the FWO notice if satisfied that there are reasonable grounds to believe the person has information or documents or is capable of giving evidence relevant to the investigation and that of obtaining information, documents or evidence have been attempted and have been unsuccessful or are not appropriate.
- Protection from liability relating to FWO notices.
- The requirement that the FWO notify the Commonwealth Ombudsman of the issue of a FWO notice and provide a report about the examination.

Amendment of the Asbestos Safety and Eradication Agency Act 2013

228. New section 14A inserted by Schedule 2 would provide for the Chief Executive Officer of the Agency to request information from a person in certain circumstances and an express permission for a person to provide the requested information.

229. New subsections 14A(5)–(6) would provide an express permission that a person can rely on to provide the requested information, if they consider the disclosure to the new Agency is appropriate. This express permission would not compel a person to provide information when requested. New subsection 14A(6) would provide that a person may disclose information to the Agency in response to a request despite anything in a law of the Commonwealth (other than the ASEA Act) or a law of a State or Territory. This means that a non-disclosure provision in other legislation that would otherwise prevent information being disclosed to the new Agency, does not prevent its disclosure.

230. This amendment engages the right to privacy because information that may be disclosed could include personal information and non-disclosure provisions that otherwise apply may be overridden.

231. To the extent that the right to privacy is limited by the amendment it is considered that limitation is necessary to achieve a legitimate objective. The purpose of the amendment is to ensure that information necessary to support the Agency's research, data and reporting functions can be collected. Silica issues are complex and require coordination and information sharing across portfolios as well as jurisdictions. This amendment is intended to facilitate information sharing between government agencies and bodies. New section 14A is framed broadly to provide flexibility for the future. For example, ASEA has a very cooperative approach and in the future the Agency may form partnerships with non-Governmental organisations and request information from such bodies as well.

232. Tracking progress against the national strategic plans and developing evidence-based research relies on input from a range of sources including all State and Territory governments. This amendment would ensure that persons with relevant information are able to provide that information to the Agency.
233. The amendment is reasonable and proportionate, as information must be necessary for the performance of the Agency's research, data and reporting functions. This would involve for example, data on number of diagnosed cases of silicosis or other silica-related diseases in each State and Territory. It would not include for example, a person's medical record as that would not be necessary for the performance of the Agency's functions. Failing to fulfil a request would not be an offence and broad discretion will be retained by the person holding information. There could be a range of legitimate reasons why a request may not be fulfilled, including if, for example, providing the information requested would cause unnecessary duplication of work and create an administrative burden on the person.
234. The Agency would be subject to a range of obligations to ensure that the information it obtains is handled appropriately:
- Personal information collected by the Agency is subject to the requirements of the *Privacy Act 1988* which governs its collection, use, disclosure, storage and disposal.
 - As Australian Public Service (APS) employees, the Agency's employees would be bound by the APS Code of Conduct, including regulation 2.1 (duty not to disclose information) which applies to information obtained by the Agency related to the performance of its statutory functions. A breach of the Code of Conduct by an APS employee may lead to the imposition of sanctions up to and including termination of employment.
 - The Criminal Code includes offences relating to the unauthorised disclosure of information by current (and former) Commonwealth officers, including APS employees, punishable by terms of imprisonment (of between two and seven years depending on the circumstances of the offence).

Right to freedom of association

235. Article 22 of the ICCPR protects the right to freedom of association, including the right to form and join trade unions. Article 8(1)(c) and (d) of the ICESCR also support the right to freedom of association by providing that States Parties undertake to ensure the right to form and join trade unions and the right to strike, including picketing activities. There are also specific obligations relating to freedom of association in the ILO's *Freedom of Association and Protection of the Right to Organise Convention 1948* (No. 87) and *Right to Organise and Collective Bargaining Convention 1949* (No. 98).

Workplace delegates' rights

236. Workplace delegates have various roles and responsibilities necessary for the ongoing support and functioning of registered employee organisations. They can serve as the first point of contact for members of an employee organisation within the workplace,

including when a worker is considering joining an employee organisation, and represent worker concerns in the workplace.

237. There is currently limited legislative protection or specific rights for workplace delegates performing these roles within a workplace. Delegates may have to use annual leave or take unpaid time off work to undertake training necessary to their roles in the registered organisation. Employers may also seek to prevent delegates from communicating with members or eligible members while at the employer's premises. Consequently, in some circumstances it may be difficult for delegates to provide effective support and representation to members and eligible members in the workplace. Imposing such restrictions on workplace delegates can have an impact on how effectively they can perform their roles, and consequently take lawful industrial activity and protected industrial action.
238. Part 7 of Schedule 1 would require that modern awards and all new enterprise agreements contain a term that deals with workplace delegates' rights. These terms must include a right to represent members within their workplace and various supporting rights, including rights to reasonable access to paid time off for training, and reasonable access to the workplace and workplace facilities for advancing their members' industrial interests. The Bill would support these new protections for workplace delegates by introducing a specific protection against an employer unreasonably failing or refusing to deal with the workplace delegate, making a false or misleading representation to the workplace delegate, or unreasonably hindering or obstructing the exercise of a workplace delegate's rights.
239. These amendments would positively engage the right to freedom of association, particularly Article 8(c) of the ICESCR which guarantees the right of trade unions to function freely, subject to no limitations other than those prescribed by law. These amendments would ensure that workplace delegates are afforded these basic primary rights within the workplace to carry out their delegate duties.

Exemption certificates for suspected underpayment

240. These amendments would positively engage the right to freedom of association, particularly Article 8(1)(c) of the ICESCR which guarantees the right of trade unions to function freely, subject to no limitations other than those prescribed by law. Of particular relevance is guidance provided by the Committee of Experts on the Application of Conventions and Recommendations of the International Labour Conference which acknowledges 'the right of trade union officers to have access to places of work' pursuant to Article 3 of ILO Convention 87 (*Freedom of Association and Collective Bargaining*, 81st session, Report III, Part 4B at [128]).
241. Part 3-4 of the FW Act provides a framework for right of entry for officials of organisations and employers the FWC to deal with the misuse of rights and disputes.
242. These amendments would waive the minimum 24-hour notice period required for entry to investigate a suspected contravention of the FW Act, or a term of a fair work instrument, in specified circumstances, namely, that the permit holder's organisation

has been issued with an exemption certificate on the ground of a suspected underpayment. This would enhance access to the workplace for officials of registered organisations (who are permit holders) to effectively investigate suspected contraventions and exercise powers under Part 3-4 including interviewing relevant persons and inspecting relevant records and documents.

243. In addition, the measure will protect permit holders exercising rights under Part 3-4 against people acting in an improper manner towards them.
244. The measure positively engages the right to freedom of association by enhancing the ability of permit holders to investigate suspected wage underpayments.

Withdrawal from amalgamations

245. This measure engages the right to freedom of association and the right to take part in public affairs and elections, by proposing to:
- repeal provisions of the RO Act that enable applications for a de-merger ballot to the FWC (to initiate a de-merger process) to be made more than five years after the relevant amalgamation (RO Act, section 94A); and
 - repeal paragraph (c) of the definition of ‘separately identifiable constituent part’ to restore certainty about the part(s) of an organisation that may be subject to a de-merger ballot (RO Act, section 93(1)).
246. This measure would restore the provisions as they were before amendments made by the *Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Bill 2020* (2020 amendments). The measure would strengthen the principle of freedom of association by removing the instability and uncertainty that has been brought about by the 2020 amendments.
247. The measure would restore the old arrangements for de-amalgamations, which provide a reasonable opportunity for members of a constituent part of an amalgamated organisation with a connection to a previously de-registered organisation to de-merge within a period of two to five years after the relevant amalgamation occurred. The measure would also not preclude members from forming, joining or seeking the registration of trade unions and employer organisations subject to the requirements of the RO Act and the rules of those organisations.

Provisions relating to regulated workers

248. The new collective agreement framework in Part 16 of Schedule 1 would provide for the making of collective agreements between regulated businesses and organisations that are entitled to represent the industrial interests of regulated workers. Further, organisations that represent the industrial interests of a person who is party to a services contract would be able to apply to the FWC for a remedy under the new unfair contract terms provisions. These amendments would positively engage the right to freedom of association by enhancing the ability of trade unions to advocate for their members and enhancing their role.

249. Item 268 would insert new subsection 350(2A), which would provide that a regulated business must not induce a regulated contractor to take, or propose to take, membership action. While existing subsection 350(2) would apply to most regulated businesses and regulated workers, it would not necessarily apply to those digital labour platforms that do not directly enter into a contract for services with an independent contractor. As such, new subsection (2A) would ensure these digital labour platform operators, and their workers are also covered. Under existing subsection 350(3), a person takes membership action if they become, do not become, remain or cease to be, an officer or member of an industrial association. By extending this protection to more people, the Bill would promote the right to freedom of association.

Right to collective bargaining

250. ILO Convention 98 protects the right of workers to collectively bargain for terms and conditions of employment. It requires States Parties (among other things) to take measures appropriate to national conditions to encourage and promote machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

Enabling multiple franchisees to access the single-enterprise stream

251. Part 3 of Schedule 1 would enhance the ability of employees of franchisees to collectively bargain for terms and conditions of employment by allowing them to access the single-enterprise stream. This would provide employees of franchisees with more options when bargaining, and would allow employees of franchisees to access a more straightforward bargaining stream.
252. Franchisees are able to access the existing single interest employer stream, in Division 10 of Part 2-4 (Enterprise agreements) of the FW Act, where the application for a single interest employer authorisation is made by the employers that would be covered, or by a bargaining representative for an employee who would be covered where other criteria are satisfied including that each employer employs at least 20 people. Employees of franchisees that employ fewer than 20 people may therefore be unable to access this stream without the consent of the employers concerned.
253. Allowing franchisees to access the single-enterprise agreement stream will remove this barrier, allowing employees of franchisees to seek a majority support determination regardless of the number of employees of each franchisee. The Bill would therefore promote the right to collective bargaining by providing an additional means of reaching agreement on the terms and conditions of employment which may be more accessible for employees of franchisees where the employer does not consent to multi-enterprise bargaining and each individual employer employs fewer than 20 people.
254. The single-enterprise agreement stream may also be the preferable bargaining stream for franchisees as a separate vote at each franchise would not be required. This is intended to make bargaining for such an agreement more attractive to franchisees and increase the willingness of franchisees to bargain with their employees.

255. By making bargaining more accessible and more attractive to franchisees, the Bill is intended to increase bargaining between franchisees and their employees. In this way, the Bill would support the right to collective bargaining.

Transitioning from multi-enterprise agreements

256. Part 4 of Schedule 1 supports the right to collective bargaining as it expands the circumstances in which an enterprise agreement can be bargained for and made. The amendments in Part 4 would allow a single-enterprise agreement to be made with employees to whom a single interest employer agreement or supported bargaining agreement that has not nominally expired applies.
257. At present, an employer specified in a supported bargaining authorisation is prohibited from bargaining for a single-enterprise agreement with employees covered by a supported bargaining authorisation unless all of its employees are covered by a supported bargaining agreement. Part 4 would allow bargaining for a replacement single-enterprise agreement to occur where not all of the employees specified in the authorisation are covered by a supported bargaining agreement. This would support the right to collective bargaining.

Provisions relating to regulated workers

258. New Part 3A-4 inserted by Part 16 of Schedule 1 would allow the FWC to register consent collective agreements between a digital labour platform operator and an organisation entitled to represent employee-like workers, or a road transport business and an organisation entitled to represent regulated road transport contractors. In doing so, it would promote the right to collectively bargain consistently with the objectives and provisions of ILO Convention 98.
259. Collective agreements would be about the terms and conditions under which regulated contractors perform work. The collective agreement making process would be simple and flexible and ensure that barriers to making and implementing agreements are as low as possible. Parties would be free to negotiate the terms of a collective agreement without interference. This would act as an incentive to make a collective agreement.
260. Further, section 536JT would authorise certain conduct for the purposes of subsection 51(1) of the *Competition and Consumer Act 2010* (CCA) and Competition Code. This would include making a collective agreement and anything done by a person or entity in preparation for, or incidental to, making, or applying for registration of, a collective agreement. This authorisation would enable the relevant parties to make and comply with collective agreements without breaching the CCA and Competition Code. By limiting appropriately these competition related restrictions on the ability to make collective agreements, this measure would further promote the right to collectively bargain.

Right to equality and non-discrimination

261. Both the ICCPR (Article 2(1)) and the ICESCR (Article 2(2)) require States Parties to the covenants to guarantee that the rights set out in these covenants are exercised without discrimination of any kind, including on the grounds of race, colour, sex,

language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 of the ICCPR further provides that States Parties must ensure that all persons are equal before the law and are entitled, without any discrimination, to the equal protection of the law.

Stronger protections against discrimination

262. Adding ‘subjection to FDV’ as a protected attribute in the FW Act would promote the rights to equality and non-discrimination by protecting vulnerable employees from discrimination within Australia’s workplaces. Terms within modern awards and enterprise agreements that discriminate against an employee because they have been, or continue to be, subjected to FDV would be prohibited by these amendments. The amendments would also protect employees and prospective employees from adverse action, such as being dismissed or refused employment, on account of the employee’s or prospective employee’s subjection to FDV. The amendments would further promote anti-discrimination protections and equality by requiring the FWC to consider the need to prevent discrimination against employees subjected to FDV whilst performing its functions. The amendment would also complement protections against discrimination for victim-survivors of FDV which exist in some States and Territories.

Right of women not to be discriminated against based on gender

263. The CEDAW provides that in relation to discrimination against women, State Parties must:

- ensure the effective protection of women against acts of discrimination (Article 2(c));
- ensure the full development and advancement of women (Article 3); and
- take all appropriate measures to eliminate discrimination against women in the field of employment to ensure the same rights between men and women (Article 11). This includes the right to equal remuneration, equal treatment in respect of work of equal value, and equality of treatment in the evaluation of the quality of work (Article 11(1)(d)).

264. Article 26 of the ICCPR requires State laws to guarantee equal and effective protection against discrimination on a number of grounds, including sex.

Casual employment

265. The Workplace Gender Equality Agency has noted that women are overrepresented in casual employment.⁴ Furthermore, ABS data shows that not only are women more likely than men to be casual (53.2 per cent of casual employees are women),⁵ they are

⁴ Workplace Gender Equality Agency, Australia’s Gender Equality Scorecard: Key results from the Workplace Gender Equality Agency’s Employer Census 2021-22, <https://www.wgea.gov.au/sites/default/files/documents/WGEA-Gender-Equality-Scorecard-2022.pdf>.

⁵ ABS, Labour Force Survey Detailed, May 2023.

more likely than men to be long term casuals. Of the 752,200 casual employees employed for more than two years, 55.7 per cent were women.⁶

266. This may add to the gender pay gap, noting casual employees are, on average, paid less than permanent employees, and exacerbates job insecurity for women workers. Casual employee average weekly earnings (in main job) were \$845.60, whereas permanent employee average weekly earnings were \$1,691.10, a difference of \$845.50.⁷
267. The amendments that would be made by Part 1 of Schedule 1 would positively engage the right of women not to be discriminated against based on gender by providing an easier pathway to permanent employment for those who choose it.

Stronger protections against discrimination

268. While FDV can affect anyone, it is recognised as a form of gendered violence that disproportionately affects women. Discrimination on the basis of subjection to FDV is therefore more likely to affect employees and prospective employees who are women. The amendments in Part 8 of Schedule 1, by protecting against such discrimination, would positively engage the rights of women not to be discriminated against based on gender in the context of employment.

Rights of parents and children

269. Article 3(1) of the CRC provides that the best interests of the child must be a primary consideration in all actions undertaken by legislative bodies.
270. Article 18(1) of the CRC goes on to state that parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of their children. Similarly, Article 5(b) of the CEDAW provides parties shall take measures to promote the recognition of the common responsibility of men and women in the upbringing and development of their children.

Casual employment

271. The amendments that would be made by Part 1 of Schedule 1 would positively engage the right to protection and assistance for families by providing a pathway to permanent employment for casual employees in caring roles. Employees who are classified as casual on engagement but whose working arrangements thereafter are not reflective of true casual employment could more easily opt to change their status to permanent under the proposed amendments. This would provide an opportunity for these employees to access paid leave and other entitlements in relation to care and family responsibilities, including paid carer's leave, which is not available to casual workers.

⁶ ABS, Characteristics of Employment, August 2022, unpublished TableBuilder.

⁷ ABS, Characteristics of Employment, August 2022, unpublished TableBuilder.

Conclusion

The Bill is compatible with human rights because it promotes human rights, including civil, political, social, economic and labour rights. To the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

Minister for Employment and Workplace Relations, the Hon Tony Burke MP

NOTES ON CLAUSES

In these notes on clause, the following abbreviations are used:

Abbreviation	Definition
2019 ASEA Review	<i>Review of the Asbestos Safety and Eradication Agency's Role and Functions – Final Report</i>
2020 RO Amdt Act	<i>Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Act 2020</i>
AEC	Australian Electoral Commission
AFP	Australian Federal Police
Agency	Asbestos and Silica Safety and Eradication Agency
AI Act	<i>Acts Interpretation Act 1901</i>
ASEA	Asbestos Safety and Eradication Agency
ASEA Act	<i>Asbestos Safety and Eradication Agency Act 2013</i>
ASEC	Asbestos Safety and Eradication Council
ASSEA Act	<i>Asbestos and Silica Safety and Eradication Agency Act 2013</i> This refers to the ASEA Act as it would be amended by the Bill
Bankruptcy Act	<i>Bankruptcy Act 1966</i>
Bill	Fair Work Legislation Amendment (Closing Loopholes) Bill 2023
Boland Review	<i>Review of the Model Work Health and Safety Laws – Final Report</i>
BOOT	Better off overall test
CDPP	Commonwealth Director of Public Prosecutions
CEO	Chief Executive Officer of the Asbestos Safety and Eradication Agency
Corporations Act	<i>Corporations Act 2001</i>
Council	Asbestos and Silica Safety and Eradication Council

Abbreviation	Definition
CPI	Consumer Price Index (national)
Crimes Act	<i>Crimes Act 1914</i>
Criminal Code	Schedule 1 to the <i>Criminal Code Act 1995</i>
Department	Department of Employment and Workplace Relations
ELGs	Employee-like Worker Guidelines
Fair Work Inspector	A person appointed as a Fair Work Inspector under section 700 or the FWO in their capacity as such
FDV	Family and domestic violence
Federal Court of Australia Act	<i>Federal Court of Australia Act 1976</i>
FEG Act	<i>Fair Entitlements Guarantee Act 2012</i>
FW Act	<i>Fair Work Act 2009</i>
FW Regulations	<i>Fair Work Regulations 2009</i>
FWC	Fair Work Commission
FWO	Fair Work Ombudsman
Guide	<i>Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers</i>
IC Act	<i>Independent Contractors Act 2006</i>
ICCPR	International Convention on Civil and Political Rights
IFA	Individual Flexibility Arrangement
ILO	International Labour Organisation
ILO Convention 111	<i>Discrimination (Employment and Occupation) Convention 1958</i> (No. 111)
ILO Convention 190	<i>Violence and Harassment Convention 2019</i> (No. 190)
Legislation Act	<i>Legislation Act 2003</i>
Migrant Workers' Taskforce	The taskforce established in 2016 to identify proposals for improvements in law, law enforcement and investigation, and other practical measures to more quickly identify and rectify

Abbreviation	Definition
	any cases of migrant worker exploitation, and chaired by Professor Allan Fels AO and Dr David Cousins AM
Minister	Minister for Employment and Workplace Relations
Model Act	<i>Model Work Health and Safety Act</i>
MSGs	Minimum Standards Guidelines
MSO	Minimum Standards Order
NDDT	National Dust Diseases Taskforce
NES	National Employment Standards
NORDR	National Occupational Respiratory Disease Registry
NPEVWC	National Plan to End Violence against Women and Children 2022–2032
NWRCC	The council by the name of the National Workplace Relations Consultative Council, established under section 4 of the National Workplace Relations Consultative Council Act 2002
PCBU	Person conducting a business or undertaking
President	President of the Fair Work Commission
RO Act	<i>Fair Work (Registered Organisations) Act 2009</i>
RTAG	Road Transport Advisory Group
RTGs	Road Transport Guidelines
RTMSO	Road Transport Minimum Standards Order
Senate Inquiry	<i>They never came home – the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia</i>
SJBP Act	<i>Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022</i>
SRC Act	<i>Safety, Rehabilitation and Compensation Act 1988</i>
SWA	Safe Work Australia

Abbreviation	Definition
UCT	Unfair contract term
WHS	Work Health and Safety
WHS Act	<i>Work Health and Safety Act 2011</i>
WHS Regulations	<i>Work Health and Safety Regulations 2011</i>

Clause 1: Short title

272. This is a formal provision specifying the short title of the Act.

Clause 2: Commencement

273. The table in this clause sets out when the provisions of the Bill commence.

Clause 3: Schedules

274. This clause gives effect to the provisions in the Schedules to the Bill.

SCHEDULE 1—MAIN AMENDMENTS

Part 1—Casual employment

Amendments to the *Fair Work Act 2009*

275. Part 1 would repeal the definition of casual employee at existing section 15A in Division 3 of Part 1-2, and introduce a new fair and objective definition which would draw on core elements of the meaning of casual employment as it was understood before the decision of the High Court of Australia in *WorkPac Pty Ltd v Rossato* [2021] HCA 23 (*Rossato*). The amendments would provide clear points in time at which the definition is to be applied, to provide certainty as to status. Together with amendments to enhance employee choice, the new definition would expand access to permanent employment for those employees who seek it.
276. Part 1 would also provide an enhanced pathway for casual employees to move to full-time or part-time employment if they wish to do so. The new framework would provide clear processes for employee driven choice about employment status which would supplement existing provisions enabling conversion in specified circumstances and the contractual ability of employees and employers to change employment status by consent. This would be underpinned by the new fair and objective test for when an employee can be classified as a casual employee of an employer, an effective dispute resolution process and strong protections against conduct designed to avoid or undermine the new framework. The new framework would retain the existing statutory offset rule in section 545A.
277. Part 1 would also amend existing Division 4A of Part 2-2 by introducing a new notification process underpinned by employee choice. This new process would enable an employee to notify their employer if they believe they are no longer, at that point in time, a casual employee within the meaning of the new definition of casual employee. This process would provide a new legislative pathway to full-time or part-time employment driven by employee choice in addition the existing casual conversion pathway.
278. Part 1 would also strengthen dispute resolution for employers and employees who have a dispute about the operation of amended Division 4A of Part 2-2, including by allowing the FWC to deal with disputes by arbitration and make any orders it considers fair and reasonable.
279. Part 1 would also include new civil remedy provisions in Division 6 of Part 3-1, the general protections provisions, to protect against conduct designed to result in the misclassification of casual employees.

Item 1: Section 15A

Section 15A Meaning of casual employee

280. This item would repeal the definition of casual employee at existing section 15A in Division 3 of Part 1-2 and substitute a new definition of casual employee. A casual employee within the meaning of new subsections 15A(1)–(2) would remain a casual employee until the occurrence of an event specified in new subsection 15A(5).

281. The new meaning of casual employee would:
- provide a fair and objective test to determine when a person can be classified as a casual employee;
 - provide certainty about when a casual employee would change or convert their employment status from casual to full-time or part-time employment; and
 - ensure that backpay liabilities could not arise because of a change in an employee's status during their employment.
282. Taken together with the new pathways for employees to seek to have their status under the definition recognised, this definition would provide greater access to permanent employment opportunities for those employees who seek it.
283. The new meaning of casual employee would underpin the new employee choice pathway (new Subdivision B—Employee choice about casual employment in Division 4A of Part 2-2), which would allow a casual employee who believes they are no longer a casual employee to notify their employer, at that point in time, and effect a change in their employment status with their employer to full-time or part-time employment (subject to the grounds for not accepting an employee notification at new subsection 66AAC(4)).
284. **General rule:** New subsection 15A(1) would introduce a general rule that defines an employee as a 'casual employee' of an employer if both of the following conditions are satisfied:
- the employment relationship is characterised by an absence of a firm advancement commitment to continuing and indefinite work (new paragraph 15A(1)(a)); 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 if the employee were a casual employee, or the employee is entitled to such a loading or rate of pay under the contract of employment (new paragraph 15A(1)(b)).
285. The 'absence of a firm advance commitment to continuing and indefinite work' would be the central element of the new meaning of casual employee, and the key feature distinguishing casual employment from full-time or part-time employment. There is no requirement for the 'continuing and indefinite work' to be according to an agreed pattern of work, unlike the existing definition or the position at common law before *Rossato*. The intention is to expand access to secure work for an employee engaged in a manner substantially consistent with full-time or part-time employment, and reflective of the patterns of work of these employees.
286. The new meaning of casual employee would draw on core elements of the meaning of casual employment, as it was understood prior to the decision of the High Court in *Rossato*, including considerations to inform the objective assessment of whether there is an absence of a firm advance commitment to continuing and indefinite work. These considerations would capture all aspects of the employment relationship and require an objective assessment of the totality of the employment relationship.

287. **Indicia that apply for the purposes of the general rule:** New subsection 15A(2) would set out a number of considerations which would need to be assessed when considering whether the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work (new paragraph 15A(1)(a)).
288. Firstly, the relationship would be required to be assessed based on the real substance, practical reality and true nature of the employment relationship, as was the approach in *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 at [180] (new paragraph 15A(2)(a)).
289. This would require an objective assessment of the totality of the relationship, and not just the terms of the contract of employment, in assessing whether the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work.
290. Secondly, a firm advance commitment may be in the form of a mutually agreed term in a contract of employment, or a mutual understanding or expectation between an employer and employee (new paragraph 15A(2)(b)). A firm advance commitment may be discerned from a mutual understanding or expectation between an employer and employee irrespective of the terms of the contract of employment. The mutual understanding or expectation does not need to amount to a contract or a variation of the contract of employment. A mutual understanding or expectation could be inferred from how the employment contract is performed, or the conduct of the employer and employee after entering into the employment contract (see new paragraph 15A(3)(a)).
291. The intention of this provision is to ensure that the assessment would be genuinely objective and not limited by the subjective views of the parties. Contrary to the result in *Rossato*, a firm advance commitment would not be required to be an ‘enforceable commitment’. A firm advance commitment could be identified, for instance, on the basis of ongoing work performed on a regular, systematic, stable or predictable basis performed over a sufficient length of time.
292. Finally, in assessing the employment relationship (on the basis of new paragraphs 15A(2)(a)-(b)), regard would be required to the following potential indicators that the employment relationship is not casual:
- whether there is an inability of the employer to elect to offer work and/or an inability of the employee to elect to accept or reject work and whether this inability occurs in practice (new subparagraph 15A(2)(c)(i));
 - whether it is reasonably likely that continuing work of the kind performed by the employee, in the employer’s enterprise, will be available in the future, having regard to the nature of the employer’s enterprise (new subparagraph 15A(2)(c)(ii));
 - whether there are full-time or part-time employees in the employer’s enterprise performing the same kind of work usually performed by the employee (new subparagraph 15A(2)(iii)) – this comparison may demonstrate that the work usually performed by the employee in the employer’s enterprise is or is not able to be performed on a full-time or part-time basis; and

- whether there is a regular pattern of work for the employee (new subparagraph 15A(2)(iv)) – this regular pattern of work may include some fluctuations or variations over time, including for reasonable absences such as for illness, injury or recreation, and does not need to be absolutely uniform (see new paragraph 15A(3)(c)). A regular pattern of work may be (but is not necessarily) indicative of a firm advance commitment to continuing and indefinite work. This reflects the former position under the general law, according to which it was the informality, uncertainty and irregularity of an engagement that gave it the characteristic of being casual: *Reed v Blue Line Cruises Ltd* (1996) 73 IR 420.
293. The considerations in new paragraph 15A(2)(c) would not be exhaustive, but each of the considerations listed would need to be taken into account when assessing whether the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work. Not all considerations need to be satisfied to establish the employment relationship is characterised by a firm advance commitment to continuing work (see new paragraph 15A(3)(b)).
294. **Exceptions to general rule:** From 6 December 2023, the FW Act will include specific provisions limiting the use of fixed term contracts. These limitations do not apply to casual employees. To ensure that casual employment is not used to undermine the limits on fixed term contracts, new subsection 15A(4) would provide that, generally, a casual employee cannot be engaged on a fixed term contract—that is, a contract which includes a term providing the contract will terminate at the end of identifiable period, whether or not the contract also includes a term that provides for circumstances in which the contract may be terminated earlier than the end of identifiable period (new paragraph 15A(4)(a)).
295. However, the limitation on casual employees being engaged on fixed term contracts will not apply if the identifiable period is identified by reference to a specified season, or the completion of the shift of work to which the contract of employment relates (new paragraph 15A(4)(b)). As a consequence, a casual employee would be able to be engaged for the duration of a season, such as a fruit picking season, or as a labourer on a shift by shift basis.
296. **Employees engaged as casual employees remain so until the occurrence of a specified event:** New subsection 15A(5) would specify an exhaustive list of events which would result in casual employee changing status to full-time or part-time employment if specified events were to occur.
297. The effect of this new subsection is to provide certainty that a person who commences employment as a casual employee within the meaning of new subsections 15A(1)–(4) will remain a casual employee of the employer until:
- the employment status of the employee is changed or converted to full-time or part-time employment under new Division 4A of Part 2-2, including by the employee choice pathway in new Subdivision B, or the existing casual conversion pathway in new Subdivision C (new paragraph 15A(5)(a)); or

- the FWC makes an order under new section 66MA, or under existing section 739 in Division 2 of Part 6, changing or converting the employment status of the employee (new paragraph 15A(5)(b)); or
 - the employment status of the employee is changed or converted to full-time or part-time employment under the terms of a fair work instrument that applies to the employee (new paragraph 15A(5)(c)); or
 - the employer makes an alternative offer of employment to the employee and the employee commences work for the employer on a basis other than as a casual employee (new paragraph 15A(5)(d)).
298. New subsection 15A(5) would provide certainty about when the employment status of a casual employee would change or convert to full-time or part-time employment and about entitlements payable to casual employees. If an employee was correctly classified as a casual employee on engagement within the meaning of new subsections 15A(1)–(4), they would remain a casual employee until such time that an event specified in new subsection 15A(5) occurred.
299. However, as under the existing definition of casual employee, if an employer misclassifies an employee as a casual employee at commencement of the employment relationship, the employee would never have been a casual employee and may make a claim to be paid an amount for one or more relevant entitlements with respect to the period they were misclassified. A court making orders in such circumstances would be required under existing section 545A to reduce any amount payable to the employee for relevant entitlements (but not below nil) by an amount equal to the casual loading amount received by the employee.

Item 2: Paragraph 61(2)(ba)

300. Existing subsection 61(2) in Division 2 of Part 2-2 lists the minimum standards that comprise the NES.
301. This item would repeal the reference to ‘offers and requests for casual conversion (Division 4A);’ at existing paragraph 61(2)(ba) and substitute with a reference to ‘casual employment (Division 4A);’ as a consequence of the amendment made by item 4.

Item 3: Subsection 65(2A)

302. Existing subsection 65(2) sets out categories of employees entitled to request flexible working arrangements. Existing paragraph 65(2)(a) provides that an employee who is not a casual employee may only request flexible working arrangements after having completed at least 12 months of continuous service. Existing subsection 65(2A) enables an employee who converts to full-time or part-time employment under existing casual conversion provisions to count the time they were a regular casual employee as continuous service for the purposes of establishing eligibility to request flexible working arrangements.
303. Item 3 would omit reference to ‘converted under Division 4A of Part 2-2’ in existing subsection 65(2A) and substitute ‘changed or converted under Division 4A of Part 2-2’,

to reflect the new pathway to full-time and part-time employment provided under new Subdivision B in Division 4A of Part 2-2 ('employee choice').

304. The amendment would clarify that a period of employment as a regular casual employee would count as continuous service for the purposes of applying existing paragraph 65(2)(a) in circumstances where:

- an employee changes to full-time or part-time employment under new Subdivision B in Division 4A of Part 2-2 ('employee choice'); or
- an employee converts to full-time or part-time employment under existing Division 4A of Part 2-2 ('casual conversion') which would become new Subdivision C in Division 4A of Part 2-2.

Item 4: Division 4A of Part 2-2 (heading)

Division 4A – Casual employment

305. This item would repeal the heading 'Division 4A—Offers and requests for casual conversion' at existing Division 4A of Part 2-2 and substitute with 'Division 4A—Casual employment', to reflect the inclusion of employee choice provisions in Division 4A, as well as the existing casual conversion provisions.

306. The casual employment framework in new Division 4A of Part 2-2 would have four subdivisions:

- Subdivision A, setting out the general application rule and object for Division 4A;
- Subdivision B ('employee choice'), setting out a process for an employee (if they choose) to notify their employer in writing that they believe they no longer meet the requirements in subsections 15A(1)–(4), and a procedure for the employer to respond;
- Subdivision C ('casual conversion'), setting out a process for casual conversion, including a requirement for an employer to offer eligible casual employees conversion to full-time or part-time employment within 21 days after the end of the 12 month period from the employee's commencement of employment unless they have reasonable grounds not to offer, and a residual right for eligible casual employees to request casual conversion; and
- Subdivision D, dealing with other provisions relevant to employee choice and casual conversion, including its effect and dispute resolution options.

307. The new casual employment framework in Division 4A of Part 2-2 would form part of the NES. The established interaction rules at existing section 55 in Division 3 of Part 2-1 would apply. These include that a modern award or enterprise must not exclude any provision of the NES.

308. Nothing would prevent an employer and employee from agreeing to a change of employment status outside the employee choice and casual conversion pathways in Division 4A of Part 2-2. If they do so, this change of status would be recognised under new paragraph 15A(5)(d).

Item 5: After section 66A

Section 66AAA Object of this Division

309. This Item would insert a new section 66AAA, to introduce an object into Division 4A of Part 2-2.
310. New section 66AAA would set out the intent to establish a new framework for changes to, or conversion of, casual employment status that:
- is quick, flexible, and informal;
 - addresses the needs of employers and employees; and
 - provides dispute resolution supporting casual employees' choice about employment status.
311. Existing paragraph 578(a) requires the FWC to take the objects of the FW Act, or any part of the FW Act, into account when performing its functions or exercising powers in relation to disputes about employee choice or casual conversion. Consequently, the FWC would need to take the object in new section 66AAA into account in performing its functions under new Division 4A.

Item 6: After Subdivision A of Division 4A of Part 2-2

Subdivision B – Employee choice about casual employment

312. Item 6 would insert new 'Subdivision B — Employee choice about casual employment' in Division 4A of Part 2-2 ('employee choice'), providing a new legislative pathway to full-time or part-time employment for casual employees who no longer believe they are a casual employee within the meaning of new subsection 15A(1).
313. An eligible casual employee would be able to initiate a change to full-time or part-time employment under these provisions if the employee:
- believes they are no longer a casual employee at the point in time when they make the notification to their employer; and
 - wants to change their employment status to full-time or part-time employment.

There would be no requirement for an employee to issue a notification if they do not want to change their employment status from casual to full-time or part-time employment. Employees would have complete choice about whether or not to do so. These amendments would have no effect on any casual employee, or their entitlement to a casual loading, unless the employee wishes to avail themselves of the opportunity to change status.

Section 66AAB Employee notification

314. New section 66AAB would provide rules for employees who wish to notify a change of status to their employer. An employee would need to:
- believe that their status no longer meets the definition of casual employment;
 - meet minimum employment periods; and

- not be currently engaged in a dispute under new section 66M, or had certain notification or dispute resolution events occur within the preceding six months.
315. **Belief in change of status:** To be eligible to make a notification, an employee would have to believe that they are no longer, at that point in time, a casual employee, having regard to the meaning of casual employee at new subsections 15A(1)–(4).
316. **No notifications while dispute being dealt with:** A casual employee would not be eligible to issue a notification under new section 66AAB to change their employment status if a dispute between the employer and employee was already being dealt with under new section 66M, including by arbitration under new section 66MA, or under existing section 739 in Division 2 of Part 6-2 (new paragraph 66AAB(b)).
317. **Minimum employment period:** To be eligible to issue a notification under new section 66AAB, a casual employee would have to have been employed for a period, beginning on the day employment started, of at least:
- 12 months, in the case of a small business employee (new subparagraph 66AAB(c)(i)); or
 - six months, for all other employees (new subparagraph 66AAB(c)(ii)).
318. **Frequency of notifications:** A casual employee would not be eligible to issue a notification to their employer if any of the events set out in the list at new paragraph 66AAB(d) had taken place in the six month period before the date the notification were to be given. If a casual employee has:
- received a response from their employer under new section 66AAC not accepting a previous employee notification made under new section 66AAB;
 - received a notice from their employer under existing subsection 66C(3) not making an offer of casual conversion under existing section 66B;
 - declined an offer for casual conversion under existing section 66D made by their employer under existing section 66B;
 - received a response from their employer under existing section 66G refusing a request for casual conversion made under existing section 66F; or
 - resolved a dispute about the operation of new Division 4A of Part 2-2, including about employee choice or casual conversion, with their employer under new section 66M, including by arbitration under new section 66MA, or under existing section 739 in Division 2 of Part 6-2 they would be required to wait a period of six months from the event before issuing a notification to their employer under new section 66AAB. If more than one event has occurred, the six month period would be counted from the last of the events.
319. This feature of the framework would protect employers against repeated attempts by a casual employee to change or convert their employment status within a six month period. Where a casual employee has had the opportunity to change or convert their employment status to full-time or part-time employment, they will not be entitled to

issue a notification under new section 66AAB, or request casual conversion under existing section 66F, within a period of at least six months.

320. Restricting access to the employee choice pathway to employees with at least six months of service for casual employees of non-small business employers, and 12 months for small business employers, would provide employers and employees with sufficient time to establish and assess the real substance, practical reality and true nature of the employment relationship. The longer period provided for small business is appropriate given the significance of change of employment status for such businesses, is intended to allow small business employers additional time to understand their rights and obligations under new Division 4A of Part 2-2, and is consistent with the current eligibility timeframes under the existing casual conversion framework.
321. The employee choice pathway would sit alongside the existing casual conversion pathway in new Subdivision C of Part 2-2. A casual employee would not be able to access both pathways simultaneously, or within a six month period of an event under one pathway occurring (subject to the ability to change pathways once a dispute is before the FWC under new subsection 66M(7)).

Section 66AAC Employer response

322. New section 66AAC provides rules for how an employer must respond to an employee notification under new section 66AAB.
323. **Timing of notification:** An employer would be required to respond in writing to a notification from an employee under new section 66AAB within 21 days after the notification is given to them (new subsection 66AAC(1)).
324. **Information that must be included in the response:** A response would be required to state whether the employee does or does not agree with the employee notification, and different information depending on whether the employer does, or does not, accept the notification (new subsection 66AAC(2)).
325. If the employer accepts the notification, they must state:
- that they accept the notification;
 - whether the employee is changing to full-time or part-time employment;
 - the employee's hours of work after the change takes effect; and
 - the day that the change will take effect.
326. If the employer does not accept the notification, they must state:
- that they do not accept the notification on one or more of the grounds set out in new subsection 66AAC(4);
 - detailed reasons for their decision; and
 - information about the employee's ability to attempt to resolve the dispute under new section 66M, and, if the dispute is not resolved, the ability of the FWC to make an order under new subsection 66MA(1).

327. **Consulting with employees:** If accepting the notification, the employer would be required to first consult with the employee on the changes to the employee's employment, including whether the change is to full-time or part-time employment, what the employee's hours of work will be and the day the change will take effect (new subsection 66AAC(3)).
328. In general, the day the status change would take effect must be the first day of the employee's first full pay period starting after the day the response is given by the employer, unless otherwise agreed (new subsection 66AAD(2)). The written response issued by the employer, after consulting with the employee, must include this information (new subparagraph 66AAC(2)(b)(iii)).
329. If not accepting the notification, the employer would be required to first consult with the employee about their decision.

Illustrative example

Mackenzie, the new owner of a beachside café, buys an upmarket espresso machine and wants to hire a barista to operate the machine. This will enable her to focus on establishing the new business.

Mackenzie engages Gus in November, on a casual basis, paying him a 25 per cent loading and rostering him to work on an 'as needed' basis. He is a student and has nominated his availability to be Wednesday to Sunday between 7.30am–3.30pm.

She is not able to indicate how long she may be able to provide him with employment at the outset, but hopes that if the new coffee machine proves successful she may be able to provide more regular employment.

On engagement: Gus is correctly classified as a casual employee. There is no firm advance commitment to continuing and indefinite work, and he is paid a casual loading under the applicable fair work instrument.

Two years later: The business is thriving and Gus now works regularly at the café, Wednesday to Sunday 7.30am–12pm, with extra hours as required to meet customer demand during the summer period. Gus is absent for some single days due to illness.

Gus decides that a move to ongoing employment would be beneficial and decides to issue a notification to Mackenzie under the 'employee choice' provisions of the FW Act.

He considers that his working arrangements are, in effect, those of an ongoing employee, although there are no other employees with which to compare. Both Mackenzie and Gus expect that these arrangements will continue into the future.

Mackenzie agrees to Gus' notification and, after discussing the notification, they agree that he will commence as a permanent part-time employee two weeks later.

330. **Grounds for not accepting a notification:** new subsection 66AAC(4) would set out an exhaustive list of grounds upon which an employer would be able to refuse an

employee notification under new section 66AAB. An employer would be able to refuse an employee notification on any of the following grounds:

- the employer believes the employee is still correctly classified as a casual employee, having regard to new subsections 15A(1)–(4) (new paragraph 66AAC(4)(a));
- it would be impractical for the employer to accept the notification because, in order to avoid contravening the term of a fair work instrument that would apply to the employee as a full-time or part-time employee, it would be reasonably necessary to make substantial changes to the terms and conditions of the employee's employment which would significantly affect the way the employee would need to work (new paragraph 66AAC(4)(b));
- a change of employment status to full-time or part-time employment would not comply with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory if the employer were to accept the notification (new paragraph 66AAC(4)(c)).

331. A change of status may be impractical for the purposes of new paragraph 66AAC(4)(b), for example, where the relevant fair work instrument would require minimum hours of engagement for part-time employment that are more than the employee is usually rostered to work as a casual employee of the employer. However, nothing would prevent the employer and employee from coming to an alternative arrangement during consultation with one another before the employer issues a written response under new section 66AAC.

332. A ground for refusal to comply with public sector recruitment or selection processes in new paragraph 66AAC(4)(c) would allow the uninterrupted operation of Commonwealth, State and Territory laws governing public service recruitment. In these sectors, decisions relating to engagement and promotion into permanent roles are required to be based on merit, which is a long-standing and fundamental principle of public sector employment in Australia. At the Commonwealth level, the *Public Service Act 1999* provides for an Australian Public Service that is career-based and which makes decisions relating to engagement and promotion that are based on merit. In order to be engaged as an ongoing Australian Public Service employee, a person must have been found suitable through a merit-based selection process. A process that enables an employee to become ongoing without a merit-based selection process for the same or a similar role within the preceding 18 months, would be inconsistent with the recruitment processes required under the *Public Service Act 1999*.

Section 66AAD Effect of employer acceptance of employee notification

333. New subsection 66AAD(1) would provide that an employee is taken to be a full-time or part-time employee, beginning on the day specified in the employer response accepting the employee's notification.

334. New subsection 66AAD(2) would provide that the day specified must be the first day of the employee's first full pay period that starts after the day of the employer's response, unless another day is agreed.

Item 7: Subdivision B of Division 4A of Part 2-2 (heading)

Item 8: Section 66AA

Item 9: Subsection 66C(3) (note)

Item 10: Subdivision C of Division 4A of Part 2-2 (heading)

Subdivision C - Offers and request for casual conversion

335. These items would make consequential amendments to reflect the insertion of new 'Subdivision B — Employee choice about casual employment' in Division 4A of Part 2-2 before existing 'Subdivision B—Employer offers for casual conversion' which would become 'Subdivision C—Offers and requests for casual conversion':

- Item 7 would repeal the heading 'Subdivision B—Employer offers for casual conversion' at existing Division 4A of Part 2-2 and substitute with 'Subdivision C—Offers and requests for casual conversion';
- Item 8 would omit 'This Subdivision does' at existing section 66AA in existing 'Subdivision B—Employer offers for casual conversion' and substitute with 'Sections 66B to 66E do', preserving the effect of existing section 66AA to exclude the application of the requirement for an employer that is a small business employer to offer casual conversion under existing sections 66B–66E;
- Item 9 would omit 'Subdivision C' from the note at existing subsection 66C(3) in existing 'Subdivision B—Employer offers for casual conversion' and substitute with 'sections 66F to 66J', ensuring the note at existing subsection 66C(3) accurately refers to the residual right to request conversion to full-time or part-time employment in certain circumstances at subsections 66F–66J; and
- Item 10 would repeal the heading 'Subdivision C—Residual right to request casual conversion'. This item would consolidate the provisions in existing 'Subdivision B—Employer offers for casual conversion' and existing 'Subdivision C—Residual right to request casual conversion' in Division 4A of Part 2-2 into one new subdivision, 'Subdivision C—Offers and requests for casual conversion'.

Item 11: Subparagraph 66F(1)(c)(i)

336. Existing subparagraph 66F(1)(c)(i) deals with circumstances which prevent an employee from making a request for casual conversion to full-time or part-time employment.

337. This item would repeal existing subparagraph 66F(1)(c)(i) and substitute new subparagraphs 66F(1)(c)(ia) and (i), to reflect the addition of the new employee choice pathway, while retaining the existing limitation on subsequent requests under the existing casual conversion framework.

338. As a result of this amendment, a casual employee would be prevented from making a request for casual conversion to convert to full-time or part-time employment if, in the period of 6 months before giving the request to their employer, the employee has:
- given an employee notification under new section 66AAB (new subparagraph 66F(1)(c)(ia));
 - refused an offer of casual conversion by their employer under existing section 66B (new subparagraph 66F(1)(c)(i)).
339. This item is intended to minimise the regulatory burden on an employer that comes with responding to a request for casual conversion or an employee notification.

Item 12: Section 66K

340. This item would insert a reference to new subparagraph 66AAC(2)(b)(iii) into the existing avoidance of doubt provision in section 66K, which deals with the effect of conversion of employment to full-time or part-time employment, as a consequence of the insertion of the new employee choice provisions in Subdivision B by item 6.
341. The existing provision makes clear that a change from casual to non-casual employment under existing paragraphs 66E(1)(c) or 66J(1)(c), would be a change for the purpose of:
- the FW Act and any other law of the Commonwealth;
 - a law of a State or Territory;
 - any fair work instrument that applies to the employee; and
 - the employment contract.
342. This item would add a change of employment status to full-time of part-time employment under the employee choice pathway, on and after the day specified in the employers response (new subparagraph 66AAC(2)(b)(iii)), to the existing avoidance of doubt provision in section 66K, to ensure clarity regarding the effect of a change of employment status under the employee choice pathway.

Item 13: Subsection 66L(1)

343. This item would repeal existing subsection 66L(1) (not including the note) and substitute new subparagraph 66L(1), which would prohibit an employer from changing the usual pattern of work, reducing or varying the hours of work, or terminating the employment of a casual employee as a means of avoiding their rights and obligations under new Division 4A of Part 2-2.
344. This amendment would expand the effect of existing subsection 66L(1) to expressly prohibit changing the pattern of work of a casual employee to avoid any right or obligation under Division 4A of Part 2-2.
345. This amendment is necessary to reflect the meaning of casual employee in new section 15A, in particular the requirement to have regard to whether there is a regular pattern of work for the employee when assessing whether there is an absence of a firm

advance commitment to continuing and indefinite work (new subparagraph 15A(2)(c)(iv)). The existence of a regular pattern of work is an important indicator of the presence of a firm advance commitment, although it would not be solely determinative of an employee's status.

Item 14: Subsection 66L(2)

346. This item would repeal existing subsection 66L(2) and substitute new subparagraph 66L(2), which would make it clear that nothing in Division 4A of Part 2-2 would:

- require an employee to change or convert to full-time or part-time employment;
- permit an employer to require an employee to change or convert to full-time or part-time employment; or
- require an employer to increase the working hours of a casual employee if they have made a notification to change, or request to convert, to full-time or part-time employment.

Item 15: Section 66M

347. This item would repeal existing section 66M and substitute a new section 66M to provide procedures the employer and employee must follow to resolve any disputes about the operation of new Division 4A of Part 2-2. This would include a procedure for referring disputes to the FWC if the employer and employee have been unable to resolve the dispute at the workplace level.

348. **Disputes covered:** This item would apply to a dispute between an employer and employee about the operation of new Division 4A of Part 2-2, including disputes about employee choice under new Subdivision B (new subsection 66M(1)) and disputes about casual conversion under new Subdivision C (new subsection 66M(3)). Unlike existing section 66M, which only applies where a process is not otherwise provided by a fair work instrument, contract of employment or other written agreement, this new process would apply generally. However, if the dispute is about employee choice under new Subdivision B, the FWC would not be able to deal with the dispute if it were satisfied a change to the status of the employee would result in the employer not complying with a recruitment or selection process required by or under a law of the Commonwealth or State or a Territory (new subsection 66M(2)).

349. **Resolving disputes:** New subsection 66M(4) would require an employer and employee to first attempt to resolve a dispute at the workplace level, by discussion between the parties. This reflects the benefit of resolving disputes as close to the workplace as possible.

350. Exactly how disputes are handled in the workplace is not specified, and may be adapted by particular employers to suit their workplace structures and policies. This could include discussion between the affected employee and their immediate supervisor or more senior levels of management if appropriate.

351. The notes at new subsection 66M(4) would refer the reader to modern awards and enterprise agreements, which must contain dispute settlement terms capable of dealing with any dispute under the NES, which would include new Division 4A of Part 2-2. These terms may supplement or be incidental or ancillary to the procedures in new sections 66M and 66MA.
352. **FWC dispute resolution:** new subsection 66M(5) would allow the employer or employee to refer the dispute to the FWC if discussions at the workplace level do not resolve the dispute.
353. The FWC would be required to first deal a dispute with it by means other than arbitration in the first instance, unless there were exceptional circumstances (new subsection 66M(6)). The note to new subsection 66M(6) refers the reader to the existing powers of the FWC to deal with disputes by mediation, conciliation, making a recommendation or expressing an opinion (see existing section 595 in Division 3 of Part 5-1).
354. If the dispute cannot be resolved by other means, the FWC would be able to deal with the dispute by arbitration in accordance with new section 66MA.
355. **Changing streams:** New subsections 66M(7)–(9) would provide the FWC with the ability to deal with a dispute about the operation of ‘Subdivision B—Employee choice about casual employment’ as though it were a dispute about the operation of new ‘Subdivision C—Offers and requests for casual conversion’, and vice versa, if it considered it appropriate to do so and the employee agreed.
356. This feature of the dispute resolution framework is designed to provide the FWC with a broad range of options for dealing with disputes arising under the operation of new Division 4A of Part 2-2. It is also intended to give effect to the object in new section 66AAA, to ensure dispute resolution is flexible and supports employee choice about employment status.
357. New subsection 66M(7) would set out the circumstances in which the FWC could deal with a dispute referred about employee choice as though it were a dispute about casual conversion. If the FWC considered it appropriate to do so and the employee agreed, the FWC would be able to treat a dispute referred under employee choice as though it were referred under casual conversion so long as the timing prerequisites set out in existing paragraph 66F(1)(c) would not otherwise have prevented the employee from making a request for casual conversion under existing section 66F in Division 4A of Part 2-2.
358. New subsection 66M(8) would set out the circumstances in which the FWC could deal with a dispute referred about casual conversion as though it were a dispute about employee choice. If the FWC considered it appropriate to do so and the employee agreed, the FWC would be able to treat a dispute referred under casual conversion as though it were referred under employee choice so long as the timing requirements set out in new subparagraphs 66AAB(c)–(d) would not have otherwise prevented the employee from giving the employer a notification under new section 66AAB. The FWC would also not be able to deal with a dispute about casual conversion as though it

were a dispute about employee choice if it were satisfied a change to the status of the employee would result in employer not complying with a recruitment or selection process required by or under a law of the Commonwealth or State or a Territory (new subsection 66M(2)).

359. If the FWC considered it appropriate to change streams under new subsections 66M(7)–(9) and the employee agreed, for the purposes of dealing with the dispute in the alternative stream, the FWC would be able to:
- deem any actions required by the employer and employee under the alternative stream, which would have been required in order for the FWC to deal with the dispute, to be taken to have occurred (new paragraph 66M(9)(a));
 - invite submissions from the employer and employee, when treating a dispute about casual conversion as though it were a dispute about employee choice, about whether any grounds from new subsection 66AAC(4) exist which would have caused the employer to be unable to accept an employee notification under new section 66AAB (new paragraph 66M(9)(b)); and
 - invite submissions from the employer and employee, when treating a dispute about employee choice as though it were a dispute about casual conversion, about whether there any reasonable grounds which the employer would rely on in refusing a request for casual conversion under existing section 66F (new paragraph 66M(9)(b)).
360. These processes are intended to reduce the burden on the FWC, applicants and respondents, by providing flexibility to the FWC to deal with matters before it in the most expedient fashion.
361. **Representatives:** New subsection 66M(10) would allow the employer or employee to appoint a representative for the purpose of resolving the dispute or having the dispute dealt with by the FWC. The representative could be a person, or an employer or employee organisation entitled to represent the industrial interests of the employer or employee. The note at new subsection 66M(10) refers the reader to the provisions at existing section 596, which allow a person to be represented in a matter before the FWC by a lawyer or paid agent with the permission of the FWC.
362. **Procedural rules:** new subsection 66M(11) provides that, in relation to a dispute referred to the FWC under new subsection 66M(5), procedural rules may provide for:
- the joinder as a party to the dispute of any other employee that has a dispute with the same employer under new section 66M, or any employee organisation entitled to represent the industrial interests of such an employee; and
 - for processes to support the operation of changing streams under new subsections 66M(7)–(9).
363. Nothing in new subsection 66M(11) would limit the operation of the procedural rules at existing section 609.

364. The content of these rules would be informed by the objects at new section 66AAA, particularly the importance of quick, flexible and informal arrangements that support the needs of both employers and employees.
365. The FWC would be able to deal with a dispute referred to it under either the employee choice or casual conversion pathway by arbitration in accordance with new section 66MA. The FWC would only deal with a dispute by arbitration after other means of dispute resolution had been attempted, such as mediation or conciliation, or in the first instance if there were exceptional circumstances (new subsection 66M(6)).
366. **Orders the FWC may make:** New subsection 66MA(1) would set out a number of orders the FWC may consider it appropriate to make if dealing with a dispute by arbitration, including:
- for a dispute about employee choice, that the employee be treated as a full-time or part-time employee from the date of the first full pay period that starts after the day the order is made (or a later date if the FWC considers it appropriate), or that the employee continue to be treated as a casual employee (new subsection 66M(4));
 - for a dispute about casual conversion, that the employer make the employee an offer of casual conversion under existing section 66B, or grant a request made for casual conversion under section 66J (new subsection 66MA(7)).
367. The orders set out in new subsection 66MA(1) are not exhaustive and the FWC is not limited to making only the orders listed in subsections 66MA(4) and (7). In general, the FWC would be able to make any order it considers appropriate. However, it would not be able to make any order unless it considers that making the order would be fair and reasonable (new subsection 66MA(2)).
368. The note at new subsection 66MA(2) refers the reader to existing paragraph 578(a), which requires the FWC to take into account the objects of the FW Act, or any part of the FW Act, when performing its functions or exercising its powers. The objects of Division 4A of Part 2-2 (new section 66MA), in addition to the objects of the FW Act at existing section 3 in Division 1 of Part 1-1, would therefore need to be considered by the FWC when making an order under new subsection 66MA(1).
369. Under new subsection 66MA(3), the FWC would not be able to make an order if the order would be inconsistent with a provision of the FW Act or a term of a fair work instrument that applies to the employer and employee at the time immediately before the order were to be made (new subsection 66MA(3)). This is intended to ensure that an order does not have the effect of amending terms and conditions designed to protect full-time or part-time employees, but which may not apply to casual employees because of the differences between full-time and part-time employment and casual employment. It would not prevent an order that is inconsistent with a previous order made under new subsection 66MA(1), where this was considered appropriate by the FWC. This clarification is necessary because ‘fair work instrument’ is defined by section 12 to include orders of the FWC.

370. In deciding whether to make an order about employee choice under new subsection 66MA(1), including an order referred to new subsection 66MA(4), and what the terms of such an order would be, the FWC would be required to:
- consider whether a substantial change would be reasonably necessary to the employee's terms and conditions to ensure the employer does not contravene the term of a fair work instrument that would apply to the employee as a full-time or part-time employee (new paragraph 66MA(5)(a));
 - disregard any conduct of the employer and employee that took place after the employee gave the employer the notification under new section 66AAB (new paragraph 66MA(5)(b)).
371. **Contravening an order:** New subsection 66MA(8) would provide that a person must not contravene an order made under new subsection 66MA(1). A contravention of an order made under new subsection 66MA(1) would be subject to a potential civil penalty.

Item 16: Subsection 67(1A)

372. This item would omit 'converted under Division 4A of Part 2-2' in existing subsection 67(1A) in Division 5 of Part 2-2 and substitute 'changed or converted under Division 4A of Part 2-2'.
373. Existing section 67 sets out categories of employees who are entitled to access parental leave and related entitlements under existing Division 5 of Part 2-2. Existing subsection 67(1) provides that an employee who is not a casual employee may access leave entitlements (other than unpaid pre-adoption leave or unpaid safe job leave) after having completed at least 12 months of continuous service. Existing subsection 67(1A) enables an employee who converts to full-time or part-time employment under existing Division 4A of Part 2-2 to count the time they were a regular casual employee as continuous service for the purposes of establishing entitlement to parental leave and relation entitlements.
374. This item would clarify that a period of employment as a regular casual employee would count as continuous service for the purposes of applying existing subsection 67(1A) in circumstances where:
- an employee changes to full-time or part-time employment under the employee choice provisions; or
 - an employee converts to full-time or part-time employment under the existing casual conversion provisions.

375. The item is a consequential amendment to reflect the new pathway to full-time and part-time employment provided by the employee choice provisions.

Item 17: Subsection 125A(2)

376. This item would omit 'and offers and requests for casual conversion' from existing subsection 125A(2) and substitute 'and how this can be changed or converted'.

377. Existing section 125A requires the FWO to prepare a Casual Employment Information Statement for publishing in the Gazette. Existing subsection 125A(2) sets out what information must be included in the Casual Employment Information Statement, including information about casual conversion under existing provisions.
378. This item would amend existing subsection 125A(2) to clarify that the Casual Employment Information Statement must include information about how an employee's casual status may change under both the employee choice and the casual conversion provisions.

Item 18: After paragraph 125A(2)(a)

379. This item would insert new subparagraphs 125A(2)(aa) and (ab) after existing paragraph 125A(2)(a).
380. Existing subsection 125A(2) provides that the Casual Employment Information Statement prepared by the FWO must include information about the meaning of casual employee under existing section 15A and information relating to casual conversion. The Casual Employment Information Statement would continue to include this information and would be updated to reflect the new meaning of casual employee and other changes made by this Bill to Division 4A of Part 2-2, such as the new employee choice pathway, the role of the FWC in dealing with disputes and the availability of arbitration.
381. This item would require the Casual Employment Information Statement to include the following information relating to the new employee choice provisions:
- the ability for casual employees who have completed six months of employment, or 12 months in the case of casual employees of small business employers, to issue a notification to their employer under new section 66AAB if they no longer, at that point in time, believe they are a casual employee within the meaning of new subsections 15A(1)–(4) (new subparagraph 125A(2)(aa));
 - the grounds upon which an employer may not accept an employee choice notification made under new section 66AAB (new subparagraph 125A(2)(ab)).
382. While the Casual Employment Information Statement must include this information, it could also include additional information about casual employment. For example, the Statement could include information about casual employees being entitled to a casual loading (or a specific rate of pay for casual employees under the terms of a fair work instrument) under new paragraph 15A(1)(b). This loading amount is paid to casual employees having regard to the nature of their employment and the fact that casual employees do not receive a range of entitlements provided to full-time and part-time employees, such as annual leave. The Statement could also explain that employees would no longer be entitled to a casual loading if they were to change or convert to full-time or part-time employment.

Item 19: Subsection 125B(1)

383. This item would repeal existing subsection 125B(1) and substitute new subsection 125B(1).

384. Existing subsection 125B sets out when an employer must give each casual employee the Casual Employment Information Statement during the course of their employment. Existing subsection 125B(1) requires this to occur before, or as soon as practicable after, the casual employee commences employment with the employer.
385. This item would amend existing subsection 125B(1) by including an additional requirement for an employer to give each casual employee the Casual Employment Information Statement as soon as practicable after 12 months of employment (new paragraph 125B(1)(b)).
386. This will ensure casual employees receive information about the ability to change or convert to full-time or part-time employment at a point in time when all casual employees will have access to the employee choice pathway, including employees of small business employers, and when some employers will be required to offer casual conversion under that pathway.

Item 20: Before section 357

Subdivision A – Independent contracting

387. Division 6 of Part 3-1 of the FW Act relates to general protections against sham arrangements. It currently only addresses independent contracting arrangements. This item would insert protections relating to casual employment arrangements. This will provide protections for employees who are engaged as casual employees under a sham arrangement.

Item 21: At the end of Division 6 of Part 3-1

Subdivision B – Casual employment

388. This item would insert a new Subdivision B—Casual employment in Division 6 of Part 3-1 of the FW Act, dealing with employers:
- misrepresenting employment as casual employment (new section 359A);
 - dismissing an employee to engage them as casual employee (new section 359B); and
 - making a misrepresentation to a current or former employee to engage them as casual employee (new section 359C).
389. These provisions complement the new definition and employee choice pathway by establishing an anti-avoidance framework in relation to casual employment.

Section 359A – Misrepresenting employment as casual employment

390. New subsection 359A(1) would prohibit an employer from misrepresenting an employment contract as a contract for casual employment under which the individual performs, or would perform, work other than as a casual employee. It is modelled on the protection in existing subsection 357(1) against misrepresenting employment as an independent contracting arrangement. This new subsection would be a civil remedy provision under Part 4-1 of the FW Act.

391. New subsection 359A(2) would provide a defence to the prohibition in subsection 359A(1), if the employer reasonably believed that the contract was a contract for employment as a casual employee. The burden of proof would rest with the party who made the representation. This approach is consistent with the proposed amendments to existing section 357 by Part 10 of Schedule 1.
392. New subsection 359A(3) would provide guidance to the FWC or a court in determining whether the employer's belief was reasonable, and would assist employers to identify the evidence they may seek to rely upon in establishing a defence to new subsection 359A(1). It would also reinforce the expectation that employers should take appropriate steps, commensurate with their experience and the nature of their enterprise, to understand how they are engaging an individual before entering into a contract of employment.
393. New subparagraph 359A(3)(a) would provide that the size and nature of the employer's enterprise must be considered when determining if the employer's belief was reasonable for the purposes of new subsection 359A(1).
394. New subparagraph 359A(3)(b) would give the FWC or a court discretion to consider any other relevant factors to determine if the employer's belief was reasonable. Depending on the particular circumstances, other relevant factors might include:
- the employer's skills and experience;
 - the industry in which the employer operates;
 - how long the employer has been operating;
 - the presence or absence of dedicated human resource management specialists or expertise in the employer's enterprise; and
 - whether the employer sought legal or other professional advice about the proper classification of the individual, including any advice from an industrial association, and, if so, acted in accordance with that advice.

Section 359B Dismissing to engage as casual employee

395. New section 359B would prohibit an employer from dismissing an employee to reengage them as casual employee to perform the same, or substantially the same, work. It is modelled on the protection in existing section 358 against dismissing an employee to engage them as an independent contractor. This new section would be a civil remedy provision under Part 4-1 of the FW Act.
396. As new section 359B would turn on the reasons for the actions of the employer, it would be subject to the effect of existing section 360 in Division 7 of Part 3-1 which provides that a person takes action for a particular reason if the reasons for the action include that reason.

Section 359C Misrepresentation to engage as casual employee

397. New section 359C would prohibit an employer from knowingly making a false statement to a current or former employee with the intention of persuading or

influencing that employee to become a casual employee to perform the same, or substantially the same, work for the employer. This new section would be a civil remedy provision under Part 4-1 of the FW Act.

398. As new section 359C would turn on the reasons for the actions of the employer, it would be subject to the effect of existing sections 360 and 361 in Division 7 of Part 3-1 which provide that a person takes action for a particular reason if the reasons for the action include that reason, and place the burden of proving the reason for an action on the employer, respectively.

Item 22: Subsection 539(2) (after table item 5AA)

399. This item would add new item 5AAA, regarding contraventions of new Division 4A of Part 2-2, to the table of civil remedy provisions set out at existing subsection 539(2). Contraventions of new subsection 66MA(8) (a person must not contravene an order of the FWC about casual employment) would be included in the new table item as a civil remedy provision.
400. The new table item would provide that a person affected by the contravention, an employee organisation or an inspector can bring an action for an alleged contravention of the provisions in a federal court or eligible State or Territory Court. The maximum civil penalty for a contravention would be 300 penalty units.

Item 23: Subsection 539(2) (before table item 12)

401. This Item would add a new table item 11B, regarding contraventions of the new sham casual arrangement prohibitions in new sections 359A–359C, to the table of civil remedy provisions set out at existing subsection 539(2).
402. The new table item would provide that a person affected by the contravention, an employee organisation or an inspector can bring an action for an alleged contravention of the provisions in a federal court or eligible State or Territory Court. The maximum civil penalty for a contravention would be 300 penalty units.

Item 24: After subsection 548(1B)

403. This item would amend existing section 548 to expand the small claims jurisdiction to include disputes about whether a person was a casual employee of their employer within the meaning of new subsections 15A(1)–(4) at commencement of their employment with that employer (new subsection 548(1C)).
404. This item would allow employees to choose the small claims procedure to apply to proceedings if the employee has applied for an order (other than a pecuniary penalty order) under Division 2 from a magistrates court or the Federal Circuit and Family Court of Australia (Division 2) in connection with a dispute about whether the employee was a casual employee of their employer within the meaning of new subsections 15A(1)–(4) at commencement of their employment with that employer.
405. The note to new subsection 548(1C) sets out an example of the kind of order a court may make under Division 2 in relation to small claims proceedings under new subsection 548(1C), being a declaration as to whether the employee was a casual, part-time or full-time employee at the commencement of the employment.

406. If an employee is found to have been misclassified as a casual employee by a court, existing section 545A will allow any resulting backpay to be offset against any casual loadings paid to the employee.

Item 25: After paragraph 675(2)(ab)

407. This item would amend existing section 675 by inserting new paragraph 675(2)(ac).
408. The effect of this would be to provide that a person does not commit an offence if the FWC has made an order under new subsection 66MA(1), and the person contravenes the order. However, contravention of an order would be prohibited by new subsection 66MA(8), and would give rise to a civil remedy.

Part 2—Small business redundancy exemption

Amendments to the *Fair Work Act 2009*

409. Part 2 would amend section 121 of the FW Act to address an anomaly arising under paragraph 121(1)(b), commonly referred to as the ‘small business redundancy exemption’. It only applies to employees of employers that are bankrupt or in liquidation due to insolvency. It does not affect ongoing, solvent businesses.
410. Part 2 covers the situation when a larger employer incrementally downsizes due to insolvency, either in the period leading up to liquidation or bankruptcy, or afterwards, and the number of employees falls below the 15 employee threshold for the small business definition, causing some employees to lose their previous entitlement to redundancy pay under section 119 of the NES. This may occur, for example, where an insolvency practitioner makes most of the employees of a company redundant upon their appointment, but retains the bookkeeping and payroll staff – fewer than 15 employees in total – to assist with the orderly wind up of the business. At present, the majority of employees would receive their redundancy entitlements. However, the employees kept on to finalise the winding up would not because the employer would then come within the small business redundancy exemption.
411. The amendment would provide an exception to the operation of the small business redundancy exemption in such downsizing contexts. It is intended to address inequitable outcomes for employees, including those who remain employed to assist with the orderly wind-down of an insolvent business, and support the more efficient conduct of external administrator, controller and bankruptcy trustee appointments.

Item 26: Section 12 (definition of *appointment*)

412. This item would repeal the existing definition of ‘appointment’ and replace it with a definition of ‘appointment’ that includes the ‘appointment of an insolvency practitioner’, to give meaning to the term in new paragraph 121(4)(d). The newly inserted text is consistent with the definition of ‘appointment’ in section 5 of the FEG Act.

Item 27: Section 12

413. This item would insert the following new definitions:

- ‘*Bankruptcy Act 1966*’;
- ‘Bankruptcy trustee’ (as defined in the Bankruptcy Act);
- ‘*Corporations Act 2001*’;
- ‘Insolvency practitioner’ (as defined in the FEG Act);
- ‘Liquidator’ (as defined in the Corporations Act); and
- ‘Members’ voluntary winding up’.

414. The new definitions would inform the interpretation of new subsections 121(4)–(7), where those terms are used.

Item 28: At the end of section 121

415. This item would insert new subsections (4), (5), (6) and (7) into section 121, to provide an exception to the operation of the small business redundancy exemption in current paragraph 121(1)(b), where an employer downsizes from a larger business to a small business employer due to insolvency.
416. New paragraphs (4)(a)–(d) would ensure the current exemption to the obligation to pay redundancy at paragraph 121(1)(b) does not apply in the circumstances where the employer is bankrupt or in liquidation (other than a members’ voluntary winding up) and has only become a small business employer due to employee terminations.
417. New subparagraphs (4)(d)(i)–(iii) would provide a six month ‘look back’ period to apply to determine the application of the exception, from six months before the bankruptcy or liquidation, or the appointment of the insolvency practitioner, or, if the appointment of the insolvency practitioner was immediately preceded by the appointment of other insolvency practitioners, from the earliest appointment date.
418. New subparagraph (4)(d)(iv) would apply where the terminations that caused the employer to become a small business employer were due to the insolvency of the employer. It would apply, for example, in the following circumstance: a receiver and manager is appointed to an employer because the employer is in default due to insolvency. During the appointment, the employer terminates the employment of one or more employees with the result that the employer becomes a small business employer. The receivership concludes and the employer enters liquidation six months and one day after the conclusion of the receivership. New subparagraphs (4)(d)(i)–(iii) do not apply to the employer because of the length of time between the conclusion of the receivership and the liquidation. However, new subparagraph (4)(d)(iv) applies because the terminations that caused the employer to become a small business employer were due to insolvency.
419. New subsection (5) would provide the new definition of members’ voluntary winding up to clarify the use of that term in new subsection (4). A members’ voluntary winding up under section 495 of the Corporations Act is a process for winding up solvent companies and requires a declaration of solvency by members. Liquidations due to a members’ voluntary winding up are excluded from new paragraph (4)(b) so that it only applies to insolvent liquidations.
420. New subsection (6) clarifies the operation of new subsection (4) in circumstances where an employer enters liquidation due to a members’ voluntary winding up but subsequently turns out to be insolvent. If and when the employer enters liquidation (other than a members’ voluntary winding up), following the process set out in section 496 of the Corporations Act, the new subsection (4) would apply to the employer, and for the purposes of new subsections (4)–(6), the original appointment date of the members’ voluntary winding up is treated as the date the company went into liquidation.

421. New subsection (7) would clarify when a partnership is bankrupt or liquidation for the purposes of new paragraph (4)(b).

Part 3—Enabling multiple franchisees to access the single enterprise stream

Amendments to the *Fair Work Act 2009*

422. Part 3 would allow multiple franchisees to access the single-enterprise agreement stream, without removing the ability to bargain for a multi-enterprise agreement if this is the preferred option of the parties.

Item 29: Subsection 172(3)

423. Existing section 172(2) of the FW Act limits bargaining for a single-enterprise agreement to a single employer or to ‘related employers’ as defined in existing subsection 172(5A). Franchisees do not come within the existing definition of ‘related employers’ and accordingly may be prevented from making a single-enterprise agreement.
424. Existing section 172(3) limits bargaining for a multi-enterprise agreement to a situation where there are two or more employers who are not all related employers.
425. This item would enable bargaining for a multi-enterprise agreement where two or more employers are all related employers as set out in new subsection 172(3A). Item 30 would insert new subsection 172(3A). This would ensure that employers that carry on similar business activities under the same franchise, and that are franchisees of the same franchisor, or related bodies corporate of the same franchisor, continue to be able to make a multi-enterprise agreement, despite meeting the definition of ‘related employers’ in new paragraph 172(5A)(c) (refer item 31).
426. The new provisions would maintain the ability of employers who are otherwise not all related employers to make a multi-enterprise agreement. If, for example, a group of employers includes franchisees of a common franchisor, as well as other employers that are not franchisees of that franchisor, these employers would not all be related employers, and could make a multi-enterprise agreement.

Item 30: After subsection 172(3)

427. This item would insert subsection 172(3A). Subsection 172(3A) operates with item 29 and item 31 to ensure that a class of related employers can bargain for a multi-enterprise agreement. This class is specified through item 30 and is all related employers under new paragraph 172(5A)(c). Item 31 would insert new paragraph 172(5A)(c).
428. In conjunction with item 29, item 30 would make clear that all related employers as defined in new paragraph 172(5A)(c) retain the ability to make a multi-enterprise agreement. Two or more employers that are all related employers as defined in existing paragraphs 172(5A)(a)–(b) (that is, related employers that are not franchisees or related bodies corporate of the same franchisor) would continue to be excluded from multi-enterprise bargaining.

Item 31: At the end of subsection 172(5A)

429. This item would expand the definition of ‘related employers’ in existing subsection 172(5A) to include employers that carry on similar business activities under the same franchise as franchisees of the same franchisor, or related bodies corporate of

the same franchisor, or any combination of the two. This definition is modelled on the definition used in existing subsection 249(2).

430. New paragraph 172(5A)(c) would allow franchisees to bargain together as related employers for a single-enterprise agreement under subsection 172(2) without needing to demonstrate that they are engaged in a common enterprise. This would allow franchisees of the same franchisor to bargain for and make a single-enterprise agreement as a single enterprise, including access to all available mechanisms relating to single-enterprise bargaining under the FW Act. A single-enterprise agreement is made where a majority of employees who vote approve the agreement (subsection 182(1)). Approval by a majority of employees of each employer would not be required. Finally, bargaining representatives for a single-enterprise agreement are able to obtain a majority support determination where a majority of employees who would be covered by the agreement wish to bargain.

Part 4—Transitioning from multi-enterprise agreements

Amendments to the *Fair Work Act 2009*

431. Part 4 would amend the FW Act to allow a single-enterprise agreement to replace a single interest employer agreement or supported bargaining agreement (as the case may be) that has not passed its nominal expiry date.

Item 32: Section 12 (definition of *voting request order*)

432. This item is a consequential amendment which expands the definition of voting request order to include an order as described in new subsection 240A(4), introduced by item 57.

Item 33: Paragraph 58(2)(c)

433. This item is a consequential amendment which would provide that the general rule in existing subsections 58(1) and (2) applies where existing subsection 58(3) and new subsections 58(4) and (5) (refer item 34) do not apply.

Item 34: At the end of section 58

434. Existing section 58 provides that only one enterprise agreement can apply to an employee at a time and sets out the rules for determining when an enterprise agreement applies to an employee. Subsection 58(2) provides that, generally, where an enterprise agreement applies to an employee, and another enterprise agreement comes into operation that would also apply to that employee, the later enterprise agreement will not apply until the earlier agreement reaches its nominal expiry date. Existing subsection 52(2) makes clear that a reference to an enterprise agreement applying to an employee is a reference to the agreement applying to that employee in relation to particular employment.
435. A special rule in existing subsection 58(3) provides that if a single-enterprise agreement applies to an employee, and a supported bargaining agreement comes into operation that covers the employee in relation to the same employment, the supported bargaining agreement will apply immediately, and the single-enterprise agreement can never apply again.
436. This item would add two new special rules into existing section 58. The interaction rules, respectively in new subsections 58(4) and 58(5), would provide that if a single interest employer agreement or a supported bargaining agreement (each of which is an old agreement) applies to an employee in relation to particular employment, and a single-enterprise agreement later comes into operation that covers that employment, the single-enterprise agreement will apply to that employee in relation to that employment, and the old agreement can never apply again.

Item 35: At the end of paragraph 173(2)(d)

437. This item would correct a typographical error in existing subsection 173(2).

Item 36: Section 180A (at the end of the heading)

438. This item would amend the heading of existing section 180A to specify that the section applies to proposed enterprise agreements that are multi-enterprise agreements. This item would assist in distinguishing between section 180A, and new section 180B (refer

item 37) which deals with the agreement of bargaining representatives in relation to certain proposed single-enterprise agreements.

Item 37: After section 180A

439. This item would insert a new section 180B into the FW Act. New section 180B is modelled on existing section 180A. Existing section 180A prevents an employer asking their employees to vote to approve a proposed multi-enterprise agreement unless they have received the written agreement of employee organisations that would be covered by the agreement, or are permitted to do so by a voting request order in relation to the agreement.
440. New section 180B would only apply to a proposed single-enterprise agreement (new agreement) where a single interest employer agreement or supported bargaining agreement that is within its nominal term (each of which is an old agreement) applies to at least one of the employees covered by the proposed agreement.
441. Where an old agreement applies to at least one of the employees who is covered by the new agreement, new section 180B would require an employer to have received the written agreement of all employee organisations to which the old agreement applies before asking employees to vote to approve the new agreement. If written agreement is not provided, the employer may apply for a voting request order under new subsection 240A(4), introduced by item 57.

Item 38: Subsection 188(2A)

Item 39: Subsection 188(2A)

Item 40: Paragraph 188(5)(ab)

442. These items are technical amendments which would deal with the insertion of new section 180B.

Item 41: After paragraph 191A(3)(b)

443. This item would add new paragraph 191A(3)(ba). Currently, when considering whether to approve an enterprise agreement with amendments, the FWC is required by existing subsection 191A(3) to seek the views of the employer or employers covered by the agreement, the award covered employees for the agreement and a bargaining representative for the agreement.
444. This item would insert a requirement that if the enterprise agreement is a single-enterprise agreement that covers a group of employees that includes at least one employee to whom a single interest employer agreement or supported bargaining agreement applies, the FWC must also seek the views of the employee or employees to whom the single interest employer agreement or supported agreement applies.

Item 42: Subsection 193(1)

445. This item would repeal and substitute subsection 193(1) with new subsections 193(1) and 193(1A). Existing subsection 193(1) states that an agreement passes the BOOT where each award covered employee and each reasonably foreseeable employee for the agreement would be better off under the agreement than the relevant modern award.

This current test for award covered employees would be retained at new paragraph 193(1)(a).

- 446. New paragraph 193(1)(b) would modify the operation of the BOOT in the circumstance where an application has been made for approval of a single-enterprise agreement (new agreement) which covers at least one employee to whom a single interest employer agreement or supported bargaining agreement (each of which is an old agreement) applies.
- 447. New paragraph 193(1)(b) would require the new agreement to be assessed against the old agreement rather than relevant modern award, for each employee to whom the old agreement applies. The new agreement would pass the BOOT in relation to these employees where the employees are better off under the new agreement than the old agreement. This would ensure that employees would be better off under the subsequent single-enterprise agreement than the old agreement.
- 448. In this circumstance the BOOT analysis for award covered employees would not be changed. The new agreement would pass the BOOT in relation to award covered employees where those employees are better off under the new agreement than the relevant award.
- 449. New subsection 193(1A) makes clear that where an employee is both award covered and an old agreement applies to them, the BOOT analysis for that employee is to be undertaken in relation to the old agreement only.
- 450. Employees who are award covered, and those to whom an old agreement applies, must all be better off overall under the new agreement for it to pass the BOOT.
- 451. The legislative notes included under existing subsection 193(1) are retained under new subsection 193(1). Legislative note 1 points the reader to the definition of reasonably foreseeable employee in existing subsection 193(5). Legislative note 2 highlights the rules for applying the BOOT in existing section 193A, drawing particular attention to the requirement that the FWC only have regard to reasonably foreseeable patterns or kinds of work in existing subsection 193A(6).

Item 43: After subsection 193(2)

- 452. This item would insert new subsection 193(2A). Existing subsection 193(2) requires the FWC to disregard an individual flexibility arrangement (IFA) that has been agreed between an employee and employer under a modern award when assessing whether an employee is better off overall under a proposed agreement than the relevant modern award.
- 453. If the FWC is assessing whether a single-enterprise agreement passes the BOOT, and a supported bargaining agreement or single interest employer agreement applies to at least one of the employees that the single-enterprise agreement covers, new subsection 193(2A) would require the FWC to disregard an IFA made under the supported bargaining agreement or single interest employer agreement.

Item 44: Paragraphs 193A(2)(a) and (b)

454. This item would amend existing paragraphs 193A(2)(a) and (b). New paragraph 193(1)(b) (refer item 42) would provide that where a single-enterprise agreement (new agreement) is made with employees, and a single interest employer agreement or supported bargaining agreement (each of which is an old agreement) applies to at least one of those employees, the employees to whom the old agreement applies must be better off under the new agreement than the old agreement for the new agreement to pass the BOOT.
455. Existing paragraphs 193A(2)(a) and (b) make clear that, when assessing whether an agreement passes the BOOT, the FWC must have regard to the terms and conditions of the agreement that would be more beneficial, and those that would be less beneficial, relative to the relevant modern award terms.
456. This item would amend paragraphs 193A(2)(a) and (b) to require the FWC to have regard to the terms and conditions of an agreement that would be more beneficial to an employee, and those that would be less beneficial to an employee, than those under the modern award, supported bargaining agreement or single interest employer agreement, whichever is relevant to the employee.

Item 45: Paragraph 193A(3)(b)

457. This item would repeal and substitute paragraph 193A(3)(b). Existing paragraph 193A(3)(b) requires the FWC to consider the views expressed by award covered employees for an agreement when determining whether the agreement passes the BOOT. This requirement would be retained in new subparagraph 193A(3)(b)(i).
458. New subparagraph 193A(3)(b)(ii) would require the FWC to also consider the opinion of any employee to whom a supported bargaining agreement or single interest employer agreement applies as to whether a proposed single-enterprise agreement that covers them passes the BOOT.

Item 46: At the end of subsection 193A(4)

459. This item would add new paragraph 193A(4)(c). Existing subsection 193A(4) requires the FWC to give primary consideration to a view shared by all of those listed in paragraphs 193A(4)(a)–(b) as to whether a proposed agreement (other than a greenfields agreement (refer existing subsection 193A(5)) passes the BOOT. Existing paragraphs 193A(4)(a)–(b) list bargaining representatives for employers and bargaining representatives for award covered employees (that are employee organisations).
460. New paragraph 193A(4)(c) would add a reference to bargaining representatives for employees to whom a supported bargaining agreement or single interest employer agreement applies, where the proposed agreement is a single-enterprise agreement that covers at least one employee to whom a supported bargaining agreement or single interest employer agreement applies.
461. Where a proposed agreement is a single-enterprise agreement that covers one of more employees to whom a supported bargaining agreement or single interest employer agreement applies, the FWC would be required to give primary consideration to a

common view as to whether the agreement passes the BOOT that is expressed by bargaining representatives for employers, bargaining representatives (that are employee organisations) for award covered employees, and bargaining representatives (that are employee organisations) for employees to whom a single interest employer agreement or supported bargaining agreement applies.

Item 47: Paragraph 193A(6A)(b)

462. This item would repeal and substitute paragraph 193A(6A)(b). Existing section 193A provides guidance as to how the FWC is to apply the BOOT. Existing subsection 193A(6) limits the patterns or kinds of work that the FWC may have regard to when applying the BOOT to those that are reasonably foreseeable. Employers cannot be required to provide undertakings in relation to hypothetical kinds of work that are not reasonably foreseeable.
463. Existing section 193A(6A) provides that the FWC must determine whether a particular pattern or kind of work is reasonably foreseeable if a view is expressed by a relevant employer, award covered employee, or bargaining representative.
464. New subparagraph 193A(6A)(b)(ii) would include an additional requirement that the FWC must also determine the matter, in the circumstance that the agreement is a single-enterprise agreement which covers employees to whom a single interest employer agreement or supported bargaining agreement applies, if those employees express a view as to whether a particular pattern or kind of work is reasonably foreseeable.

Item 48: Subsection 193A(7)

465. Existing subsection 193A(7) allows the FWC to assume that if an employee belongs to a class of employees that would be better off under the agreement than the modern award, the employee would also be better off under the agreement, in the absence of evidence to the contrary.
466. This item would amend existing subsection 193A(7) to allow the FWC to assume that an employee would be better off under a proposed single-enterprise agreement than under an existing single interest employer agreement or supported bargaining agreement that applies to them, in the absence of evidence to the contrary, where that employee is a member of a group of employees that would be better off under the single-enterprise agreement than the relevant single interest employer agreement or supported bargaining agreement.

Item 49: After paragraph 211(4A)(ac)

467. This item would insert new paragraph 211(4A)(ad). Existing section 211 sets out when the FWC must approve a variation of an enterprise agreement. Existing subsection 211(4A) provides that the FWC must give consideration to any views relating to whether the agreement (as proposed to be varied) passes the BOOT that have been expressed by the relevant employer or employers, employees, and any employee organisations covered by the agreement.

468. New paragraph 211(4A)(ad) would provide that new paragraph 193A(4)(c) (refer item 46) would not apply when the FWC is considering whether an agreement as proposed to be varied passes the BOOT.
469. Existing subsection 193A(4) requires the FWC to give primary consideration to the common views of those listed in paragraphs 193A(4)(a)–(b). New paragraph 193A(4)(c) lists employee organisations that are bargaining representatives for any employee to whom a single interest employer agreement or supported bargaining agreement applies, where a single-enterprise agreement has been made that covers at least one such employee.
470. In the context of an application to vary an enterprise agreement, the circumstances described in new paragraph 193A(4)(c) are not relevant as the previous agreement would no longer apply to the employees. Existing paragraph 211(4A)(ac) relevantly provides for the consideration of the views of bargaining representatives that are covered by the agreement that is proposed to be varied.

Item 50: Paragraph 227A(2)(a)

471. This item would amend existing paragraph 227A(2)(a). Existing subsection 227A(2) provides the circumstances that must be satisfied before an application can be made to the FWC for a reconsideration as to whether an enterprise agreement passes the BOOT.
472. The condition in existing paragraph 227A(2)(a) is that the FWC must have had regard to patterns or kinds of work engaged in or to be engaged in by award covered employees for the agreement prior to approving it.
473. This item would amend existing paragraph 227A(2)(a) to include the FWC having had regard to patterns or kinds of work engaged in, or to be engaged in, by any employee or employees to whom a single interest employer agreement or supported bargaining agreement applies prior to approving a single-enterprise agreement that covers that employee or those employees.

Item 51: Paragraph 227A(2)(b)

Item 52: At the end of section 227A

474. These items would amend paragraph 227A(2)(b) and insert new subsection 227A(5). Existing paragraph 227A(2)(b) provides the second condition that must be satisfied before an application can be made to the FWC for reconsideration of whether an agreement passes the BOOT.
475. Existing paragraph 227A(2)(b) refers to employees covered by existing subsection 227A(4) performing or engaging in patterns or kinds of work that the FWC did not consider when it undertook the BOOT. Existing subsection 227A(4) covers an employee if the employee would be an award covered employee as defined in existing subsection 193(4) if the test time were the time the application for reconsideration was made.
476. These items provide that the condition in paragraph 227A(2)(b) can also be satisfied where the relevant employee is covered by new subsection 227A(5).

477. New subsection 227A(5) would cover employees who, at the time the application for reconsideration is made, are employees to whom a single-enterprise agreement applies, and to whom a single interest employer agreement or supported bargaining agreement applied at the time the FWC undertook the BOOT assessment of the single-enterprise agreement.

Item 53: After paragraph 227B(2)(a)

478. This item would amend section 227B to insert new paragraph 227B(2)(aa). Existing section 227B varies the effect of existing sections 193 and 193A for the purposes of reconsidering whether an agreement passes the BOOT.
479. This item would provide that, when reconsidering whether a single-enterprise agreement which applies to employees to whom a single interest employer agreement or supported bargaining agreement applied immediately before the single-enterprise agreement came into operation, employees that are covered by new subsection 227A(5) (refer item 52) are taken to have a single interest employer agreement or supported bargaining agreement apply to them. Employees covered by new subsection 227A(5) are employees to whom a supported bargaining agreement or single interest employer agreement applied before the FWC approved the single-enterprise agreement.
480. This item is necessary as, at the time of reconsideration, the single interest employer agreement or supported bargaining agreement would no longer apply, as the single-enterprise agreement would apply.

Item 54: After paragraph 227B(2)(f)

481. This item would amend section 227B to insert new paragraph 227B(2)(fa). Existing section 227B varies the effect of existing sections 193 and 193A for the purposes of reconsidering whether an agreement passes the BOOT. Existing subsection 193A(4) requires the FWC to give primary consideration to the common views of those listed in paragraphs 193A(4)(a)–(b). New paragraph 193A(4)(c) (refer item 46) would list employee organisations that are bargaining representatives for any employee to whom a single interest employer agreement or supported bargaining agreement applies, where a single-enterprise agreement has been made that covers at least one such employee.
482. New paragraph 227B(2)(fa) would provide that when reconsidering whether an agreement passes the BOOT, the FWC would not need to consider the views shared by persons including bargaining representatives for any employee to whom a single interest employer agreement or supported bargaining agreement applies, where a single-enterprise agreement has been made that covers at least one such employee. In the context of an application to reconsider the BOOT, the single interest employer agreement or supported bargaining agreement would no longer apply. Existing paragraph 227B(2)(f) relevantly provides for the consideration of the common views of the employer(s) and employee organisations that are covered by the agreement.

Item 55: After subsection 236(1A)

Item 56: After subsection 238(1)

483. These items would insert new subsections 236(1B) and 238(2), which would prevent applications for majority support determinations and scope orders being made in relation to a proposed single-enterprise agreement which covers (among other employees) at least one employee to whom a single interest employer agreement or supported bargaining agreement that has not nominally expired, applies. Parties would have access to bargaining dispute applications under existing section 240. Preventing access to majority support determinations and scope orders would have the effect that bargaining representatives could not compel bargaining for a single-enterprise agreement where there is a supported bargaining agreement or single interest employer agreement within its nominal term and in operation.

Item 57: At the end of section 240A

484. This item would insert new subsection 240A(4). Existing section 240A allows a bargaining representative for a multi-enterprise agreement to apply to the FWC for a voting request order permitting the employer to ask their employees to vote to approve the agreement (refer existing section 180A).

485. New subsection 240A(4) would allow an application to be made for a voting request order in relation to a proposed single-enterprise agreement where a supported bargaining agreement or single interest employer agreement (each of which is an old agreement), which has not passed its nominal expiry date, applies to one or more of the employees who would be covered by the proposed agreement.

486. The requirements in new subsection 240A(4) are modelled on those in existing subsection 240A(1). After the notification time for a proposed agreement, a bargaining representative for the agreement could apply for a voting request order where the bargaining representatives for the agreement have been asked to provide the employer with their written agreement to the employer putting the agreement to vote, and one or more bargaining representatives have failed to do so.

487. This item would provide a means for an employer to take the new agreement to vote where the failure of a bargaining representative to provide written agreement is unreasonable in the circumstances, and making the request for employees to vote on the agreement would not be inconsistent with the employer's good faith bargaining obligations (refer sections 240B and 228).

Item 58: Section 240B

488. This item is a consequential amendment that would give effect to new subsection 240A(4).

Item 59: Section 245

489. This item is a technical amendment to allow for new subsection 245(2) (refer item 60).

Item 60: At the end of section 245

490. This item would insert new subsection 245(2). Existing section 245 provides that the FWC is taken to have varied a supported bargaining authorisation (authorisation) to

remove an employer's name only when they, and all of their employees that are listed on the authorisation, are covered by an enterprise agreement or workplace determination. There is no means for an employee to be removed from an authorisation.

491. Existing subsection 172(7) provides that an employer covered by an authorisation cannot bargain for or make an enterprise agreement other than a supported bargaining agreement with employees specified on an authorisation.
492. New subsection 245(2) would provide that the FWC is taken to have varied an authorisation to remove an employee when they are covered by an enterprise agreement or workplace determination that has come into operation. New subsection 245(2) would allow an employer to make a single-enterprise agreement with a group of employees with whom the employer has previously made a supported bargaining agreement, where some of its employees that are specified on the authorisation are not covered by an agreement or workplace determination.

Part 5—Model terms

Amendments to the *Fair Work Act 2009*

493. Part 5 would require the FWC to determine model flexibility, consultation and dispute resolution terms for enterprise agreements, and the model dispute settlement term for copied State instruments. As Australia's independent workplace relations tribunal, with responsibility for setting and reviewing the equivalent clauses in the award safety net, it is appropriate that the FWC perform this function. The Bill prescribes the matters the FWC must take into account when determining each model term.
494. Part 5 would commence by Proclamation or the day after a 12-month period commencing on the day the Bill receives Royal Assent. A maximum period of 12 months would allow sufficient time to constitute a Full Bench (or Full Benches) to determine the model terms, hear and consider submissions made in relation to the model terms as would be required by Part 5, and make the determinations. It is intended that the FWC would undertake detailed consultation, including with (but not limited to) national peak councils, during this period.
495. The FWC would have the power to vary its determinations. Responsibility for maintaining the currency of the model terms will be vested in the FWC and the ability to vary the terms in line with developments in workplace relations will ensure their ongoing relevancy.

Item 61: Subsection 202(5)

496. Existing subsection 202(1) requires that enterprise agreements contain a flexibility term. The flexibility term enables an employer and employee to agree to vary the effect of an enterprise agreement to meet the genuine needs of the employer and employee.
497. This item would repeal and substitute a new subsection 202(5) as well as insert new subsections 202(6) and (7).
498. In doing so, the existing requirement that the FW Regulations prescribe the model flexibility term for enterprise agreements would be replaced with a requirement that the FWC determine the model flexibility term.
499. New subsection 202(6) would set out what is required of the FWC when determining the model flexibility term.
500. The model term determined by the FWC would be required to be consistent with the existing requirements of a flexibility term set out in subsection 202(1).
501. Paragraph 202(6)(b) would provide a list of matters that the FWC must take into consideration in determining the model term, in addition to any other matters the FWC considers relevant.
502. The FWC would be required to consider whether the model term generally accords with comparable terms in modern awards. New subparagraph 202(6)(b)(i) would require consideration of common features of flexibility terms in modern awards, rather than a detailed examination of all flexibility terms found in awards, or the selection of a single

flexibility term to be used as a comparator. This would promote consistency across enterprise agreements and modern awards.

- 503. New subparagraph 202(6)(b)(ii) would require the FWC to take into account what it considers is 'best practice' workplace relations. This would allow the FWC to exercise its expert judgement, supplemented by submissions, to determine a model term that reflects the current best approach.
- 504. New subparagraph 202(6)(b)(iii) would require the FWC to consider whether all persons and bodies have been provided with a reasonable opportunity to make submissions on the determination of the model term. This would ensure that there is meaningful public consultation prior to determining the model term.
- 505. New subparagraph 202(6)(b)(iv) would require the FWC to take into account the object of the FW Act, and the objects of Part 2-4 (see section 171).
- 506. Legislative note 1 draws attention to the requirement that a Full Bench is required to make the model flexibility term. This requirement would be inserted into the FW Act by item 63.
- 507. Legislative note 2 points to subsection 33(3) of the AI Act for variations of a determination. This subsection provides that, in summary, where an Act provides a power to make an instrument of legislative character, that power includes the power to vary such an instrument. This would allow the FWC to update the model term from time to time in line with developments in workplace relations practices.
- 508. New subsection 202(7) would provide that the model term is a legislative instrument that could not be disallowed by Parliament. As Australia's workplace relations tribunal, the FWC has expert and technical knowledge of contemporary workplace relations and operates independently of political processes. The determination would be required to be made following consideration of submissions by the public, thereby mandating public participation in the process. The model term would play a limited role in creating rights or obligations in circumstances where an enterprise agreement does not contain a compliant flexibility term.
- 509. Ensuring the model term is not disallowable would also avoid the risk of the model term being disallowed after an enterprise agreement has proceeded to a vote by employees on the basis that the model term determined by the FWC would be included. Were this to occur, questions as to genuine agreement may arise on the basis that an important term of the agreement would not be included. This situation may also cause commercial uncertainty and frustrate bargaining processes.

Item 62: Subsection 205(3)

- 510. Existing subsection 205(1) requires enterprise agreements to include a consultation term which requires an employer to consult with employees about major workplace change or a change in rosters or ordinary hours of work. The term must also allow for employees to be represented for the purposes of that consultation.

511. This item would repeal and substitute a new subsection 205(3) as well as insert new subsections 205(4), (5) and (6).
512. In doing so, the existing requirement that the FW Regulations prescribe the model consultation term for enterprise agreements would be replaced with a requirement that the FWC determine the model consultation term.
513. New subsection 205(4) would set out what is required of the FWC when determining the model consultation term.
514. New paragraph 205(4)(a) would require the model term to satisfy the requirements of existing subsections 205(1) and (1A), which set the minimum requirements of a consultation term included in an enterprise agreement.
515. New paragraph 205(4)(b) would provide a list of matters that the FWC must take into consideration in determining the model term, in addition to any other matters the FWC considers relevant.
516. The FWC would be required to consider whether the model term generally accords with comparable terms in modern awards. New subparagraph 205(4)(b)(i) would require consideration of common features of consultation terms in modern awards, rather than a detailed examination of all consultation terms found in awards, or the selection of a single consultation term to be used as a comparator. This would promote consistency across enterprise agreements and modern awards.
517. New subparagraph 205(4)(b)(ii) would require the FWC to take into account what it considers is 'best practice' workplace relations. This would allow the FWC to exercise its expert judgement, supplemented by submissions, to determine a model term that represents the current best approach.
518. New subparagraph 205(4)(b)(iii) would require the FWC to consider whether all persons and bodies have been provided with a reasonable opportunity to make submissions on the determination of the model term. This would ensure that there is appropriate public consultation prior to determining the model term.
519. New subparagraph 205(4)(b)(iv) would require the FWC to assess whether the model term would be an objectionable emergency management term according to existing paragraphs 195A(1)(a)–(d). It is not relevant to the FWC's assessment of whether the model term would be an objectionable emergency management term that the term would not be an objectionable emergency management term because of the operation of existing subsection 195A(2).
520. New subparagraph 205(4)(b)(v) would require the FWC to take into account the object of the FW Act and the objects of Part 2-4 of the FW Act (see section 171).
521. Legislative note 1 draws attention to the requirement that a Full Bench is required to make the model consultation term. This requirement would be inserted into the FW Act by item 63.

522. Legislative note 2 points to subsection 33(3) of the AI Act for variations of a determination. This subsection provides that, in summary, where an Act provides a power to make an instrument of legislative character, that power includes the power to vary such an instrument. This would allow the FWC to update the model term from time to time in line with developments in workplace relations practices.
523. New subsection 205(5) would ensure that when determining the model consultation term, the FWC is not limited to addressing the content of existing subsections 205(1) and 205(1A). Rather, existing subsections 205(1) and (1A) set the core requirements that must be satisfied by a consultation term, including the model consultation term.
524. New subsection 205(6) would provide that the model term is a legislative instrument that cannot be disallowed by Parliament. As Australia's industrial relations tribunal, the FWC has expert and technical knowledge of contemporary workplace relations and operates independently of political processes. The determination would be required to be made following consideration of submissions by the public, thereby mandating public participation in the process. The model term would play a limited role in creating rights or obligations in circumstances where an enterprise agreement does not contain a compliant consultation term.
525. Ensuring the model term is not disallowable would also avoid the risk of the model term being disallowed after an enterprise agreement has proceeded to a vote by employees on the basis that the model term determined by the FWC would be included in it. Were this to occur, questions as to genuine agreement may arise on the basis that an important term of the agreement would not be included. This situation may also cause commercial uncertainty and frustrate bargaining processes.

Item 63: After subsection 616(4)

526. Section 616 sets out the FWC's functions that must be performed by a Full Bench of the FWC. This item would insert new subsection 616(4A) to require that any determination of a model term under new subsections 202(5), 205(3), 737(1) or 768BK(1A) be made by a Full Bench. This would ensure consistency with the manner in which modern awards are created.

Item 64: Section 737

527. This item would repeal and substitute a new section 737.
528. The existing requirement that the FW Regulations prescribe the model dispute resolution term for enterprise agreements in section 737 would be replaced with a requirement in new subsection 737(1) that the FWC determine the model term.
529. New subsection 737(2) sets out what is required of the FWC when determining the model term.
530. New paragraph 737(2)(a) would require the model term determined by the FWC to satisfy the requirements of existing subsection 186(6). This subsection requires an enterprise agreement to include a term setting out the process for settling disputes arising under the agreement or the National Employment Standards (NES). The term must also permit the representation of employees throughout that process.

531. New paragraph 737(2)(b) would provide a list of matters that the FWC must take into account in determining the model term, in addition to any other matters the FWC considers relevant.
532. New paragraph 737(2)(b) would provide a list of matters that the FWC must take into account in determining the model term, in addition to any other matters the FWC considers relevant.
533. The FWC would be required to consider whether the model term generally accords with comparable terms in modern awards. New subparagraph 737(2)(b)(i) would require consideration of common features of dispute resolution terms in modern awards, rather than a detailed examination of all dispute resolution terms found in awards, or the selection of a single dispute resolution term to be used as a comparator. This would promote consistency across enterprise agreements and modern awards.
534. New subparagraph 737(2)(b)(ii) would require the FWC to take into account what it considers is ‘best practice’ workplace relations. This would allow the FWC to exercise its expert judgement, supplemented by submissions, to determine a model term that represents the current best approach.
535. New subparagraph 737(2)(b)(iii) would require the FWC to consider whether all persons and bodies have been provided with a reasonable opportunity to make submissions on the determination of the model term. This would ensure that there is appropriate public consultation prior to determining the model term.
536. New subparagraph 737(2)(b)(iv) would require the FWC to take into account the operation of existing subsections 739(3)–(6) and 740(3)–(4). These subsections limit the powers of the FWC, or the person empowered to arbitrate a dispute under the dispute resolution term, to dealing with the dispute only in the manner permitted by the dispute resolution term, and prohibit a decision being made by the FWC or the person that is inconsistent with the FW Act or a fair work instrument that applies to the parties.
537. New subparagraph 737(2)(b)(v) would require the FWC to take into account the object of the FW Act.
538. Legislative note 1 draws attention to the requirement that a Full Bench is required to make the model dispute resolution term. This requirement would be inserted into the FW Act by item 63.
539. Legislative note 2 points to subsection 33(3) of the AI Act for variations of a determination. This subsection provides that, in summary, where an Act provides a power to make an instrument of legislative character, that power includes the power to vary such an instrument. This would allow the FWC to update the model term from time to time in line with developments in workplace relations practices.
540. New subsection 737(3) would provide that the model term would be a legislative instrument that could not be disallowed by Parliament. As Australia’s independent workplace relations tribunal, the FWC has expert and technical knowledge of contemporary workplace relations and operates independently of political processes.

The determination would be required to be made following consideration of submissions by the public, thereby mandating public participation in the process. The model term would play a limited role in determining rights and obligations, as it will only apply where it is agreed to by the parties, or where the FWC accepts an undertaking from the employer that the model term will apply under existing paragraph 190(1)(b).

Item 65: Section 768BK (after the heading)

Item 66: Subsection 768BK(1)

Item 67: After subsection 768BK(1)

- 541. Part 6-3A of the FW Act provides for the transfer of State public sector employees to the national system. This might take place when, for example, a State enterprise is sold to a national system employer. Part 6-3A was modelled on Part 2-8 of the FW Act, which provides for transfers of employees between national system employers.
- 542. When the employees transfer from State public sector employment to national system employment, a copied State instrument governs the terms and conditions under which the employees are employed. The instrument is the same as the State award or agreement which applied to the employees immediately before moving into the national system.
- 543. Existing section 768BK provides that if the copied State instrument does not provide a procedure for settling disputes about matters arising under the instrument, then the model term prescribed by the FW Regulations applies.
- 544. Item 65 would insert a new subheading into existing section 768BK as a guide for the reader consequential to item 67 inserting new subsection 768BK(1A) in the FW Act.
- 545. Items 66 and 67 would amend existing subsection 768BK(1) to provide that a copied State instrument for a transferring employee that does not include a dispute settlement procedure term will be taken to include the model term determined by the FWC pursuant to new subsection 768BK(1A).

Item 68: Subsection 768BK(2)

Item 69: Subsection 768BK(2)

- 546. As copied State instruments can either be based on a State award or an agreement made under State law, existing subsection 768BK(2) clarifies that the model term prescribed for either class of instrument can be the same or different.
- 547. Items 68 and 69 do not change the substance of existing subsection 768BK(2). The items would amend subsection 768BK(2) to reflect the amendments made by items 66 and 67.

Item 70: At the end of section 768BK

- 548. This item would insert a new subsection 768BK(3) into the FW Act. The new subsection would set out the matters the FWC must take into account when determining the model dispute settlement term.

549. New paragraph 768BK(3)(a) would require the FWC to consider whether the model term generally accords with comparable terms in modern awards. The new paragraph would require consideration of common features of dispute settlement terms in modern awards, rather than a detailed examination of all dispute settlement terms found in awards, or the selection of a single dispute settlement term to be used as a comparator.
550. New paragraph 768BK(3)(b) would require the FWC to take into account what it considers is 'best practice' workplace relations. This would allow the FWC to exercise its expert judgement, supplemented by submissions, to determine a model term that represents the current best approach.
551. New paragraph 768BK(3)(c) would require the FWC to consider whether all persons and bodies have been provided with a reasonable opportunity to make submissions on the determination of the model term. This would ensure that there is appropriate public consultation prior to determining the model term, and in applying the other factors set out in new subsection 768BK(3).
552. New paragraph 768BK(3)(d) would require the FWC to consider whether the model term is consistent with the operation of existing subsections 739(3)–(6) and 740(3)–(4). These subsections limit the powers of the FWC, or the person empowered to arbitrate a dispute under the dispute settlement term, to dealing with the dispute only in the manner permitted by the dispute settlement term, and prohibit a decision being made by the FWC or the person that is inconsistent with the FW Act or a fair work instrument that applies to the parties.
553. New paragraph 768BK(3)(e) would require the FWC to take into account the object of the FW Act.
554. Legislative note 1 draws attention to the requirement that a Full Bench is required to make the model dispute settlement term. This requirement would be inserted into the FW Act by item 63.
555. Legislative note 2 points to subsection 33(3) of the AI Act for variations of a determination. This subsection provides that, in summary, where an Act provides a power to make an instrument of legislative character, that power includes the power to vary such an instrument. This would allow the FWC to update the model term from time to time in line with developments in workplace relations practices.
556. New subsection 768BK(4) would provide that the model term would be a legislative instrument that could not be disallowed by Parliament. As Australia's industrial relations tribunal, the FWC has expert and technical knowledge of contemporary workplace relations and operates independently of political processes. The determination would be required to be made following consideration of submissions by the public, thereby mandating public participation in the process. The model term would play a limited role in creating rights or obligations in circumstances where a copied State instrument does not contain a dispute settlement term.

Part 6—Closing the labour hire loophole

Amendments to the *Fair Work Act 2009*

557. Part 6 would insert new Part 2-7A into the FW Act. New Part 2-7A would relate to various labour hire arrangements and provide for orders to be made regulating these arrangements.
558. When an employer supplies one or more employees to a host business, employees and unions would be able to apply to the FWC for a regulated labour hire arrangement order. The FWC would not be required to make the order if satisfied that it was not fair and reasonable, having regard to submissions from affected businesses and employees. The FWC would be required to consider a range of factors including existing pay arrangements, whether the performance of the work is for the provision of services rather than the supply of labour, and the history of industrial arrangements applying to the host and the employer.
559. If the FWC made the order, employers that supply labour to a host and are covered by the order would generally be required to ensure that employees working as part of the arrangement are paid no less than the rate at which they would be paid under the host employer's enterprise agreement if they were directly employed (the protected rate of pay). In this way, the orders would protect bargained rates in enterprise agreements that host businesses have negotiated with their employees from being undercut by the use of labour hire.
560. Once an order is made, host employers would be required to provide certain information to employers supplying employees under the arrangement on request to assist them in meeting their payment obligations.
561. Certain exemptions would be built into the framework, including where an employee supplied under the arrangement is engaged for a short-term period or where a training arrangement applies to the employee. The provisions also would not apply where the host business is a small business employer as defined in the FW Act.
562. The provisions would be supported by an anti-avoidance framework to prevent businesses from adopting certain practices with the intention of avoiding obligations under new Part 2-7A.
563. The FWC would be able to resolve disputes about the operation of Part 2-7A, including by mandatory arbitration. It would be able to determine an alternative protected rate of pay for an employee supplied to work for a host employer where it would be unreasonable for the employee's employer to pay the employee the protected rate of pay under Part 2-7A and there is an alternate employment instrument that applies to the host employer or a related body corporate of the host employer.

Item 71: After paragraph 5(8)(a)

564. Section 5 sets out the content of Chapter 2 of the FW Act (Terms and conditions of employment). This item would make a consequential amendment to include new Part 2-7A (inserted by item 73) in the list of other terms and conditions for national system employees.

Item 72: Section 12

565. Section 12 of the FW Act contains the Dictionary. This item would insert several new definitions in section 12 for terms relied on in new Part 2-7A (inserted by item 73). Those terms are:

- alternative protected rate of pay order, defined by reference to new subsection 306M(2);
- arbitrated protected rate of pay order, defined by reference to new subsection 306Q(1);
- covered employment instrument;
- host employment instrument, defined by reference to new subsection 306E(6);
- protected rate of pay, defined by reference to new section 306F;
- recurring extended exemption period, defined by reference to new subsection 306K(2);
- regulated employee, defined by reference to new subsection 306E(5);
- regulated host, defined by reference to new section 306C; and
- regulated labour hire arrangement order, defined by reference to new subsection 306E(1).

566. A reference to a covered employment instrument would include an enterprise agreement, a workplace determination (as defined in section 12 of the FW Act), and a determination under section 24 of the *Public Service Act 1999* that applies to a class of APS employees in an Agency (within the meaning of that Act).

567. It would also include an instrument made under any other law of the Commonwealth or a State or a Territory that provides for the terms and conditions of employment for a class of national system employees of the Commonwealth or a State or Territory, or of an authority of the Commonwealth or of a State or Territory. This would include instruments determining the terms and conditions of employment of relevant employees made under Acts such as the *Australian Federal Police Act 1979* or the *Parliamentary Service Act 1999*.

568. This definition would ensure that the regulatory framework in new Part 2-7A would apply in relation to workplaces covered by determinations or instruments other than an enterprise agreement, but which serve an equivalent purpose. The Part would apply in relation to any determination or equivalent instrument that covers a class of employees, including as amended after the provision would commence. Regulations may be made to ensure that new Part 2-7A can apply to any other instrument relating to the employment of a class of national system employees that is made under a Commonwealth, State or Territory law that is not already covered by the wording of this provision.

Item 73: After Part 2-7

569. This item would insert new Part 2-7A, relating to regulated hire arrangement orders, into the FW Act, after existing Part 2-7.

Division 1—Introduction

570. Division 1 would set out the introductory matters for Part 2-7A.

Section 306A Guide to this Part

571. New section 306A would set out the guide to Part 2-7A. This Part would regulate certain labour hire arrangements with the intention of ensuring that employees working for a host business as part of a labour hire arrangement are paid for the work they perform in line with the terms of the host business' covered employment instrument. The guide would provide that the new Part relates to regulated labour hire arrangement orders. This includes the making of such orders by the FWC and the obligations of employers and regulated hosts covered by such orders. The Part deals with the making of alternative protected rate of pay orders by the FWC, disputes arising under the Part, and prohibiting avoidance behaviour.

Section 306B Meanings of employee and employer

572. New section 306B would provide that, for the purposes of Part 2-7A, employee means a national system employee and employer means a national system employer. These terms are defined in sections 13 and 14 of the FW Act respectively.

Section 306C Meaning of regulated host

573. New section 306C would provide the definition of 'regulated host' and lists the bodies and persons that would be defined as a 'regulated host'. The list would reflect the entities covered by the definition of national system employer set out at section 14 of the FW Act, as extended by sections 30D and 30N in States that have referred power over workplace relations to the Commonwealth. The provision would rely on the same constitutional powers that underpin the definition of national system employer, with some alteration given host businesses are not the employers of regulated employees. The Part would regulate the conduct of those persons and bodies in relation to their role in hosting a person who is not their employee.

Section 306D References to kinds of work and work performed for a person etc.

574. New subsection 306D(1) would provide that, for the purposes of Part 2-7A, a reference to work of a kind includes a reference to work that is substantially of that kind. This would clarify that the provisions of this Part are not intended to be read narrowly or limited to a specific kind of work. Labour hire arrangements can be complex and involve multiple parties and agreements.

575. New section 306D would clarify that new Part 2-7A is intended to apply in broad circumstances to labour hire arrangements. To this end, new subsection 306D(2) would provide that for the purposes of Part 2-7A, a reference to work performed for a person

includes a reference to work performed wholly or principally for the benefit of the person or an enterprise they carry on. This could include, for example, where a regulated host receives the benefit of a regulated employee's labour either directly or indirectly through intermediary companies. To further clarify this point, new subsection 306D(3) would provide that when determining whether work is performed for a person by an employee of an employer it does not matter whether there is or will be any agreement between the person and the employer relating to the performance of the work. That is, for the purposes of determining which party should be named the 'regulated host' for the purposes of an order made under the new Part, it is not a requirement that there be a direct agreement (or any agreement) between the party receiving the benefit of the work, and the employer employing workers to perform the work.

Division 2—Regulated labour hire arrangement orders

576. Division 2 would set out:

- when the FWC may make a regulated labour hire arrangement order (Subdivision A, new section 306E);
- the obligations of employers and regulated hosts when there is a regulated labour hire arrangement order in effect (Subdivision B, new sections 306F–306H);
- the details of short-term arrangements (Subdivision C, new sections 306J–306L); and
- the details of alternative protected rate of pay orders (Subdivision D, new sections 306M–306N).

Subdivision A—Making regulated labour hire arrangement orders

Section 306E FWC may make a regulated labour hire arrangement order

577. New section 306E would provide for the circumstances in which the FWC may make a regulated labour hire arrangement order. The effect of the order would be to apply the obligations in Part 2-7A to a labour hire arrangement. If no order is made, hosts and employers would have no obligations under Part 2-7A, other than those imposed by the anti-avoidance provisions in Division 4.

578. **Regulated labour hire arrangement order:** New subsection 306E(1) would provide that the FWC must make such an order, on application, if satisfied that an employer supplies or will supply employees to a regulated host to perform work, either directly or indirectly, and where, had the regulated host employed those employees directly to perform that work, a covered employment instrument that applies to the regulated host would apply to the employees.

579. New paragraph 306E(1)(c) would provide that the FWC cannot make such an order where the regulated host is a small business employer. This would reduce the administrative burden on small businesses. It would also allow for labour hire workers

employed by small businesses to be covered by a regulated labour hire arrangement order where they are working for a regulated host who is not a small business. Small business employer is defined in section 23 of the FW Act.

580. New subsection 306E(2) would provide that despite subsection (1), the FWC must not make the order if it is satisfied that it is not fair and reasonable to do so in the circumstances, having regard to considerations arising under subsection (8). As part of an order under this provision, the FWC may consider and jointly make other orders pursuant to applications made under Part 2-7A relating to the regulated labour hire arrangement. For example, if a party considered that an alternative protected rate of pay should apply in relation to an employee, if the FWC were to make a regulated labour hire arrangement order, the FWC could deal with that question by making an order under new section 306M at the same time as it considered whether to make the regulated labour hire arrangement order (see new paragraph 306M(1)(c)).
581. Subsection 306E(3) would provide that the supply of employees to the regulated host can be the result of one or more agreements, and that those agreements can be between parties that are not the regulated host or the employer. This would recognise that regulated labour hire arrangement orders can cover complex arrangements with multiple participating parties and agreements. Labour hire workers can be supplied directly from the employer to the regulated host or indirectly through multiple agreements and entities. Where the result of those agreements is that an employer provides employees to perform labour for the regulated host, the arrangement would satisfy the criterion in new paragraph 306E(1)(a).
582. New paragraph 306E(3)(c) would provide that a regulated labour hire arrangement order can apply even where the regulated host and employer are related bodies corporate. This would capture circumstances where a company is established to employ employees and provide them to a related body corporate host business under a labour hire arrangement where there is a covered employment instrument applying to the regulated host. A note to the provision would clarify that where related bodies corporate with different branding do not provide labour to one another, the FWC would not make a regulated labour hire arrangement order. This is because the obligations imposed as a result of a regulated labour hire arrangement order only apply where one employer provides labour to another.
583. New subsection 306E(4) would clarify that the basis on which particular employees are engaged as part of a labour hire arrangement is not relevant to the consideration under new paragraph 306E(1)(b). This would address, for example, circumstances where employees are or would be employed as casual employees and the covered employment instrument that applies to the regulated host does not provide for casual employment. Where that instrument applies to work of the kind to be undertaken by the employees as part of the labour hire arrangement, the requirements of new paragraph 306E(1)(b) would be satisfied.
584. **Regulated employee and host employment instrument definition:** New subsection 306E(5) would define the term ‘regulated employee’ as an employee

- employed or who will be employed to work as part of a labour hire arrangement in relation to which a regulated labour hire arrangement order is in force or may apply.
585. New subsection 306E(6) would define the term ‘host employment instrument’ as the covered employment instrument relevant to a regulated labour hire arrangement order.
586. **Who may apply for an order:** New subsection 306E(7) would list the parties who can apply to the FWC for a regulated labour hire arrangement order.
587. **Matters to be considered if submissions are made:** New subsection 306E(8) would set out matters that the FWC may consider when deciding whether it is not fair and reasonable in all the circumstances to make a regulated labour hire arrangement order for the purposes of new subsection 306E(2). The FWC is only required to consider matters listed in new subsection (8) where the parties have made submissions on these matters (new subsection 306E(2)).
588. New paragraph 306E(8)(a) would provide that the FWC may consider the pay arrangements that apply to employees of the regulated host (or its related bodies corporate). The FWC may consider whether the host employment instrument applies only to a particular class of employees, and whether there would be employees of that class performing work as part of the regulated labour hire arrangement. It may consider whether the host has ever actually engaged employees under its employment instrument to perform work of the same classification as would be performed under the labour hire arrangement. This may assist the FWC in determining the relevant rate of pay that would apply to the regulated employees, were an order made. The FWC may also consider the relevant rate of pay that would apply under a regulated labour hire arrangement order in determining if it is fair and reasonable to all parties to make the order.
589. New paragraph 306E(8)(b) would provide that the FWC may consider whether the work performed by the regulated employee is part of the provision of a specific service, rather than the supply of labour. This paragraph would recognise that employers often contract for the provision of specialised external services rather than for the provision of labour to undertake work that the employer engages in the ordinary course of its business. The Part does not intend to regulate contracting for specialised services. For example, a catering service contracted to provide catering for employees of a regulated host whose primary business is not the provision of catering services may be found to be the provision of a specialised service, even where the host employment instrument provided for the performance of work of the type provided by the service. New subparagraphs 306E(8)(b)(i)–(vi) would outline factors that would inform this consideration. Not all the factors listed would need to be satisfied for the FWC to find that the arrangement relates to the provision of a service rather than the provision of labour.
590. Relevant considerations would include whether an employee’s employer exercises direction, supervision or control over the performance of the employee’s work, the times at which work is performed, employee rosters, assigning tasks and reviewing the

work's quality; and whether the employee uses systems, plants or structures belonging to the employer to perform their work (for example, catering equipment) rather than those belonging to the regulated host. The 'systems' referred to in new subparagraph 306E(8)(b)(iii) may not be physical systems but rather practices or ways of working, methods of directing and managing staff, or virtual systems.

591. The FWC may also consider whether the work is specialist or expert work, and whether the employer is subject to industry or professional standards in relation to its employees and the performance of their work under new subparagraphs 306E(8)(b)(iv) and (v). For the purposes of these subparagraphs, higher education qualifications would not be required for work to be considered specialist or expert work. Work such as the provision of catering services could be considered specialist or expert work, where the employee's employer has meaningful direction, supervision or control over how and when the work is performed.
592. The FWC may also consider whether the regulated host has previously directly employed or could directly employ employees to perform the specific work provided by the labour hire arrangement under new subparagraph 306E(8)(b)(vi).
593. New paragraph 306E(8)(c) would provide that the FWC may consider the history of industrial arrangements applying to the regulated host and the employer. This would include considering previous regulated labour hire orders and bargaining related to any covered employment instrument applying to each party. It may also include how staff have been previously engaged by a regulated host to perform certain work.
594. New paragraph 306E(8)(d) would provide that the FWC may also consider any corporate relationship between the regulated host and the employer, including whether they are related bodies corporate, engaged in a joint venture or a common enterprise.
595. New paragraph 306E(8)(e) would provide that the FWC may consider the terms and nature of the labour hire arrangement, including how long it will operate for, the location of the work being performed, the industry the work is performed in and how many employees are engaged to perform work for the regulated host as part of the arrangement.
596. Finally, the FWC would also be able consider any other matters it considers relevant (new paragraph 306E(8)(f)).
597. **What an order must specify:** New subsection 306E(9) would provide a list of matters that must be specified in a regulated labour hire arrangement order. This would include:
- the parties covered by the order;
 - the relevant host employment instrument; and
 - the date the order commences.
598. Where the order is required to list the regulated employees covered by the order, it is not required to list each employee, but rather the class of employees that would be participating in the regulated labour hire arrangement. The orders are intended to be

broad and to cover employees engaged to work as part of the regulated labour hire arrangement after the order is made.

599. **What an order may specify:** New subsection 306E(10) would provide that a regulated labour hire arrangement order may (but need not) specify an end date for the order, when it will cease to be in force. A regulated labour hire arrangement order could also be varied or revoked under existing section 603.

Subdivision B—Obligations of employers and regulated hosts etc. when a regulated labour hire arrangement order is in force

Section 306F Protected rate of pay payable to employees if a regulated labour hire arrangement order is in force

600. **Application of section:** Section 306F would apply where there is a regulated labour hire arrangement order in force.
601. **Employer must not pay less than the protected rate of pay:** Subsection 306F(2) would require an employer covered by a regulated labour hire arrangement order to pay regulated employees no less than the protected rate of pay in connection with the work performed under the arrangement. This is a civil remedy provision.
602. The obligation to pay no less than the protected rate of pay requires employers to ensure that the total overall amount paid to the regulated employee is no less than the protected rate of pay. In accordance with the definition of protected rate of pay set out in subsections (4)–(9), it does not:
- require a strict line-by-line comparison of entitlements;
 - require the application of entitlements from the host instrument to the regulated employees;
 - require all employees to be paid the same amount, irrespective of their length of service, skills or experience, unless this is also a requirement of the host’s covered employment instrument; or
 - prevent the regulated employee being paid more than the protected rate of pay, if, for example, their employer’s enterprise agreement is more generous than the host’s agreement.
603. That is, if the full rate of pay that would have been payable to the regulated employee if they were directly employed by a host for a particular period is \$1,000, the only obligation of the employer is to pay that employee at least \$1,000.
604. The obligation to pay the protected rate of pay extends to periods of leave a regulated employee takes during a placement with a regulated host covered by a regulated labour hire arrangement order.
605. **Exception:** New subsection 306F(3) would set out an exception to the obligation to pay no less than the protected rate of pay at subsection 306F(2). The subsection would provide for circumstances where the protected rate of pay is not paid because the

employer reasonably relies on information provided by the regulated host as to how the protected rate of pay should be correctly calculated and the information provided by the regulated host is incorrect. In this circumstance, the employer would not be exposed to a civil penalty for failing to comply with new subsection 306F(2). This would protect employers from a penalty that could arise from circumstances that are outside of their control. Given the serious consequences for employees should this situation arise, employers should take careful steps to ensure that the protected rate of pay is properly calculated and that the regulated host has provided them with any necessary information to allow correct calculation of the protected rate of pay.

606. **Meaning of protected rate of pay:** New subsection 306F(4) would define ‘protected rate of pay’ as the full rate of pay that would be payable to the employee if the host employment instrument covered by the regulated labour hire arrangement order were to apply to the employee. This provision would adopt the definition of ‘full rate of pay’ in existing section 18. The protected rate of pay would accordingly include loadings (including annual leave loading), allowances, overtime or penalty rates, incentive-based payments or bonuses and any other separately identifiable amounts.
607. New subsection 306F(5) would clarify how the protected rate of pay should be calculated for casual employees where the host employment instrument either does not provide for casual employment, or does not provide for casual employees to undertake work of the relevant kind the casual employee is engaged to perform. The provision would provide that the protected rate of pay for casual employees in this circumstance is the full rate of pay that would be payable if the employee were engaged other than as a casual employee under the host employment instrument, and the base rate of pay were increased by an additional 25 per cent. This increase to the base rate of pay is intended to reflect the casual loading rates. This provision would ensure that casual employees are not prevented from receiving the protected rate of pay for their work for a regulated labour host, including where casual employment is not specifically provided for in the host employment instrument.
608. New subsection 306F(6) would address circumstances where the employer mentioned in subsection 306F(1) is only a national system employer because of section 30D or 30N (which extend the meaning of national system employer in relation to state referrals of power). The new subsection would provide that, despite subsections (4) and (5), the protected rate of pay for regulated employees in this circumstance would not include any amount that relates to an excluded subject matter within the meaning of subsection 30A(1) or 30K(1). Amounts relating to excluded subject matters for the purposes of this subsection may include long service leave, leave for victims of crime and jury or emergency service leave.
609. New subsections 306F(7) and (8) would set out how the protected rate of pay would be calculated for employees who are pieceworkers for the purposes of existing paragraphs 16(2)(b) and 18(2)(b) respectively.
610. New subsection 306F(9) would provide that the protected rate of pay for the purposes of new subsection 306F(5) would not include paid leave entitlements that would apply

if the employee were engaged other than as a casual, unless the employee were otherwise entitled to them. This subsection would clarify the operation of new subsection 306F(5). This means, for example, that a casual would not be entitled to paid annual leave because of any provision in Part 2-7A, but nothing in the Part would prevent a casual employee being entitled to paid family and domestic violence leave as this paid leave entitlement is extended to casual employees.

611. **Requirement to pay no less than protected rate of pay applies despite other fair work instruments etc.:** New subsection 306F(10) would provide that new subsection 306F(2) would apply irrespective of any provision of any fair work instrument or covered employment instrument (other than an instrument made by the FWC under the Part, including under section 306N or section 306Q) that applies to the regulated employee or the regulated employee's contract of employment, that would provide for a rate of pay for the work that is less than the protected rate of pay. The intention of this provision is to ensure that regulated employees are remunerated at the higher of any applicable rate of pay under a fair work instrument or relevant covered employment instrument. Where the protected rate of pay is less than the amount of total remuneration an employee receives, paying the employee as normal would comply with both the obligation to pay at least the protected rate of pay, and the remuneration obligations under the relevant industrial instrument.

Section 306G Exceptions from requirement to pay protected rate of pay

612. New section 306G would provide for circumstances where there is no requirement to pay the protected rate of pay, despite a regulated labour hire arrangement order being in force.
613. **Training arrangements:** New subsection 306G(1) would provide that there is no requirement to pay the protected rate of pay where a training arrangement applies in respect of a regulated employee. This provision is intended to apply to all workers employed on an apprentice or trainee contract. This would reduce barriers to employers providing training pathways to meet future skills demands. Training arrangement is defined in the Dictionary at section 12.
614. **Certain short-term arrangements:** New subsection 306G(2) would provide for circumstances in which there is no requirement to pay the protected rate of pay to a regulated employee because the regulated employee performs work for the regulated host during a short-term arrangement. Unless the FWC makes a determination extending, removing or shortening this exempt period, the exemption period will generally be where an employee performs work for a period of three months or less. This exception would recognise that businesses may need to respond quickly to short-term increases in demand for services, or to rapid deadlines. The exception would reduce barriers to rapidly increasing a workforce to satisfy surges in demand over a short-term period. Employers may need to engage employees for short-term periods to back fill positions for employees on leave or who are unwell, or to respond to a temporary surge in demand. Employers may have a discrete role or task that needs

completion in the short term and may choose to engage employees through a labour hire agreement to meet that requirement. Employers may need to engage labour hire employees while they conduct a formal hiring process. In these circumstances, the provision would facilitate the employers' need to respond rapidly to staffing requirements by providing an exception to the requirements set out in this Part.

615. The exception would also act to protect employees by limiting the time the exception can operate for. New subsection 306G(3) would provide that the exception to new section 306F in relation to short-term arrangements would only apply until such time as the agreement or agreements under which the regulated employee is engaged to work are varied, or a new agreement or agreements are made that result in the employee continuing to perform work of the kind for the regulated host for longer than the three month period (or another exempt period as specified by a FWC determination under new sections 306J or 306K). The requirement to pay the employee the protected rate of pay would be enlivened from the date their contract is varied or a new contract is entered into, that would require them to work for longer than the exempt period.

Section 306H Obligations of regulated hosts covered by a regulated labour hire arrangement order

616. **Application of this section:** New section 306H would set out obligations of regulated hosts covered by a regulated labour hire arrangement order.
617. **Ability to request information regarding protected rate of pay:** New subsection 306H(2) would provide that where a regulated labour hire arrangement order is in force and an employer does not have all the information required to work out the protected rate of pay for work performed by a regulated employee for a regulated host, the employer may request that the regulated host provide it with the information. The subsection would allow employers to identify specific information which, if provided, would allow them to accurately determine the protected rate of pay and request that the regulated host or proposed regulated host provide it. It would also allow employers to request that regulated hosts provide information such as policies relating to how rates of pay are calculated or how a host employment instrument applies.
618. New subsection 306H(3) would provide that, if an employer makes a request for the purposes of subsection 306H(2), the regulated host must comply with the request as soon as reasonably practicable after it is made, and within a period that allows the employer to comply with its obligations to pay the protected rate of pay to its employees in a timely manner. This subsection would be a civil remedy provision.
619. This information could include documents, policies, emails or records in any form detailing how a regulated host applies the terms of the host employment instrument to certain classes of employee (whether in practice, or in theory if the regulated host has not previously engaged employees under a certain classification). It may include a copy of the host employment instrument that covers the class of work or class of employees covered by a regulated labour hire arrangement order. It may include information about how a regulated host calculates, or would calculate, certain entitlements under the

relevant host employment instrument or how it determines or would determine an employee's classification and rate of pay for certain work based on their previous level of experience. The obligation to respond to an employer's request could also extend to the creation of documents that detail how the protected rate of pay should be calculated, if no documents to this effect were available, or if the relevant documents were considered to be commercially sensitive.

620. **Manner of complying with request:** New subsection 306H(4) would provide that a regulated host could comply with a request under new subsection 306H(2) by different methods.

- Regulated hosts could provide an employer with the relevant information that would allow the employer to undertake their own calculations to determine the protected rate of pay for the work.
- Alternatively, a regulated host may choose to undertake its own calculations as to the correct protected rate of pay for each regulated employee for each pay period, and to provide that information to the employer before the end of each pay period. Regulated hosts might choose to undertake their own calculations, for example, where information about how the protected rate of pay is calculated under their policies is commercially sensitive, or where they are concerned that the correct protected rate of pay will not otherwise be accurately calculated.

Subdivision C—Short-term arrangements

Section 306J Determination altering exemption period for short-term arrangements

621. Subdivision C would address short-term arrangements, including circumstances where the FWC may make orders altering the exemption period of a short-term arrangement.
622. New section 306J would provide that the FWC can alter the duration of the three month short-term exemption period provided for in new subsection 306G(2). On application, the FWC could make a determination under this section if a regulated labour hire arrangement order had been made (whether or not it is yet in force), or where an application for such an order had been made but not finally determined.
623. The FWC could determine under this section that there was no exempt period for the purpose of new section 306G, or that the exempt period provided for in that section is extended or reduced to a period determined by the FWC. During the exempt period, there would be no requirement for the employer to pay regulated employees the protected rate of pay.
624. Parties would be able to apply for a determination that the short-term exemption period is extended or reduced, or that there is no exemption period, to reflect the specific circumstances of a surge demand period experienced by a regulated host. Employers or organisations entitled to represent their industrial interests may seek a determination under this provision due to an extended surge in demand during which it is necessary to engage many additional workers. Employees or organisations entitled to represent their

industrial interests may seek a determination that a specified surge period should be shortened or that there is no surge period at all.

Section 306K Determination of recurring extended exemption period

625. New section 306K would provide that the FWC could determine that there is a recurring period that would be exempt from the requirement to pay the protected rate of pay for the purposes of subparagraph 306G(2)(b)(iii). An application for a determination under this section could be made where a regulated labour hire arrangement order had been made (whether or not it is yet in force) or where an application for such an order had been made but not finally determined.
626. The FWC could determine under this section that the exempt period for the purpose of subsection 306G(4) is to recur at specified intervals, for an exempt period of more than three months, starting on a specified day in specified consecutive years. An example of this would be for surges in staffing requirements occurring around the Christmas period or snow season, that occur every year for a period of more than three months. For employees who commence during the recurring extended exempt period, there would be no requirement for the employer to pay regulated employees the protected rate of pay for the remaining period of the extended exemption, or three months, whichever is longer (see new subparagraph 306G(2)(b)(iii)). The determination could be made in relation to specified kinds of work in relation to which the labour hire arrangement order relates or would relate.
627. For harvest periods or surge periods with changeable dates, employers could apply for the recurring surge period to start at the earliest possible date for that predicted surge period. Regulated hosts would not be required to commence engaging labour hire on the start date of a recurring surge exemption period and could engage employees under the exemption at any time during the period. A regulated host could seek a longer recurring exemption period to buffer any uncertainty around the dates of a seasonal surge period if necessary.

Section 306L Making and effect of determinations under this Subdivision

628. New section 306L would set out matters relating to determinations made under Subdivision C.
629. **Who may apply for determination:** New subsection 306L(1) would specify which parties can apply for a determination under the subdivision.
630. **Time for making determination:** New subsection 306L(2) would require the FWC to make a determination under the subdivision as quickly as possible after an application is made. This is intended to minimise the period of uncertainty as to what the exemption period will be once an application has been made.
631. **Requirements for making determination:** New subsection 306L(3) would require the FWC to seek submissions from any other party that could have applied for a determination under the Subdivision. This would ensure all relevant parties are given an opportunity to make submissions relating to any application for a change to the short-

term exemption period. However, there is no requirement that those parties express any views, provided that they have been provided with a reasonable opportunity to do so.

632. New subsection 306L(4) would require that the FWC only make a determination extending, reducing, or removing the exemption period, or providing for a recurring period, if it is satisfied that there are exceptional circumstances to justify the determination. In determining whether there are exceptional circumstances, the FWC would be required to have regard to the purpose of the proposed exemption period, including whether the application requests that the period be specified to satisfy the need for short term or surge workforce demands. The FWC would also be required to have regard to several other factors set out in the subsection, including submissions from the relevant parties and organisations entitled to represent their industrial interests (if any), the circumstances of the relevant parties, the industry in which the work is performed, and any other matters it considers relevant. If an application has been made for a longer or recurring exemption period, a greater justification will be required the longer the period or the greater the number of recurring surge periods sought in the application.
633. **When determination comes into force:** New subsection 306L(5) would specify when a determination under this subdivision comes into force.

Subdivision D—Alternative protected rate of pay orders

Section 306M Making an alternative protected rate of pay order

634. **Application of this section:** Subdivision D would set out the process for making alternative protected rate of pay orders and the effect of such orders. This Subdivision is intended to apply where parties consider that the host employment instrument that applies (or would apply) under a regulated labour hire arrangement order should not apply to certain regulated employees, and that an alternative covered employment instrument should apply instead. This may be the case where the alternative covered employment instrument better reflects the type of work or classification of work to be performed under the regulated labour hire arrangement. Such an application could also arise where the rate of pay specified under the alternative covered employment instrument more fairly compensates for work of the type to be performed under the regulated labour hire arrangement.
635. **Alternative protected rate of pay order:** New section 306M would set out the process for making an alternative protected rate of pay order. An application for an order under this section could be made where a regulated labour hire arrangement order had been made (whether or not it is yet in force) or where an application for such an order had been made but not finally determined.
636. An alternative rate of pay order would specify how the alternative protected rate of pay would be calculated and that the employer must pay the rate of pay worked out in that way to the regulated employee (new subsection 306M(2)).

637. **Rate of pay:** New subsection 306M(3) would provide that the method for determining the alternative protected rate of pay must be set by reference to the protected rate of pay that would apply if an alternative covered employment instrument applied to the employee. The alternative covered employment instrument specified would be required to be either:
- an instrument that applies to a related body corporate of the regulated host and would apply to a person employed by the related body corporate to perform work of that kind; or
 - an instrument that applies to the regulated host and would apply to a person employed by the regulated host to perform work of that kind, in circumstances that do not apply in relation to the employee.
638. The latter condition is intended to apply in situations where the regulated host has multiple enterprise agreements covering the same kinds of work, that apply to different employees in different circumstances (for example, in different locations, or by reference to when they commenced employment).
639. The intention of the provision is to allow the FWC to make an order specifying an alternative covered employment instrument only in circumstances where that instrument would be more appropriately applied to a regulated employee's employment as part of a labour hire arrangement, and where the alternative instrument applies to one of the parties participating in or arranging for the labour hire arrangement. An instrument that is unrelated to the employment obligations of the regulated host or its related bodies corporate will not apply.
640. **Who may apply:** The FWC could make an alternative protected rate of pay order on application by the employee, the employer, the regulated host or an organisation entitled to represent the industrial interests of one of those parties (new subsection 306M(4)).
641. **Time for making:** The FWC would be required to make a determination as quickly as possible after the application for an alternative protected rate of pay order is made. If it makes an alternative protected rate of pay order, the order would be required to specify how the alternative protected rate of pay is to be calculated, and that the employer must pay the alternative protected rate of pay as specified in connection with the work performed under the associated regulated labour hire arrangement order.
642. **Criteria for making etc.:** New subsection 306M(6) would provide that the FWC must not make the order unless it is satisfied that requiring an employer to pay the regulated employee at the protected rate of pay arising under the host employment instrument would be unreasonable (for example, because the rates would be insufficient or excessive). The FWC must also be satisfied that there is a covered employment instrument of the kind referred to in new subsection 306M(3) that could be the subject of an alternative rate of pay order.
643. New subsection 306M(7) would require that, before making the order, the FWC seek submissions from relevant parties listed in the subsection, including the employer and

employees to whom the alternative covered employment instrument to be specified in the order applies for the purposes of subsection (3) (if that employer is not the regulated host).

644. New subsection 306M(8) would require that the FWC have regard to whether the host employment instrument covered by the regulated labour hire arrangement order applies only to a particular class of employees (including whether it applies to all of the relevant regulated employees to be engaged under a regulated labour hire arrangement) in deciding whether to make the order. It must also have regard to whether the host employment instrument has ever applied to an employee at a classification that would be applicable to the relevant regulated employee or group of regulated employees. Where the host employment instrument has previously applied to employees at the same classification as the regulated employee, it may weigh against the making of an alternative protected rate of pay order. Where the host employment instrument would apply to a class of employees that would not generally include the regulated employee, it may support the view that an alternative covered employment instrument might be more appropriately applied to the regulated employee.
645. The FWC must also consider the views of any of the parties listed in subsection (7), the protected rate of pay that would be payable to the regulated employee if an order were made, and any other considerations it thinks is relevant in deciding whether to make the order.
646. **Exception for short-term arrangements:** New subsection 306M(9) would provide that when making an alternative protected rate of pay order, the FWC must ensure that any exception set out in new section 306G (short-term arrangements) that would apply to the calculation of the protected rate of pay also applies in relation to the alternative protected rate of pay order.

Section 306N Effect of alternative protected rate of pay order

647. New section 306N would provide when an alternative protected rate of pay order comes into effect, and when the alternative protected rate of pay would be applied.
648. **When alternative protected rate of pay order comes into force:** New subsection 306N(1) would specify when an alternative protected rate of pay order would come into force.
649. **Effect of alternative protected rate of pay order:** New subsection 306N(2) would provide that where a regulated labour hire arrangement order is already in force at the time the alternative protected rate of pay order is made, then the alternative protected rate of pay order applies only to work performed once that order comes into force. Employers will not be required to backpay regulated employees where an alternative rate of pay order comes into force after a regulated labour hire arrangement order is already in force. Similarly, employers will not be entitled to recover money from employees for wages paid in respect of work undertaken under a regulated labour hire arrangement order that is already in force, when an alternative protected rate of pay order is made that decreases the protected rate of pay.

650. The alternative protected rate of pay order would have effect despite the requirement in new section 306F and any other provision of a fair work instrument, covered employment instrument or employment contract that provides for a lower rate of pay than that specified in the alternative protected rate of pay order.
651. **Person must not contravene an alternative protected rate of pay order:** New subsection 306N(3) would provide that a person must not contravene a term of an alternative protected rate of pay order. This provision would be a civil remedy provision.

Division 3—Dealing with disputes

652. Division 3 would set out the dispute resolution framework for Part 2-7A.

Section 306P Disputes about the operation of this Part

653. **When this division applies to a dispute:** New section 306P would provide a mechanism for the resolution of disputes arising under the Part. This dispute resolution mechanism would apply if there was a dispute about the operation of Part 2-7A and a regulated labour hire arrangement order is in force or will come into force. A dispute may arise, for example, about what the protected rate of pay is for a regulated employee. The dispute could also be concerned with whether the protected rate of pay has been or is being paid by the employer.
654. **Parties must attempt to resolve dispute at a workplace level:** The section would require parties to attempt to resolve the dispute at a workplace level before applying to the FWC.
655. **How the FWC deals with dispute:** If workplace level discussions do not resolve the dispute, a party to the dispute would be able to make an application to the FWC to resolve the dispute. The FWC would be required to first deal with the dispute by means other than arbitration unless there were exceptional circumstances.
656. **Representatives:** An employer, employee or regulated host would be able to appoint an organisation or other person to support or represent them for the purposes of resolving the dispute at the workplace level or through the FWC.
657. **Joinder of other employees to disputes:** The FWC procedural rules could also provide for the joinder of employees as parties to the dispute who have a dispute about the operation of Part 2-7A with the same regulated host or employer.

Section 306Q Dealing with disputes by arbitration

658. New subsection 306Q(1) would provide that the FWC can arbitrate a dispute under this Part, including by making an arbitrated protected rate of pay order.
659. An arbitrated protected rate of pay order made under this section would be required to specify how the protected rate of pay in respect of a regulated employee should be worked out where an order is or will be in force. This may include a breakdown of how

provisions of a host employment instrument are to be applied. It may include specifying how a regulated employee or class of regulated employees are to be classified under a host employment instrument.

- 660. The order must also specify that the protected rate of pay for a regulated employee is to be calculated and paid as provided by the order.
- 661. New subsection 306Q(2) would address circumstances where the employer is only a national system employer because of section 30D or 30N (which extend the meaning of national system employer in relation to state referrals of power). The new subsection would provide that the rate of pay specified under an arbitrated protected rate of pay order made for the purposes of this new subsection must not include any amount that relates to an excluded subject matter within the meaning of subsection 30A(1) or 30K(1). Amounts relating to excluded subject matters for the purposes of this subsection may include long service leave, leave for victims of crime and jury or emergency service leave.
- 662. New subsection 306Q(3) would provide that the FWC could not make an arbitrated protected rate of pay order unless satisfied that it would be fair and reasonable to do so.
- 663. New subsection 306Q(4) would provide that where the parties agree to the FWC arbitrating the dispute, the protected rate of pay order could apply in relation to work performed on or after the regulated labour hire arrangement order is made. This may mean that an employer is liable to pay backpay to the regulated employee if the employer has been paying the employee less than the rate set out in the arbitrated protected rate of pay order.
- 664. New subsection 306Q(5) would provide that if the parties did not agree to the FWC arbitrating the dispute, the arbitrated protected rate of pay order could only apply in relation to work performed on or after the day the order is made, or on or after the day a regulated labour hire arrangement order comes into force (whichever is later). An employer will not be required to provide back pay in respect of work performed under a regulated labour hire arrangement that has been undertaken prior to an arbitrated protected rate of pay order being made in this circumstance.
- 665. **Effect of arbitrated protected rate of pay order:** New subsection 306Q(6) would provide that an arbitrated protected rate of pay order would have effect despite the requirements in new section 306F and any relevant fair work instrument, covered employment instrument or employment contract that provides for a lower rate of pay in relation to so much of the work as is performed during the period in which the order applies. The intention of this provision is to clarify that the effect of an arbitrated protected rate of pay order is to establish a single authority for how the protected rate of pay should be calculated in respect of a relevant regulated employee, during the period in which it is in force.
- 666. New subsection 306Q(7) would provide that a person must not contravene a term of an arbitrated protected rate of pay order. This provision would be a civil remedy provision.

667. New subsection 306Q(8) would provide that, when making an arbitrated protected rate of pay order, the FWC must ensure that any exception set out in section 306G (short-term arrangements) that would apply to the calculation of the protected rate of pay also applies in relation to the arbitrated protected rate of pay order.

Section 306R Application fees

668. New section 306R is modelled on section 367 of the FW Act and other similar provisions that provide for application fees.
669. New subsection 306R(1) would require an application made under new subsection 306P(4) to be accompanied by the fee prescribed in the FW Regulations (if any). New paragraphs 306R(2)(a)–(c) would provide that the FW Regulations may prescribe the application fee, the method for indexing the fee and the circumstances in which all or part of the fee may be waived or refunded.
670. As a result of section 15A of the AI Act, as in force on 25 June 2009 (see section 40A of the FW Act), this regulation-making power cannot be read as authorising the imposition of a tax.

Division 4—Anti-avoidance

671. Division 4 would set out the anti-avoidance framework for Part 2-7A.

Section 306S Preventing making of regulated labour hire arrangement orders

672. New section 306S is intended to be a broad anti-avoidance provision aimed at preventing behaviours intended to avoid the operation of Part 2-7A.
673. New subsection 306S(1) would provide that an employer or a regulated host contravenes the section if they enter into a scheme, or carry out or begin to carry out a scheme, either alone or with another person or persons, where the sole or dominant purpose is to prevent the FWC from making a regulated labour hire arrangement order, and the FWC is prevented from making the order.
674. A contravention of this provision would attract a civil penalty.
675. ‘Scheme’ would be defined broadly in new subsection 306S(2).
676. Adopting certain corporate structures with the purpose of preventing the FWC from being able to make a regulated labour hire order is an example of a scheme that may contravene this provision.

Section 306T Short-term arrangements —engaging other employees

677. This provision is intended to prevent an employer from engaging successive employees for less than three months (or another period determined by the FWC) in order to enliven the short-term arrangement exemption and avoid paying employees in accordance with Part 2-7A.

678. An employer would contravene this provision if they were covered by a regulated labour hire arrangement order and:

- the employer is not required to pay a regulated employee at a rate determined in accordance with Part 2-7A (the protected rate of pay, arbitrated rate of pay or alternative rate of pay) because the employee was engaged for less than three months (or a different period determined by the FWC altering the short-term exemption period); and
- the employer engages another person to perform the same, or substantially the same, work as the first employee; and
- it could reasonably be concluded that the purpose, or one of the purposes, of engaging the other person was to avoid paying a regulated employee in accordance with Part 2-7A.

679. A contravention of this provision would attract a civil penalty.

Section 306U Short-term arrangements — entering into other labour hire agreements

680. This provision is intended to prevent a regulated host from entering into successive short-term labour hire agreements to avoid paying employees in accordance with Part 2-7A. As each such agreement would be for a period of three months or less, the short-term arrangement exemption would be enlivened which would mean employers would not be obliged to pay regulated employees the protected rate of pay under this Part.

681. A regulated host would contravene this provision if they were covered by a regulated labour hire arrangement order and:

- the employer is not required to pay a regulated employee at a rate determined in accordance with Part 2-7A (the protected rate of pay, arbitrated rate of pay or alternative rate of pay) because the agreement would engage employees for less than three months (or a different period determined by the FWC altering the short-term exemption period); and
- the regulated host enters into an agreement that has the result that another person is to perform the same, or substantially the same, work as that performed by the regulated employee for the regulated host; and
- it could reasonably be concluded that the purpose, or one of the purposes, of engaging the other person was to avoid the employer paying a regulated employee in accordance with Part 2-7A.

682. A contravention of this provision would attract a civil penalty.

Section 306V Engaging independent contractors

683. This provision is intended to prevent an employer from dismissing labour hire employees and engaging other workers as independent contractors to perform the same work to avoid the operation of Part 2-7A.

684. Dismissing an employee and re-engaging the same employee as an independent contractor to perform the same work is already prohibited under section 358 of the FW Act.
685. An employer covered by a regulated labour hire arrangement order would contravene new section 306V if the employer:
- dismisses a regulated employee covered by the order who was performing work for a regulated host; and
 - engages another person as an independent contractor to perform the same work or work of that kind for the regulated host; and
 - as a result, the employer is not required to pay a person a rate determined under or in accordance with Part 2-7A (for example, because the obligations do not extend to labour hire employees who are independent contractors); and
 - it could reasonably be concluded that the purpose, or one of the purposes, of engaging the independent contractor was to avoid paying a regulated employee in accordance with Part 2-7A.
686. A contravention of this provision would attract a civil penalty.

Division 5—Other matters

Section 306W Guidelines

687. New section 306W would require the FWC to make written guidelines in relation to the operation of Part 2-7A to assist with education and compliance, so that readers can more easily understand the new Part.
688. New subsection 306W(2) would assist readers by clarifying that the guidelines would not be a legislative instrument within the meaning of subsection 8(1) of the Legislation Act. This is not an express exemption from the Legislation Act, but rather clarifies the status of the guidelines.
689. New subsection 306W(3) would require the FWC to ensure the guidelines are in force by 1 November 2024, when the provisions take effect, and at all times after that day.

Item 74: Subsection 539(2) (after table item 9)

690. This item would add a new table item, 9A, regarding contraventions of new Part 27A, to the table of civil remedy provisions set out at subsection 539(2) of the FW Act. Contraventions of new sections 306F(2), 306H(3), 306N(3), 306Q(7), 306S(1), 306T, 306U and 306V would be included in the new table item as civil remedy provisions.
691. The new table item would provide that an employee, an employee organisation or an inspector could bring an action for an alleged contravention of the provisions in a federal court or eligible State or Territory Court. The maximum civil penalty for a contravention would be 60 penalty units, or 600 penalty units for serious contraventions.

Item 75: After paragraph 557(2)(f)

692. Section 557 of the FW Act sets out when two or more contraventions of a civil remedy provision are taken to constitute a single contravention where certain conditions are met. Generally, those conditions are that the contraventions were committed by the same person and arose out of a course of conduct by that person.
693. This item would insert new paragraphs into subsection 557(2), including new sections 306F(2) (protected rate of pay payable to employees covered by a regulated labour hire arrangement order), 306H(3) (obligations of regulated hosts covered by regulated labour hire arrangement orders), 306N (contravention of alternative protected rate of pay orders) and 306Q(7) (contravention of arbitrated protected rate of pay orders) in the list of civil remedy provisions that are taken to constitute a single contravention.

Item 76: After paragraph 576(1)(f)

694. Section 576 of the FW Act sets out the functions that are conferred on the FWC by the FW Act. This item would make a consequential amendment that would insert regulated labour hire arrangement orders (Part 2-7A) into the existing list of functions.

Part 7—Workplace delegates’ rights

Amendments to the *Fair Work Act 2009*

695. Part 7 would introduce new workplace rights and protections for workplace delegates, who are employees or workers, appointed or elected under the rules of their employee organisation, to represent members in a particular enterprise. These new rights and protections would support their role in representing employees and regulated workers in workplaces. It would provide for modern awards and future enterprise agreements to provide more detailed rights for specific industries, occupations and workplaces. It would also provide a new general protection for workplace delegates to facilitate the exercise of these rights.

Division 1—Amendments commencing the day after Royal Assent

696. Division 1 of Part 7 contains amendments to the FW Act that would commence the day after Royal Assent. These amendments would:

- insert definitions of ‘delegates’ rights term’ and ‘workplace delegate’ into the Dictionary;
- from 1 July 2024, require all modern awards, new enterprise agreements and new workplace determinations to include a delegates’ rights term (see item 308, clauses 103, 104, 105 and 106);
- insert a new general protection in Division 4 of Part 3-1 of the FW Act specific to workplace delegates; and
- give workplace delegates rights in relation to representing the industrial interests of members, and other persons eligible to be a member, of the relevant employee organisation, including in a dispute with their employer.

Item 77: Section 12

697. Section 12 of the FW Act contains the Dictionary. This item would insert a new definition of ‘delegates’ rights term’ as a term in a fair work instrument that provides for the exercise of the rights of workplace delegates.

698. The note to the definition of ‘delegates’ rights term’ would alert readers to:

- new section 350C, which sets out the rights of workplace delegates, and
- that the delegates’ rights term must provide for at least the exercise of these rights (in accordance with new section 205A and new subsection 273(7) inserted by items 81 and 82).

699. This item would also insert a new definition of ‘workplace delegate’ into the Dictionary by reference to new subsection 350C(1), which would be inserted by item 84.

Item 78: At the end of Subdivision C of Division 3 of Part 2-3

700. Subdivision C of Division 3 of Part 2-3 of the FW Act sets out the terms that must be included in modern awards. This item would insert a new section 149E, which would require modern awards to include a delegates’ rights term.

701. When the FWC varies a modern award, it would be required to include a new delegates' rights term or to vary an existing delegates' rights term in a modern award, and it must be satisfied that making the variation would be necessary to achieve the modern awards objective in section 134 of the FW Act. This obligation (to be satisfied it is necessary to achieve the modern awards objective in section 134 of the FW Act) also applies to the FWC making a new modern award.

Item 79: Section 169 (paragraph about Division 5)

702. Section 169 is the Guide to Part 2-4 of the FW Act, which deals with enterprise bargaining. This item is a consequential amendment that would signpost that Division 5 of Part 2-4, which deals with mandatory terms of enterprise agreements, would include a requirement for terms about workplace delegates' rights. This reflects the inclusion of this requirement in new section 205A, which would be inserted by item 81.

Item 80: After subsection 201(1)

703. This item would insert a new subsection 201(1A) to support the operation of the new subsection 205A(2) (as set out in item 81).
704. Existing section 201 of the FW Act sets out certain matters that the FWC must note in its decision to approve an enterprise agreement. This item would add to these matters a requirement for the FWC to make a note in its approval decision if the delegates' rights term contained in a modern award is taken to be term of an enterprise agreement.
705. The FWC's enterprise agreement approval decisions are publicly available, and this item would provide greater clarity to employees and employers regarding their rights and obligations.

Item 81: At the end of Division 5 of Part 2-4

706. Division 5 of Part 2-4 of the FW Act sets the terms that must be included in an enterprise agreement. This item would insert a new section 205A.
707. New subsection 205A(1) would provide that an enterprise agreement must include a delegates' rights term. This requirement would only apply to enterprise agreements put to a vote by the employer on or after 1 July 2024 (as set out in Part 18 item 105).
708. New subsection 205A(2) would provide that a delegates' rights term in an enterprise agreement must be at least as favourable as the delegates' rights term of modern award (or awards) that cover the workplace delegates. This would involve comparing the delegates' rights term of the enterprise agreement against the term in the relevant modern award(s).
709. If during the approval process, the FWC considers an enterprise agreement that would otherwise be approved has a less favourable delegates' rights term than that included in the modern award(s) that cover the workplace delegates, this item would provide that the enterprise agreement term has no effect and that the delegates' rights term of the modern award that covers the workplace delegates would instead be taken as a term of the agreement. If there are multiple modern awards that cover the workplace delegates, the FWC would be required to determine the most favourable delegates' rights term included in those modern awards. New subsection 201(1A) (inserted by item 80) would

then require the FWC to note that this modern award term is taken to be a term of the enterprise agreement in its decision to approve the enterprise agreement.

710. New subsection 205A(3) would confirm that, where a delegates' rights term in a modern award is taken to be a term of the enterprise agreement, the term does not change if the modern award changes. This means that the delegates' rights term contained in the relevant modern award at the time that the enterprise agreement is approved continues to be the term that applies to the parties to the enterprise agreement. This is intended to provide certainty as to the rights and obligations of parties to the enterprise agreement.

Item 82: At the end of section 273

711. Existing section 273 of the FW Act sets out the mandatory terms that must be included in a workplace determination. Workplace determinations set the terms and conditions of employment in certain circumstances where bargaining for a proposed enterprise agreement has not resolved all of the matters at issue at the end of a negotiating period.
712. New subsections 273(6) and (7) would provide that the FWC must include a delegates' rights term for workplace delegates to whom the workplace determination applies in workplace determinations, and require that such a term cannot be less favourable than a delegates' rights term in any modern award that covers the workplace delegate.

Item 83: Section 334 (paragraph about Division 4)

713. Existing section 334 provides a Guide to Part 3-1 of the FW Act, which provides for the general protections. This item would amend section 334 to signpost that provisions concerning the exercise of workplace delegates' rights are also contained in Division 4 of that Part.

Item 84: At the end of Division 4 of Part 3-1

714. This item would insert new sections 350A and 350C into Division 4 of Part 3-1, to provide protections for workplace delegates, and to set out their rights, respectively.

New section 350A – Protection for workplace delegates

715. Division 3 of Part 3-1 provides protections against adverse action for employees who become officers or members of industrial associations as a result of their membership. Division 4 of Part 3-1 includes protections for freedom of association and involvement in lawful industrial activities. New section 350A would complement these existing protections by providing specific protections for workplace delegates.
716. New subsection 350A(1) would prohibit an employer from:
- unreasonably failing or refusing to deal with a workplace delegate;
 - knowingly or recklessly making a false or misleading representation to a workplace delegate; or
 - unreasonably hindering, obstructing or preventing the exercise of the rights of a workplace delegate.
717. This new general protection would be subject to certain limitations.

718. Under new paragraphs 350A(1)(a) and (c), a delegate would only be protected from an employer unreasonably failing or refusing to deal with a workplace delegate, or unreasonably hindering, obstructing or preventing the exercise of the rights of a workplace delegate. As a result, employers would still be able to undertake reasonable management action, carried out in a lawful way.
719. New subsection 350A(3) provides that the burden for establishing that the conduct of an employer is not unreasonable is on the employer. Accordingly, if a workplace delegate establishes that an employer failed or refused to deal with them, or hindered, obstructed or prevented the exercise of their rights, the burden would shift to employers to demonstrate the reasonableness of their acts or omissions. The burden would be placed on the employer because the employer is best placed to provide evidence about the reasons and intent behind the actions they took (or omitted to take).
720. New subsection 350A(2) makes it clear that the protections in new subsection 350A(1) are only enlivened when an employer is dealing with a workplace delegate acting in that capacity.
721. Finally, new subsection 350A(4) would provide that the protections would not apply in respect of any conduct required by or under a law of the Commonwealth or a State or Territory. This would include action taken, for example, under relevant work health and safety legislation, to ensure the health and safety of workers while at work.

New section 350C – Workplace delegates and their rights

722. **Definition of ‘workplace delegate’:** New subsection 350C(1) would define the term ‘workplace delegate’.
723. Section 12 of the FW Act provides that the term ‘officers of industrial associations’ can include ‘delegates’, but does not specify who would be a workplace delegate.
724. This new definition is intended to be sufficiently broad to capture workplace delegates across a range of employee organisations, regardless of the language used to describe the role in each organisation’s rules. The definition of ‘workplace delegate’ would recognise the role of workplace delegates in representing the interests of all workers, not just employees, who work at the relevant enterprise and who are eligible to be a member of the relevant employee organisation. The definition would not include employees of the employee organisations in workplaces generally, as a person can only be a workplace delegate in respect of the enterprise or part of an enterprise where they work, either as an employee or as a regulated worker (see new section 15G).
725. ‘Employee organisation’ is defined in section 12 of the FW Act as an organisation of employees that is registered under the RO Act. Almost all large trade unions are registered as employee organisations under the RO Act. Limiting the definition of workplace delegate to representatives of such organisations enables the new provisions to rely on the existing regulatory framework established around registered organisations, and is consistent with the approach taken in the FW Act regarding the application of the right of entry provisions in Part 3-4.

726. **Workplace delegates' rights:** New subsections 350C(2) and (3) would provide rights for workplace delegates.
727. There is currently limited legislative protection for workplace delegates performing their roles within a workplace. The FW Act does not contain any positive rights specific to workplace delegates.
728. New subsection 350C(2) would provide a key right for workplace delegates to represent the industrial interests of members, and other persons eligible to be a member, of the relevant employee organisation, including in a dispute with their employer. If reasonable opportunities to undertake representation are provided, but not taken up, there will be no breach of the right.
729. The proposed note to subsection 350C(2) clarifies that new subsection 350C(2) would not require a worker to accept representation from a workplace delegate or create any obligation on a worker. It would not infringe on a workers' right to choose their own representative in a dispute with their employer or relevant regulated business (if they choose to be represented) and does not affect the relationship between workplace delegates and their members. Rather, new subsection 350C(2) would create an enforceable right between a workplace delegate and their employer or relevant regulated business.
730. New subsection 350C(3) would facilitate the exercise of the representational rights in new subsection 350C(2) by providing that workplace delegates are entitled to:
- reasonable communication with members, and any other persons eligible to be members, in relation to their industrial interests;
 - reasonable access to the workplace and workplace facilities where the enterprise is being carried on; and
 - reasonable access to paid time, during normal working hours, for the purposes of related training.
731. These rights are specified at the level of principle, with the expectation that for most employees, modern awards and enterprise agreements would provide greater detail for particular industries, occupations, or enterprises. In relation to communication and access, in many cases this may require nothing more than the general access to communications or premises that an employee would normally have by virtue of working for an enterprise.
732. All of the rights in new subsection 350C(3) are subject to a requirement of reasonableness, that is, an employer would only be required to provide facilities to the extent that this would be reasonable. To recognise the diversity of Australian workplaces and their available facilities and resources, new subsection 350C(5) would provide that in determining what is reasonable for the purposes of new subsection 350C(3), regard must be had to the size and nature of the relevant enterprise, the resources of the employer at the enterprise and the facilities available at the relevant enterprise.

733. Further, an exemption for small businesses would be provided by new subparagraph 350C(3)(b)(ii). Small businesses would be exempt from the obligation to provide workplace delegates paid time for the purpose of undertaking training for their role as a workplace delegate due to the amendments. This exemption would alleviate the cost burden of the amendments on small businesses. Small businesses could still elect to provide workplace delegates with paid time for training, or may otherwise have obligations to do so, for example under an enterprise agreement. For the purposes of this provision, small business has the meaning given by existing section 23 of the FW Act.
734. Subsection 350C(4) would provide that where an employer complies with a delegates' rights term in a fair work instrument, the employer is taken to have complied with the rights as set out in subsection 350C(3). This would ensure that, where a fair work instrument provides more detailed information about the rights of workplace delegates, employers can rely on that term as a complete statement of their obligations under new subsection 305C(3).

Item 85: Subsection 539(2) (table item 11, column 1)

735. This item would add a contravention of subsection 350A(1) to the table of civil remedy provisions set out at existing subsection 539(2) of the FW Act.
736. The new table item would provide that a person affected by the contravention, an industrial association or a FWO inspector can bring an action for an alleged contravention of new subsection 350A(1) in a federal court.
737. The maximum penalty for a contravention would be 60 penalty units, which is consistent with the penalty for other breaches of the general protections.

Division 2—Amendments commencing 1 July 2024

738. Division 2 of Part 7 contains amendments to the FW Act that commence on 1 July 2024, to align with the commencement of new Chapter 3A inserted by Part 16 of Schedule 1 (Provisions relating to regulated workers). This Division would expand the provisions provided for in Division 1 of Part 7 to include regulated workers (see new section 15G) and regulated businesses (see new section 15F).
739. Under new section 15G a person would be taken to be a regulated worker if they are:
- an 'employee-like worker' (see new section 15P), being an independent contractor performing digital platform work (see new section 15N) under a services contract (see new section 15H) with one or more 'employee-like' characteristics (see new paragraph 15P(1)(e)); or
 - a 'regulated road transport contractor' (see new section 15Q) performing work in the road transport industry (see new section 15S) under a services contract (see new section 15H).

Item 86: Section 12

740. Section 12 of the FW Act contains the Dictionary. This item would insert a new definition of ‘associated regulated business’ by reference to new subsection 350B(5) which would be inserted by item 87.

Item 87: After section 350A

741. This item would insert a new section 350B to provide protections to regulated workers who are workplace delegates, on the same basis as the protections provided to workplace delegates who are employees by new section 350A (inserted by item 84).

Protections for delegates who are regulated workers

742. As for workplace delegates who are employees, new subsection 350B(1) would prohibit an associated regulated business from:
- unreasonably failing or refusing to deal with a workplace delegate;
 - knowingly or recklessly making a false or misleading representation to a workplace delegate; or
 - unreasonably hindering, obstructing or preventing the exercise of the rights of a workplace delegate.
743. As for the protection for workplace delegates who are employees, the protection for workplace delegates who are regulated workers would be subject to certain limitations.
744. Under new paragraphs 350B(1)(a) and (c), a delegate would only be protected from an associated regulated business *unreasonably* failing or refusing to deal with a workplace delegate, or *unreasonably* hindering, obstructing or preventing the exercise of the rights of a workplace delegate. As a result, associated regulated businesses would still be able to undertake reasonable management action, carried out in a lawful way.
745. New subsection 350B(3) provides that the burden for establishing that the conduct of an associated regulated business is not unreasonable is on the business. Accordingly, if a workplace delegate establishes that a business failed or refused to deal with them, or hindered, obstructed or prevented the exercise of their rights, the burden would shift to the business to demonstrate the reasonableness of their acts or omissions. The burden would be placed on the business because it is best placed to provide evidence about the reasons and intent behind the actions it took (or omitted to take).
746. New subsection 350B(2) makes it clear that the protections in new subsection 350B(1) are only enlivened when an associated regulated business is dealing with a workplace delegate acting in that capacity.
747. Finally, new subsection 350B(4) would provide that the protections would not apply in respect of any conduct required by or under a law of the Commonwealth or a State or Territory. This would include action taken, for example, under relevant work health and safety legislation, to ensure the health and safety of workers while at work.

Meaning of associated regulated business

748. New subsection 350B(5) would set out the meaning of ‘associated regulated business’. A business would be an associated regulated business for a regulated worker who is a workplace delegate if it either directly engaged the delegate under a contract for services, or if it arranged or facilitated the delegates entry into a services contract.

Item 88: Subsection 350C(1)

749. This item would amend the definition of workplace delegate provided in new subsection 350C(1) (inserted by item 84), to provide that a workplace delegate is a person appointed or elected to represent the industrial interests of either or both employees and regulated workers. This reflects the extension of protections to regulated workers by the amendments in Division 2.

Item 89: Subsection 350C(2)

750. This item would amend new subsection 350C(2) to expand the right for workplace delegates to represent other workers in a dispute to include disputes with regulated businesses.

Item 90: Subparagraphs 350C(3)(b)(i) and (ii)

751. This item would replace subparagraphs 350C(3)(b)(i) and (ii) (inserted by item 84), to grant regulated workers who are workplace delegates the ability to access workplace facilities for the purpose of representing the industrial interests of all workers who are eligible to be a member of the relevant employee organisation.
752. The extent to which regulated workers can access facilities is assessed against a test of reasonableness and in consideration of the factors in new subsection 350C(5). For example, some regulated businesses (for example, a digital labour platform or a road transport business) may not have physical workplaces or facilities in the same way as an employer does where employees perform work on-site. In determining whether a regulated business provided a workplace delegate reasonable access to the workplace and facilities, regard would have to be given to the factors at new subsection 350C(5), which could include consideration of the actual facilities available at the regulated business and whether providing access to such facilities is possible.
753. The amendments made by this item would not require regulated businesses to provide paid time to regulated worker delegates for the purposes of training in relation to their role as a workplace delegate. This recognises that regulated workers often perform ‘task’ based commitments within clearly defined parameters, such as making a delivery, compared to many traditional employee relationships with routine ‘shifts’, time-based work or regular and systematic working hours.

Item 91: Subsection 350C(4)

754. This item would replace new subsection 350C(4) to ensure that, in addition to employers, regulated businesses are taken to have complied with the workplace delegates’ rights provided for in new subsection 350C(3) of the FW Act if they have complied with the delegates’ rights term in the relevant fair work instrument. While the inclusion of such a term would not be mandatory, for a regulated business, the relevant

category of fair work instrument would be a minimum standards order (MSO) (see new section 15E) or collective agreement (see new section 15B)

Item 92: Paragraphs 350C(5)(a), (b) and (c)

755. This item would replace new paragraphs 350C(5)(a), (b) and (c), to ensure that the factors provided for in new subsection 350C(5), which must be considered when assessing the reasonableness of workplace delegates' entitlements in subsection 350C(3), appropriately extend to regulated businesses.

Item 93: Subsection 539(2) (table item 11, column 1)

756. This item would add a contravention of subsection 350B(1) to the table of civil remedy provisions set out at existing subsection 539(2) of the FW Act.
757. The new table item would provide that a person affected by the contravention, an industrial association or a FWO inspector can bring an action for an alleged contravention of new subsection 350B(1) in a federal court.
758. The maximum penalty for a contravention would be 60 penalty units, which is consistent with the penalty for other breaches of the general protections.

Part 8—Strengthening protections against discrimination

Amendments to the *Fair Work Act 2009*

759. Subjection to FDV is not currently a protected attribute in the FW Act or other Commonwealth anti-discrimination laws but is protected by some State and Territory anti-discrimination laws. The amendments in Part 8 would include a new protection for employees and prospective employees by recognising subjection to FDV as a protected attribute within the FW Act's anti-discrimination provisions.
760. The FW Act was recently amended by the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* to introduce 10 days of paid FDV leave in a 12-month period for full-time, part-time and casual employees. These amendments would complement this leave entitlement as both amendments seek to give effect to Australia's obligations under *Violence and Harassment Convention 2019* (ILO Convention 190) and work to progress the same overall policy intention of strengthening workplace protections for employees subjected to FDV.

Item 94: Subsection 153(1)

Item 95: Subsection 195(1)

Item 96: Subsection 351(1)

Item 97: Section 578

Item 98: Paragraph 772(1)(f)

761. The FW Act contains a range of protections against discriminatory conduct:
- Subsections 153(1) and 195(1) of the FW Act deal with discriminatory terms in modern awards and enterprise agreements, respectively.
 - Subsection 351(1) of the FW Act prohibits an employer from taking discriminatory adverse action against a person who is a current or prospective national system employee because of the person's protected attribute.
 - Paragraph 578(c) requires the FWC, when performing its functions or exercising powers, to take into account the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination.
 - Paragraph 772(1)(f) prohibits an employer from terminating an employee's employment because of the person's protected attribute.
762. These items would add 'subjection to family and domestic violence' to the existing list of protected attributes at each of these provisions.
763. This protection against subjection to family and domestic violence would be consistent with the approach of State and Territory anti-discrimination laws which include family and domestic violence as a protected attribute.⁸ This protection would also ensure the

⁸ *Discrimination Act 1991* (ACT) s 7(1)(x); *Industrial Relations Act 2016* (QLD) s 296; *Anti-Discrimination Act 1992* (NT) s 19(1)(jb); *Equal Opportunity (Domestic Abuse) Amendment Act 2023* (SA). See also Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA) (*Project 111 Final Report*), May 2022, pp. 12, 121-4.

anti-discrimination provisions in the FW Act would not apply to persons who are perpetrators of (or have perpetrated) family and domestic violence and who are not subject to (or have not been subjected to) family and domestic violence.

764. Under existing subsection 342(3) of the FW Act, action taken that is authorised by or under a law of the Commonwealth or a law of a State or Territory prescribed by the regulations, such as an action taken to mitigate a work health safety risk, does not constitute adverse action for the purposes of subsection 351(1).

Item 99: Before section 789HA

Item 100: Section 789HA (heading)

Item 101: Section 789HA

765. These items are consequential amendments to Part 6-4E of the FW Act to accommodate the insertion of a new Division 2.

Item 102: At the end of Part 6-4E

766. This item would insert a new Division 2 in existing Part 6-4E dealing with the constitutional basis for the amendments and the extension of the anti-discrimination rules. This would ensure that the amendments to add subsection to FDV as a protected attribute under the FW Act would have constitutional support to apply to national system employers and employees by virtue of the external affairs power under paragraph 51(xxix) of the Constitution.
767. This would ensure that the amendments to add subsection to FDV as a protected attribute in the FW Act have constitutional support to apply in relation to employees and employers that are national system employees and employers by virtue of the States' referrals of industrial relations power (State referral employees and employers).
768. New section 789HC would set out the Conventions relied upon for the external affairs power under paragraph 51(xxix) of the Constitution.
769. Existing sections 153, 195 and 351 of the FW Act are intended to operate with the same coverage in relation to subsection to FDV as they currently do in relation to the existing protected attributes. The extension of these amendments by new section 789HD to State referral employers and employees, and in the case of section 351 to action taken in a referring State, would rely on the external affairs power as enlivened by the Conventions listed in new section 789HC.
770. The amendments to paragraph 578(c) made by item 97 would be supported by the incidental aspects of the relevant powers relied on to support sections 153, 195 and 351, and so is not covered by this item.
771. The amendments in Part 8 give effect to Australia's obligations under ILO Convention 111 and the ILO Convention 190.
772. Article 2 of ILO Convention 111 requires Members to declare and pursue a national policy designed to promote equality of opportunity and treatment in respect of

employment and occupation, with a view to eliminating any discrimination in employment.

773. Article 3(b) of ILO Convention 111 requires Members to, by methods appropriate to national conditions and practice, enact such legislation ‘as may be calculated to secure the acceptance and observance of the policy.’
774. The National Plan to End Violence against Women and Children 2022–2032 (NPEVWC), is a national policy encouraging workplaces to integrate intervention initiatives to reduce, prevent and respond appropriately to sexual harassment and violence. The NPEVWC aims to promote recovery for victim-survivors, including ‘rebuilding of a victim-survivor’s life, their ability to return to the workplace and community, as well as obtaining financial independence and economic security’.⁹ The term ‘victim-survivor’ is used in the NPEVWC as a gender-neutral term to describe all people, including men, experiencing family, domestic and sexual violence.¹⁰ The NPEVWC also aims to challenge sensationalised or stereotyped views, as well as views informed by other types of discrimination, that contribute to a culture that condones gender-based violence and enables victim-blaming.¹¹ The NPEVWC notes ‘[e]ffective processes and policies can also enable employees experiencing gender-based violence to seek support and receive assistance from their employers’.¹² The amendments in Part 8 would support these aims by preventing discrimination against employees and prospective employees subjected to FDV and, in the case of items 96 and 97, allowing a victim-survivor to seek civil remedy when they believe their employer or prospective employer has contravened the relevant general protections prohibitions.
775. The Australian Government ratified ILO Convention 190 on 9 June 2023. When ILO Convention 190 comes into force for Australia on 9 June 2024, amendments in Part 8 would engage Australia’s commitments under this Convention to ensure non-discrimination in employment and occupation, and to mitigate the effects of domestic violence in the world of work.
776. Article 6 of ILO Convention 190 requires Members to adopt laws, regulations and policies ensuring the right to equality and non-discrimination in employment and occupation, including for women workers, as well as for workers and other people belonging to vulnerable groups disproportionately affected by violence and harassment in the world of work. The amendments in Part 8 ensure the right to equality and non-discrimination for employees experiencing FDV by establishing a new protected attribute within the FW Act for employees who have been, or continue to be, subjected to family and domestic violence.
777. Article 10(f) of ILO Convention 190 requires Members to take appropriate measures to recognise the effects of domestic violence and, so far as reasonably practicable,

⁹ Commonwealth of Australia (2022) *National Plan to End Violence Against Women and Children 2022-2032*, 86.

¹⁰ Ibid 33.

¹¹ Ibid 105.

¹² Ibid 57.

mitigate its impact in the world of work. The amendments in Part 8 recognise the effects of domestic violence and mitigate its impact in the world of work by preventing discrimination against employees subjected to family and domestic violence and improving those employees' options for recourse when such discrimination does occur in the workplace.

Part 9—Sham arrangements

Amendments to the *Fair Work Act 2009*

778. The amendments in Part 9 would change the defence to misrepresenting employment as an independent contracting arrangement (known as ‘sham contracting’), in subsection 357(2) of the Act from a test of ‘recklessness’ to one of reasonable belief. The amendments in this schedule would also provide a non-exhaustive list of factors a court must consider when assessing reasonableness under the new defence. The new test will only apply in relation to representations made on or after the commencement of Part 9 of Schedule 1 to this Bill.

Item 103: Subsection 357(2)

779. Subsection 357(1) currently prohibits an employer from misrepresenting an employment contract as an independent contracting arrangement. This is often referred to as sham contracting. Subsection 357(2) currently provides a defence to sham contracting if the employer proves that, when the representation was made, the employer did not know, and was not reckless as to whether, the contract was a contract of employment rather than a contract for services.

780. This item would repeal existing subsection 357(2) and replace it with new subsections 357(2) and 357(3). New subsection 357(2) would provide a defence to sham contracting in subsection 357(1) if the employer reasonably believed that the contract was a contract for services. The burden of proof would rest with the party who made the representation, consistently with the existing defence.

781. This would implement recommendations made by several independent reviews, including the Post Implementation Review of the Act, the Productivity Commission’s Report on the Workplace Relations Framework and the Black Economy Taskforce Final Report. The reviews found that the current defence in subsection 357(2) is not effective at deterring sham contracting, as it is too easy for an employer to establish that they did not know the true nature of the engagement and did not act recklessly when making the misrepresentation. The reviews recommended the defence be replaced with a more objective test. The new defence under subsection 357(2) would enable a court to assess an employer’s behaviour according to what the employer reasonably believed, rather than assessing an employer’s behaviour only with regards to their subjective reasons for acting.

782. The new subsection 357(3) would provide guidance to a court in determining whether an employer’s belief was reasonable. Subparagraph 357(3)(a) would provide that the size and nature of the employer’s enterprise must be considered when determining if an employer’s belief was reasonable. This consideration would only be a relevant consideration of reasonable belief for the purposes of sham contracting and would not apply to uses of that phrase elsewhere in the FW Act.

783. New subparagraph 357(3)(b) would give a court discretion to consider any other relevant factors relevant to determining if an employer’s belief was reasonable. Depending on the particular circumstances, other relevant factors might include:

- the employer's skills and experience;
- the industry in which the employer operates;
- how long the employer has been operating;
- the presence or absence of dedicated human resource management specialists or expertise in the employer's enterprise; and
- whether the employer sought legal or other professional advice about the proper classification of the individual, including any advice from an industrial association, and, if so, acted in accordance with that advice.

784. Subsection 357(3) would provide guidance to employers as to the evidence they may seek to rely upon in establishing the new defence to sham contracting and reinforce the expectation that employers should take appropriate steps, commensurate with their experience and the nature of their enterprise, to understand how they are engaging an individual before entering into a contract.

785. If an employer is found to have engaged in sham contracting but successfully makes out the defence, the employer would not be liable to a civil penalty for a contravention of subsection 357(1). However, they may still be liable for other civil contraventions in relation to the misclassification. For example, if an employer has not paid correct entitlements to an employee as a result of a misclassification of an employee as an independent contractor, the employer may be liable to a civil penalty and/or to backpay the unpaid entitlements.

Part 10—Exemption certificates for suspected underpayment

Amendments to the *Fair Work Act 2009*

786. This Part would amend Part 3-4 (Right of Entry) of the FW Act to:

- enable an organisation to obtain an exemption certificate from the FWC to waive the minimum 24 hours' notice requirement for entry if they reasonably suspect a member of their organisation has been or is being underpaid;
- empower the FWC to take action in relation to the future issue of such exemption certificates if those rights are misused (for example, by imposing conditions, or banning their issue for a specified period);
- protect permit holders who are exercising rights in accordance with Part 3-4 from improper conduct by others; and
- empower the FWC to impose conditions on a permit, as an alternative to revoking or suspending an entry permit in the circumstances set out in section 510 of the FW Act.

Item 104: Subsection 481(1) (note 4)

Item 105: Subsection 483A(1) (note 3)

Item 106: Section 484 (note 2)

Item 107: Subsection 492(3) (note 2)

Item 108: Section 500 (note 3)

Item 109: Section 502 (at the end of the heading)

Item 110: At the end of subsection 502(1)

Item 111: Subsection 502(2)

Item 112: Subsection 502(3)

787. These items would amend the existing prohibition on hindering or obstructing a permit holder exercising their rights in accordance with Part 3-4 of the FW Act, so that it also prohibits improper conduct, and make the necessary consequential amendments.

788. Items 104 to 108 are consequential, and would update the notes under the specified subsections to reflect the proposed change.

789. Item 109 is consequential upon the substantive change, and would amend the specified heading so it reflects the proposed change.

790. Item 110 would amend subsection 502(1) to provide (in addition to the existing prohibitions) that a person must not act in an improper manner towards a permit holder who is exercising their rights in accordance with Part 3-4 of the FW Act. This extension is intended to cover a wider range of conduct than intentionally hindering or obstructing and may include, depending on the circumstances, swearing, making offensive, racist, sexist or homophobic comments or acting in a physically aggressive or intimidatory manner towards a permit holder.

791. The proposed amendment would bring the prohibition in section 502 in line with the similar prohibition in section 500, which prohibits permit holders from hindering or obstructing etc. others while exercising their rights in accordance with Part 3-4.

792. Subsection 502(1) is a civil remedy provision under Part 4-1 (Civil Remedies).

793. Items 111 and 112 are consequential, and would amend the specified subsections to reflect the changes made to the substantive provision by Item 110.

Item 113: After paragraph 508(2)(d)

Item 114: After paragraph 508(2)(e)

794. Subsection 508(1) of the FW Act empowers the FWC to restrict the rights that are exercisable under Part 3-4 by an organisation, or officials of an organisation, if satisfied that they have misused those rights. Subsection 508(2) sets out examples of the kind of action the FWC may take.

795. These items would insert two new items into the list to make clear that the FWC may take action by:

- requiring, for a specified period, that some or all of the exemption certificates that might be issued in relation to the organisation on the ground mentioned in subparagraph 519(1)(b)(ii) to be issued subject to specified conditions; and
- banning, for a specified period, the issue of exemption certificates on the ground mentioned in subparagraph 519(1)(b)(ii) in relation to an organisation, either generally or to specified permit holders.

796. The reference to subparagraph 519(1)(b)(ii) denotes the new ground on which the FWC may issue an exemption certificate (see item 122).

797. These items would provide the FWC with additional powers to support its protective role with respect to rights exercised under Part 3-4.

798. If the FWC required exemption certificates to be issued subject to specified conditions, such conditions could be recorded on the exemption certificate(s) when issued by the FWC.

Item 115: Subdivision D of Division 5 of Part 3-4 (heading)

Item 116: Section 510 (heading)

Item 117: Subsection 510(1) (heading)

Item 118: Subsection 510(1)

Item 119: Subsection 510(5) (at the end of the heading)

Item 120: Subsection 510(5)

Item 121: Paragraph 510(6)(a)

799. Subsection 510(1) provides that the FWC must revoke or suspend each entry permit held by a permit holder if it is satisfied that any of the events listed in paragraphs 510(1)(a) to (f) has happened since the first of those permits was issued.

800. These items would empower the FWC to impose conditions on a permit, as an alternative to revoking or suspending an entry permit in the circumstances set out in section 510 of the FW Act, and make the necessary consequential amendments.
801. Items 115 to 117 are consequential upon the substantive changes, and would amend the specified headings to reflect the proposed changes.
802. Item 118 would empower the FWC to impose conditions on an entry permit as an alternative to suspending or revoking the entry permit when required to take action under subsection 510(1). This would provide the FWC with an additional mechanism in taking action under subsection 510(1), to ensure that the proposed sanction is appropriate.
803. The FWC must record on an entry permit any conditions that have been imposed on its use (FW Act, subsection 515(3)). The FWC may specify the duration of a condition, if appropriate.
804. Items 119 to 121 are consequential upon the substantive change made by item 118, and would ensure that the change is reflected throughout section 510 as appropriate.

Item 122: Paragraph 519(1)(b)

Item 123: After paragraph 519(2)(d)

805. Subsection 519(1) of the FW Act provides that the FWC must issue an exemption certificate to an organisation for an entry under section 481 (which deals with entry to investigate suspected contraventions) if the organisation has applied for the certificate (paragraph 519(1)(a)) and the FWC reasonably believes that the advance notice of the entry given by an entry notice might result in the destruction, concealment or alteration of relevant evidence (paragraph 519(1)(b)).
806. In effect, an exemption certificate waives the minimum 24 hours' notice requirement that would otherwise apply to entry under section 481. A permit holder exercising entry without notice (pursuant to a certificate) must instead provide a copy of the exemption certificate to the occupier of the premises and any affected employer either before or as soon as practicable after entering the premises (section 487).
807. Item 122 would supplement the exemption scheme in section 519 by empowering the FWC to issue an exemption certificate on a new ground, that is, if it is satisfied that the suspected contravention, or contraventions, involve the underpayment of wages, or other monetary entitlements, of a member of the organisation whose industrial interests the organisation is entitled to represent and who performs work on the relevant premises.
808. This amendment would enhance the ability of permit holders and organisations to effectively investigate suspected contraventions of the Act or a fair work instrument (for example, a modern award or enterprise agreement) involving underpayment of wages, or other monetary entitlements, of a member.

809. It is anticipated that applications under section 519 (including applications brought under the new ground) would generally be dealt with on an *ex parte* basis, because its purpose is to enable entry to premises without notice, in the specified circumstances.
810. There is no change to existing protections, including:
- limiting the exercise of the relevant entry rights to workplaces and working hours only (subsections 481(1), 490(1));
 - limiting access to member records as set out in section 482, subject to the existing exemption scheme in section 483AA;
 - prohibiting entry permit holders from intentionally hindering and obstructing any other person when exercising rights of entry, or otherwise acting in an improper manner (section 500);
 - restricting the unauthorised use or disclosure of information or documents (section 504); and
 - prohibiting an entry permit holder from entering any part of premises that is used mainly for residential purposes (section 493).
811. Item 123 would add a new requirement to the content requirements for exemption certificates listed in subsection 519(2). That is, a new requirement that an exemption certificate issued on the new ground set out in new subparagraph 519(1)(b)(ii) must also specify the names of any permit holders who may enter under the exemption certificate.

Part 11—Penalties for civil remedy provisions

Amendments to the *Fair Work Act 2009*

812. Part 11 would amend the FW Act to reduce underpayments and the exploitation of workers in Australia by providing further deterrence against non-compliance with tougher penalties.

813. The measures in this Part implement recommendation 5 of the Migrant Workers’ Taskforce to increase the general level of penalties for contraventions of wage exploitation-related provisions in the FW Act so that they are more in line with those applicable in other business and consumer laws.

814. The amendments made by this Part would:

- increase civil pecuniary penalties that apply to contraventions (including serious contraventions) of wage exploitation-related provisions by five times;
- increase the civil pecuniary penalty for failure to comply with a compliance notice by 10 times so that it is consistent with other penalties;
- enable the maximum penalty for a contravention to be determined by reference to three times the value of the underpayment (if relevant) in certain circumstances;
- amend the scheme for ‘serious contraventions’ in section 557A so that it applies to knowing and reckless contraventions of the relevant provisions, so the scheme applies to mid-tier contraventions and operates more harmoniously with the proposed underpayments offence.

Division 1—Penalties

Item 124: Subsection 539(2) (cell at table item 1, column 4)

Item 125: Subsection 539(2) (cell at table item 2, column 4)

Item 126: Subsection 539(2) (cell at table item 3, column 4)

Item 127: Subsection 539(2) (cell at table item 4, column 4)

Item 128: Subsection 539(2) (cell at table item 5, column 4)

Item 129: Subsection 539(2) (cell at table item 7, column 4)

Item 130: Subsection 539(2) (cell at table item 8, column 4)

Item 131: Subsection 539(2) (cell at table item 9, column 4)

Item 132: Subsection 539(2) (cell at table item 10, column 4)

Item 133: Subsection 539(2) (cell at table item 10A, column 4)

Item 138: Subsection 539(2) (cell at table item 29, column 4)

815. These items would increase the maximum civil pecuniary penalties for the specified civil remedy provisions to 3,000 penalty units for a ‘serious contravention’ (as provided for in section 557A of the FW Act) and otherwise 300 penalty units. This represents a five-fold increase. The maximum civil pecuniary penalties would be five times higher

for a body corporate. The amount of a Commonwealth penalty unit is \$313 at the time of publishing.

816. In summary, the proposed civil pecuniary penalty increases for ordinary and ‘serious contraventions’ would affect:

Bill item	Item in subs 539(2) table	Provision, general description
124	1	44—Contravening National Employment Standards
125, 126	2, 3	45—Contravening a modern award
127, 128	4, 5	50—Contravening an enterprise agreement
129	7	280—Contravening a workplace determination
130	8	293—Contravening a national minimum wage order
131	9	305—Contravening an equal remuneration order
132, 133	10, 10A	323(1), (3)—Method and frequency of payment 325(1), (1A)—Unreasonable requirements to spend or pay amount 328(1), (2), (3)—Employer obligations in relation to guarantee of annual earnings
138	29	535(1), (2), (4)—Employer obligations in relation to employee records 536(1), (2), (3)—Employer obligations in relation to pay slips

Item 134: Subsection 539(2) (table item 11, column 1)

Item 135: Subsection 539(2) (table item 11, column 1)

Item 136: Subsection 539(2) (table item 11, column 1)

Item 137: Subsection 539(2) (after table item 11)

Item 139: Subsection 539(2) (table item 29AA, column 4)

Item 140: Subsection 539(2) (table item 29A, column 4)

Item 141: Subsection 539(2) (table item 32, column 4)

Item 142: Subsection 539(2) (table item 33, column 4)

Item 143: Subsection 539(2) (table item 33A, column 4)

Item 144: Subsection 539(2) (table item 34, column 4)

817. These items would increase the ordinary civil pecuniary penalties for the specified civil remedy provisions to 300 penalty units for an individual, and five times higher for a body corporate. This represents a five-fold increase, and a ten-fold increase to the maximum civil pecuniary penalty for a failure to comply with a compliance notice (table item 33 in subsection 539(2)).

818. Items 134 to 137 would involve a rearrangement of table item 11 in subsection 539(2), so that the penalty increase is limited to contraventions of subsection 357(1) and sections 358 and 359 of the FW Act.

819. In summary, the proposed civil pecuniary penalty increases for ordinary contraventions would affect:

Bill item	Item in subs 539(2) table	Provision, general description
137	11A	357(1)—Misrepresenting employment as independent contracting arrangement 358—Dismissing to engage as independent contractor 359—Misrepresentation to engage as independent contractor
139	29AA	536AA(1), (2)—Employer obligations in relation to advertising rates of pay
140	29A	558B(1), (2)—Responsibility of responsible franchisor entities and holding companies for certain contraventions
141	32	712(3)—Power to require persons to produce records etc
142	33	716(5)—Compliance notices
143	33A	718A(1)—False or misleading information or documents
144	34	745(1)—Contravening the extended parental leave provisions 760—Contravening the extended notice of termination provisions

Item 145: Paragraph 557A(1)(a)

Item 146: Paragraph 557A(1)(b)

Item 147: Subsection 557A(1) (example)

Item 148: Subsections 557A(2) to (5)

820. These items would amend the scheme for ‘serious contraventions’ in section 557A so that the scheme applies to mid/upper-tier contraventions and operates harmoniously with the proposed underpayments offence. The latter would be reserved for the most serious instances of intentional underpayments.

821. Items 145 and 146 would amend the concept of a ‘serious contravention’ so that a contravention of a civil remedy provision by a person is a serious contravention if the person knowingly contravened the provision or was reckless as to whether the contravention would occur.

822. This adds an alternative ‘recklessness’ element to the provision, and omits the requirement in existing paragraph 557A(1)(b) that ‘the person’s conduct constituting the contravention was part of a systematic pattern of conduct relating to one or more other persons’.

823. Item 147 would update the example under subsection 557A(1) to reflect the changes.
824. Item 148 would omit provisions that deal with the test for systematic patterns of conduct, and insert a definition of ‘reckless’ for purposes of the provision as amended. The definition is specific to the provision, and adopts a ‘subjective belief’ test, commensurate to the test that is typically used in the criminal law. The higher evidentiary bar posed by using the ‘subjective belief’ test for recklessness reflects the seriousness of these kinds of contraventions, which attract relatively high civil pecuniary penalties under the FW Act. The insertion of this provision is not intended to affect the operation of how ‘recklessness’ fault elements operate elsewhere in the FW Act, as the term is intended to take its meaning from the individual purpose and context of each provision.

Division 2—Contingent amendments

Item 149: Subsection 539(2) (cell at table item 34AAA, column 4)

825. The SJPB Act will insert a new item (item 34AAA) into the table under subsection 539(2) of the FW Act. This will specify section 757BA (which deals with employer obligations in relation to pay slips relating to paid leave to which the person is entitled because of section 757B) as a civil remedy provision. The maximum civil penalty for a contravention will attract a penalty for a ‘serious contravention’ of 600 penalty units for an individual, or otherwise 60 penalty units for an individual. The penalty is five times higher for bodies corporate.
826. This item is contingent on the commencement of the relevant sections, and would increase the penalties five-fold to 3,000 penalty units for a ‘serious contravention’ (as provided for in section 557A of the FW Act) and otherwise 300 penalty units.

Division 3—Underpayments

Item 150: Section 12

Item 151: Subsection 539(2) (after note 3)

Item 152: Subsection 546(2)

Item 153: After subsection 546(2)

827. These items would enable an ‘amount of the underpayment’ penalty to apply as the maximum civil penalty for contravention of a civil remedy provision, if certain prerequisites are met.
828. Item 150 would insert a definition of the phrase ‘associated with an underpayment amount’ into the definitions (section 12 of the FW Act).
829. Item 151 would insert a note under subsection 539(2) to alert readers to provisions that deal with civil penalties for bodies corporate, and contraventions associated with underpayment amounts.
830. Item 152 is consequential upon the insertion of new subsection 546(2A), by accommodating the new subsection.

831. Item 153 would insert new subsection 546(2A), which provides for application of the new ‘amount of the underpayment’ penalty for contravention of a civil remedy provision, providing that:
- the contravention is ‘associated with an underpayment amount’ (paragraph 546(2A)(a)); and
 - the application specifies that the applicant wants the maximum penalty to be calculated based on a multiple of the underpayment amount (paragraph 546(2A)(b)); and
 - the person is not taken to have contravened the civil remedy provision under section 550 (person involved in a contravention) (paragraph 546(2A)(c)).
832. New paragraph 546(2A)(b) is intended to afford respondents an extra degree of protection; by putting them on notice, as early as possible in the proceeding, about the kind of civil pecuniary penalties that are being sought (and could be imposed) against them and the evidence required for the court to determine the amount of the underpayment. It is intended to operate in a similar manner to existing subsection 557A(6), which applies where higher pecuniary penalties are being sought for an alleged ‘serious contravention’. While it would be possible for an applicant to seek to amend their originating application before a court to seek an ‘amount of the underpayment’ penalty at a later stage, it is expected that the relevant court would consider justice between the parties and the timing of the application to amend as important factors in exercising their discretion whether to allow the application.
833. New paragraph 546(2A)(c) makes it clear that an ‘amount of the underpayment’ penalty would not be available in relation to an accessory (see section 550 of the FW Act). The rationale for an ‘amount of the underpayment’ penalty is that the maximum penalty that may be imposed on a wrong doer should reflect a multiple (that is, three times) of the amount of their wrongful profit, in this context, the amount of the underpayment. Such a penalty is intended to more adequately penalise and deter wrongdoing in circumstances where the amount of the underpayment exceeds the maximum civil pecuniary penalty specified in subsection 539(2). In an underpayments case, the beneficiary of the wrongful conduct (that is, underpayments) would be the underpaying employer, not an accessory, so it is inappropriate to levy an ‘amount of the underpayment’ penalty against multiple parties, and against individuals who are not the beneficiary of the underpayment—that is, against an accessory or accessories, as well as the employer.
834. New paragraphs 546(2A)(d) and (e) would provide that the maximum pecuniary penalty is the higher of: the ordinary penalty for the contravention as set out in the relevant column in the table in existing subsection 539(2) (or five times that amount for bodies corporate) or three times the ‘underpayment amount’. This provision establishes the maximum pecuniary penalty for a contravention of a civil remedy provision, and the courts would be responsible for imposing an appropriate civil pecuniary penalty on the contravener(s), using their sentencing discretion.

Item 154: After section 546

835. This item would insert new section 546A into the FW Act, to provide for when a contravention of a civil remedy provision is taken to be ‘associated with an underpayment amount’ for the purposes of determining whether an ‘amount of the underpayment’ penalty may apply.
836. New section 546A would enable an ‘amount of the underpayment’ penalty to be available if there is a failure to pay the required amount under the FW Act or a specified instrument (as set out in the provision), and the failure is related to the contravention. This means that such a penalty may apply to contraventions that directly or indirectly result in underpayments. For example, failure to pay minimum rates under an applicable modern award is an example of a contravention that directly results in an underpayment. A sham contracting misrepresentation, or a failure to keep employee records, are examples of contraventions that may indirectly result in an underpayment. The effect of new section 546A is that an ‘amount of the underpayment’ penalty may be available in either of these circumstances.
837. New subsection 546A(2) would define the term ‘underpayment amount’, consistently with the approach taken for the proposed wage theft measure.
838. Existing section 557 may apply if 2 or more contraventions of a civil remedy provision specified in subsection 557(2) are committed by the same person, and the contraventions arise out of a course of conduct by the person. If multiple contraventions are ‘grouped’ by this rule, then the corresponding ‘underpayment amount’ for each relevant contravention would also likewise be aggregated for purposes of the new provisions.

Part 12—Compliance notice measures

Amendments to the *Fair Work Act 2009*

839. This Part would amend the FW Act to clarify that:

- a compliance notice issued to a person may require the person to calculate and pay the amount of any underpayment; and
- a relevant court may make an order requiring compliance with a notice (other than an infringement notice) issued by a Fair Work Inspector or the FWO.

Item 155: At the end of subsection 545(2)

840. Subsection 545(1) of the FW Act affords a broad discretion to a relevant court to grant an ‘appropriate’ remedy which meets the circumstances of the contravention of a civil remedy provision under the FW Act. Without limiting subsection (1), subsection 545(2) provides that a relevant court can make orders of the specified kind.

841. This item would amend the provision to add a new example to the list in subsection 545(2): an order requiring a person to comply, either wholly or partly, with a notice (other than an infringement notice) given to the person by a Fair Work Inspector or the FWO. This reference to a notice includes:

- a notice to produce issued by a Fair Work Inspector (see the FW Act, section 712);
- a compliance notice issued by a Fair Work Inspector (see the FW Act, section 716); and
- a FWO notice given to a person by the FWO (or their delegate) (see the FW Act, section 712AD).

Item 156: At the end of paragraph 716(2)(a)

842. Subsection 716(2) of the FW Act provides that a Fair Work Inspector may give a person a notice (compliance notice) requiring the person to take the action specified in the notice to remedy the direct effects of the contravention identified in subsection 716(1). That subsection applies only if an inspector reasonably believes that a person has contravened one or more of the provisions or terms referred to in subsection 716(1) of the FW Act.

843. This item would amend existing subsection 716(2) to clarify that the specified action may include requiring the recipient to calculate and pay the amount of any underpayment.

844. This amendment supports the view of the Migrant Workers’ Taskforce that there should be no ‘unnecessary legislative or administrative barriers’ to the effective use of compliance notices.

Part 13—Withdrawal from amalgamations

Amendments to the *Fair Work (Registered Organisations) Act 2009*

845. This Part would amend the RO Act to repeal amendments made by the 2020 RO Amdt Act, relating to the withdrawal of parts of amalgamated organisations (de-merger).

846. Amendments proposed to be made by this Part would:

- repeal provisions of the RO Act that enable the FWC to accept applications for a de-merger ballot to be made more than five years after the relevant amalgamation has occurred, to restore stability and certainty for amalgamated organisations;
- repeal paragraph (c) of the definition of ‘separately identifiable constituent part’ in subsection 93(1) of the RO Act, to restore certainty about the part(s) of an organisation that may be subject to a de-merger ballot and de-merger from an amalgamated organisation;
- reverse a number of minor or technical amendments to the de-merger provisions including provisions about:
 - a. the conduct of ballots;
 - b. the proposed name of the relevant organisations and the proposed rules, or alterations of rules, of the relevant organisations and when they take effect at the conclusion of a de-merger process;
 - c. the FWC’s power to accept undertakings to avoid demarcation disputes; and
 - d. membership of the newly registered organisation.

Item 157: Paragraph 92(a)

Item 158: Paragraph 92(b)

847. These items update the objects of the relevant Part to reflect the proposed changes made by this Bill.

Item 159: Section 92A

848. Section 92A of the RO Act requires there to be a statutory review of the amendments made by the 2020 RO Amdt Act by the specified time. The relevant review report is published on the website of the Department.

849. This item would repeal the section, as it has been complied with and is now redundant.

Item 160: Subsection 93(1) (definition of *amalgamated organisation*)

Item 161: Subsection 93(1) (definition of *amalgamated organisation*)

Item 162: Subsection 93(1) (paragraph (b) of the definition of *constituent member*)

Item 163: Subsection 93(1) (subparagraph (b)(i) of the definition of *constituent part*)

Item 165: Subsection 93(1) (definition of *predecessor law*)

Item 166: Subsection 93(1) (paragraph (a) of the definition of *separately identifiable constituent part*)

Item 170: Subsection 93(2)

Item 171: Subsection 93(3)

Item 172: Subsection 93(4)

Item 174: Paragraph 94(1)(a)

850. The 2020 RO Amdt Act amended the RO Act to empower the FWC to accept applications for de-merger ballots more than five years after the relevant amalgamation occurred: section 94A of the RO Act. As part of this function, the FWC may consider organisations that existed, or amalgamations that occurred under older, ‘predecessor laws’ (as defined). It is proposed that the FWC’s ability to accept applications outside the standard five year limitation period be removed.

851. These items would remove the definition of, and references to, the term ‘predecessor law’ throughout the relevant Part, as they will no longer be required if the other repeals proposed by this Bill are made.

Item 164: Subsection 93(1) (definition of *designated official*)

Item 179: Subsection 102(1) (heading)

Item 180: Subsections 102(1A), (1B) and (1C)

Item 185: Subsection 102(3)

Item 187: Section 103 (heading)

Item 188: Subsection 103(1) (heading)

Item 189: Subsections 103(1A), (1B) and (1C)

Item 190: Subsection 103(2) (heading)

Item 191: Subsection 103(2)

Item 192: Subsection 103(5) (heading)

Item 193: Subsection 103(7) (heading)

Item 194: Subsection 103(7)

Item 195: Subsection 104(1)

Item 196: Subsection 104(1A)

Item 197: Subsection 106(1)

Item 198: Paragraph 106(1)(c)

Item 199: Subsections 106(2) and (3)

Item 200: Section 107 (heading)

Item 201: Subsection 107(1)

Item 202: Subsection 107(2)

Item 203: Subsection 107(4)

852. The 2020 RO Amdt Act amended the RO Act to enable a ‘designated official’ to conduct de-merger ballots and related functions if allowed by the FWC.

853. These items would remove capacity for de-merger ballots to be conducted by a ‘designated official’, and make the necessary consequential amendments. This would reinstate the arrangements for conducting de-merger ballots as they were before the 2020 amendments (that is, de-merger ballots would be conducted exclusively by the AEC).

Item 167: Subsection 93(1) (paragraph (b) of the definition of *separately identifiable constituent part*)

Item 168: Subsection 93(1) (paragraph (c) of the definition of *separately identifiable constituent part*)

854. The 2020 RO Amdt Act amended the RO Act to expand the kinds of ‘constituent parts’ that are eligible to de-merge from an amalgamated organisation (that is, by adding paragraph (c) to the definition of ‘separately identifiable constituent part’ in subsection 93(1)). In a departure from previous policy, this extension did not require there to be a clear connection between the ‘constituent part’ seeking to de-merge and a previous organisation de-registered with respect to the formation of the amalgamated organisation.

855. These items would repeal paragraph (c) of the definition of a ‘separately identifiable constituent part’ in subsection 93(1) of the RO Act and make a consequential amendment. This would reinstate the rules regarding which parts of an amalgamated organisation are capable of de-merging to as they were before the 2020 amendments were made, and remove the uncertainty about the scope and operation of the current provisions.

Item 169: Subsection 93(1) (definition of *workplace or safety law*)

Item 175: Sections 94A and 95A

Item 177: Paragraph 100(1)(ba)

Item 183: Paragraphs 102(2)(aa) and (ca)

Item 207: Sections 110A and 110B

856. The 2020 RO Amdt Act amended the RO Act to:

- empower the FWC to accept applications for de-merger ballots made more than five years after the relevant amalgamation has occurred (section 94A of the RO Act);
- require specified information be given to the FWC about proposed names and rules (or amendments to existing names and rules, as the case may be) for the affected organisations (section 95A of the RO Act);
- specify when the rules of a newly registered organisation and any alterations to the rules of an amalgamated organisation take effect (section 110A of the RO Act); and

- make the necessary consequential amendments.

857. These items would repeal these provisions, and restore the relevant provisions to how they were before the 2020 amendments.

Item 173: Subsection 94(1)

Item 176: Subsection 100(1)

Item 181: Subsection 102(2) (heading)

Item 182: Subsection 102(2)

Item 184: Subsection 102(3)

Item 186: Subsection 102(4)

858. The 2020 RO Amdt Act amended provisions of the RO Act relating to the conduct of de-merger ballots, to provide that such ballots could be conducted otherwise than by post (for example, by attendance ballots).

859. These items would restore the provisions relating to the conduct of de-merger ballots to how they were before the 2020 amendments, and make necessary consequential amendments. This would align the provisions with those for similar kinds of ballots conducted under the RO Act, including the default for ballots to approve proposed amalgamations (RO Act, section 65).

Item 178: Subsection 100(4)

Item 183: Paragraphs 102(2)(aa) and (ca)

Item 207: Sections 110A and 110B

860. The 2020 RO Amdt Act amended the RO Act so that, in ordering that a ballot be held, the FWC may accept certain undertakings to avoid demarcation disputes that might otherwise from an overlap between the eligibility rules proposed for the affected organisations (RO Act, subsection 100(4)).

861. These items would repeal this power (RO Act, subsection 100(4)) (item 178), provision for when and how such undertakings take effect (RO Act, section 110B) (item 207) and other minor consequential amendments. This would restore the provisions to how they were before the 2020 amendments.

Item 204: Paragraph 109(2)(a)

Item 205: Paragraph 109(2)(b)

Item 206: Paragraph 109(2)(ba)

862. The 2020 RO Amdt Act made minor amendments to section 109 of the RO Act, which empowers the Federal Court to make certain orders giving effect to ballots, including orders relating to assets and liabilities. In general, these amendments reflected the fact that a broader range of ‘constituent parts’ could potentially de-merge from an amalgamated organisation.

863. These items would reverse the 2020 amendments, which will no longer be necessary or relevant if the other repeals proposed by this Bill are made.

Item 208: Section 111 (heading)

Item 209: Paragraph 111(3)(b)

Item 210: Subsection 111(4)

864. The 2020 RO Amdt Act amended the provisions for membership of an organisation following de-merger of a ‘separately identifiable constituent part’, so that any members of such a part would become a member of the newly registered organisation by default (RO Act, subsections 111(3) and (4)).

865. These items would restore the relevant provisions to how they were prior to the 2020 amendments. In particular, by restoring a process for members of the amalgamated organisation to choose to remain a member of the amalgamated organisation or become a member of the newly registered organisation.

Item 211: Subsection 123(2)

866. The 2020 RO Amdt Act amended the provisions for individuals holding office after de-merger under section 123 of the RO Act, so that the rules of a newly registered organisation must not permit a person to hold office after the day that would have been the person’s last day of term in the constituent office if the de-merger had not occurred.

867. This item would reinstate the provisions that applied before the 2020 amendments, so that the rules of the newly registered organisation must not permit a person to hold office after the later of:

- the day that would have been the person’s last day of term in the constituent office if the withdrawal had not occurred; or
- the first anniversary of the date of the withdrawal.

Item 212: Application of amendments

868. This item provides for the application of the proposed amendments, as follows:

- if the relevant section 94 application does not or did not rely on section 94A or paragraph (c) of the definition of ‘separately identifiable part’ – the process may proceed under the old rules (that is, the provisions that applied under the RO Act as if the amendments made by this Part had not been made); and
- if the relevant section 94 application for a proposed de-merger relies or relied on one or both of those provisions – the process may only continue (again, under the old rules) if the ballot in relation to the proposed de-merger was finalised before 1 July 2023 (that is, the ballot was prepared, dated and signed (under subsection 106(1) of the RO Act)).

Part 14—Wage theft

Amendments to the *Fair Work Act 2009*

869. Part 14 would amend the FW Act to:

- introduce a new criminal offence for wage theft, which applies to intentional conduct;
- apply Part 2.5 of the Criminal Code to establish corporate criminal liability in relation to the new criminal offence for wage theft;
- enable the responsible Minister to declare, by legislative instrument, a voluntary small business wage compliance code (the voluntary code). Compliance with the voluntary code is intended to provide assurance to small business employers that they will not be referred for criminal prosecution for wage theft under the FW Act;
- introduce cooperation agreements with ‘safe harbour’ effect, in relation to self-reporting of conduct to the FWO which may amount to the commission of a wage theft offence under the FW Act;
- confer a new function on the FWO requiring the FWO to publish a compliance and enforcement policy, including guidelines relating to the circumstances in which the FWO will or will not accept or consider undertakings, or enter or consider entering into cooperation agreements;
- require the FWO consult with the NWRCC about the guidelines, before publishing its compliance and enforcement policy;
- make minor amendments to the functions and powers of FWO and Fair Work Inspectors, to ensure that all relevant existing compliance and related powers may be exercised for determining whether an offence has been committed;
- clearly empower the FWO and Fair Work Inspectors to exercise their compliance and related powers to investigate suspected ancillary and similar offences (‘related offence provisions’), for which provision is made under the Criminal Code or Crimes Act;
- provide that immunities (that apply if an individual’s privilege against self-incrimination is abrogated) do not apply in relation to employee records required to be kept under the FW Act, or records of pay slips;
- provide that only the CDPP and AFP may commence a prosecution of the new criminal offence for wage theft, within 6 years of the offence occurring;
- enable the Commonwealth Crown (but not other Australian Governments) to be liable to be prosecuted for the new criminal offence for wage theft or a ‘related offence provision’;
- clarify that the Crown in each of its capacities (that is, all Australian Governments) and to the extent the Commonwealth’s legislative power permits, is liable to be the subject of proceedings for a contravention of a civil remedy provision (which maintains the status quo for these provisions); and

- establish new attribution rules enabling civil liability to be established under the FW Act against all Australian Governments (to the extent the Commonwealth's legislative power permits) and criminal liability to be established against the Commonwealth.

Item 213: Section 12

870. This item would insert 11 new definitions into the Dictionary of the FW Act, section 12. These new definitions are explained in the context of the proposed substantive provisions in which they appear (below).

Item 214: At the end of subsection 37(2)

Item 215: At the end of section 37

871. These items would amend the Crown liability provisions in section 37 of the FW Act, to lift the 'Crown shield' in that section, to enable the Commonwealth to be prosecuted for the new criminal offence for wage theft or a 'related offence provision'.

872. Item 214 would enable an exception to be created to the general rule in subsection 37(2), that the FW Act does not make the Crown liable to be prosecuted for an offence.

873. Item 215 would insert new subsections 37(3) and (4).

874. New subsection 37(3) provides that the Crown in right of the Commonwealth (Commonwealth) is liable to be prosecuted for the new criminal offence for wage theft or a 'related offence provision' that relates to such an offence. The Crown in right of the States and Territories will not be liable for prosecution for the new offence.

875. New subsection 37(4) clarifies that the Crown, in each of its capacities and to the extent the Commonwealth's legislative power permits, is liable to be subject of proceedings for a contravention of a civil remedy provision. The reference to the Crown in each of its capacities refers to all Australian Governments. Notably, the scope of liability is intended to apply only to the extent of the Commonwealth's legislative power, including the States' referral of powers in relation to the FW Act.

876. This provision makes clear that civil proceedings may be brought against an Australian Government under the FW Act (subject to the relevant limitations described above), and civil remedies including civil pecuniary penalties may be imposed in such civil proceedings. This reflects the status quo.

Item 216: Section 321 (after the paragraph relating to Division 2)

877. This item would update the Guide to the relevant Part, to reflect the introduction of the new criminal offence for wage theft.

Item 217: Before section 323

Item 218: Subsection 324(1) (note 1)

Item 219: Section 327 (heading)

Item 220: At the end of Division 2 of Part 2-9

878. These items would insert 2 new subdivisions into Division 2 of Part 2-9 (Items 217 and 220) and make a consequential amendment to a note and section heading to reflect this change (Items 218 and 219).
879. Item 220 would insert the new criminal offence for wage theft into the FW Act (new section 327A), make provision for the voluntary code (new section 327B) and provide for the commencement of proceedings for offences against the new offence for wage theft and related offence provisions (new section 327C).

New section 327A

880. New section 327A provides that an employer commits an offence if:
- the employer is required to pay an amount (a required amount) to, on behalf of, or for the benefit of, an employee under the FW Act or a specified instrument; and
 - the required amount is not a contribution payable to a superannuation fund for the benefit of the employee or an amount covered by subsection (2); and
 - the employer engages in conduct; and
 - the conduct results in a failure to pay the required amount to, on behalf of, or for the benefit of, the employee in full on or before the day when the required amount is due for payment.
881. New section 327A requires consideration of whether an amount is one that an employee is 'required' to pay 'to, on behalf of, or for the benefit of, an employee'. If an employer pays what the FW Act requires (section 323, read subject to the deductions clause in section 324), they will not contravene new subsection 327A(1). For example, if a modern award specifies a weekly base rate of \$1,000 for a full-time employee, and the employer has been properly authorised by the employee to deduct \$100 per week for parking fees (or salary sacrifice, etc.) then the 'required amount' would be \$900.
882. New subparagraph 327A(1)(b)(i) provides that a contribution to a superannuation fund for the benefit of the employee (superannuation contribution) is not covered by the offence provision. Superannuation contributions are excluded from scope as compulsory superannuation contributions are enforceable under the comprehensive superannuation framework. Superannuation entitlements may also be enforceable as workplace entitlements under the FW Act, by way of proceedings for a contravention of a civil remedy provision.
883. New subparagraph 327A(1)(b)(ii) provides that an amount covered by subsection (2) is not covered by the offence provision. The states' referral of powers to the Commonwealth that is relied on for the FW Act excludes:
- long service leave;
 - paid leave that the employee was entitled to take by reason of being a victim of crime; and

- paid leave that the employee was entitled to take because the employee attended for service on a jury, or for emergency services duties.
884. The new offence provision for wage theft does not apply to the underpayment of any of these leave types, if the parties are only national system employees and national system employers due to a state's referral of powers to the Commonwealth for the purposes of paragraph 51(xxxvii) of the Constitution.
 885. Generally, with the exception of employees who are entitled to long service leave under Division 9 of Part 2-2 (the NES), State or Territory long service leave laws are specifically permitted to provide entitlements to national system employees (paragraph 27(2)(g)).
 886. For new paragraph 327A(1)(c), the prosecution will have to prove beyond reasonable doubt that the defendant intentionally engaged in the relevant conduct. A failure to make a payment, for example, due to a banking error would not be caught by the provision.
 887. For clarity, the term 'engage in conduct' will be defined in section 12 to mean: do an act or omit to perform an act. The term 'engages in conduct' allows the prosecution to allege a course of conduct in charging an offence rather than being required to identify a particular act as constituting the offending conduct.
 888. For new paragraph 327A(1)(d), the prosecution will have to prove beyond reasonable doubt that the defendant intended that their conduct would result in a failure to pay the required amount to, on behalf of, or for the benefit of, the employee in full on or before the day when the required amount is due for payment.
 889. For there to be an offence, the person must mean to bring about the result (that is, a failure to pay the required amount), or be aware that result will occur in the ordinary course of events (refer to section 5.2 of the Criminal Code).
 890. This makes clear that underpayments that are accidental, inadvertent or based on a genuine mistake are not caught by the provision. For example, if an employer genuinely misclassifies an employee and pays them an hourly rate of \$25 per hour instead of \$30 per hour (for the correct classification), the resulting failure to pay the required amount (\$30 per hour) was not intentional and would not be caught by the provision.
 891. If, however, an employer paid an employee \$10 per hour, knowing it was below the minimum wage, the resulting failure to pay the required amount (whatever it may be) would be intentional, and caught by the provision. Exact knowledge of the required amount (to a dollars and cents value) would not be required to establish the offence.
 892. New subsection 327A(1) is followed by two legislative notes. Note 1 refers readers to the penalty, in subsection (5), and note 2 makes clear that a single payment to, on behalf of, or for the benefit of, an employee in relation to a particular period may comprise more than one required amount.
 893. New subsection 327A(3) specifies the fault elements for the new criminal offence for wage theft:

- absolute liability applies to paragraphs (1)(a) and (b); and
 - the fault element for paragraphs (1)(c) and (d) is intention.
894. The two legislative notes under the subsection alert the reader to the sections of the Criminal Code that are relevant to the interpretation of the subsection.
895. Section 6.2 of the Criminal Code provides that the prosecution is not required to prove any fault element in relation to any offence or physical element of an offence which is expressly provided to be of absolute liability. Where absolute liability applies to an element of an offence or the complete offence, the defence of mistake of fact under section 9.2 of the Criminal Code is not available to the defendant. Absolute liability is appropriate in situations where it is not sensible to place on the prosecution the onus of demonstrating a fault element and where the mistake of fact defence should not be available to a defendant.
896. Absolute liability applies to the physical elements in proposed paragraphs (1)(a) and (b) because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, and accordingly the offence would become almost unenforceable if the prosecution were obliged to demonstrate fault. Further, the person's degree of culpability under this offence is not materially affected by absence of the subject fault. (The fault element for paragraphs (1)(c) and (d) is intention, which requires the prosecution to prove that the required conduct was intention, and that there was a resulting intention to fail to pay the required amount, or underpay.) The defence of mistake of fact should not be available to the defendant for paragraphs (1)(a) and (1)(b) and accordingly absolute liability, and not strict liability, is the appropriate application.
897. New subsection 327A(4) deals with the situation where things have been given or provided (that is 'payment in kind'), or amounts required to be spent or paid, in contravention of Division 2 of Part 2-9 of the FW Act. For example, an employee may have been required to pay an amount of their wages back to their employer (or a person nominated by their employer) as 'cashback'. The new subsection would apply the rules in section 327 of the FW Act, so that:
- anything given or provided by the employer contrary to paragraph 323(1)(b) and subsection 323(3) is taken never to have been given or provided to the employee; and
 - any amount that the employee has been required to spend or pay contrary to subsection 325(1), or in accordance with a term to which subsection 326(3) applies, is taken to be a deduction, from an amount payable to the employee, made by the employer otherwise than in accordance with section 324.
898. Any unlawful off-set or requirement to spend would be treated as an underpayment for purposes of the new offence for wage theft.
899. New subsection 327A(5) sets out the maximum penalty for an offence against the new offence provision for wage theft, which may include a term of imprisonment of up to

10 years, in addition to a fine of up to the specified amount, set out in the provision. The Guide to Framing Commonwealth Offences was applied in determining to criminalise the requisite conduct, and set the maximum penalty for an offence. In setting the maximum term of imprisonment for an offence, regard was had to offences of a similar nature, particularly offences of theft and fraud under the general law (for example, the offence of general dishonesty in section 135.1 of the Criminal Code, among others).

900. New subsection 327A(5) enables the sentencing court to impose a fine based on the underpayment amount.
901. New subsection 327A(6) provides that the maximum fine for an offence against the new offence provision for wage theft is:
- if the court can determine the underpayment amount for the offence—the greater of 3 times the underpayment amount and whichever of the following applies:
 - a. for an individual – 5,000 penalty units;
 - b. for a body corporate – 25,000 penalty units; or
 - otherwise, the following amount:
 - a. for an individual – 5,000 penalty units;
 - b. for a body corporate – 25,000 penalty units.
902. The value of a Commonwealth penalty unit is \$313 at the time of publishing.
903. New subsection 327A(7) defines the ‘underpayment amount’ for the purposes of the section. It covers both a failure to underpay the required amount in full, or a failure to pay at all.
904. New subsections 327A(8)–(10) establish a ‘course of conduct’ sentencing rule for the new offence for wage theft, which is based on a similar rule that applies in the context of sentencing for civil contraventions (FW Act, section 557).
905. New subsection 327A(8) provides that if a person is found guilty of committing two or more offences (the aggregated offences) and the aggregated offences arose out of a course of conduct by the person, then the person is taken for sentencing purposes to have been found guilty of a single offence.
906. The intention is that a ‘course of conduct’ may occur in relation to groups of employees who have been underpaid in the same manner over time, not just in relation to a single employee.
907. New subsections 327A(9) and (10) clarify the effect of the ‘course of conduct’ sentencing rule on calculating penalties based on the underpayment amount. If multiple offences are grouped and penalised as a single offence under the sentencing rule, then the corresponding underpayments are also aggregated (that is, added up together) for purposes of applying these penalties.

New section 327B

908. New subsection 327B(1) enables the Minister to declare by legislative instrument a ‘voluntary small business wage compliance code’ (voluntary code). Compliance with the voluntary code is intended to provide assurance to small business employers (as defined by the voluntary code) that they will not be referred for criminal prosecution in relation to a failure to pay an amount to, on behalf of, or for the benefit of, an employee. Item 213 relevantly amends the Dictionary in section 12 of the FW Act to insert a signpost referring readers to the definition of ‘voluntary small business wage compliance code’ in new subsection 327B(1).
909. It is intended that the FWO will develop the voluntary code through a tripartite process involving both employee and employer organisations. The voluntary code would be declared by the Minister before the commencement of the offence contained in new subsection 327A(1).
910. If a small business employer has underpaid an employee and wishes to seek assurance from the FWO under these provisions, the small business employer will need to satisfy the FWO that it has complied with the voluntary code in relation to that underpayment. For example, this could include evidence that the small business employer has rectified any systemic issue that contributed to underpaying affected employees, and that required payments have been made to those employees. If the FWO is satisfied that a small business employer has complied with the voluntary code, the FWO must not refer any conduct that resulted in the failure to pay to the CDPP or the AFP for action in relation to a possible offence against new subsection 327A(1). The FWO must also not enter into a cooperation agreement with the employer that covers any conduct that resulted in the ‘failure to pay’ (new subsection 327B(2)).
911. The FWO must give a small business employer written notice of its decision as to whether the employer has complied (or not) with the voluntary code (new subsection 327B(3)).
912. Compliance or otherwise with the voluntary code does not affect the power of an inspector to institute or continue civil proceedings, or give a compliance notice (section 716 of the FW Act) in relation to the conduct, or the power of the FWO to accept an enforceable undertaking in relation to the conduct (section 715 of the FW Act), or any other power or function of the FWO or a Fair Work Inspector that is not mentioned in new paragraphs 327(2)(a) or 327(2)(b) (new subsection 327B(4)).

New section 327C

913. New subsection 327C(1) would limit the function of commencing proceedings for an offence against the new offence for wage theft or a ‘related offence provision’ to the CDPP or the Australian Federal Police. This has the effect of providing a contrary intention for purposes of the Crimes Act, section 13 (which provides for the institution of proceedings in respect of offences).
914. New subsection 327C(2) would impose a limitation period of 6 years for bringing a proceeding, after the commission of the offence. This means that any alleged offending

that occurred outside the limitation period (even if it could be said to form part of the same course of conduct) would not be covered by the new wage theft offence.

Item 221: Paragraph 682(1)(c)

Item 222: Paragraph 682(1)(c)

915. The functions of the FWO include monitoring compliance with the FW Act, and inquiring into, and investigating any act or practice that may be contrary to the Act (paragraphs 682(1)(b) and (c)). These functions already cover investigating offences against the FW Act. Amendments are proposed to ensure the FWO has the new function of investigating offences against ‘related offence provisions’ (in the Crimes Act and Criminal Code), that deal with ancillary and similar liability, insofar as they relate to offences against the FW Act.
916. Item 213 would insert a definition of ‘contravene’ into the Act’s definitions section (section 12), to make clear that general references to contravening the Act (or a similar phrase) may cover the contravention of a civil remedy provision, a provision of the FW Act that creates an offence and a ‘related offence provision’ (that is, unless the context of the term clearly dictates otherwise). This is consistent with the well-understood interpretation of the term, so is a clarifying amendment only.
917. Item 221 would amend paragraph 682(1)(c) to replace the word ‘act’ with ‘any conduct’, to make clear that the FWO’s functions include monitoring and investigating etc. omissions under the FW Act, as well as acts.
918. Item 222 would amend the FWO’s investigations function in paragraph 682(1)(c) to additionally cover conduct that maybe contrary to a ‘related offence provision’. The term ‘related offence provision’ is proposed to be defined in FW Act’s dictionary in section 12 to mean:
- section 6 of the Crimes Act; or
 - a provision of Part 2.4 of the Criminal Code;
- to the extent that the offence created by the provision relates to an offence against this Act other than an offence mentioned in the dot points above.
919. Similar amendments are proposed in relation to the compliance powers Fair Work Inspectors (as necessary), to ensure that these powers also extend to investigating alleged offences against ‘related offence provisions’ insofar as they relate to offences against the FW Act. These are described in more detail below.

Item 223: After paragraph 682(1)(d)

Item 224: At the end of section 682

920. Subsection 682(1) of the FW Act sets out the functions of the FWO.
921. This item would add to this list the function of publishing a compliance and enforcement policy, including guidelines relating to the circumstances in which the FWO will, or will not: accept or consider accepting undertakings under section 715; or enter or consider entering into cooperation agreements under section 717B.

922. The addition of this function would formalise a long-standing practice of the FWO, in publishing this material. The provision does not specify how the material must be published.

923. Item 224 would require the FWO to consult with the NWRCC about the guidelines, before publishing its policy. No details are prescribed about how this consultation should occur, but it is expected that it would be carried out reasonably, commensurate to the nature of any proposed changes to the guidelines. This would not prevent the FWO from consulting more widely on other aspects of its policies as appropriate.

Item 225: Paragraph 706(1)(a)

Item 226: Subsection 711(1)

Item 227: Paragraph 712AA(1)(a)

924. Sections 706, 711 and 712AA deal with the scope of the compliance powers of Fair Work Inspectors, their power to ask for a person's name and address, and the FWO's powers in relation to FWO notices.

925. These items would amend the specified provisions to ensure that the relevant powers are exercisable in relation to a suspected offence against the Act, including a 'related offence provision' as proposed to be defined in section 12.

Item 228: At the end of section 713

Item 229: Section 713A

Item 230: At the end of section 713A

926. Sections 713 and 713A of the FW Act abrogate the common law privilege against self-incrimination in the specified circumstances. This loss is offset, by conferring use and derivative use immunities on the affected individuals. That is, by providing that documents produced and any information or thing obtained as a direct or indirect consequence will not be admissible as evidence against the individual in the specified proceedings (subject to the specified exceptions).

927. These items would create an exception to the immunities conferred by these sections, in relation to:

- an employee record in relation to an employee that is made under section 535; or
- a copy of a pay slip created in relation to an employee. Pay slips are required to be issued to employees under section 536.

928. The rationale is that employee records that are required to be kept under the FW Act, section 535, or copies of payslips that are required to be issued under the FW Act, section 536, should be able to be tendered as evidence before a court, including criminal proceedings. In other words, the regulator should not be prevented from tendering evidence of employee records or pay slips against an individual, just because they were produced by notice or other coercive process. Further, as the regulator will be undertaking criminal investigations, and these records will be central to being able to

prove the offence, providing immunity would mean the regulator is unable to properly discharge their function in respect of criminal underpayments.

Item 231: After Subdivision DD of Division 3 of Part 5-2

929. This item inserts new subdivision DE of Division 3 of Part 5-2, which establishes a framework for the making of cooperation agreements between the FWO and a person that has self-reported to the FWO the possible commission of an offence, or at least the physical elements of an offence, against new subsection 327A(1) or a related offence provision (to the extent that the offence created by the provision relates to an offence against subsection 327A(1)) (new subsection 717B(1)). Item 213 amends the Dictionary in section 12 of the FW Act to relevantly insert a signpost referring readers to the definition of ‘cooperation agreement’ in new subsection 717B(1).
930. The cooperation agreements framework is intended to provide a person with the opportunity to access ‘safe harbour’ from potential criminal prosecution if they have engaged in conduct that amounts to the possible commission of the new wage theft offence or related offence and self-reported their conduct to the FWO. If, after having regard to a range of matters provided in new subsection 717B(2), the FWO decides to enter into a cooperation agreement with the person, the FWO must not refer conduct engaged in by the person that is covered by the agreement to the CDPP or the AFP for possible criminal prosecution while the agreement is in force. The matters that the FWO must have regard to in new subsection 717B(2) include whether in the FWO’s view, the person has made a voluntary, frank and complete disclosure of the conduct (to the extent of the person’s knowledge at the time of the disclosure), and the nature and level of detail of the disclosure (paragraph 717B(2)(a)), and the person’s history of compliance with the FW Act (paragraph 717B(2)(f)), which is intended to be construed broadly and could include, for example, whether there has been past compliance with enforcement tools such as compliance notices.
931. While a cooperation agreement is in force, it does not prevent an inspector instituting or continuing civil proceedings in relation to the conduct, or conduct engaged in by any other person from being referred to the CDPP or the AFP for action in relation to a possible offence (new subsection 717A(2)).
932. The regulations may prescribe matters in relation to the content of cooperation agreements (new subsection 717B(3)).
933. New section 717C provides that a cooperation agreement is in force from the time it is entered into or any later time specified in the agreement until it expires (if an expiry date is specified in the agreement), is terminated (new section 717D), or is withdrawn (new section 717E).
934. The FWO may terminate a cooperation agreement with a person, by written notice at any time, if it is satisfied that the person has contravened a term of the agreement, or provided false or misleading information or documents, or on any other ground prescribed by the regulations (new subsection 717D(1)). As an alternative to terminating a cooperation agreement on the grounds in new subsection 717D(1), the

FWO may apply to the Federal Court, the Federal Circuit and Family Court of Australia (Division 2) or an eligible State or Territory Court for an order under new subsection 717D(3).

935. The parties to a cooperation agreement may withdraw from, or vary, the agreement by consent (new sections 717E, 717F).
936. New section 717G is intended to clarify how the cooperation agreements framework interacts with other powers in the FW Act. In particular, a cooperation agreement does not affect the power of an inspector to give a compliance notice (section 716 of the FW Act) in relation to the conduct, or the power of the FWO to accept an enforceable undertaking in relation to the conduct (section 715 of the FW Act), or any other power or function of the FWO or an inspector that is not mentioned in new subsection 717A(1). An enforceable undertaking or a compliance notice has no effect to the extent of inconsistency with a cooperation agreement (new subsection 717G(2)).

Item 232: Subsections 793(1) and (2)

Item 233: After subsection 793(3)

Item 234: At the end of subsection 793(4)

937. Section 793 of the FW Act attributes to the corporation the conduct and (if relevant) state of mind of the individuals referred to in the section. It deals with both civil and criminal liability. Section 793 does not exhaustively prescribe the legal means by which the state of mind held by, or the conduct engaged in by, a body corporate may be ascertained. Its purpose is to provide for an expanded range of persons whose conduct and state of mind might be ascribed to a body corporate than that which exists at common law, while at the same time preserving the common law doctrines.
938. Subsection 793(4) provides that Part 2.5 of Chapter 2 of the Criminal Code does not apply to an offence against the FW Act.
939. These items would reverse the position in relation to the new offence for wage theft and related offence provisions (to the extent they relate to such an offence), by disapplying the statutory attribution rules in subsections 793(1) and (2), so applying Part 2.5 of Chapter 2 of the Criminal Code. This means that the attribution rules for criminal responsibility in Part 2.5 of Chapter 2 of the Criminal Code would apply in those circumstances (but not for other offences against the FW Act).

Item 235: After section 794

940. Subsection 37(1) provides that the FW Act binds the Crown in all its capacities (that is, all the Australian Governments), to the extent the states' referral of powers (if any) permit. However, the provision that attributes the conduct (and states of mind) of individuals to apply to bodies corporate (section 793), so that liability may be established, does not apply to bodies politic (that is, the Australian Governments).
941. Item 235 would address this gap by inserting:
- new section 794A into the FW Act to provide for the liability of Australian Governments under civil remedy provisions;

- new section 794B to provide for the liability of the Commonwealth for certain offences (that is, to the extent that the ‘Crown shield’ against prosecution for offences has been lifted);
- new section 794C to identify responsible agencies for Australian Governments; and
- new section 794D to provide for the liability of the Commonwealth to pay civil and criminal penalties.

New section 794A

942. New subsection 794A(1) would limit the scope of the new attribution provision for the purposes of applying a civil remedy provision, or any other provision of the FW Act, insofar as it relates to a civil remedy provision, in relation to an Australian Government.
943. The practical operation of this provision will be limited to the extent the Commonwealth’s legislative power permits, including the scope of the states’ referral of powers.
944. New subsection 794A(2) would define an ‘Australian Government’ for purposes of the section to include the Commonwealth, a State, the Australian Capital Territory and the Northern Territory.
945. New subsections 794A(3) and (4) would make provision for the conduct and state of mind the individuals referred to in the section to be attributed to an Australian Government. These provisions are based on the equivalent provisions that apply in relation to bodies corporate, in section 793 of the FW Act.
946. New subsection 794A(5) would clarify that if an Australian Government contravenes a civil remedy provision, the pecuniary penalty that it may be ordered to pay is that applicable to a body corporate. This reflects the status quo, so would be an amendment of a clarifying nature only.
947. New subsection 794A(6) would enable regulations to be made to prescribe modifications in the way the section applies in relation to Australian Governments. The Government has developed the new regulatory framework for the liability of Australian Governments under civil remedy provisions, but it is a new and as yet untested framework. A degree of complexity is involved, as the provisions need to be able to (potentially) apply to all Australian Governments (noting practical operation of the provisions would currently be limited because of the limited scope of the states’ referrals in relation to their public services). There remains the possibility that the operation of the section in practice may produce unintended or unforeseen results. Including this regulation-making power is critical to ensuring timely and targeted adjustments can be implemented if required.
948. New subsection 794A(7) would define the term ‘employee’ to have its ordinary meaning in the section.

New section 794B

949. New subsection 794B(1) would apply Part 2.5 of the Criminal Code in relation to the Commonwealth, for the purposes of an offence against new subsection 327A(1) (offence for failing to pay amounts as required) or a related offence provision, to the specified extent, in the same way as Part 2.5 applies in relation to bodies corporate. This aligns with the attribution rules that are proposed for corporate criminal responsibility (that is, Part 2.5 of the Criminal Code).
950. New subsection 794B(1) would apply Part 2.5 of the Criminal Code:
- without the provisions that are not relevant (that is, as if section 12.4 and 12.5 of the Criminal Code were omitted); and
 - with the modifications set out in the table below subsection (2) (subject to any further modification prescribed by the regulations);
 - such other modifications as are necessary, given the different regulatory context for liability of the Commonwealth (subject to any further modification prescribed by the regulations); and
 - any modifications prescribed by the regulations.
951. The modifications set out in the table translate certain terms and concepts that apply in the corporate context (that is, ‘a body corporate’s board of directors’, ‘a high managerial agent of a body corporate’ and ‘the corporate culture of a body corporate’) and substitute references that work in the government context.
952. In the context of government, the equivalent of:
- a body corporate’s board of directors—is taken to be the governing body of the agency of the Commonwealth (the ‘relevant agency’) whose officer, employee or agent engaged in conduct constituting a physical element of the offence;
 - a high managerial agency of a body corporate— is taken to be a person who is an officer, employee or agent of the Commonwealth with duties of such responsibility that the person’s conduct may fairly be assumed to represent the policy of the relevant agency;
 - the corporate culture of a body corporate—is taken to be one or more attitudes, policies, rules, courses of conduct or practices existing within the relevant agency or a part of the relevant agency.
953. New subparagraph 794B(2)(b)(iii) would enable regulations to be made to prescribe modifications to the way in which Part 2.5 applies to establish Commonwealth liability (including modifications to those made by the table following the subsection (2)).
954. The Government has developed a new regulatory framework for the criminal liability of the Commonwealth, leveraging from a similar exercise in relation to the WHS Act. It is a new and as yet untested framework. A degree of complexity is involved, as the provisions need to be able to (potentially) apply to a broad range of Commonwealth entities. There remains the possibility that the operation of the section in practice may

produce unintended or unforeseen results. Including this regulation-making power is critical to ensuring timely and targeted adjustments can be implemented if required.

- 955. New subsection 794B(3) provides that the penalty to be imposed on the Commonwealth, if found guilty of a relevant offence, is the penalty applicable to a body corporate.
- 956. New subsection 794B(4) would define the term ‘employee’ to have its ordinary meaning.
- 957. New subsection 794B(5) would define the term ‘governing body’ of the Commonwealth for the purposes of the section.

New section 794C

- 958. New section 794C would specify how proceedings may be brought against an Australian Government (civil proceedings only), or the Commonwealth (that is, civil proceedings, or criminal proceedings brought against the Commonwealth in the permitted circumstances). That is, by identifying a ‘responsible agency’.
- 959. New subsection 794C(1) would provide that, if relevant proceedings are brought, the ‘responsible agency’ as defined in new subsection (4) in relation to the contravention or the commission of the offence may be specified in any document initiating, or relating to, the proceedings.
- 960. New subsection 794C(2) specifies the nature of the responsible agency’s entitlement to act in the proceedings, and confers the procedural rights and obligations of the relevant Government on the responsible agency.
- 961. New subsection 794C(3) would empower, with the court’s leave, a specified person to change the responsible agency during the proceedings. This flexibility is necessary to deal with changes like machinery of government changes.
- 962. New subsection 794C(4) would define what a ‘responsible agency’ is in relation to a contravention of a civil remedy provision by an Australian Government, or the commission of an offence by the Commonwealth. The starting point is identifying the agency where the relevant conduct occurred; then, if it has ceased to exist, any successor of that agency; then (if none), the agency of the Australian Government or Commonwealth (as the case requires) that the court declares to be the responsible agency.
- 963. New subsection 794C(5) would enable regulations to be made to modify how the section applies in relation to an Australian government (in relation to a contravention of a civil remedy provision), and the Commonwealth (in relation to the commission of an offence).
- 964. The Government has developed a new regulatory framework for the liability of Australian Governments, including how relevant proceedings may be brought against them under the FW Act. It is a new and as yet untested framework. A degree of complexity is involved, as the provisions need to be able to (potentially) apply to a

broad range of entities of the Australian Governments. There remains the possibility that the operation of the section in practice may produce unintended or unforeseen results. Including this regulation-making power is critical to ensuring timely and targeted adjustments can be implemented if required.

New section 794D

965. While the Commonwealth is not liable to pay a pecuniary penalty to itself, the intention is that the Commonwealth should be notionally liable to pay such a penalty, whether under:

- a court's pecuniary penalty order (whether imposed in civil or criminal proceedings under the FW Act); or
- infringement notice issued under the FW Act.

966. New section 794D would provide a process for making the notional payment, including provision for an appropriation for the purpose (new subsection 794D(4)).

Amendments to the *Federal Court of Australia Act 1976*

Item 236: After paragraph 23AB(4)(a)

967. Section 562 of the FW Act confers jurisdiction on the Federal Court in relation to any matter (whether civil or criminal) arising under the FW Act.

968. Division 1A of Part III of the Federal Court of Australia Act sets out procedures to be followed during criminal proceedings in the Federal Court relating to certain indictable offences. This Division does not confer jurisdiction on the Court in relation to indictable offences. Other provisions (like section 562 of the FW Act) need to have done this.

969. Subsection 23AB(4) of the Federal Court of Australia Act lists the offences to which the Division applies.

970. This item would amend paragraph 23AB(4)(a) to add a new item, being an indictable offence against the FW Act, so that the procedures in the Division apply in relation to those proceedings.

Part 15—Definition of employment

Amendments to the *Fair Work Act 2009*

971. For the most part the FW Act confers rights and imposes obligations on, and in respect of the relationship between, an ‘employer’ and an ‘employee’. The terms ‘employer’ and ‘employee’ are defined to have their ordinary meanings, that is, the meanings ascribed at common law.
972. Part 15 of Schedule 1 would insert a new section 15AA into Part 1-2 of the FW Act. New section 15AA would require that the ordinary meanings of ‘employee’ and ‘employer’ be determined by reference to the real substance, practical reality and true nature of the relationship between the parties. This would require the totality of the relationship between the parties, including not only the terms of the contract governing the relationship but also the manner of performance of the contract, to be considered in characterising a relationship as one of employment or one of principal and contractor.
973. In requiring an inquiry that extends beyond the contractual rights and obligations of the parties, the amendments would overcome the contract-centric approach established by the High Court’s decisions in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 (*Personnel Contracting*) and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 (*Jamsek*). In these decisions, a majority of the High Court held that where a comprehensive written contract exists, the question of whether an individual is an employee of a person is to be determined solely with reference to the rights and obligations found in the terms of that contract. In such circumstances, the High Court held, it is not necessary or appropriate to engage in a wide-ranging review of the parties’ conduct in performing their obligations under that contract. There are limited exceptions where one can look beyond the terms of the contract, such as where a contract is a sham, or has been varied or rendered unenforceable, or subject to an estoppel.
974. The intention of this Part is to require a ‘multi-factorial’ assessment, as was previously commonly understood to be the correct approach in characterising a relationship as one of employment, or of principal and contractor, for the purposes of the FW Act. There is no exhaustive list of factors that will be relevant to a ‘multi-factorial’ assessment, ensuring a flexible approach that will enable the ordinary meanings of ‘employee’ and ‘employer’ to continue to adapt to changing social conditions, market structures and work arrangements.

Item 237: After section 15

975. This item would insert new section 15AA into Division 3 of Part 1-2 of the FW Act to provide a principle of interpretation for determining the ordinary meanings of ‘employee’ and ‘employer’ for the purposes of the FW Act.

Section 15AA – Determining the ordinary meanings of employee and employer

976. Subsection 15AA(1) would require that the ordinary meanings of ‘employee’ and ‘employer’ be determined by ascertaining the real substance, practical reality and true nature of the relationship between the parties. This phrase indicates that, while the

terms of the contract between the parties will be a relevant factor, they are not determinative in circumstances where they do not reflect the real nature of the working relationship.

977. The new interpretive principle aligns with Article 9 of ILO Recommendation 198, which states that, with respect to the employment relationship, ‘the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties.’ By ensuring that the true nature of the relationship is determinative, the new provision will ensure that disguised employments, which seek to evade or attenuate the legal obligations of an employment relationship, are legally ineffective.
978. Subsection 15AA(1) would make it clear that this new approach applies for the purposes of the FW Act. New section 15AA would not change the meaning of ‘employee’ or ‘employer’ at common law. New section 15AA would not change the meaning of these terms in the context of any other Commonwealth legislative scheme.
979. Subsection 15AA(2) would identify matters that must be considered in ascertaining the real substance, practical reality and true nature of the relationship between parties.
980. Paragraph 15AA(2)(a) would first require consideration of the totality of the relationship between the parties. This phrase, drawn from His Honour Justice Mason’s judgment in *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1 (*Brodribb*) and echoed by the majority in *Hollis v Vabu* [2001] HCA 44 (*Hollis*), is intended to indicate that in characterising the relationship, all relevant incidents of the relationship must be considered and no one incident will necessarily be determinative.
981. Paragraph 15AA(2)(b) would provide that in considering 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 including, but not limited to, the manner in which the contract is performed. This would make it clear that analysis of the totality of the relationship is not restricted to a consideration of the rights and duties established under the parties’ contract. It must include, among other things, how the contract is performed in practice.
982. The intention is to ensure that the way in which a contract is performed in practice can be considered in characterising the relationship irrespective of whether the performance of the contract has resulted in a contractual variation. This is intended to directly counteract the principle established in *Personnel Contracting* and *Jamsek* that where a comprehensive written contract exists, evidence of post-contractual conduct of the parties is not relevant in establishing the existence of an employment relationship or otherwise (except in limited circumstances, including where the contract has been varied by post-contractual conduct).

983. The intention is that subsection 15AA(2) would facilitate the use of a multi-factorial approach when characterising a relationship, even in the face of a comprehensive written contract.
984. Under the multi-factorial approach, guidance for the outcome is provided by various factors or indicia. A considerable number of case authorities, including *Brodrigg* and *Hollis*, identify factors relevant in the characterisation of a relationship as one of employment or one of contractor and principal. In *Brodrigg*, Mason J noted a prominent factor in determining the nature of the relationship between a person who engages another to perform work and the person so engaged is the degree of control which the former can exercise over the latter. Other relevant matters were said to include, among other things:
- the mode of remuneration;
 - the provision and maintenance of equipment;
 - the obligation to work;
 - the hours of work and provision for holidays;
 - the deduction of income tax;
 - the delegation of work by the putative employee.
985. Wilson and Dawson JJ determined that factors suggesting a contract of service (an employment relationship) include:
- the right to have a particular person do the work;
 - the right to suspend or dismiss the person engaged;
 - the right to the exclusive services of the person engaged and the right to dictate the place of work, hours of work and the like.
986. Indicia which indicate a contract for services (a relationship of principal and contractor) were said to include:
- work involving a profession, trade or distinct calling on the part of the person engaged;
 - the provision by the putative employee of their own place of work or their own equipment;
 - the creation by the putative employee of goodwill or saleable assets in the course of their work;
 - the payment by the putative employee from their remuneration of business expenses of any significant proportion;
 - the payment to the putative employee of remuneration without deduction for income tax.

987. Wilson and Dawson JJ also noted that the actual terms and terminology of the contract will always be of considerable importance.
988. Other indicia have arisen over time in the authorities. Courts have often observed that there is no exhaustive list of relevant factors and that they will vary from case to case. So too will the weight to be afforded to particular indicia. This is partly because the test has evolved to adapt to changing social conditions and new work arrangements, and indeed will continue to do so.
989. A legislative note following subsection 15AA(2) would alert the reader to the decisions of the High Court in *Personnel Contracting* and *Jamsek* and clarify that the amendments are a direct response to those decisions.
990. In most work relationships, the question of an individual's employment status is uncontroversial. Where this is the case, the amendments are intended to have little or no impact. Where the question of an individual's work status does arise, the amendments would ensure that a fairer test applies to characterising the relationship.

Illustrative example 1

Wei is a cleaner and works via a cleaning agency to clean commercial offices in Melbourne's Central Business District. She works five nights per week and is told which offices to clean among the agency's list of clients. Wei signed a services agreement with the cleaning agency, which describes her as an independent contractor and specifies a rate of \$90 per office, which can take anywhere from three to six hours in the evening. The services agreement also specifies that she is responsible for travel to and from worksites, and able to delegate work to others as required.

The new interpretive principle to determine the meaning of 'employee' and 'employer' under the FW Act applies when determining whether Wei is an employee of the cleaning agency. The interpretive principle allows an assessment of the arrangement by way of reference to the real substance, practical reality and true nature of the relationship between Wei and the agency, and beyond the terms of the services agreement to which Wei has agreed. For example, a court or a tribunal would take into account a range of factors relating to the totality of the relationship, such as Wei being told where and when she has to work, that she has little control over how she performs the work, the expectation that Wei would dress in attire branded with the logo of the cleaning agency and that her work is judged against the agency's performance standards. It would be relevant that she is able to delegate that work.

991. New section 15AA would not apply to certain provisions of the FW Act.
- New paragraph 15AA(3)(a) would provide that subsections 15AA(1) and (2) do not apply to Divisions 2A and 2B of Part 1-3 of the FW Act. As a result, subsections 15AA(1) and (2) would not apply to employers and employees who are national system employers and employees because of the extended meaning given by sections 30C, 30D, 30M and 30N. The common law test for employment as provided for in *Personnel Contracting* and *Jamsek* would continue to apply to

employees and employers that are national system employees and employers by virtue of the States' referrals of industrial relations power.

- New paragraph 15AA(3)(b) would provide that subsections 15AA(1) and (2) would not apply to Part 3-1 of the FW Act to the extent that Part 3-1 applies only by operation of sections 30G or 30R of the FW Act. Part 3-1 of the FW Act sets out a range of workplace protections. Section 30G and 30R extend the application of Part 3-1 to action in a referring State.

992. The approach required by the decisions in *Personnel Contracting* and *Jamsek* would also continue to apply to employees and employers under other workplace laws, to the extent that those laws adopt the ordinary meaning of employee and employer.

Part 16—Provisions relating to regulated workers

993. This Part would implement amendments to the Fair Work Act and associated legislation to ensure that certain independent contractors are entitled to greater workplace protections than they are currently. The majority of the amendments are targeted at independent contractors who are either:

- employee-like workers performing digital platform work; or
- engaged in the road transport industry.

994. The amendments would:

- provide a framework for the FWC to exercise functions and powers that relate to the road transport industry;
- insert a new jurisdiction enabling the FWC to set minimum standards orders and minimum standards guidelines in relation to employee-like workers performing digital platform work and regulated road transport industry contractors;
- enable digital labour platform operators and road transport businesses to make consent-based collective agreements with registered employee organisations;
- empower the FWC to deal with disputes over an employee-like worker's unfair deactivation from a digital labour platform, or the unfair termination of a road transport contractor's services contract by a road transport business; and
- enable independent contractors earning below a specified high-income threshold to dispute unfair contract terms in the FWC.

Division 1—Overarching road transport matters

Amendments to the *Fair Work Act 2009*

Item 238: After section 40B

1. This item would insert new Part 1-4—Road transport industry objective and advisory group into the FW Act.
2. Part 1-4 would provide a framework for the FWC's exercise of functions and powers in relation to the road transport industry, including:
 - employers and employees; and
 - regulated road transport contractors and road transport businesses, primarily under new Chapter 3A.

Part 1-4—Road transport industry objective and advisory group

Division 1—Guide to this Part

40C Guide to this Part

995. This section would outline the Guide to this Part. In particular, the Guide would explain that Part 1-4 provides:

- that the Expert Panel for the road transport industry must have regard to the road transport objective when performing functions and exercising powers under this Act;
- that the Expert Panel's functions and powers extend to employees, employers, regulated road transport contractors and road transport businesses;
- for the establishment and membership of the RTAG, its advisory functions in relation to road transport minimum standards, and matters relating to prioritisation of the FWC's work in the road transport industry;
- for regulations in relation to the road industry contractual chain.

Division 2—Road transport industry objective

40D The road transport objective

996. This section would set out the road transport objective. In performing a function or exercising power under the FW Act, the Expert Panel for the road transport industry would be required to consider the need for an appropriate safety net of minimum standards for regulated road transport workers and employees in the road transport industry, having regard to:

- the need for standards that ensure the road transport industry is safe, sustainable and viable;
- the need to avoid unreasonable adverse impacts on the following:
 - a. sustainable competition among road transport industry participants;
 - b. road transport industry business viability, innovation and productivity;
 - c. administrative and compliance costs for road transport industry participants.

997. A note to this section would clarify that the matters that must be dealt with by the Expert Panel are matters relating to the making of, varying or revoking modern awards and road transport minimum standards orders relating to the road transport industry (with a cross reference to subsection 617(10B)). It would also confirm that the President has discretion to direct an Expert Panel for the road transport industry to deal with a matter (with a cross reference to subsection 617(10D)).

998. For matters relating to employees, it is intended that the road transport objective would be a consideration the Expert Panel must take into account in addition to any other objectives or guidance provided under the FW Act, such as the modern awards objective set out in section 134 in relation to making or varying a modern award.

Division 3—Road Transport Advisory Group

999. This division would provide for the establishment and functions of the RTAG and its subcommittees. The RTAG is a special advisory body appointed by the Minister specifically to support the FWC in carrying out its functions relating to the road

transport industry, including in relation to employees and regulated road transport contractors.

40E Establishment of Road Transport Advisory Group

1000. This section would provide for the establishment of the RTAG.

1001. Subsection (2) would outline that the function of the RTAG is to advise the FWC in relation to matters about the road transport industry, including but not limited to:

- the making and varying of modern awards relating to the road transport industry;
- the making and varying of RTMSOs and RTGs;
- the prioritisation by the FWC of matters relating to the road transport industry; and
- such other matters as are prescribed by the regulations.

1002. Subsection (3) would require that the RTAG, before advising the FWC in relation to a matter, must consult any relevant subcommittee established under 40G.

1003. Subsection (4) would require the President to consult, and have regard to the views of, the RTAG in deciding the priorities for the work of the FWC regarding matters affecting the road transport industry.

1004. Note that new subsection 536KA would require the FWC to not make a RTMSO unless it has consulted with the RTAG.

40F Membership of the Road Transport Advisory Group

1005. Subsection (1) would provide that the RTAG consists of members the Minister appoints.

1006. Subsection (2) would state the Minister must ensure members of the RTAG are members of and/or nominated by an organisation entitled to represent the industrial interests of one or more regulated road transport contractors; or an organisation that is entitled to represent the industrial interests of one or more road transport businesses.

1007. Subsection (3) would explain that a member of RTAG would hold office for the period specified in the instrument of appointment, which would be a maximum of three years. A note to this section would clarify a member of RTAG is eligible for reappointment, cross referencing subsection 33(4A) of the AI Act.

1008. Subsection (4) would allow the Minister to revoke a person's appointment to the RTAG.

1009. Subsection (5) would state the President of the FWC could give directions to the RTAG as to how it is to carry out its functions.

1010. Subsection (6) would allow the President to appoint a member of the Expert Panel for the road transport industry to chair the RTAG.

1011. It is not intended that members of the RTAG would be entitled to any remuneration or allowances for their participation.

40G Road Transport Advisory Group subcommittees

1012. This section would allow the RTAG to establish subcommittees to advise it in relation to matters relevant to performance of its functions.

1013. The subcommittee may include persons who are not members of RTAG, but a subcommittee must be chaired by a member. Subcommittee membership may be drawn from the broad range of organisations and interests in the road transport industry, under the leadership of RTAG members.

1014. It is not intended that members of the RTAG's subcommittees would be entitled to any remuneration or allowances for their participation.

Division 4—Regulations relating to the road transport industry contractual chain

1015. This division would provide a power for regulations to be made about the road transport industry contractual chain and contractual chain participants.

1016. This division would allow regulations to be made to empower the FWC to make orders in relation to road transport contractual chains and participants within those chains. This reflects the nature of the road transport industry that may see a range of parties throughout a contractual chain (otherwise known as a supply chain) that affect the working conditions of road transport workers and operating conditions of road transport and ancillary businesses. It would give the Government flexibility to extend the operation of the new road transport jurisdiction in Chapter 3A to contractual chains, should it become apparent this is necessary to ensure the successful operation of the new framework.

40H Meaning of road transport industry contractual chain participant

1017. This section would provide that a road transport industry contractual chain participant is a person connected with the road transport industry who is:

- a national system employer (as defined in section 14);
- a national system employee (as defined in section 14);
- a constitutional corporation (as defined in section 12);
- a regulated road transport contractor (see new section 15Q);
- a road transport business (see new section 15R); or
- a person who satisfies the requirements prescribed by the regulations.

1018. The intent is to ensure that all relevant persons in the road transport industry contractual chain are able to be brought within scope, should this be required for the purposes described below.

40J Regulations about the road transport industry contractual chain

1019. This section would enable regulations to be made for and in relation to matters relating to the road transport industry contractual chain or road transport contractual chain participants. For example, the regulations may:

- empower the FWC to make road transport industry contractual chain orders, that confer rights and impose obligations on road transport industry contractual chain participants;
- specify the matters that a road transport industry contractual chain order must, may or must not deal with;
- empower the FWC to vary, suspend or revoke road transport industry contractual chain orders;
- empower the FWC to deal with disputes between road transport industry contractual chain participants covered by road transport industry contractual chain orders;
- provide for and in relation to the interaction between road transport industry contractual chain orders, fair work instruments and other instruments under this Act or the regulations;
- provide for and in relation to the interaction between the regulations or road transport industry contractual chain orders and a law of the Commonwealth, a State or a Territory or an instrument made under such a law;
- provide for civil penalties for contraventions of the regulations, which must not exceed 60 penalty units for an individual and 600 penalty units for a body corporate; and
- empower the FWO to enforce road transport industry contractual chain orders.

1020. The maximum penalties for these regulations would ensure broadly consistent treatment with breaches of other civil remedy provisions in the Fair Work Act. Ensuring penalties have an appropriate deterrent effect would be consistent with achieving the objective of ensuring a safe and viable road transport industry

1021. This section would provide that before making regulations under this section, the Minister must be satisfied that the regulations are for the purposes of promoting the following:

- equitable workplace relations outcomes;
- a safe, sustainable and viable road transport industry;
- sustainable competition among road transport industry participants; and
- fairness between road transport industry contractual chain participants.

Division 2—Expert Panel for the road transport industry

Amendments to the *Fair Work Act 2009*

1022. This division would make amendments to the FW Act to establish and provide the functions of a new Expert Panel for the road transport industry. The Expert Panel would be responsible for performing functions and exercising powers relating to the road transport industry, including in relation to modern awards and RTMSOs, having regard

to the road transport objective. The Expert Panel could also be directed to deal with other matters that the President considers may relate to the road transport industry.

1023. This would ensure the FWC has the expertise it needs to better assess minimum standards and conditions for both employees and contractors working in the road transport industry. The expertise required for the new Expert Panels would be provided by either part-time Expert Panel members or appropriately qualified FWC members.

Item 239: At the end of subsection 157(1) (after note 3)

1024. Section 157 of the FW Act provides that the FWC may make, vary or revoke a modern award if the FWC is satisfied that it is necessary to achieve the modern awards objective.

1025. This item would insert a note at the end of subsection 157(1) (after note 3) of the FW Act clarifying if the FWC is making, varying or revoking a modern award the President considers might relate to the road transport industry (cross-referencing section 40D), it must have regard to the road transport objective.

1026. This would make the reader aware that both the modern awards objective and road transport objective would need to be applied when the FWC is making, varying or revoking such an award.

Item 240: After subsection 582(4)

1027. This item would amend section 582 of the FW Act to insert new subsections (4A), (4B) and (4C). Existing section 582 relates to directions by the President.

1028. New subsection (4A) would provide that if the President gives a direction that two or more matters be dealt with jointly, then the direction must require the matters to be dealt with by the Expert Panel where at least one of the matters:

- must be dealt with by an Expert Panel constituted to deal with a matter that relates to the road transport industry (as required by new subsection 617(10B)); or
- is a matter the President considers might relate to the road transport industry and has directed be dealt with by an Expert Panel constituted for that purpose (in accordance with new subsection 617(10D)).

1029. This means that where at least one of the matters to be dealt with jointly fall into one of those categories then the matters will travel together and be dealt with by an Expert Panel. The note to this subsection would cross-reference subsection 620(1E) regarding the constitution of an Expert Panel for these purposes.

1030. Subsection (4B) would provide that the above provisions do not limit the power of the President to direct that other matters be dealt jointly by an Expert Panel.

1031. Section (4C) would provide that the President may give a direction that a FWC member deal with a matter that the President considers might relate to the road transport industry, if the FWC member has knowledge of, or experience in, the road transport industry, whether or not the President considers that the matter might relate to another industry or sector. For example, the President would be able to direct a suitably

qualified FWC member to deal with a dispute relating to a road transport collective agreement.

Item 241: After subsection 617(10A)

1032. This item would insert new subsections after subsection 617(10A) of the FW Act.

1033. Subsection (10B) would provide that the following must be made by an Expert Panel for the road transport industry:

- a modern award that the President considers might relate to the road transport industry;
- a determination varying or revoking a modern award that the President considers might relate to the road transport industry;
- a RTMSO or a determination varying or revoking a RTMSO;
- RTG or a determination varying or revoking RTG;
- such other instruments as prescribed.

1034. Note 1 to this subsection would cross-reference subsection 620(1E) for further information about the constitution of the Expert Panel for the road transport industry.

1035. Note 2 to this subsection would inform the reader that the road transport objective would be relevant to functions of the Expert Panel for the road transport industry as would be provided in new section 40D.

1036. Subsection (10C) would provide that for the purposes of new subsection (10B), if the President considers that a determination or a modern award or other prescribed instrument might relate to the road transport industry it does not matter if the President considers that the determination or modern award might relate to another industry or sector.

1037. Section 10D would provide that the President with power to direct that the following matters be dealt with by an Expert Panel constituted for the purpose, regardless of whether the President considers that the matter might also relate to another industry or sector:

- the making, varying or revoking of an ELMSO or ELG to the Expert Panel if the President considers it might relate to the road transport industry; and
- any other prescribed instrument or matter that the President considers might relate to the road transport industry.

1038. The note to this subsection would cross-reference to subsection 620(1E) regarding constitution of an Expert Panel.

Item 242: At the end of subsection 617AA(4)

1039. This item would insert new paragraphs (e) and (f) in existing subsection 617AA(4).

1040. Existing section 617AA applies where a Full Bench and Expert Panel consist of the same FWC members. It provides, for the avoidance of doubt, that the functions and

powers of those FWC members as a Full Bench are not limited by the purposes for which an Expert Panel consisting of those same members was constituted. Likewise, the functions and powers of the Expert Panel are not limited by the functions and powers of the Full Bench.

1041. Subsection 617AA(4) clarifies that a reference to a full bench or an Expert Panel performing a functions or exercising a power would include reference to the listed functions or powers.

1042. The following would be added would to the listed functions or powers to make clear section 617AA would apply to them:

- performing a function or exercising a power under Chapter 3A;
- dealing with a matter that the President considers might relate to the road transport industry.

Item 243: Subsection 617A(1)

1043. This item would amend existing section 617A(1) to insert reference to new subsection 620(1E).

1044. Existing Subsection 617A allows the President to give a direction under section 582 requiring that a matter that is relevant to a function of an Expert Panel for pay equity, an Expert Panel for the Care and Community Sector or an Expert Panel for pay equity in the Care and Community Sector be investigated, and that a report about the matter be prepared.

1045. This amendment would similarly allow the President to also give a direction requiring that a matter relevant to a function of the Expert Panel for the road transport industry be investigated and that report about the matter be prepared.

Item 244: Subsection 617A(1) (note)

1046. After ‘remuneration’ in subsection 617A(1)(note), this item would insert the words ‘the road transport industry’. This is a consequential change to reflect the amendment made by the above item.

Item 245: After subsection 620(1D)

1047. This item would insert new subsection 620(1E) which would provide for constitution of an Expert Panel for the road transport industry.

1048. Subsection (1E) would provide that an Expert Panel constituted under this subsection for a purpose referred to in subsection 617(10B) or (10D) must include (except as provided by section 622):

- the President, a Vice President or Deputy President appointed by the President to be Chair of the Panel; and
- at least one Expert Panel member or other FWC Member who has knowledge of, or experience in, the road transport industry; and

- subject to existing subsection 620(2A) (which would require the President to ensure an Expert Panel for the road transport industry consists of a majority of FWC members who have knowledge of, or experience in, the road transport industry), such number (if any) of other FWC Members as the President considers appropriate.

Item 246: Subsection 620(2A)

Item 247: Subsection 620(2A)

1049. These items would add references to new subsection (1E) and paragraph (1E)(b) in existing subsection 620(2A).

1050. These amendments would require the President to ensure an Expert Panel for the road transport industry consists of a majority of FWC members who have knowledge of, or experience in, the road transport industry.

Division 3—Minimum standards for regulated workers

Amendments to the *Fair Work Act 2009*

Item 248: After section 15A

1051. This item would insert new Division 3A into Part 1-2 (Definitions).

Division 3A—Definitions relating to regulated workers

Subdivision A—General

*15B Meaning of **collective agreement***

1052. This section would insert a new meaning of ‘collective agreement’ into the FW Act, being:

- an employee-like worker collective agreement;
- a road transport collective agreement.

*15C Meaning of **contractor high income threshold***

1053. This section would insert a new definition of ‘contractor high income threshold’ into the FW Act. This amount would be prescribed by regulations. A regulation will have no effect if it reduces the amount of the contractor high income threshold.

1054. This regulation making power is similar to section 333 of the FW Act, which provides for a high income threshold for employees. This would allow for indexation of the contractor high income threshold.

1055. The contractor high income threshold would be relevant in the following circumstances:

- New paragraph 536LT(5)(b) – the amount of compensation for an unfair termination that can be ordered by the FWC to a person would not be able to exceed the lesser of half the amount of the contractor high income threshold immediately before termination. This amount is the total amount of remuneration received by the person or to which the person was entitled (whichever is higher) for any period

during which the person performed work under the services contract during the 26 weeks immediately before the termination.

- New subsection 536LU(2) – this would prevent a person from making an application for an unfair deactivation or unfair termination remedy unless, the sum of the contractor’s annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the contractor high income threshold.
- New section 536ND – this would prevent a person from making an application for an unfair contract remedy in relation to a services contract unless, the sum of the contractor’s annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the contractor high income threshold within the meaning of the FW Act.
- New subsection 12(2A) of the IC Act, as amended by item 306 of this Part 16 – this would provide an application must not be made in relation to a services contract unless, the sum of the contractor’s annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is more than the contractor high income threshold within the meaning of the FW Act.

*15D Meaning of **minimum standards guidelines***

1056. This section would insert a new definition of ‘minimum standards guidelines’ into the FW Act, being:

- employee-like worker guidelines (ELG);
- road transport guidelines (RTG).

*15E Meaning of **minimum standards order***

1057. This section would insert a new definition of ‘minimum standards order’ (MSO) into the FW Act, being:

- an employee-like worker minimum standards order (ELMSO);
- a road transport minimum standards order (RTMSO).

*15F Meaning of **regulated business***

1058. This section would insert a new definition of ‘regulated business’ into the FW Act, being:

- a digital labour platform operator; or
- a road transport business.

*15G Meaning of **regulated worker***

1059. This section would insert a new definition of ‘regulated worker’ into the FW Act, being:

- an employee-like worker; or
- a regulated road transport contractor.

*15H Meaning of **services contract***

1060. This section would insert a new definition of ‘services contract’ into the FW Act.

General meaning

1061. Subsection (1) would provide that services contract is defined to mean a contract for services that:

- relates to the performance of work under the contract by an individual; and
- has the requisite constitutional connection.

1062. A note in subsection (1) would provide that conditions or collateral arrangements that relates to a services contract would be taken to be part of that services contract: subsection (4).

The requisite constitutional connection

1063. Subsection (2) would provide the circumstances in which a services contract would have the requisite constitutional connection for the purposes of subsection (1). The requisite constitutional connection identifies the constitutional bases for new Chapter 3A. This includes the corporations power (paragraph 51(xx) of the Constitution), the Commonwealth’s power to regulate entities of the Commonwealth and Commonwealth authorities, the Territories power and the trade and commerce power.

1064. A contract for services would have the requisite constitutional connection if:

- at least one party to the contract is:
 - a. a constitutional corporation; or
 - b. the Commonwealth or a Commonwealth authority; or
 - c. a body corporate incorporated in a Territory in Australia;
- or any of the following applies:
 - a. the work concerned is wholly or principally to be performed in a Territory in Australia; or
 - b. the contract was entered into in a Territory in Australia; or
 - c. at least one party to the contract is a natural person who is resident in, or a body corporate that has its principal place of business in, a Territory in Australia; or
 - d. the work concerned is done in the course of constitutional trade or commerce.

1065. A note to subsection (2) would explain that Australia includes Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands, including a cross-reference to the definition of Australia in section 12.

1066. A services contract under Part 3A-2 (minimum standards for regulated workers), Part 3 (unfair deactivation and unfair termination) and Part 4 (collective agreement) to the extent it relates to digital platform work, would also have the requisite constitutional connection if the contract was arranged or facilitated through or by means of a digital labour platform, where the operator of the digital labour platform is either:

- a constitutional corporation; or
- the Commonwealth or a Commonwealth authority; or
- a body corporate incorporated in a Territory in Australia; or
- a natural person who is resident in, or a body corporate that has its principal place of business in, a Territory in Australia.

1067. A note to (3) would mirror the note in (2) regarding the coverage of Australia.

1068. The intent of this definition is to clearly capture operators of ‘horizontal’ or ‘marketplace’ digital labour platforms which may intermediate a services contract made between a worker and an individual but is not itself a party to it. There are examples of such digital labour platforms in the care sector.

Conditions and collateral arrangements

1069. Subsection (4) would provide that a condition or a collateral arrangement that relates to a services contract is to be included as part of the services contract if, were the condition or collateral arrangement itself a contract for services, would have the requisite constitutional connection. For example, this would mean that a side agreement that refers to the operation of the services contract could be treated itself as part of the services contract. This ensures that technical distinctions do not need to be drawn between the services contract and other agreements between the parties that are likely to impact on the operation of the services contract. A similar provision exists in subsection 5(4) of the IC Act and existed in the former paragraph 832(1)(b) of the *Workplace Relations Act 1996* in relation to the former Commonwealth unfair contracts jurisdiction.

15J Prospective regulated workers

1070. This section would make clear that a reference to a regulated worker in relation to a services contract also refers to a person who may later become a regulated worker for a services contract.

15K Effect of Chapter in determining whether a person is an employee or employer

1071. This section would provide that the effect of an MSO, MSG or a collective agreement applying to or covering an individual or a person is to be disregarded for the purposes of ascertaining the real substance, practical reality and true nature of the relationship between an individual and a person.

1072. This provision would aim to ensure that anything done to comply with an MSO, MSG or collective agreement would not, in and of itself, have the effect of altering a worker’s

status. For example, an assessment of the practical reality of the relationship would occur before considering how external factors such as an MSO or MSG are factored in.

1073. Item 237 in Part 15 would insert new section 15AA into Division 3 of Part 1-2 of the FW Act which would provide a principle of interpretation that applies for the purposes of determining the ordinary meaning of ‘employee’ and ‘employer’ for the purposes of the FW Act.

Subdivision B—Digital platform work

*15L Meaning of **digital labour platform***

1074. Subsection (1) would insert a new definition of ‘digital labour platform’ into the FW Act. It would mean an online enabled application, website or system operated to arrange, allocate or facilitate the provision of labour services, where:

- the operator of the application, website or system:
 - a. engages independent contractors directly or indirectly through or by means of the application, website or system; or
 - b. acts as an intermediary for or on behalf of more than one distinct but interdependent sets of users who interact with the independent contractors or the operator via the application, website or system; and
- the operator of the application, website or system processes aggregated payments referable to the work performed by the independent contractors.

1075. Subsections (2) and (3) would insert regulation-making powers, enabling an online enabled application, website or system to be prescribed as a digital labour platform, or to be excluded as not being a digital labour platform.

1076. Subsection (4) would specify that an application, website or system may be specified by name or by inclusion in a specified class or specified classes or in respect of all forms of digital platform work, or in respect of specified forms of digital platform work.

1077. The definition of digital labour platform is intended to be deliberately broad to ensure that it can capture new market structures and forms of work as they emerge. It is not intended to capture online classifieds where there is not a payment processed, or digital platforms that facilitate the sale of goods.

*15M Meaning of **digital labour platform operator***

1078. This section would insert a new definition of ‘digital labour platform operator’ into the FW Act. It would mean the operator of a digital labour platform that enters into or facilitates a services contract where work is performed by employee-like workers.

*15N Meaning of **digital platform work***

1079. Subsection (1) would insert a new definition of ‘digital platform work’ into the FW Act. It would mean either work:

- performed by an independent contractor where the work is performed under a services contract through or by means of a digital labour platform, or the services

contract under which the work is performed was arranged or facilitated through or by means of a digital labour platform and payment is made for that work; or

- work prescribed by the regulations.

1080. Subsection (2) would enable regulations to also be made to prescribe when work is not ‘digital platform work’.

1081. Subsection (3) would provide that for the purposes of paragraph (1)(b) and subsection (2), digital platform work may include work specified by name or by inclusion in a specified class or classes.

*15P Meaning of **employee-like worker***

1082. This section would insert a new definition of ‘employee-like worker’ into the FW Act.

1083. A person will be an employee-like worker if they are any of the following:

- an individual who is a party to a services contract in their capacity as an individual (other than as a principal), and performs work under the contract;
- if a body corporate is a party to a services contract (other than as a principal) – an individual who is a director of the body corporate, or a member of the family of a director of a body corporate, and performs work under the contract;
- if a trustee of a trust is a party to a services contract in their capacity as a trustee (other than as a principal) – an individual who is a trustee of the same trust and performs work under the contract, whether or not the individual is a party to the contract; or
- if a partner in a partnership is a party to a services contract in their capacity as a partner (other than as a principal) – an individual who is a partner in the same partnership and performs work under the contract, whether or not the individual is a party to the contract.

1084. The effect of this subsection to capture individuals performing work under a services contract regardless of the type of entity they have adopted.

1085. Additionally, the person must:

- perform all, or a significant majority, of the work to be performed under the services contract;
- the work that the person performs under the services contract is digital platform work;
- the person does not perform any work under the services contract as an employee; and
- satisfy one or more of the following characteristics:
 - a. the person has low bargaining power in negotiations in relation to the services contract under which the work is performed;

- b. the person receives remuneration at or below the rate of an employee performing comparable work;
- c. the person has a low degree of authority over the performance of the work; or
- d. the person has such other characteristics as are prescribed by the regulations.

1086. The regulations made may specify that a person must have all or only one or some of the characteristics prescribed.

1087. The intended effect of these provisions is not to capture persons that have a high degree of bargaining power, are comparatively well paid and have a significant degree of authority over their work, regardless of whether they perform work on a digital platform. It is intended, for example, that skilled tradespeople would not be captured even if they work on a digital platform.

1088. For the purposes of determining whether a person satisfies the above characteristics, the effect of an MSO, MSG or a collective agreement applying to, or covering, the individual is to be disregarded.

Illustrative example: Care sector digital labour platform

Jim works as an independent contractor providing services on a gig platform in the care sector called GigCare. GigCare operates as an online-enabled marketplace, where contractors pay a fee to operate on the platform and must agree to terms of service that place obligations on how they use the platform and interact with clients found on the platform. GigCare's platform provides a platform for communications between the parties and processes payments from clients to Jim.

GigCare's platform is a digital labour platform because it acts as an intermediary between Jim (and other contractors) and clients, and it processes payments. If a union representing Jim and similar contractors applies to the FWC for a minimum standards order in relation to work that he and those similar contractors performs through the GigCare platform, the FWC will also need to consider whether those similar contractors are employee-like workers, including because they have low bargaining power, comparatively low pay or a low degree of authority over their work.

1089. A reference to an independent contractor includes a reference to an employee-like worker.

Subdivision C—Road Transport Industry

15Q Meaning of regulated road transport contractor

1090. Subsection (1) would insert a new definition of 'regulated road transport contractor' into the FW Act.

1091. A person will be a regulated road transport contractor if they are any of the following:

- an individual who is a party to a services contract in their capacity as an individual (other than as a principal), and performs work under the contract;
- if a body corporate is a party to a services contract (other than as a principal) – an individual who is a director of the body corporate, or a member of the family of a director of a body corporate, and performs work under the contract;
- if a trustee of a trust is a party to a services contract in their capacity as a trustee (other than as a principal) – an individual who is a trustee of the same trust and performs work under the contract, whether or not the individual is a party to the contract; or
- if a partner in a partnership is a party to a services contract in their capacity as a partner (other than as a principal) – an individual who is a partner in the same partnership and performs work under the contract, whether or not the individual is a party to the contract.

1092. The effect of this subsection to capture individuals performing work under a services contract regardless of the type of entity they have adopted.

1093. Additionally:

- the person must perform all, or a significant majority, of the work to be performed under the services contract (the definition of services contract would be inserted at section 15H);
- the person must not perform any work under the services contract as an employee;
- the work performed under the services contract must be work in the road transport industry (the definition of road transport industry would be inserted at section 15S); and
- the person must not be an employee-like worker who performs work in the road transport industry under the services contract (the definition of employee-like worker would be inserted at section 15P).

1094. Subsection (2) would provide that in this Part, a reference to an independent contractor includes a reference to an individual who is a regulated road transport contractor.

*15R Meaning of **road transport business***

1095. This section would insert a new definition of ‘road transport business’ into the FW Act.

1096. Subsection (1) would provide a person is a road transport business if they:

- receive services under a services contract, where the services contract provides for the performance of work in the road transport industry; or
- are a constitutional corporation, or is included in a class of constitutional corporations, prescribed by the regulations.

1097. Subsection (2) would specify that a business or undertaking may be specified by name or by inclusion in a specified class or classes.

15S Meaning of road transport industry

1098. This section would insert a new definition of ‘road transport industry’ into the FW Act.

1099. Subsection (1) would provide that ‘road transport industry’ includes all of the following:

- the road transport and distribution industry within the meaning of the Road Transport and Distribution Award 2020 as in force on 1 July 2024, with such modifications (if any) as are prescribed by regulations for the purposes of this paragraph; and
- the long distance operations in the private road transport industry within the meaning of the Road Transport (Long Distance Operations) Award 2020 as in force on 1 July 2024, with such modifications (if any) as are prescribed by regulations for the purposes of this paragraph; and
- the waste management industry within the meaning of the Waste Management Award 2020 as in force on 1 July 2024, with such modifications (if any) as are prescribed by regulations for the purposes of this paragraph; and
- the cash in transit industry within the meaning of the Transport (Cash in Transit) Award 2020 as in force on 1 July 2024, with such modifications (if any) as are prescribed by regulations for the purposes of this paragraph; and
- the passenger vehicle transportation industry within the meaning of clause 4.2 of the Passenger Vehicle Transportation Award 2020, not including paragraph 4.2(c)), as in force on 1 July 2024, with such modifications (if any) as are prescribed by regulations for the purposes of this paragraph; and
- any other industry (however described) prescribed by the regulations for the purposes of this paragraph.

1100. Subsection (2) would specify that the regulations can prescribe an industry as a road transport industry by applying, adopting or incorporating any matter contained in a modern award as in force or existing from time to time.

Item 249: After section 536H

1101. This item would insert new Chapter 3A into the FW Act.

- Part 3A-1 would contain core provisions, dealing with the coverage and operation of the provisions of this Chapter;
- Part 3A-2 would provide the framework for setting minimum standards for employee-like workers performing digital platform work, and for road transport contractors;
- Part 3A-3 would be about unfair deactivation from digital labour platforms of employee-like workers and unfair termination of the services contracts of regulated road transport contractors;

- Part 3A-4 would provide the framework for collective-agreement making between regulated businesses (that is, digital labour platform operators and road transport businesses) and registered employee organisations;
- Part 3A-5 would be about unfair contract terms of services contracts, providing a framework for dealing with unfair contract terms.

Part 3A-1—Core provisions for this Chapter

1102. Part 3A-1 would be about the coverage and operations of the provisions in new Chapter 3A. It would set out when MSOs, MSGs and collective agreements cover regulated workers and regulated businesses. It would also specify the rules relating to the interaction of the provisions in new Chapter 3A with State and Territory laws.

Division 1—Introduction

536J Guide to this Part

1103. New section 536J would provide a Guide to Part 3A-1.

536JA Meaning of employee and employer

1104. This section would provide that in Part 3A-1 the terms ‘employee’ and ‘employer’ have their ordinary meanings.

Division 2—Provisions relating to coverage and operation of minimum standards orders, minimum standards guidelines and collective agreements

Subdivision A—Coverage and operation of minimum standards orders and guidelines

536JB Contravening a minimum standards order

1105. Section 536JB would provide that a person must not contravene a term of an MSO.

1106. A note would explain this section would be a civil remedy provision under Part 4-1 of the FW Act. As such, civil remedies may be sought in relation to a contravention.

1107. Another note would provide that a person would not contravene a term of an MSO unless the MSO applies to the person (with a cross-reference to subsection 536JC(1)).

536JC The significance of a minimum standards order applying to a person

1108. New section 536JC would provide that an MSO would not impose obligations on a person, and a person would not contravene an MSO unless the MSO specifically applies to that person (see new section 536JD).

1109. This section would also provide that an MSO does not give a person an entitlement unless the MSO specifically applies to that person (see new section 536JD).

*536JD When a minimum standards order **applies** to a person*

1110. Section 536JD would provide when an MSO applies to a person.

1111. **When a minimum standards order applies to a regulated worker:** Subsection (1) would provide that an MSO ‘applies’ to a regulated worker if:

- the MSO is in operation and covers the regulated worker (see section 536JE); and

- no other provision of the FW Act provides, or has the effect, that the MSO does not apply to the regulated worker.

1112. When an ELMSO applies to a digital labour platform operator: Subsection (2) would provide that an ELMSO ‘applies’ to a digital labour platform operator if:

- the ELMSO covers the digital labour platform operator (see new section 536JE);
- the ELMSO covers employee-like workers;
- the digital labour platform operator:
 - a. directly or indirectly engages employee-like workers under services contracts covered by the ELMSO, and those employee-like workers perform work through or by means of the digital labour platform it operates; or
 - b. arranges or facilitates services contracts through or by means of the digital labour platform it operates, under which employee-like workers who are covered by the MSO perform work;
 - c. the MSO is in operation; and
 - d. no other provision of the FW Act provides, or has the effect, that the ELMSO does not apply to the digital labour platform operator.

1113. When a RTMSO applies to a road transport business: Subsection (3) would provide that a RTMSO applies to a road transport business if:

- the RTMSO covers the road transport business (see new section 536JE); and
- the RTMSO covers regulated road transport contractors (see new section 536JE); and
- the road transport business receives the services of a regulated road transport contractor covered by the RTMSO under a services contract;
- the RTMSO is in operation (see new section 536JF); and
- no other provision of the FW Act provides, or has the effect, that the RTMSO does not apply to the road transport business.

1114. MSO applies in relation to services contracts: Subsection (5) would provide that a reference in the FW Act to an MSO applying to a regulated worker is a reference to the order applying to the regulated worker in relation to a services contract. In other words, MSOs would only apply in relation to services contracts (see new section 15H).

536JE When a minimum standards order covers a regulated worker or a regulated business

1115. Section 536JE would provide when an MSO ‘covers’ a regulated worker or a regulated business, being when the order is expressed to cover the regulated worker or regulated business.

1116. Effect of other provisions of this Act, FWC orders or court orders on coverage:

Subsection (2) would provide that an MSO also covers a regulated worker or regulated business if any of the following provides for or has that effect:

- a provision of the FW Act;
- an FWC order made under a provision of the FW Act;
- an order of a court.

1117. Subsection (3) would provide that, despite subsections (1) and (2), an MSO does not cover a regulated worker or regulated business if any of the following provides, or has the effect, that the MSO would not cover the regulated worker or regulated business:

- a provision of the FW Act;
- an FWC order made under a provision of the FW Act;
- an order of a court.

1118. **MSOs that have ceased to operate:** Subsection (4) would provide that an MSO that has ceased to operate does not cover a regulated worker or regulated business (see new section 536JF).

536JF When a minimum standards order is in operation

1119. Section 536JF would provide when an MSO is in operation.

1120. **When an MSO comes into operation:** Subsections (1) and (2) would provide that an MSO comes into operation on the day specified in the order, which must not be earlier than the day on which the MSO is made.

1121. Subsection (3) would provide that the specified day on which an RTMSO would come into operation must not be earlier than 24 months after the relevant notice of intent for the order is published (refer to new section 536KB). This is to ensure that a notice of intent and draft RTMSO would need to be in place for 24 months before an RTMSO can come into effect.

1122. Where the FWC make significant changes to a draft RTMSO, it would be required to publish a notice of intent in relation to the revised draft RTMSO and publish the revised draft; and undertake a period of consultation on the revised draft RTMSO lasting at least 12 months (see new subsection 536KE(2)).

1123. **When a determination revoking an MSO comes into operation:** Subsection (4) would provide that a determination varying or revoking an MSO would operate on the day specified in that determination.

1124. Subsection (5) would provide that a determination varying or revoking an MSO must not be earlier than the day on which the determination is made. The subsection provides very limited exceptions in which a determination can come into operation before that day:

- when a determination is made under subsection 536KQ(3), which would enable the FWC to make a determination varying an MSO to remove an ambiguity or uncertainty or to correct an error; and
- where the FWC is satisfied that there are exceptional circumstances.

1125. This is similar to existing subsection 165(2) of the FW Act, which provides for a determination that varies a modern award, other than in relation to modern award wages, to have retrospective effect in limited circumstances.

1126. Enabling retrospectivity in limited circumstances would help to ensure that MSOs are working as intended in the event of errors, ambiguity or exceptional circumstances. New section 536JU would ensure that any person who contravenes a term of an MSO due to a variation with retrospective effect is not liable to pay a pecuniary penalty in respect of past conduct.

1127. **MSOs operate until revoked:** Subsection (6) would provide that an MSO continues to operate until it is revoked.

1128. Subsection (7) would provide that the ‘relevant notice of intent’ for an RTMSO is the notice of intent published under subsection 536KB(1) at the same time as the draft of the RTMSO is made.

536JG When minimum standards guidelines cover a regulated worker or regulated business

1129. Subsection (1) would provide that an MSG ‘covers’ a regulated worker or a regulated business if the MSG is expressed to cover them.

1130. **Effect of other provisions of this Act, FWC orders or court orders on coverage:**

Subsection (2) would provide that an MSG would cover a regulated worker or regulated business if any of the following provides or has the effect that an MSG would cover them:

- a provision of the FW Act;
- an FWC order made under a provision of the FW Act;
- an order of the court.

1131. Subsection (3) would provide that despite subsections (1) and (2), an MSG would not cover a regulated worker or regulated business if any of the following provides or has the effect that an MSG would not cover them:

- a provision of the FW Act;
- an FWC order made under a provision of the FW Act;
- an order of the court.

1132. **MSGs that have ceased to operate:** Subsection (4) would provide that an MSG that has ceased to operate does not cover a regulated worker or regulated business.

536JH When minimum standards guidelines are in operation

1133. This section would provide when an MSG is in operation.

1134. **When MSGs come into operation:** Subsections (1) and (2) would provide that an MSG would come into operation on the day specified in the MSG, which must not be earlier than the day on which the MSG is made.

1135. **When a determination varying or revoking MSGs comes into operation:** Subsections (3) and (4) would provide that a determination revoking an MSG would operate on the day specified in that determination; which must not be earlier than the day on which the determination is made.

1136. **MSGs operate until revoked:** Subsection (5) would provide that an MSG would continue to operate until it is revoked.

Subdivision B—Coverage and operation of collective agreements

536JJ Contravening a collective agreement

1137. Section 536JJ would provide that a person must not contravene a term of a collective agreement.

1138. A note would explain this section would be a civil remedy provision under Part 4-1 of the FW Act. As such, civil remedies may be sought in relation to a contravention.

1139. Another note would explain that a person does not contravene a term of a collective agreement unless it applies to them and refer the reader to new section 536JK.

536JK The significance of a collective agreement applying to a person

1140. Subsection (1) would provide that a collective agreement would not impose obligations on a person, nor would a person contravene a term of a collective agreement, unless the agreement applies to the person (see new section 536JL).

1141. Subsection (2) would provide that a collective agreement would not give a person an entitlement unless it applies to them (see new section 536JL).

*536JL When a collective agreement **applies** to a person*

1142. **When a collective agreement applies to a regulated worker:** Subsection (1) would provide that a collective agreement ‘applies’ to a regulated worker where:

- it covers the regulated worker (see new section 536JM);
- is in operation (see new section 536JN); and
- no other provision of the FW Act has the effect that the collective agreement does not apply to the regulated worker.

1143. **When a collective agreement applies to a regulated business:** Subsection (2) would provide that a collective agreement ‘applies’ to a regulated business if:

- the collective agreement covers the regulated business (see new section 536JM);
- the collective agreement covers regulated workers (see new section 536JN);
- if the regulated business is a digital labour platform operator:

- a. it directly or indirectly engages, under services contracts, employee-like workers covered by the collective agreement who perform work through or by means of a digital labour platform it operates; or
- b. it arranges or facilitates services contracts through or by means of the digital labour platform it operates, under which employee-like workers covered by the collective agreement perform work;
- if the regulated business is a road transport business – the road transport business receives services of the regulated road transport contractors under a services contract; and
- no other provision of the FW Act provides, or has the effect, that the collective agreement does not apply to the regulated business.

1144. **Collective agreement applies in relation to services contracts:** Subsection (3) would provide that a reference in the FW Act to a collective agreement applying to a regulated worker is a reference to the collective agreement applying to the regulated worker in relation to a services contract. In other words, collective agreements would only apply in relation to services contracts (section 15H).

536JM When a collective agreement covers a regulated worker, a regulated business or an organisation

1145. Section 536JM would provide when a collective agreement ‘covers’ a regulated worker, a regulated business or an organisation.

1146. Subsection (1) would provide that a regulated worker, regulated business or an organisation would be covered by a collective agreement if the agreement is expressed to cover them.

1147. **Effect of other provisions of this Act, FWC orders or court orders on coverage:** Subsection (2) would provide that a collective agreement would also cover a regulated worker, regulated business or organisation if a provision of the FW Act, a FWC order made under the FW Act or court order has the effect that they would be covered.

1148. Subsection (3) would provide that, despite subsections (1) and (2), a collective agreement would not cover the regulated worker, the regulated business or the organisation if a provision of the FW Act, a FWC order made under the FW Act or court order has the effect that they would not be covered.

1149. **Collective agreements that have ceased to operate:** Subsection (4) would provide that a collective agreement would not cover a regulated worker, business or an organisation where it has ceased to operate.

536JN When a collective agreement is in operation

1150. Section 536JN would provide when a collective agreement is in operation.

1151. **When a collective agreement comes into operation:** Subsection (1) would provide that a collective agreement would come into operation on either the day it is registered, or on a later date if one is specified in the collective agreement.

1152. **When a collective agreement is terminated:** Subsection (2) would provide that a collective agreement would be terminated either at the end of the period of operation specified in the collective agreement (see paragraph 536MS(3)(a)), or on an earlier date if one is specified in a termination notice for the collective agreement (see new subsection 536MW(1)).

1153. **Collective agreements operate until terminated:** Subsection (3) would provide that a collective agreement would continue in operation until it is terminated.

1154. **Interaction with MSOs, etc.:** Subsection (4) would provide that a term of a collective agreement has no effect to the extent that it is detrimental to the regulated worker in any respect, when compared to an MSO or State or Territory law that applies to the regulated worker in relation to that matter (see further the requirements set out in new section 536MR). This would enable collective agreements to supplement an MSO or State or Territory law, but not override them.

Division 3—Exclusion of certain States and Territory laws

536JP Exclusion of certain State and Territory laws

1155. This section would exclude the operation of certain State and Territory laws that cover similar kinds of matters that Chapter 3A would cover. This broadly replicates sections 7 and 10 of the IC Act but relates to regulated workers and regulated businesses instead of parties to a services contract.

1156. The reason for broadly replicating parts of the IC Act in a new division (rather than amending Part 1-3 of the FW Act) is to ensure the same kinds of laws covered by the IC Act exclusion would be excluded in relation to parties covered by Chapter 3A, and therefore support consistency across the statute book.

1157. The intention is to ensure that no new State or Territory schemes would operate concurrently with the Commonwealth scheme without the power for the Commonwealth to prevent (or allow) this. This seeks to ensure the full effectiveness of the scheme.

1158. Subsection (1) would provide that the rights, entitlements, obligations and liabilities of a regulated worker or a regulated business are not affected by a law of a State or Territory to the extent that the law would otherwise do one or more of the following:

- take, deem or treat a regulated business or regulated worker to be an employee or an employer for the purposes of a law relating to one or more workplace relations matters (defined in new section 536JQ);
- confer or impose rights, entitlements, obligations or liabilities on regulated business or regulated worker in relation to matters that, in an employment relationship, would be workplace relations matters (defined in new section 536JQ);
- expressly provide for a court, commission or tribunal to do any of the following in relation to a services contract on an unfairness ground (defined in new section 536JR):

- a. make an order or determination setting aside, voiding or making all or part of the services contract unenforceable;
- b. make an order or determination amending or varying all or part of the services contract.

1159. Notes to subsection (1) would refer the reader to the fact that the meanings of ‘workplace relations matter’ and ‘unfairness ground’ are set out in sections 536JQ and 536JR respectively.

1160. Subsection (2) would provide for the exclusion of additional State and Territory laws by regulation. Specifically, it would specify that rights, entitlements, obligations and liabilities of a regulated business or a regulated worker are not affected by a State or Territory law that is specified in regulations made for the purposes of this subsection. This would allow the Commonwealth to provide that particular laws (or parts of those laws) are excluded from operation even where other parts of Division 3 expressly preserve their operation, as made clear by subsection 536JP(4).

1161. Subsection (3) would provide certain exceptions to the rule in subsection (1). A State or Territory law is not excluded in relation to:

- the extent that it deals with outworkers;
- Chapter 6 of the *Industrial Relations Act 1996* (NSW) and related provisions; and
- the *Owner Drivers and Forestry Contractors Act 2005* (Vic).

1162. Paragraph (3)(c) would also enable the regulations to specify a law of a State or Territory (or part of those laws) that would be exempt from the exclusion in subsection 536JP(1), and as such, would continue to have effect. It is expected (but subject to a future decision of government) that initially the same laws that are presently exempted by the *Independent Contractors Regulation 2016* would also be exempted by regulations made under this subsection.

*536JQ What are **workplace relations matters***

1163. Section 536JQ would provide a definition of ‘workplace relations matters’. This definition would be critical for the operation of the exclusion of State and Territory laws in new subsection 536JP(1) and is also relevant to the new framework for orders in relation to unfair contract terms of services contracts (Div 3 of Part 3A-5). It would provide a list of what matters would be included and excluded as a workplace relations matter, and broadly replicates section 8 of the IC Act.

1164. New paragraph (1)(i) would allow the regulations to specify further matters that would be ‘workplace relations matters’.

1165. New paragraph (2)(m) would allow the regulations to specify further matters that would not be ‘workplace relations matters’.

*536JR What is an **unfairness ground***

1166. Section 536JR would provide a definition of ‘unfairness ground’. It would list of what matters would be an unfairness ground, and broadly replicates section 9 of the IC Act.

This definition would be critical for the operation of the exclusion of State and Territory laws in paragraph 536JP(1)(c).

536JS Interaction of minimum standards orders with State and Territory laws

1167. Subsection (1) would provide that an MSO would prevail over a State or Territory law to the extent of any inconsistency.

1168. This is intended to address the interaction between MSOs and State and Territory laws that are not excluded from operating by subsection 536JP(1), as these laws would otherwise have concurrent operation.

1169. Such a law (or regulations, rules or other instruments (however described) made under that law) would not operate, in relation to the parties covered by the MSO, to the extent that it prescribes rights and obligations that are inconsistent with the rights and obligations set out in the MSO.

1170. Subsection (2) would provide that, despite subsection 536JS(1), an MSO is subject to:

- any State or Territory laws prescribed by the regulations;
- any State or Territory law that provides for rights or remedies by reference to a State or Territory law prescribed by the regulations for the purposes of paragraph (2)(a); and
- regulations, rules or other instruments (however described) made pursuant to or for the purposes of these laws.

1171. An MSO could not diminish, but could supplement, rights and obligations under these laws.

*536JT Authorisation of conduct for the purposes of the **Competition and Consumer Act 2010***

1172. This section would authorise certain conduct for the purposes of subsection 51(1) of the *Competition and Consumer Act 2010* (CCA) and the Competition Code that is operative in each state and territory within the meaning of section 150A of the CCA.

1173. Subsection 51(1) of the CCA provides that an Act can specify, and specifically authorise, conduct that would otherwise contravene Part IV of the CCA. Such conduct must be disregarded in deciding whether a person has contravened Part IV, which relates to restrictive trade practices and prohibits certain conduct.

1174. Under subsections (1), (2) and (3), the following conduct would be specified in and specifically authorised for the purposes of subsection 51(1) of the CCA and Competition Code:

- anything done in accordance with an MSO, MSG or a collective agreement by a person or entity covered by the order or agreement;
- making a collective agreement by a person or entity;
- anything done by a person or entity in preparation for, or incidental to, making, or applying for registration of, a collective agreement. This includes conduct involved in amending or terminating a collective agreement.

1175. The intention of authorising this conduct would be to enable people or entities to make and comply with collective agreements and comply with MSOs or guidelines in accordance with Chapter 3A without breaching the CCA or Competition Code.

1176. However, subsection 536JT(4) would provide that conduct referred to in subsections (1), (2) and (3) would not be specified in or specifically authorised where the conduct is:

- making a contract or arrangement, or arriving at an understanding, that contravenes or would contravene paragraphs 45AD(3)(a) or 45AD(3)(b) of the CCA or the Competition Code; or
- boycott conduct within the meaning of subsection 87AA(2) of the CCA or the Competition Code.

1177. This conduct is not authorised because it is not considered necessary to do so to give effect to the arrangements in Chapter 3A and, in relation to boycott conduct, could be inconsistent with the consent-based nature of the collective agreement provisions.

1178. Collective agreement would take the meaning set out in new section 15B, that is, an employee-like worker collective agreement or a road transport collective agreement.

Division 4—Other general matters

536JU Special rules relating to retrospective variations of minimum standards orders

1179. Subsection (1) would provide that this section applies if a determination is made that varies an MSO with retrospective effect. A note would refer the reader to subsection 536JF(5), which sets out when a determination may commence retrospectively.

1180. **No creation of liability to pay pecuniary penalty for past conduct:** Subsection (2) would provide that a court must not order a person to pay a pecuniary penalty under Division 2 of Part 4-1 in relation to conduct that contravenes a term of the order if:

- the person engaged in conduct before the determination was made; and
- but for the retrospective effect of the determination, the conduct would not have contravened a term of the minimum standards order.

1181. A note to this subsection would clarify that subsection (2) does not affect the powers of a court to make other kinds of orders under Division 2 of Part 4-1.

Part 3A-2—Minimum standards for regulated workers

1182. This Part would insert a new and novel framework which empowers the FWC to set minimum standards for certain classes of independent contractors.

1183. Part 3A-2 would deal with two specific classes of independent contractors eligible for minimum standards. While the rationale for minimum standards for employee-like workers performing digital platform work and road transport contractors may differ, the way in which the FWC should approach setting standards for individuals performing work under services contracts is essentially the same. For this reason, Part 3A-2 would

establish a single framework for standard-setting, with some important departures for RTMSOs in respect of the process of consultation and prohibited content, owing to the specific characteristics of the industry.

Division 1—Introduction

536JV Guide to this Part

1184. This section would provide a Guide to Part 3A-2, which sets out the minimum standards objective and empowers the FWC to make MSOs and MSGs for regulated workers.

536JW Meaning of employee and employer

1185. This section would provide that in Part 3A-2 the terms ‘employee’ and ‘employer’ have their ordinary meanings.

Division 2—The minimum standards objective

536JX The minimum standards objective

1186. This section would set out the minimum standards objective and provide for when the minimum standards objective applies.

1187. The minimum standards objective would require the FWC to take into account the need for an appropriate safety net of minimum standards for regulated workers, having regard for the need for standards:

- to be clear, simple, fair and relevant;
- to recognise the skills and experiences of regulated workers and the value of the work they perform, as well as their views and preferences about their working arrangements;
- that do not change the form of engagement of regulated workers from independent contractor to employee;
- that do not preference a particular business model or working arrangement;
- to be tailored to the relevant industry, occupation, sector, business model, the type of work, working arrangements, and regulated worker preferences.
- that deal with minimum rates of pay:
 - a. that take into account all necessary costs for regulated workers covered by an MSO or MSG;
 - b. to ensure that workers covered by an MSO or MSG receive pay comparable to the pay and conditions that employees performing comparable work would receive;
 - c. to not change the form or engagement of regulated workers;
- to avoid unreasonable adverse impacts upon:
 - a. industry participants, including on sustainable competition and administrative and compliance costs;

- b. business viability, innovation and productivity;
- c. the national economy; and
- to consider other orders or instruments (including but not limited to MSOs and MSGs) made under new Chapter 3A.

1188. The minimum standards objective would apply to the performance and exercise of the FWC's functions and powers under Part 3A-2.

1189. When performing a function or power in relation to the road transport industry under Part 3A-2, new section 40D would also require the FWC to take into account the road transport objective.

Division 3—Minimum standards orders

Subdivision A—General matters

536JY Minimum standards orders

1190. This section would allow the FWC, on its own initiative or on an application, to make an MSO setting standards for employee-like workers or regulated road transport contractors.

1191. An MSO for employee-like workers would be an 'employee-like minimum standards order' (ELMSO).

1192. An MSO for regulated road transport contractors would be a 'road transport minimum standards order' (RTMSO).

1193. A note would refer the reader to the fact that an RTMSO can only be made by the Expert Panel for the road transport industry (cross-referencing new subsection 617(10B)).

536JZ Applications for minimum standards orders

1194. This section would set out the process for how an application for an MSO can be made to the FWC.

1195. Subsection (1) would provide that any of the following may apply to the FWC for the making of an MSO:

- an organisation entitled to represent the industrial interests of one or more regulated workers that would be covered by the MSO;
- an organisation entitled to represent the industrial interests of one or more regulated businesses that would be covered by the MSO;
- a regulated business that would be covered by the MSO;
- the Minister.

1196. 'Organisation' is defined in section 12 of the FW Act as an organisation registered under the RO Act. As such, only registered organisations would be able to make an application. This is consistent with applications for the making or variation of modern awards.

1197. A note would explain that an Expert Panel for the road transport industry can hear more than one application under the FW Act together (cross-referencing subsection 582(4)). An Expert Panel would be able to hear an application for an RTMSO together with another application that relates to the road transport industry.

1198. **Matters to be specified in an application:** Subsections (2) and (3) would create a requirement that an application under subsection (1) must:

- specify whether an ELMSO or a RTMSO is being applied for; and
- specify the class of regulated worker to be covered by the MSO.

1199. Subsection (4) would provide that this class could be described by reference to a particular industry or sector, or part of an industry or sector, or particular kinds of work.

1200. These application requirements would be in addition to any application requirements specified in the procedural rules (see section 609 of the FW Act).

Subdivision B—Initial matter to be considered for employee-like worker minimum standards orders

536K Initial matter to be considered for employee-like worker minimum standards orders

1201. This section would set out the initial matter the FWC must consider before making or varying an ELMSO under new section 536KG.

1202. Subsection (1) would provide this section applies if an application is made for an ELMSO or for a variation of an ELMSO under subsection 536JZ(1), or if the FWC is considering making or varying an employee-like worker MSO under new section 536KP.

1203. Subsection (2) would require the FWC be satisfied that, overall, the class of people to be covered by the MSO are employee-like workers. If the FWC is not satisfied, subsection (3) would require it to decide to refuse to consider the application or not make the order.

1204. The FWC would be required to generally consider the class of people, rather than enquiring into the individual circumstances of all of the persons that fall within the class.

1205. It is intended that this would act as a “gateway” so that whether workers within a class detailed in the application meet the criteria set out in paragraph 15P(1)(d) is a preliminary consideration for the FWC before it considers the application further. This reflects the scope of the jurisdiction that is limited to employee-like workers rather than independent contractors more generally.

Subdivision C—Matters relating to road transport minimum standards orders

536KA Particular matters FWC must take into account in making a decision on a road transport minimum standards order

1206. This section would set out the particular matters the FWC must take into account before making a decision to make or vary a RTMSO.

1207. Subsection (1) would provide that this section applies where an application is made for a RTMSO under subsection 536JZ(1), variation of a RTMSO under section 536KP or the FWC is considering making or varying a RTMSO on its own initiative.

1208. Subsection (2) would require the FWC to not make an RTMSO unless:

- there has been genuine engagement with the parties to be covered;
- the RTAG has been consulted; and
- the consultation process set out in Subdivision D has been followed;

1209. The FWC must also have regard to the commercial realities of the road transport industry; and must be satisfied that making the RTMSO will not unduly affect the viability and competitiveness of owner drivers or similar persons.

Subdivision D—Consultation process for road transport minimum standards orders

536KB FWC to prepare and publish a draft of a road transport minimum standards order

1210. Subsection (1) would provide that before the FWC makes a RTMSO, it must publish a notice stating that it proposes to make it and publish a draft of the proposed RTMSO. Subsection (2) would require the notice of intent and draft RTMSO be published on the FWC website and by any other means the FWC considers appropriate.

1211. This requirement is limited to the making of RTMSOs and would ensure that before a RTMSO is made, the FWC has adequately consulted affected parties on the implications of the rights and obligations put forward in a draft RTMSO. This would also assist the FWC in its decision-making in accordance with the minimum standards objective (see new section 536JX), road transport objective (see new section 40D) and additional matters listed in new section 536KA.

536KC Affected persons and bodies to have a reasonable opportunity to make and comment on a draft road transport minimum standards order

1212. Subsection (1) would provide that, during the period of consultation, the FWC must ensure affected persons have a reasonable opportunity to make written submissions to it in relation to a draft RTMSO published under new section 536KB.

1213. Subsections (2) and (4) would require the FWC to publish submissions received on its website and by any other means it considers appropriate.

1214. Subsection (3) would provide the FWC does not have to publish information in submissions that is confidential or commercially sensitive. Instead, the FWC may publish a summary of the information which contains sufficient detail to allow a reasonable understanding of the information without disclosing anything that is confidential or commercially sensitive. If the FWC considers it not practicable to prepare such a summary, the FWC may publish a statement that confidential or commercially sensitive information in the submission has not been published. As for submissions, subsection (4) would require the FWC to publish this material on its website and by any other means it considers appropriate. Subsection (5) would provide

that a reference in the FW Act to a submission under this section includes a reference to a summary or statement.

1215. Subsection (6) would provide that an affected person for the purposes of subsection (1) is a person likely to be affected by the making of an RTMSO based on the draft RTMSO. An affected person would include, but not be limited to, a regulated road transport contractor that would be covered by the RTMSO, a road transport business that would be covered by the RTMSO, or an organisation entitled to represent the industrial interests of such a regulated road transport contractor or road transport business. It is intended this section would require the FWC to give people an opportunity to be involved in the process, noting it is required under existing section 577 to perform its functions in a manner that is open and transparent. This subsection would not prevent any other interested person or association (including peak councils) from making submissions during this process.

536KD Hearings in relation to draft order

1216. This provision would provide that the FWC may hold a hearing in relation to a draft road transport MSO if it chooses.

536KE Finalising draft order

1217. This section would provide that the FWC may make any changes it thinks appropriate to a draft RTMSO. If the changes are significant, the FWC must do the following:

- decide not to make the RTMSO based on the draft;
- publish a subsequent notice of intent (as per new section 536KB) in relation to the revised RTMSO and republish the revised draft;
- follow the same process set out in section 536KC – with the period of consultation to be no shorter than 12 months starting from when the subsequent notice of intent and revised draft are published.

1218. This provision would require the FWC to afford affected persons another meaningful opportunity (in addition to the initial consultation that would be required under section 536KC) to consider the revised draft order and how it may affect them, and ensure the FWC takes these contemporary views on a draft RTMSO as it is meant to be made into account in the making of a final order, if any.

536KF Decision not to make order based on the draft

1219. This provision would provide that the FWC can decide that no RTMSO is to be made based on the draft. If it does, it must publish a notice of this decision on its website and any other means it considers appropriate. In this way, there is nothing compelling the FWC to make a RTMSO at the completion of the mandatory consultation process.

Subdivision E—Decisions on minimum standards orders

536KG Decisions on applications for minimum standards orders

1220. Subsection (1) would list the types of decisions the FWC could make about an application for an MSO. The FWC may decide to:

- refuse to consider the application
- make an MSO;
- not make an MSO; or
- if it considers it appropriate to do so, instead make an MSG under section 536KR.

1221. Without limiting the FWC's power to refuse an application, subsection (2) would provide that the FWC would be empowered (but would not be required) to refuse to consider an application if it would not be consistent with a direction of the President under new section 582(4D). New section 582(4D) would be inserted by item 279, and would require the President to give a direction as to how the FWC would prioritise its work under Part 3A-2.

536KH Terms that must be included in an employee-like worker minimum standards order

1222. **Terms relating to coverage:** Subsection (1) would provide that an ELMSO must have terms that set out their coverage which set out:

- the digital platform work covered by the ELMSO;
- the digital labour platform operator or operators covered by the ELMSO; and
- the employee-like workers covered by the ELMSO.

1223. Subsection (2) would provide that an ELMSO must be expressed to cover one or more specified digital labour platform operators, and specified employee-like workers with the requisite link to a digital platform operator. These being employee-like workers who:

- are engaged through or by means of a digital labour platform operated by a digital labour platform operator covered by the ELMSO; or
- perform work under a contract arranged or facilitated through or by means of a digital labour platform operated by digital labour platform operator covered by the ELMSO.

1224. Subsection (3) would provide that an ELMSO must specify which digital labour platform operator or operators is/are primarily responsible for providing the entitlements of employee-like workers.

1225. Subsection (4) would provide that a digital labour platform operator may be specified by name or by inclusion in a specified class/classes. Employee-like workers must be specified by inclusion in a specified class/classes. Subsection (5) would provide that the class may be described by reference to a particular industry or sector or part thereof, or by reference to particular kinds of work.

536KJ Terms that must be included in a road transport minimum standards order

1226. **Terms relating to coverage:** Subsection (1) would provide that RTMSOs must have terms that set out their coverage. An RTMSO must include terms which set out:

- the work in the road transport industry covered by the RTMSO;

- the regulated road transport contractors covered by the RTMSO; and
- the road transport businesses covered by the RTMSO.

1227. Subsection (2) would provide that an RTMSO must be expressed to cover specified road transport businesses and specified regulated road transport contractors.

1228. Subsection (3) would provide that a road transport business may be specified by name or by inclusion in a specified class or classes. Regulated road transport contractors must be specified by inclusion in a specified class or classes. Subsection (4) would provide that the class may be described by reference to a particular industry or sector or part thereof, or by reference to particular kinds of work.

536KK Terms about setting disputes must be included in a minimum standards order

1229. This section would provide that an MSO must include a term setting out a procedure for settling disputes about any matter arising under the order.

1230. Item 302 of Part 16 would make corresponding consequential amendments to section 738 of the FW Act. Section 738 provides that Division 2 of Part 6-2 of the FW Act (which relates to dealing with disputes) applies where certain instruments include terms for dealing with disputes. This would have the effect that Division 2 of Part 6-2 would apply if an MSO includes a term that provides a procedure for the FWC to deal with a dispute.

536KL Terms that may be included in a minimum standards order

1231. This section would provide a non-exhaustive list of matters that may be included in an MSO, which would be:

- payment terms;
- deductions;
- working time;
- record-keeping;
- insurance;
- consultation;
- representation;
- delegates' rights; and
- cost recovery

1232. Other matters not listed above would be able to be included in an MSO, provided they are not terms that must not be in an MSO (refer to new section 536KM and 536KN). This may include terms which require human review of automated decisions made by the digital labour platform.

536KM Terms that must not be included in a minimum standards order

1233. Subsection (1) would set out matters which MSOs cannot include terms about. These would be:

- overtime rates;
- rostering arrangements;
- matters primarily of a commercial nature that do not affect the terms and conditions of engagement of regulated workers covered by the MSO;
- terms that would change the form of the engagement or the status of regulated workers covered by the MSO. For example, an MSO could not include a term that deems a regulated worker to be an employee. An MSO could also not include terms that are so incompatible with the nature of independent contracting that to comply with them, would cause the regulated worker to be treated as if they were an employee;
- a matter relating to work health and safety that is otherwise comprehensively dealt with by a law of the Commonwealth, a State or a Territory; and
- a matter prescribed by the regulations, or belonging to a class of matter prescribed by the regulations.

1234. Subsection (3) would provide that for the purposes of paragraph (1)(e), the regulations would be able to

- specify that a particular matter is, or is not, dealt with comprehensively by another law; and
- prescribe one or more laws to which paragraph (1)(e) does not apply.

536KN Further terms that must not be included in a road transport minimum standards order

1235. This section would set out additional matters which RTMSOs cannot include terms about. These would be:

- matters relating to road transport that is otherwise comprehensively dealt with by the Heavy Vehicle National Law (as set out in the schedule to the *Heavy Vehicle National Law Act 2012* (Qld)) or another law of the Commonwealth, a State or a Territory;
- matters prescribed by the regulations.

1236. Subsection (2) would provide that for the purposes of paragraph (1)(b), the regulations would be able to:

- specify that a particular matter is, or is not, dealt with comprehensively by the Heavy Vehicle National Law or another law; and
- prescribe one or more laws to which subparagraph (1)(a)(ii) does not apply.

536KP Application to vary or revoke minimum standards orders

1237. This section would set out that the following may apply to the FWC for variation or revocation of an MSO:

- an organisation that is entitled to represent the industrial interests of one or more regulated workers that is or would be covered by the MSO;
- an organisation that is entitled to represent the industrial interests of one or more regulated businesses that is or would be covered by the MSO;
- a regulated business that is or would to be covered by the MSO; and
- the Minister.

1238. 'Organisation' is defined in section 12 of the FW Act as an organisation registered under the RO Act. As such, only registered organisations would be able to make an application. This is consistent with applications for the making or variation of modern awards.

536KQ FWC may vary or revoke minimum standards orders if consistent with the minimum standards objective

1239. Subsection (1) would allow the FWC to make a determination to vary or revoke an MSO if the FWC is satisfied that doing so would be consistent with the minimum standards objective (see new section 536JX). A note would indicate that for RTMSOs, the FWC would also need to take into account the road transport objective (see new section 40D).

1240. Subsection (2) would provide that in making a determination to vary an MSO, the FWC would not need to give effect to all elements of the variation sought an application under new section 536KP. For example, an application may seek for an MSO to be varied in such a way that would cover people who would not meet the definition of 'regulated worker', but also seek that additional terms are included in the MSO. The FWC could refuse to extend the coverage but make a determination to vary the MSO to include the additional terms if it considers this would be consistent with the minimum standards objective.

1241. Subsection (2) is intended to complement (and apply in addition to) section 599 of the FW Act, which provides that the FWC is not required to make a decision in relation to an application in the terms applied for.

1242. Subsection (3) would provide that the FWC can make a determination varying an MSO to remove an ambiguity or uncertainty or to correct an error.

1243. Subsection (4) would provide that the FWC can make a determination to vary or revoke an MSO on its own initiative or on application by a party under new section 536KP.

Division 4—Minimum standards guidelines

536KR Minimum standards guidelines

1244. Subsection (1) would allow the FWC to make MSGs for regulated workers performing work under a services contract (refer to new sections 15G and 15H). MSGs would set non-binding minimum standards.

1245. Subsections (2) and (3) would provide that MSGs for employee-like workers would be called ‘employee-like worker guidelines’ (ELGs) and MSGs for regulated road transport contractors would be called ‘road transport guidelines’ (RTGs), respectively.

1246. Subsection (4) would provide the FWC may make MSGs on its own initiative or on application by a relevant party under new section 536KS.

536KS Applications for minimum standards guidelines

1247. Subsection (1) would provide that the following may apply to the FWC for the making of MSGs:

- an organisation that is entitled to represent the industrial interests of one or more regulated workers to be covered by the MSGs;
- an organisation that is entitled to represent the industrial interests of one or more regulated businesses to be covered by the MSGs;
- a regulated business to be covered by the MSGs; and
- the Minister.

1248. ‘Organisation’ is defined in section 12 of the FW Act as an organisation registered under the RO Act. As such, only registered organisations would be able to make an application. This is consistent with applications for the making or variation of modern awards.

1249. **Matters to be specified in an application:** Subsection (2) would require that an application for MSGs must specify the class of regulated workers to be covered by the MSGs.

1250. Subsection (3) would provide that for the purposes of subsection (2) (but without limiting the way in which the class can be described), the class may be described by reference to a particular industry or sector, or part of an industry or sector, or particular kinds of work. This would mirror the equivalent MSO provisions (refer to section 536JZ).

1251. These application requirements would be in addition to any application requirements specified in the procedural rules (see section 609 of the FW Act)

536KT Initial matter to be considered for employee-like worker minimum standards guidelines

1252. Subsection (1) would provide that the FWC must consider a certain initial matter before making or varying an ELG on its own initiative or on application. This mirrors the provision under section 536K for ELMSOs.

1253. The FWC must be satisfied under new subsection (2) that, on the whole, the class of people to be covered by the ELGs are employee-like workers. It is intended that the FWC would be required to consider the class of people in general, rather than enquiring into the individual circumstances of all the persons that fall within the class.

1254. If it is not satisfied, subsection (3) would require the FWC to refuse to consider the application (if an application was made) or not make or vary the ELGs (if the FWC was considering making or varying the ELGs on its own initiative). It is intended that this would act as a “gateway” so that whether workers within a class detailed in the application meet the criteria set out in paragraph 15P(1)(e) is a preliminary consideration for the FWC before it considers the matter further.

536KU Decision on applications for minimum standards guidelines

1255. Subsection (1) would set out the decisions the FWC can make if an application for MSGs is made to it under subsection 536KS(1). The FWC may decide to:

- refuse to consider the application;
- make the MSGs; or
- not make the MSGs.

1256. Without limiting the FWC’s power to refuse an application, subsection (2) would provide that the FWC would be empowered (but would not be required) to refuse to consider an application if it would not be consistent with a direction of the President regarding prioritisation under new section 582(4D). New section 582(4D) would be inserted by item 279, and would require the President to give a direction as to how the FWC would prioritise its work under Part 3A-2.

536KV Minimum standards guidelines not to be made if a minimum standards order is in operation

1257. This section would provide that where an MSO is in operation, the FWC must not make MSGs that cover the same regulated workers and the same regulated businesses in relation to the same matters as the MSO. This is because the intention is that, since MSOs are binding, they would override MSGs.

536KW Terms that must be included in minimum standards guidelines

1258. This section would provide that:

- RTGs must include terms about the same matters RTMSOs must include terms on (see section 536KJ); and
- ELGs must include terms about the same matters that ELMSOs must include terms on (see section 536KH).

536KX Terms that may be included in minimum standards guidelines

1259. This section would provide that MSGs may include terms about any of the same matters as permitted to be included in MSOs (as would be set out in new sections 536KJ and 536KL).

536KY Terms that must not be included in minimum standards guidelines

1260. This section would provide that:

- RTGs must not: include terms about any matters not permitted to be included in RTMSOs (see sections 536KM and 536KN); and
- ELGs must not include terms about any matters not permitted to be included in ELMSOs (see section 536KM).

536KZ FWC may vary or revoke minimum standards guidelines if consistent with the minimum standards objective and the road transport objective

1261. Subsection (1) would provide that the FWC may make a determination to vary or revoke MSGs if it is satisfied that doing so would be consistent with the minimum standards objective and, if applicable, the road transport objective. New section 40D would set out when the road transport objective would be applicable.

1262. Subsection (2) would provide that in making a determination to vary MSGs, the FWC would not need to give effect to all elements of the variation sought an application under new section 536L. For example, an application could seek for MSGs to be varied in such a way that they would cover people who would not meet the definition of ‘regulated worker’, but also seek that additional terms are included in the MSGs. The FWC could refuse to extend the coverage but make a determination to vary the MSGs to include the additional terms if it considers this would be consistent with the minimum standards objective.

1263. Subsection (2) is intended to complement (and apply in addition to) section 599 of the FW Act, which provides that the FWC is not required to make a decision in relation to an application in the terms apply for.

1264. Subsection (3) would allow the FWC to make a determination varying the minimum standards guidelines to remove an ambiguity or uncertainty or correct an error.

1265. Subsection (4) would provide that the FWC could vary or revoke MSGs on its own initiative or on application under section 536L.

1266. Subsection (5) would require that where the FWC makes an MSO that covers the same regulated workers and the same regulated businesses in relation to the same matters as MSGs, the MSGs must be revoked from the day which the MSO comes into operation. This would prevent both being in force at the same time, which could create confusion. The intention is for MSOs to effectively replace relevant MSGs.

1267. Subsection (6) would require that where the FWC makes an MSO that covers the some or all of the same regulated workers and the same regulated businesses in relation to some or all of the same matters as are in MSGs, the FWC must vary the MSGs so that it does not cover the same regulated workers, regulated businesses or matters. The intention of this subsection is to address situations where the contents and coverage of MSGs and an MSO are not identical but have some overlap. The FWC would essentially be required to vary the MSGs to remove this overlap.

536L Applications to vary or revoke minimum standards guidelines

1268. This section would set out that the following may apply to the FWC for variation or revocation of MSGs:

- an organisation that is entitled to represent the industrial interests of one or more regulated workers that is or would be covered by the MSGs;
- an organisation that is entitled to represent the industrial interests of one or more regulated businesses that is or would be covered by the MSGs;
- a regulated business that is or would to be covered by the MSGs; and
- the Minister.

1269. ‘Organisation’ is defined in section 12 of the FW Act as an organisation registered under the RO Act. As such, only registered organisations would be able to make an application. This is broadly consistent with applications for the making or variation of modern awards.

Division 5—Merits review of minimum standards orders

536LA Regulations may be made for internal merits review of road transport minimum standards orders

1270. The purpose of this section would be to provide for a mechanism, subject to regulations being made, to allow for the internal review of a FWC decision to make or vary an RTMSO in certain circumstances. This would reflect the fact that RTMSOs when made by the FWC are binding on the parties, and can only be varied or revoked by application consistent with the requirements of Part 3A-2. The alternative would be to apply to a court for injunctive relief, which would be unnecessarily confrontational and potentially longer and more expensive.

1271. Taking a future-focused approach, there may be circumstances where a particular party considers that the FWC has erred in its decision-making and, subject to the parameters set by regulation, apply for a reconsideration, confirmation, revocation, variation or set aside/substitution of a decision before it comes into, or soon after comes into, force.

1272. As this is a novel jurisdiction and there is no precedent for internal review for the decisions of an Expert Panel or Full Bench under the FW Act, it is to be determined whether internal review is necessary, and if so, what shape it should take. Enabling regulations to provide for this would mean that any internal review mechanism, if established, would be fit for purpose and responsive to emerging issues.

1273. Subsection (1) would provide that the regulations may empower the FWC to review the decision to make or vary an RTMSO.

1274. Subsection (2) would provide that without limiting subsection (1), the regulations could empower the FWC to: reconsider, confirm, revoke or vary the decision; or set the decision aside and substitute a new decision.

1275. Subsection (3) would provide that without limiting subsection (1), the regulations could provide that a reconsideration, confirmation, revocation or variation of a decision or setting aside of a decision and substitution of a new decision may have the effect that:

- the RTMSO is suspended from operating for a definite or indefinite period;
- the RTMSO is revoked;
- that the day the RTMSO commences is varied;
- that the operation of one or more of the terms of the RTMSO is suspended for a definite or indefinite period.

1276. Subsection (4) would provide that without limiting subsection (1), the regulations could provide for the following in respect of a decision to make or vary and RTMSO:

- the circumstances in which an application for review of the decision can be made;
- the people who may apply for review of the decision;
- timeframes for applications and decisions on applications for review the decision;
- the enforcement of decisions made on review;
- the circumstances in which the decision mentioned in subsection (2) may have an effect set out in subsection (3);
- matters consequential on decision made on review; and
- how the FWC is constituted for the review – for example, the regulations could provide that the internal review must be performed by an Expert Panel that includes different members to those who made the original decision to ensure an independent review process.

1277. The regulations would provide for internal review only (rather than external review) to promote consistency with the role and structure of the FWC and because of the unique expertise that the FWC would have compared to another review body.

Part 3A-3—Unfair deactivation or unfair termination of regulated workers

1278. Part 3A-3 would be about:

- unfair deactivation from digital labour platforms of employee-like workers; and
- unfair termination of the services contracts of regulated road transport contractors.

1279. This Part would set out:

- when a person is protected from unfair deactivation or unfair termination;
- when a person is taken to have been deactivated or terminated, and the factors the FWC must consider in deciding whether a deactivation or termination is harsh;
- the remedies the FWC may grant for unfair deactivation or unfair termination; and
- the procedural matters of an unfair deactivation or unfair termination application.

Division 1—Introduction

536LB Guide to this Part

1280. New section 536LB would provide a guide to Part 3A-3.

536LC Object of this Part

1281. Subsection (1) would set out the objects of Part 3A-3. The principal aim of this framework would be to create new protections for employee-like workers and road transport contractors against unfair deactivation and unfair termination respectively, while balancing the needs of the regulated businesses and regulated workers.

1282. The object of Part 3A-3 would also be to establish quick, flexible and informal procedures for the resolution of unfair deactivation and termination claims that address the needs of both the regulated businesses and regulated workers. In addition to the rules set out in Part 3A-3, the rules of natural justice would apply. Paragraph (1)(c) would highlight that reactivation or reinstatement would be the primary remedy for unfair deactivation or termination respectively.

1283. Subsection (2) would provide that the procedures and remedies referred to in subsection (1), and the manner of deciding on and working out such remedies, are intended to ensure that a ‘fair go all round’ is provided to both regulated businesses and regulated workers. A note would refer to the fact that the expression ‘fair go all round’ was used by Sheldon J in *re Loty and Holloway v Australian Workers’ Union* [1971] AR (NSW) 95. This is the same test used in relation to Part 3A-5 (Unfair contract terms of services contracts).

Division 2—Protection from unfair deactivation or unfair termination

536LD When a person is protected from unfair deactivation

1284. Section 536LD would outline when a person is protected from unfair deactivation. This expression is subsequently used in section 536LP as a condition that is necessary before the FWC may order a remedy for unfair deactivation, and section 538LW, as a matter which the FWC must consider before considering the merits of an application for a remedy for unfair deactivation.

1285. A person would be ‘protected from unfair deactivation’ at a time if:

- the person is an employee-like worker (see section 15P);
- the person:
 - a. performs work through or by the means of a digital labour platform operator (see section 15M); or
 - b. perform work under a services contract arranged or facilitated by a digital labour platform (see sections 15H and 15L) operated by a digital labour platform operator; and
- the person had been performing digital platform work through or by means of that digital labour platform (see sections 15N and 15L), or under a contract, or a series

of contracts, arranged or facilitated through or by means of the digital labour platform, on a regular basis for a period of at least six months.

1286. Definitions of ‘services contract’, ‘employee-like worker’, ‘digital labour platform’, ‘digital labour platform operator’ and ‘digital platform work’ would be set out in new Division 3A of Part 1-2.

536LE When a person is protected from unfair termination

1287. Section 536LE would outline when a person is protected from unfair termination. This expression is subsequently used in section 536LR as a condition that is necessary before the FWC may order a new contract or compensation as a remedy for unfair termination, and section 536LW as a matter which the FWC must consider before considering the merits of an application for a remedy for unfair termination.

1288. A person would be ‘protected from unfair termination’ at a time if:

- the person is a regulated road transport contractor (see section 15Q);
- a road transport business receives services under a services contract under which the person performs work in the road transport industry (see sections 15H, 15R and 15S); and
- the person has been performing work in the road transport industry under a services contract for a road transport business for at least 12 months.

1289. Definitions of ‘services contract’ ‘regulated road transport contractor’, ‘road transport business’ and ‘road transport industry’ would be set out new Division 3A of Part 1-2.

Division 3—What is an unfair deactivation or unfair termination

Subdivision A—What is an unfair deactivation

536LF What is an unfair deactivation?

1290. New section 536LF would set out when a person has been unfairly deactivated, being when the FWC is satisfied that:

- the person has been deactivated from a digital labour platform (see section 536LG);
- the deactivation was unfair (see section 536LH); and
- the deactivation was not consistent with the Digital Labour Platform Deactivation Code (being the code made by the Minister under section 536LJ).

*536LG Meaning of **deactivated***

1291. Section 536LG would set out the circumstances in which a person is taken to be ‘deactivated’ from a digital labour platform. A person would be deactivated if:

- the person performed digital platform work through or by means of the digital labour platform (see sections 15L and 15N);
- the digital labour platform operator (see section 15M) modifies, suspends, or terminates the person’s access to the digital labour platform; and

- the person is no longer able to perform work under an existing or prospective services contract (see section 15H), or their ability to do so is significantly altered that in effect the person is no longer able to perform such work.

536LH Criteria for considering whether a deactivation was unfair etc.

1292. Subsection (1) would be central to the unfair deactivation provisions as it sets out the factors the FWC must take into account when considering whether a person's deactivation was unfair, including:

- whether there was a valid reason for deactivation related to the person's capacity or conduct;
- whether any relevant processes specified in the Digital Labour Platform Deactivation Code were followed (being the code made by the Minister under section 536LJ); and
- any other matters the FWC considers relevant.

1293. Subsection (2) would provide that deactivation that occurs because of serious misconduct of the person who was deactivated is not unfair. 'Serious misconduct' is already defined in section 12 of the FW Act and has the meaning prescribed by the regulations. Examples of serious misconduct would include, but not be limited to:

- criminal conduct, including theft, fraud, assault, sexual harassment; and
- causing serious and imminent risk to the health and safety of another person, or to the reputation or profits of the digital labour platform.

536LJ Minister to make a Digital Labour Platform Deactivation Code

1294. Subsection (1) would require the Minister to, by legislative instrument, make a Digital Labour Platform Deactivation Code.

1295. Without limiting the matters covered by the Digital Labour Platform Deactivation Code, subsection (2) would require the code to deal with at least the following:

- the circumstances in which work is performed on a regular basis;
- matters that constitute or may constitute a valid reason for deactivation;
- rights of response to deactivations;
- the internal processes of digital labour platform operators in relation to deactivation;
- communication between the employee-like worker and the digital labour platform operator in relation to deactivation;
- the accessibility in practice of the internal processes of digital labour platform operators in relation to deactivation; and
- the treatment of data relating to the work performed by employee-like workers.

1296. Subsection (3) would provide that a person's deactivation is 'consistent with the Digital Labour Platform Deactivation Code' if the actions of the digital labour platform

operator at the time of deactivation were consistent with the code in relation to the deactivation.

Subdivision B—What is an unfair termination

536LK What is an unfair termination

1297. New section 536LK would set out when a person has been unfairly terminated, being when the FWC is satisfied that:

- the person was performing work in the road transport industry (see section 15S);
- the person was terminated (see section 536LL);
- the termination was unfair (see section 536LM); and
- the termination was not consistent with the Road Transport Industry Termination Code (being the code made by the Minister under section 536LN).

*536LL Meaning of **terminated***

1298. New section 536LL would set out the circumstances in which a person is taken to be terminated, being if:

- the person performed work as a regulated road transport contractor under a services contract (see sections 15Q and 15H);
- the road transport business received services under the services contract (see section 15R); and
- the services contract was terminated by, or as a result of, conduct, the road transport business.

1299. A person would not be terminated if the services contract entered into with a road transport business contains a term which specifies the duration of a contract, and the duration of the contract has expired and is not renewed by the road transport business.

536LM Criteria for considering whether a termination was unfair etc.

1300. Subsection (1) would be central to the unfair termination provisions as it sets out the factors the FWC must take into account when considering whether a termination was unfair, including:

- whether there was a valid reason for the termination related to the person's capacity or conduct;
- whether any relevant processes specified in the Road Transport Industry Termination Code were followed (being the code made by the Minister under section 536LN); and
- any other matters the FWC considers relevant.

1301. Subsection (2) would provide that termination that occurs because of serious misconduct of the person who was terminated is not unfair. 'Serious misconduct' is already defined in section 12 of the FW Act and has the meaning prescribed by the regulations. Examples of serious misconduct would include, but not be limited to:

- criminal conduct, including theft, fraud, assault, sexual harassment, and
- causing serious and imminent risk to the health and safety of another person, or to the reputation or profits of the road transport business.

536LN Minister to make a Road Transport Industry Termination Code

1302. Subsection (1) would require the Minister to, by legislative instrument, make a Road Transport Industry Termination Code.

1303. Without limiting the matters covered by the Road Transport Industry Termination Code, subsection (2) would require the code to deal with at least the following:

- matters that constitute or may constitute a valid reason for termination;
- rights of response to terminations;
- the internal processes of road transport businesses in relation to the termination; and
- communication between the regulated road transport contractor and the road transport business in relation to the termination.

1304. Subsection (3) would provide that a person's termination is 'consistent with the Road Transport Industry Termination Code' if the actions of the road transport business that terminated the services contract, or as a result of whose conduct the services contract was terminated, complied with the Road Transport Industry Termination Code.

Division 4—Remedies

Subdivision A—Remedies for unfair deactivation

536LP When the FWC may order remedy for unfair deactivation

1305. New subsection (1) would provide the FWC may order a person's reactivation if:

- the FWC is satisfied that the person was protected from unfair deactivation (see section 536LD) at the time of being deactivated; and
- the person has been unfairly deactivated (see Division 2).

1306. Subsection (2) would provide the FWC can only make the order if the person has applied under new section 536LU.

1307. However, the FWC would not be confined to ordering the remedy the applicant has specifically applied for. Section 599 of the FW Act provides that the FWC does not have to make an order in the terms applied for.

1308. Consistently with reactivation being the primary remedy, subsection (3) would prevent the FWC from ordering the payment of compensation to the person.

1309. A note would refer the reader to Division 5 of this Part, which deals with procedural matters such as applications for remedies for unfair deactivation.

536LQ Remedy – reactivation etc.

1310. **Reactivation:** Subsection (1) would provide that an order for reactivation must be that the digital labour platform operator who operated the digital labour platform at the time

of the deactivation take measures to restore the person to the position they would have been in but for the deactivation, including to, as relevant:

- remove the suspension of the person's access to the digital labour platform;
- reinstate the person's access to the digital labour platform;
- modify the person's access to the digital labour platform to way it was before deactivation took place.

1311. If the digital labour platform from which the person was deactivated no longer exists (the 'original digital labour platform') and a similar digital labour platform is operated by an associated entity of the operator of the original digital labour platform (the 'second digital labour platform'), the FWC may make an order that the associated entity provide access to the second digital labour platform on terms and conditions no less favourable than those immediately before the person's access to the original digital labour platform was terminated or suspended. 'Associated entity' is defined in section 12 of the FW Act.

1312. **Order to restore lost pay:** In addition to making an order under subsection (1), should the FWC consider it appropriate to do so, subsection (3) would permit it to also make an order for the digital labour platform to pay the person an amount for remuneration lost, or likely to have been lost, because of the deactivation.

1313. In making such an order, subsection (4) would require the FWC to take into account any remuneration the person has earned, or is likely to earn, from any other work between the time of deactivation and the actual reactivation.

1314. As these orders would only be intended to compensate for lost remuneration, they cannot extend to include any component by way of compensation for shock, distress or humiliation caused by the manner of the person's deactivation.

Subdivision B—Remedies for unfair termination

536LR When the FWC may order remedy for unfair termination

1315. New subsection (1) would provide the FWC may order a remedy for unfair termination if:

- the FWC is satisfied that the person was protected from unfair termination (see section 536LE) at the time of being terminated; and
- the person has been unfairly terminated (see Division 3 of this Part).

1316. Subsection (2) would provide the FWC can only make the order if the person has applied under new section 536LU.

1317. However, the FWC would not be confined to ordering the remedy the applicant has specifically applied for. Section 599 of the FW Act provides that the FWC does not have to make an order in the terms applied for.

1318. Consistent with ordering the parties enter into a new services contract being the primary remedy, subsection (3) would provide the FWC must not order compensation unless it

is satisfied that entering into a new services contract would be inappropriate, and it considers compensation is appropriate in all circumstances if the case.

1319. A note would refer the reader to Division 5 of this Part, which deals with procedural matters such as applications for remedies for unfair termination.

536LS Remedy – new contract, etc.

1320. **Reinstatement:** Subsection (1) would provide that an order for a new contract must be an order that the road transport business enter into a new contract in the same terms as the services contract at the time of the termination, with such variations as the FWC considers appropriate.

1321. Subsection (2) would further provide that if the original road transport business the person used to work for no longer exists, the FWC may order that an associated entity of the former that is a road transport business, enter into a new contract with the person on terms and conditions no less favourable than those immediately before the termination, with such variations as the FWC considers appropriate. ‘Associated entity’ is defined in section 12 of the FW Act.

1322. **Order to restore lost pay:** In addition to making orders under subsection (1), should the FWC consider it appropriate to do so, subsection (3) would permit it to also make an order for the road transport business to pay the person an amount for remuneration lost, or likely to have been lost, as a result of the termination.

1323. In making such an order, subsection (4) would require the FWC to take into account any remuneration the person has earned, or is likely to earn, from any other work between the time of the termination and the new services contract being entered into.

1324. As these orders would only be intended to compensate for lost remuneration, they cannot extend to include any component by way of compensation for shock, distress or humiliation caused by the manner of the person’s termination.

536LT Remedy – compensation

1325. **Compensation:** Subsection (1) would provide that an order for the payment of compensation must be in lieu of entering into a new services contract.

1326. **Criteria for deciding amounts:** New subsection (2) would require the FWC to take into account all of the circumstances of the case in determining the amount of compensation, including:

- the effect of the order on the viability of the road transport business;
- the remuneration that the person would have received, or would have been likely to receive, if the person had not been terminated;
- the efforts of the person (if any) to mitigate the loss suffered by the person because of the termination;
- the amount of any remuneration earned by the person from other work during the period between the termination and the making of the order for compensation;

- the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and
- any other matter that the FWC considers relevant.

Illustrative example: Circumstances the FWC must consider in determining the amount of compensation

The FWC is deciding the amount of compensation to order for a tipper truck driver, Ewin. In addition to the matters listed in section 536LT, the FWC can consider Ewin's conduct following the termination of his contract, such as his social media posts about the incident. It can also consider costs that Ewin has not had to bear during this time – which are likely to be primarily variable rather than fixed costs. An example of a variable cost borne by Ewin is the cost of diesel to operate the tipper truck.

1327. **Misconduct reduces amount:** Subsection (3) would provide that the FWC must reduce the amount of compensation it would otherwise order if it is satisfied that the person's misconduct contributed to the road transport business's decision to dismiss the person.
1328. **Shock, distress etc. disregarded:** Under subsection (4), any compensation ordered by the FWC must not include a component by way of compensation for shock, distress of humiliation, or other analogous hurt resulting from the termination.
1329. **Compensation cap:** New subsection (5) would provide that there is a cap on the compensation the FWC can order to a person. The compensation cap is the lesser of the amount worked out in subsection (6) or half the amount of the 'contractor high income threshold' immediately before the termination. The 'contractor high income threshold' is defined at section 15C, and will be prescribed by, or worked out in a manner prescribed by, regulations.
1330. Subsection (6) would outline the amount is the total remuneration received by the person or to which the person was entitled to (whichever is higher) for any period the person performed work under the services contract during the 26 weeks immediately before the termination.

Division 5—Procedural matters

536LU Application for unfair deactivation or unfair termination remedy

1331. Subsection (1) would set out when a person who has been deactivated or terminated may apply to the FWC under Division 4 of Part 3A-3 for a remedy.
1332. Note 1 to this section would refer the reader to Division 4, which sets out when the FWC may order a remedy for unfair deactivation or unfair termination.
1333. Note 2 to this section would provide that application fees are set out in section 536LV.
1334. Note 3 to this section would alert the reader that Part 6-1 (Multiple actions) may prevent an application being made under this Part if another application or complaint has been made in relation to the deactivation or termination.

1335. Subsection (2) would apply the contractor high income threshold; providing that an application for an unfair deactivation or unfair termination remedy must not be made unless in the year the application was made, the sum of the person's annual rate of earnings, and any other relevant amounts worked out in accordance with the regulations, is less than the contractor high income threshold. The 'contractor high income threshold' is defined at section 15C.

1336. Subsection (3) would provide that an application must be made within 21 days of a deactivation or termination taking effect. However, subsection (4) would give the FWC discretion to extend the timeframe for making an unfair deactivation or unfair termination application if it is satisfied that there are exceptional circumstances, taking into account:

- the reason for the delay; and
- whether the person first became aware of the deactivation or termination after it had taken effect; and
- any action taken by the person to dispute the deactivation or termination; and
- prejudice to the regulated business (including prejudice caused by the delay); and
- the merits of the application; and
- fairness as between the person and other regulated workers in a similar position; and
- any processes specified in the Digital Labour Platform Deactivation Code or the Road Transport Industry Termination Code.

536LV Application fees

1337. Subsection (1) would require applicants to pay any prescribed fee at the time of making their application.

1338. Paragraphs (2)(a), (b) and (c) would provide that the application fee, a method for indexing the fee, and the circumstances in which all or part of the fee may be waived or refunded, may be prescribed by regulation.

1339. The intent is that the FWC would be a low-cost jurisdiction for unfair deactivation and unfair termination applications.

536LW Initial matters to be considered before merits

1340. New section 536LW would require the FWC to decide certain matters before it considers the merits of a deactivation or unfair termination application. These matters are whether:

- the application was made within 21 days as specified in subsection 536LU(3);
- the person was protected from unfair deactivation (section 536LD) or unfair termination (section 536LE); and

- the deactivation or termination was consistent with the Digital Labour Platform Deactivation Code (section 536LJ) or the Road Transport Industry Termination Code (section 536LN).

536LX Matters involving contested facts

1341. New section 536LX would provide that, where an unfair deactivation or unfair termination matter involves contested facts, the FWC must conduct a conference or hold a hearing in relation to the matter. However, the FWC's ability to conduct a hearing would be limited by section 536LZ.

536LY Conferences

1342. Subsection (1) would set out that this provision only applies where the FWC holds a conference in relation to the unfair deactivation or unfair termination matter.

1343. Subsection (2) would provide that where a conference is held it must be undertaken in private. This section would act as an unfair deactivation and unfair termination specific limitation on the FWC's discretion in subsection 592(3), which would otherwise enable the person conducting the conference to direct it be held in public. This subsection is analogous with subsection 398(2), which applies in relation to unfair dismissal proceedings.

1344. Subsection (3) would require the FWC to take into account any difference in the circumstances of the parties when considering the application and informing itself in relation to the application.

1345. Subsection (4) would require the FWC to take into account the wishes of the parties when considering and informing itself in relation to an application in a conference situation.

1346. Subsections (3) and (4) relate to how the FWC considers a matter in a procedural sense in the context of a conference, for instance, where it holds the conference or the method of conducting it. It does not mean that FWC should take into account the circumstances and wishes of the parties when making a substantive decision in relation to the matter, for example, when deciding whether the deactivation or termination was unfair or when making a resulting order.

1347. Sections that are relevant to the holding of unfair deactivation and unfair termination conferences are also located in Part 5-1 (Fair Work Commission). Subsection 592(1) has the effect of empowering the FWC to direct people to attend an unfair deactivation or termination conference at a time and place specified by the FWC.

1348. Subsection 592(2) has the effect that responsibility for conducting unfair deactivation or termination conferences rests with an FWC Member, or a delegate of the FWC.

1349. Section 609 also enables the President of the FWC to make procedural rules in relation to the manner in which conferences are to be conducted.

536LZ Hearings

1350. This section would limit the FWC's discretion under paragraph 590(2)(i) to inform itself by holding a hearing under section 593.

1351. Subsection (1) would provide that the FWC must not hold a hearing in relation to a matter arising under Part 3A-3 unless it considers it is appropriate to do so, taking into account the views of the parties and whether a hearing would be the most effective and efficient way to resolve the matter.

1352. Subsection (2) would provide the FWC with flexibility to hold a hearing in relation to all, or only part of, a matter arising under this Part. For instance, the FWC may decide that one element of an unfair deactivation or unfair termination claim is best dealt with in a formal hearing because it involves a complex legal issue but that the remaining elements would be better dealt with in a more informal conference.

1353. Subsection (3) would provide the FWC with flexibility to decide whether to hold a hearing in relation to a matter arising under this Part at any time, including before, during or after a conference.

536M Dismissing applications

1354. Subsection (1) would enable the FWC to dismiss an unfair deactivation or unfair termination application if it is satisfied the application has acted unreasonably:

- failed to attend a conference or hearing held by the FWC in relation to the application; or
- failed to comply with a direction or order of the FWC relating to the application; or
- failed to discontinue the application after a settlement agreement has been concluded.

1355. The power to dismiss an unfair deactivation or unfair termination application in these circumstances is not intended to prevent an applicant from robustly pursuing a legitimate claim. Rather, it is intended to address circumstances in which applicants seek to pursue claims in an improper or unreasonable manner.

1356. Note 2 to subsection (1) would draw the reader's attention to the FWC's capacity to make an order for costs under new section 536MB if satisfied that the applicant's failure caused the other party to the matter to incur costs.

1357. Subsection (2) would provide that the power to dismiss applications is only exercisable on application by a regulated business.

1358. Subsection (3) and Note 1 to subsection (1) would make clear new subsection (2) is not intended to limit the FWC's general power to dismiss applications on grounds such as where the application is frivolous or vexatious or has no reasonable prospects of success under section 587.

536MA Appeal rights

1359. The primary provisions dealing with appeals of decisions are contained in Division 3 of Part 5-1 of the FW Act (Fair Work Commission). The appeal rights for unfair dismissal provisions are contained in section 400 of the FW Act. These provisions broadly replicate those provisions.

1360. The effect of this section would be to make the process for permitting appeals for unfair deactivation and unfair termination decisions different from the general grounds in section 604 in two respects.

1361. First, subsection (1) would prevent the FWC from granting permission to appeal a decision under Part 3A-3 (in relation to unfair deactivation and unfair termination) unless satisfied that it is in the public interest to do so. This replicates the appeal rights in subsection 400(1).

1362. Secondly, subsection (2) would limit appeals based on a question of fact to only be made where the decision involved a significant error of fact. This is intended to limit the FWC's discretion to permit an appeal under subsection 604(1). This mirrors subsection 400(2).

536MB Costs orders against parties

1363. New subsection (1) would allow the FWC to make costs orders against a party to a matter arising under Part 3A-3 where the FWC is satisfied costs were incurred because of an unreasonable act or omission of a party in connection with conduct or continuation of the matter.

1364. Subsection (2) would provide that, in order for the FWC to make a costs order against a party, an application by the person seeking the costs order needs to have been made under new section 536MD.

1365. This section is designed to deter parties from bringing speculative unfair deactivation or unfair termination claims, particularly claims they know have no reasonable prospects of success, or to unreasonably defend a claim or make a jurisdictional argument where there is no prospect of the argument succeeding.

1366. Subsection (3) would make clear that it does not limit the FWC's power to order costs under current section 611 in the circumstances where:

- a person made an application, or responded to an application, vexatiously or without reasonable cause; or
- a person made an application, or responded to an application, and it should have been reasonably apparent to the person that their application, or response to an application, had no reasonable prospects of success.

1367. Not complying with a costs order would expose a person to a civil penalty, by virtue of section 536MG which provides that a person must not contravene a term of an order made Part 3A-3.

536MC Costs orders against lawyers and paid agents

1368. Subsection (2) would allow the FWC to make costs orders against a lawyer or paid agent where the representative caused those costs to be incurred because:

- the representative encouraged the person to start, continue or respond to the matter even though it had no reasonable prospect of success; or

- of an unreasonable act or omission by the representative in connection with the ongoing matter.

1369. This section is designed to deter lawyers and paid agents from encouraging others to bring speculative unfair deactivation or unfair termination claims, particularly claims they know have no reasonable prospects of success, or to unreasonably encourage a party to defend a claim or make a jurisdictional argument where there is no prospect of the argument succeeding.

1370. Subsection (3) would clarify the power in this section would operate in addition to and does not limit section 611. Section 611 provides the FWC with a general power to make costs orders against a person in the following circumstances:

- where a person made an application, or responded to an application, vexatiously or without reasonable cause; or
- where a person made an application, or responded to an application, and it should have been reasonably apparent to the person that their application, or response to an application, had no reasonable prospects of success.

1371. Not complying with a costs order would expose a person to a civil penalty, by virtue of section 536MG, which would provide that a person must not contravene a term of an order made under the Part.

536MD Application for costs orders

1372. Section 536MD would provide that an application for costs, either under general costs provisions in section 611 in relation to this Part, or under new sections 536MB or 536MC, must be made within 14 days after the FWC determines the matter or it is discontinued.

1373. Sections relevant to the discontinuation of matters are contained in Part 5-1 (Fair Work Commission). Section 588 allows a person who has applied to the FWC to discontinue the application in accordance with the procedural rules, whether or not the matter has been settled.

536ME Schedule of costs

1374. New subsection (1) would allow for the prescription of a schedule of costs to items of expenditure likely to be incurred in relation to matters covered by an order under

- section 611 in relation to a matter arising under Part 3A-3; or
- under new sections 536MB or 536MC.

1375. The term costs is intended to have its ordinary meaning, namely legal and professional costs, disbursements and expenses of witnesses (see *Cachia v Hanes* (1994) 179 CLR 403; *Re JJT; Ex parte Victoria Legal Aid* (1998) 195 CLR 184). The purpose of this section would be to expand the FWC's capacity to award legal and professional costs and disbursements to include expenses arising from the representation of a party by a person or organisation other than on a legal professional basis.

1376. Subsection (2) would provide that if a schedule of costs is prescribed, the FWC is not restricted in its award of costs to the items of expenditure listed in the schedule. However, if an item of expenditure appears in the schedule, the FWC cannot make an award of costs above the rate or amount specified.

536MF Security for costs

1377. Section 536MF would allow the FWC to make procedural rules for the furnishing of security of costs in respect of matters arising under Part 3A-3.

536MG Contravening orders under this Part

1378. Section 536MG would provide that where an order made by the FWC under Part 3A-3 applies to a person, that person must not contravene the order.

3. This section would be a civil remedy provision under Part 4-1 of the FW Act. As such, civil remedies may be sought in relation to contravention.

Part 3A-4—Collective agreements for regulated workers

1379. Part 3A-4 would provide for a new consent-based collective agreement making framework covering regulated workers and regulated businesses (that is, digital labour platform operators and road transport businesses). Key elements of the agreement-making framework would include that:

- agreement-making is achieved by consent of both parties to the agreement;
- collective agreements are about the terms and conditions under which regulated workers perform work, and how agreements operate, and have no effect to the extent that they are about other matters;
- collective agreements are intended to operate in addition to (but not override) any mandatory terms under a law of the Commonwealth, a State or Territory or orders made by the FWC or a tribunal of a State or Territory;
- the framework reflects the status of regulated workers as independent contractors and the arrangements whereby a regulated business agrees to terms and conditions of engagement through the services contracts they make with regulated workers from time to time; and
- the FWC must register new collective agreements, vary eligible collective agreements and register notices of termination.

Division 1—Introduction

536MH Guide to this Part

1380. New section 536MH would provide a Guide to Part 3A-4.

536MJ Object of this Part

1381. This section would set out the object of Part 3A-4. The object of this Part would be to provide a simple, flexible and fair framework that enables collective agreements to be made by consent for employee-like workers and regulated road transport contractors.

Division 2—Regulated workers and regulated businesses may make collective agreements

536MK Making a collective agreement

1382. New subsection (1) would provide that this section enables the making of an agreement (a collective agreement) between a regulated business and an organisation that is entitled to represent the industrial interests of one or more regulated workers. Only one regulated business will be able to make a collective agreement with one relevant organisation who will act on behalf of a particular class of regulated workers proposed to be covered by the agreement. This Part would not permit collective agreements to be made between multiple regulated businesses and an organisation.

1383. New subsection (2) would describe the entities that can make a collective agreement for employee-like workers and the content the agreement may contain. A collective agreement may be made between a digital labour platform operator and an organisation that is entitled to represent the industrial interests of one or more employee-like workers about the following matters:

- the terms and conditions on which employee-like workers covered by the collective agreement perform digital platform work:
 - a. under a services contract to which the digital labour platform operator is a party; or
 - b. under a services contract arranged or facilitated through or by means of the digital labour platform operated by the digital labour platform operator; and
- how the collective agreement will operate.

1384. A note to subsection (2) would cross-reference new section 536JM which describes when a collective agreement covers a digital labour platform operator, an employee-like worker or an organisation.

1385. New subsection (3) would similarly describe the entities that may make a collective agreement for regulated road transport contractors and the content the agreement may contain. A collective agreement may be made between a road transport business and an organisation entitled to represent the industrial interests of one or more regulated road transport contractors about:

- the terms and conditions on 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
- how the collective agreement will operate.

1386. A note to new subsection (3) would again cross-reference new section 536JM which would describe when a collective agreement covers a road transport business, a regulated road transport contractor or an organisation.

1387. A term of a collective agreement will have no effect to the extent that it is about a matter not mentioned in subsection (2) or (3) (see section 536MX below).

1388. New subsections (4)-(5) would provide that a collective agreement referred to in subsection (2) is an ‘employee-like worker collective agreement’, and a collective agreement referred to in subsection (3) is a ‘road transport collective agreement’.

536ML Notice of consultation period for a proposed collective agreement

1389. This section would set out the entities that may initiate a consultation period for a proposed collective agreement by giving a consultation notice, and what the consultation notice must specify.

1390. New subsection (1) would provide that either a regulated business that will be covered by the proposed collective agreement, or an organisation that is entitled to represent the industrial interests of one or more regulated workers who will be covered by the proposed collective agreement, may initiate a consultation period by giving a notice under this section (a ‘consultation notice’).

1391. New subsection (2) would list the matters required to be specified in a consultation notice. These are:

- that the entity giving the notice (the ‘notifying entity’) proposes to try to make a collective agreement under this Part;
- the name of the organisation to which the consultation notice is given (if the notifying entity is a regulated business), or that is giving the consultation notice;
- the matters that are to be dealt with by the proposed collective agreement;
- the regulated business that will be covered by the proposed collective agreement; and
- the class of regulated workers who will be covered by the proposed collective agreement.

536MM Consultation notice to be given to FWC, etc.

1392. This section would outline when a notifying entity must give a consultation notice to the other entity proposed to be covered by the collective agreement and to the FWC. Giving a consultation notice would formally indicate to the regulated business or organisation that the notifying entity wishes to commence negotiations for a collective agreement that will cover it, the entity receiving the notice and a specified class of regulated workers. The requirement to also provide the consultation notice to the FWC alerts the FWC to the fact that negotiations for a proposed collective agreement will occur, enabling the FWC to maintain broad oversight of the process if required.

1393. New subsection (1) would provide that a consultation notice for a proposed collective agreement must be given on the same day to the FWC, and depending on the notifying entity, either the regulated business or organisation entitled to represent the industrial interests of the regulated workers who will be covered by the proposed collective agreement.

1394. New subsection (2) would provide the notifying entity, and the entity to which the consultation notice is given, are the ‘negotiating entities’ for the proposed collective agreement.

1395. New subsection (3) would require the FWC publish a copy of the consultation notice on its website.

536MN Notice to be given to regulated workers

1396. New subsection (1) sets out a process for the notification of regulated workers. It would provide that, after a consultation notice has been given for a proposed collective agreement, either negotiating entity must, with the other negotiating entity’s consent, make reasonable efforts to give a notice to either:

- each eligible employee-like worker for a proposed employee-like worker collective agreement; or
- each eligible regulated road transport contractor for a proposed road transport collective agreement.

1397. New subsection (2) would outline the matters that must be specified in a notice. These are:

- the regulated business that will be covered by the proposed collective agreement;
- the class of regulated workers that will be covered by the proposed collective agreement, and that the regulated worker to whom the notice is given is included in that class;
- the organisation that will sign the proposed collective agreement on behalf of the regulated workers; and
- the matters proposed to be dealt with in the proposed collective agreement.

1398. New subsection (3) would define an ‘eligible employee-like worker’ for a proposed employee-like collective agreement. This refers to an employee-like worker who, at any time in the 28 days prior to the giving of a consultation notice by the notifying entity under new subsection 536ML(1)), was performing work under a services contract:

- through or by means of a digital platform operated by a digital platform operator that will be covered by the proposed collective agreement, or
- arranged or facilitated through by means of a digital platform operated by a digital platform operator that will be covered by the proposed collective agreement.

1399. New subsection (4) would similarly define an ‘eligible regulated road transport contractor’ for a proposed road transport collective agreement. This refers to a regulated road transport contractor who, at any time in the 28 days prior to the giving of a consultation notice under new subsection 536ML(1), was performing work under a services contract to which a road transport business covered that will be covered by the proposed collective agreement is a party.

1400. The 28 day period prior to the giving of a consultation notice for eligibility will focus efforts to notify on regulated workers with a current or recent connection to the regulated business and ensure the obligation on notifying entities is manageable.

536MP Application for the FWC to deal with a dispute

1401. New subsection (1) would provide that if the negotiating entities for a proposed collective agreement are unable to resolve a dispute about the making of the agreement, either negotiating entity may, with the consent of the other entity, apply to the FWC for the FWC to deal with the dispute. The FWC must then deal with the dispute (other than by arbitration).

1402. This recognises that while a collective agreement is to be made by consent of both negotiating entities, disagreements during the negotiation process may arise requiring resolution by the FWC as an independent third party. It is intended this dispute resolution mechanism would only be relied on by the parties during negotiations for the proposed collective agreement, prior to the agreement being made.

536MQ Negotiating entity may request that other negotiating entity sign a proposed collective agreement

1403. New subsection (1) would provide that a negotiating entity may request the other negotiating entity for a proposed agreement to sign the agreement.

1404. New subsection (2) would introduce a time limit for when such a request to sign a proposed agreement may take place, that being no earlier than 30 days after the last day on which a notice was given to the employee-like worker or regulated road transport contractor under subsection 536MN(1) in relation to the proposed agreement. The minimum 30-day timeframe commencing on the day after the last notice was given to a relevant regulated worker about the proposed agreement is intended to provide the relevant regulated workers sufficient opportunity to consult with the organisation and the business on the proposed terms and conditions of the agreement that will cover them, prior to it being signed.

1405. Subsection (3) would provide that the collective agreement is made when both negotiating parties sign the agreement. At this point, the collective agreement would commence to cover the relevant regulated business, regulated workers and organisation.

Division 3—Registration of collective agreements by the FWC

536MR Application to the FWC to register a collective agreement

1406. New subsection (1) would permit a negotiating entity who has signed the agreement, with consent of the other negotiating entity, to apply to the FWC register the agreement. If the other negotiating entity does not consent to the first negotiating entity applying to the FWC to register the agreement, the agreement cannot commence operation. New subsection 536JN(1) would provide that a collective agreement comes into operation on the day that it is registered under subsection 536MS(1), or on a later day specified in the agreement.

1407. New subsections (2)–(3) would describe the material that must accompany the application. The application must be accompanied by a signed copy of the collective

agreement which must identify the regulated business, the organisation and the class of regulated workers covered by the collective agreement.

1408. The application must also be accompanied by a declaration signed by the regulated business and the organisation covered by the collective agreement which must:

- state that the regulated business and the organisation explained the terms of the agreement and their effect to the regulated workers covered by the agreement, and a description of the explanation;
- state the regulated business or the organisation, as required, made reasonable efforts to give a notice under paragraph 536MN(1)(a) or (b) to the regulated workers referred to in whichever of those paragraphs is applicable. Paragraph 536MN(1)(a) and (b) require either negotiating entity to the proposed collective agreement, with the other's consent, to make reasonable efforts to notify the relevant regulated workers that a collective agreement that will over them is proposed to be made;
- state that neither the regulated business, organisation or a relevant regulated worker who was notified of the collective agreement, were subject to any form of duress in relation to the making the collective agreement; and
- if an MSO currently is in operation that covers the same class of regulated workers as the collective agreement covers, specify:
 - a. the MSO; and
 - b. in relation to each matter dealt with by both the collective agreement and the MSO – how the term of the collective agreement is more beneficial to the regulated workers than the term of the order in relation to that matter. Relevantly, new subsection 536JN(4) would in effect provide that a term of a collective agreement may only supplement a term of an MSO that deals with the same matter. The term of a collective agreement will have no effect in relation to a regulated worker in respect of a matter to the extent that the term is detrimental to the worker in any respect, when compared to an applicable MSO or a State or Territory law that deals with that matter.

1409. The regulated business and the organisation must ensure that the content of the declaration is true and correct. If the information in the declaration is false or misleading, that may amount to a contravention of the Criminal Code.

1410. New subsection (4) would provide that the application must be accompanied by any other declaration required by the procedural rules.

536MS FWC must register collective agreement

1411. New subsection (1) would provide that if an application is made under subsection 536MR(1), the FWC must register the collective agreement if all the requirements under section 536MR and subsection (2) are met in relation to the agreement.

1412. New subsection (2) would provide that the FWC must be satisfied that the collective agreement includes a dispute settlement term that requires or allows the FWC, or another person independent of the persons covered by the agreement, to settle disputes about any matters arising under the collective agreement. The term must also allow for regulated workers covered by the agreement to be represented for the purposes of that dispute resolution procedure.

1413. New subsection (3) would provide that the FWC must be satisfied that the collective agreement includes:

- a term that provides for its period of operation; and
- a term that provides for requirements in relation to terminating the collective agreement before the end of that period.

1414. In effect, the collective agreement would automatically terminate and no longer operate once the period of operation has concluded. However, persons covered by the agreement would be able to terminate the collective agreement at an earlier time by following the agreed termination procedure required to be in the agreement under paragraph (3)(b).

1415. New subsection (4) would require the FWC to publish a copy of the collective agreement and declaration referred to in new subsection 536MR(3) on the FWC's website.

Division 4—Variation of collective agreements

536MT Application for variation of a collective agreement

1416. New subsection (1) would provide that either a regulated business or organisation covered by the collective agreement may apply for a variation of a collective agreement that is in operation. New section 536MT merely stipulates the administrative steps that must occur for a variation agreed to by both the regulated business and organisation to be registered. Negotiations for any variation and the timing of these negotiations will otherwise be left to the discretion of the regulated business, the organisation and the regulated workers.

1417. New subsections (2)–(3) would set out the material that must accompany the application for variation. The application must be accompanied by a signed copy of the collective agreement as proposed to be varied which must identify the regulated business and organisation covered by the agreement, and the class of regulated workers covered by the collective agreement as proposed to be varied.

1418. New subsection (3) would provide that the application must be accompanied by a declaration signed by the regulated business and organisation covered by the agreement which must:

- state that the regulated business and the organisation explained the terms of the agreement and their effect to the regulated workers covered by the agreement as proposed to be varied. The declaration must also provide a description of the explanation;

- if an MSO currently is in operation that covers the same class of regulated workers covered by the collective agreement as proposed to be varied, specify:
 - a. the MSO; and
 - b. in relation to each matter dealt with by a term of the collective agreement as proposed to be varied that is also dealt with by a term of the MSO—how the term of the collective agreement as proposed to be varied is more beneficial to the regulated workers covered by the collective agreement as proposed to be varied, in relation to that matter, than the term of the order in relation to that matter. Relevantly, new subsection 536JN(4) would in effect provide that a term of a collective agreement may only supplement a term of an MSO that deals with the same matter. The term of a collective agreement will have no effect in relation to a regulated worker in respect of a matter to the extent that the term is detrimental to the worker in any respect, when compared to an applicable MSO or a State or Territory law that deals with that matter.
- that no regulated worker, regulated business or organisation covered by the collective agreement as proposed to be varied was subject to any form of duress in relation to the proposed variation.

1419. The regulated business and the organisation must ensure that the content of the declaration is true and correct. If the information in the declaration is false or misleading, that may amount to a contravention of the Criminal Code.

1420. New subsection (4) would provide that the application must be accompanied by any other declaration required by the procedural rules.

536MU FWC must vary collective agreement

1421. New subsection (1) would provide that if an application for a variation of a collective agreement is made under subsection 536MT(1), the FWC must register the agreement as varied if the requirements of section 536MT (which set out the requirements for making an application for a variation) are met in relation to the variation.

1422. New subsection (2) would require the FWC to publish a copy of the collective agreement as varied and the declaration referred to in subsection 536MT(3) on the FWC's website.

1423. New subsection (3) would provide that the variation comes into operation when the agreement as varied is registered by the FWC.

Division 5—Termination of collective agreements

536MV FWC must be notified of termination

1424. New section (1) would apply if a collective agreement has been terminated in accordance with the termination process specified in the agreement before the end of its period of operation. New paragraph 536MS(3)(b) would require the FWC to be satisfied that the collective agreement includes a procedure enabling the organisation

and regulated business covered by the agreement to terminate the agreement prior to the end of its period of operation.

1425. New subsection (2) would require the regulated business or organisation covered by the collective agreement to, with the consent of the other, notify the FWC of the termination on the date the agreement is terminated.

1426. New subsection (3) would provide that the notification to the FWC under subsection (2) must be accompanied by a declaration signed by the regulated business and the organisation covered by the collective agreement. The declaration must state that the collective agreement has been terminated in accordance with the process stipulated in the agreement; and specify the date of effect of the termination. The regulated business and the organisation must ensure that the content of the declaration is true and correct. If the information in the declaration is false or misleading, the entities may contravene the Criminal Code.

1427. New subsection (4) would provide that the notice must be accompanied by any other declaration required by the procedural rules. Procedural rules are made by the President under section 609.

536MW FWC must register termination notice

1428. New subsection (1) would provide that if a notice is given to the FWC under subsection 536MV(2) in relation to the collective agreement (that is, a notification that a collective agreement has been terminated in accordance with the agreed termination procedure specified in the agreement), the FWC must publish a notice on the FWC's website:

- stating that the collective agreement has been terminated; and
- specifying the date of effect of the termination specified in the declaration under paragraph 536MV(3)(b).

1429. New subsection (2) would provide that the collective agreement ceases to operate on the date of effect of the termination specified in the declaration under paragraph 536MV(3)(b).

Division 6—Other matters

536MX—Terms of a collective agreement that are of no effect

1430. New subsection (1) would provide that a term of a collective agreement has no effect to the extent that it is a term about a matter other than a matter mentioned in subsection 536MK(2) or (3). These subsections would stipulate that a collective agreement may be made in respect of the terms and conditions on which regulated workers covered by the collective agreement perform work; and how the agreement will operate.

1431. New subsection (2) would provide that a term of a collective agreement has 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. The intention is that a collective agreement would only include terms and

conditions relating to the engagement of the relevant class of regulated workers and the operation of the agreement.

1432. New subsection (3) would provide that if a collective agreement includes a term that has no effect because of subsections (1) and (2), the inclusion of the term does not prevent the agreement from being a collective agreement. This would allow a collective agreement to include other matters by consent, but they are not enforceable under the FW Act.

Illustrative example: Agreement-making framework

Platform A is a digital labour platform operator that engages delivery partners under services contracts to perform parcel delivery services via its digital labour platform. The Delivery Network is an organisation entitled to represent the industrial interests of one or more of the delivery partners engaged via the Platform A digital labour platform. The delivery partners are employee-like workers.

The Delivery Network gives a consultation notice to Platform A in accordance with section 536ML to negotiate an employee-like worker collective agreement. Platform A agrees to negotiate a collective agreement covering its delivery partners, and The Delivery Network provides the consultation notice to the FWC, which in turn publishes the notice on its website (section 536MM).

With the agreement of The Delivery Network, Platform A provides a notice under section 536MN about the proposed collective agreement to its delivery partners that have performed work in the last 28 days. Platform A is best placed to give the notice via its digital labour platform in the most efficient and accurate manner. Delivery partners engage with Platform A and The Delivery Network over the proposed terms and implications of the collective agreement.

After three months of negotiation, The Delivery Network requests Platform A sign the collective agreement. Once both parties have signed the agreement, it is made.

The Delivery Network, with the consent of Platform A, applies to the FWC to register the agreement. The application is accompanied by a signed copy of the collective agreement and a signed declaration of both parties covered by the agreement declaring that the delivery partners have had the terms of the agreement explained to them, that the parties made reasonable efforts to give a notice to eligible delivery partners, and that no party was subject to any form of duress in relation to the making of the agreement.

The declaration also specifies the relevant minimum standards order in operation. The declaration details in relation to each matter dealt with by a term of the collective agreement that is also dealt with by the minimum standards order, how the term of the collective agreement is more beneficial to the delivery partners covered by the agreement than the terms of the minimum standards order.

Upon receiving the application and declaration, the FWC registers the agreement and publishes it on its website. The collective agreement comes into operation.

The collective agreement would continue to operate for as long as parties agreed it to operate, unless the agreement is varied (and registered by the FWC) or is terminated in accordance with the provisions providing for its termination, and the termination is registered by the FWC.

If a delivery partner or The Delivery Network commences action under the FW Act to enforce a term of the collective agreement, it can only do so in relation to terms that relate to the terms and conditions of engagement of the delivery partners, or how the agreement is to operate. Any other term of the agreement, including any that deal with matters that are primarily of a commercial nature cannot be enforced under the civil penalty framework of the FW Act.

Part 3A-5—Unfair contract terms of services contracts

1433. Part 3A-5 would empower the FWC to deal with disputes about UCTs in services contracts.

Division 1—Introduction

536MY Guide to this Part

1434. New section 536MY would provide a guide to Part 3A-5.

*536MZ Meaning of **employee and employer***

1435. This section would provide that in Part 3A-5 the terms ‘employee’ and ‘employer’ have their ordinary meanings.

Division 2—Object of Part

536N Object of Part

1436. New subsection (1) would set out the object of Part 3A-5, which would be to:

- establish a framework for dealing with UCTs of services contracts that:
- balances the needs of principals and independent contractors;
 - a. addresses the need for a level playing field between independent contractors and principals by creating disincentives to include UCTs in services contracts;
 - b. recognises and protects the freedom of independent contractors to enter into services contracts;
- establish procedures for dealing with UCTs that are quick, flexible and informal and that address the needs of principals and independent contractors;
- provide appropriate remedies if a term of a services contract is found to be unfair.

1437. Subsection (2) would provide that the procedures and remedies referred to in subsection (1), and the manner of deciding on and working out such remedies, are intended to ensure that a ‘fair go all round’ is provided to both independent contractors

and principals. A note would refer to the fact that the expression ‘fair go all round’ was used by Sheldon J in *re Loty and Holloway v Australian Workers’ Union* [1971] AR (NSW) 95.

Division 3—Orders in relation to unfair contract terms of services contracts

536NA When the FWC may make an order in relation to an unfair contract term of a services contract

1438. Subsections (1) and (2) would set out when the FWC may make an order in relation to an UCT of a services contract, being if:

- the FWC is satisfied that a services contract includes one or more UCTs which, in an employment relationship, would relate to workplace relations matters (see section 536JQ); and
- an application has been made under section 536ND (by a person who is a party to the services contract or an organisation that represents their industrial interests).

1439. Subsection (3) would require the FWC to take into account fairness between parties concerned in deciding whether to make an order, and what kind of order to make.

536NB Matters to be considered in deciding whether a term of a services contract is an unfair contract term

1440. Subsection (1) would list certain matters the FWC may consider when determining whether a term of a services contract is an UCT. These include:

- the relative bargaining power of the parties;
- whether the services contract displays a significant imbalance between the rights and obligations of the parties;
- whether the contract term is reasonably necessary to protect the legitimate interests of a party to the contract;
- whether the contract term imposes a harsh, unjust or unreasonable requirement on a party to the contract;
- whether the services contract as a whole provides total remuneration for performing work less than regulated workers performing the same or similar work would receive under an MSO or MSG, or less than employees performing the same or similar work would receive; and
- any other matter the FWC considers relevant.

1441. The concepts of ‘harsh’, ‘unjust’ and ‘unreasonable’ would take their common law meanings.

1442. It is intended that total remuneration would include all payments and income paid to an independent contractor. New subsection (2) would require that the matters described above, except for the relative bargaining power of the parties, are to be assessed at the time the FWC considers the application.

Illustrative example: FWC assessment at time it considers application

Thanh works as an independent contractor providing graphic design services to businesses. One of his clients, PriceCo, is a large retail business with stores across Australia. At the time Thanh first entered into the services contract with PriceCo, it was a small business with only one store. The contract sets out Thanh's terms and conditions of engagement, including PriceCo's ability to unilaterally vary certain terms.

One day PriceCo informs Thanh that it will vary a term in his contract. Thanh applies to the FWC for an UCT remedy on the basis that the contract term allowing PriceCo to unilaterally vary the contract is unfair.

In determining whether the contract term is unfair, the FWC may take into account matters such as whether the contract term is reasonably necessary to protect PriceCo's legitimate interests and whether the contract term would impose a harsh, unjust or unreasonable requirement on Thanh. As the FWC is required to consider the contract at the time of the application rather than at its commencement when determining whether the term is unfair, PriceCo's *current* business size and circumstances will be relevant to the FWC's consideration.

536NC Remedy – order to set aside etc. contract

1443. Section 536NC would empower the FWC to make the following orders:

- setting aside all or part of a services contract which, in an employment relationship, would relate to a workplace relations matter (the term workplace relation matter is defined in section 536JQ); or
- amending or varying all part of a services contract which, in an employment relationship, would relate to a workplace relations matter.

*Division 4—Procedural matters**536ND Application for unfair term remedy*

1444. Subsection (1) would outline the parties that can apply to the FWC for a remedy on the basis that the services contract contains a term that is unfair (these are a person party to the contract or an organisation that represents their industrial interests).

1445. Subsection (2) would introduce the contractor high income threshold; providing that an application for an UCT remedy must not be made unless in the year the application was made, the sum of the person's annual rate of earnings, and any other relevant amounts worked out in accordance with the regulations, is less than the contractor high income threshold. The 'contractor high income threshold' is defined at section 15C.

1446. A note refers the reader to Division 3, which would set out when the FWC may order a remedy for an UCT.

Illustrative example: Contractor high income threshold

Teresa is a construction worker who provides her services as an independent contractor. Teresa makes an application to the FWC to dispute a contract term. However, the FWC finds that her rate of earnings in the year of her application was more than the contractor high income threshold, making her ineligible to access the FW Act UCT protections. Teresa decides to apply to a Court for a review of her contract under the IC Act instead.

536NE Application fees

1447. Subsection (1) would require applicants to pay any prescribed fee at the time of making their application.

1448. Paragraphs (2)(a), (b) and (c) would provide that the application fee, a method for indexing the fee, and the circumstances in which all or part of the fee may be waived or refunded, may be prescribed by regulation.

1449. The intent is that the FWC would be a low-cost jurisdiction for parties dealing with UCTs.

536NF Conferences

1450. Subsection (1) would set out that this provision only applies where the FWC holds a conference.

1451. Subsection (2) would provide that where a conference is held it must be undertaken in private. This subsection would act as an UCT specific limitation on the FWC's discretion in subsection 592(3), which would otherwise enable the member conducting the conference to direct it to be held in public. This subsection is consistent with the unfair dismissal provision in subsection 398(2).

1452. Subsection (3) would require the FWC to take into account any differences in the circumstances of the parties when considering and informing itself in relation to an application for unfair contract terms remedy.

1453. Subsection (4) would similarly require the FWC to take into account the wishes of the parties when considering and informing itself in relation to an application.

1454. Subsections (3) and (4) relate to how the FWC considers a matter in a procedural sense in the context of a conference, for instance where it holds the conference or the method of conducting it. It does not mean that FWC should take into account the circumstances and wishes of the parties when making a substantive decision in relation to the matter, for example when deciding whether a term of the contract is an UCT or when making a resulting order.

536NG Hearings

1455. This section would limit the FWC's discretion under paragraph 590(2)(i) to inform itself by holding a hearing under section 593.

1456. Subsection (1) would provide that the FWC must not hold a hearing in relation to a matter arising under this Part 3A-5 unless it considers it is appropriate to do so, taking

into account the views of the parties and whether a hearing would be the most effective and efficient way to resolve the matter.

1457. Subsection (2) would provide the FWC with flexibility to hold a hearing in relation to all, or only part of, a matter arising under this Part. For instance, the FWC may decide that one element of an UCT claim is best dealt with in a formal hearing because it involves a complex legal issue but that the remaining elements would be better dealt with in a more informal conference.

1458. Subsection (3) would provide the FWC with flexibility to decide whether to hold a hearing in relation to a matter arising under this Part at any time, including before, during or after a conference.

536NH Dismissing applications

1459. Subsection (1) would enable the FWC to dismiss an UCT application where the FWC is satisfied the applicant has unreasonably:

- failed to attend a conference or hearing conducted by the FWC in relation to the application;
- failed to comply with a direction or order of the FWC relating to the application; or
- failed to discontinue the application after a settlement was reached between the parties.

1460. The power to dismiss an UCT application in these circumstances is not intended to prevent an applicant from robustly pursuing a legitimate claim. Rather, it is intended to address any circumstances in which applicants seek to pursue claims in an improper or unreasonable manner.

1461. Subsection (2) would provide that the power to dismiss applications is exercisable on application by a party to the matter or an organisation entitled to represent the industrial interests of a party (the same entities that may apply for an UCT remedy).

1462. Subsection (3) and a note to subsection (1) would make clear new subsection (2) is not intended to limit the FWC's general power to dismiss applications on grounds such as where the application is frivolous or vexatious or has no reasonable prospects of success under section 587.

536NJ Appeal rights

1463. The primary provisions dealing with appeals of FWC decisions are contained in Division 3 of Part 5-1 of the FW Act. The appeal rights for unfair dismissal provisions are contained in section 400 of the FW Act. These provisions broadly replicate those provisions.

1464. First, subsection (1) would prevent the FWC from granting permission to appeal a decision under Part 3A-5 (in relation to UCT) unless satisfied that it is in the public interest to do so. This replicates the appeal rights in subsection 400(1).

1465. Secondly, subsection (2) would limit appeals based on a question of fact to only be made where the decision involved a significant error of fact. This is intended to limit

the FWC's discretion to permit an appeal under subsection 604(1). This mirrors subsection 400(2).

1466. The intent of these provisions to improve the opportunity for applicants to appeal an unfair contracts matter due to the lower cost and accessibility of applying to the FWC compared to the Federal Court of Australia.

536NK Contravening orders under this Part

1467. Section 536NK would provide that where an order made by the FWC under Part 3A-5 applies to a person, that person must not contravene the order.

1468. This section would be a civil remedy provision under Part 4-1 of the FW Act. As such, civil remedies may be sought in relation to contravention.

Division 4—Consequential amendments

Amendments to the *Fair Work Act 2009*

1469. This division would make consequential amendments to the Fair Work Act that are required as a result of the changes that would be made by Part 16.

Item 250: After paragraph 3(c)

1470. This item would amend section 3, which provides the object of the FW Act, to insert new paragraphs (3)(ca) and (cb). This would have the effect that the object of the FW Act would include providing a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion of all Australians by:

- ensuring safety net of fair, relevant and enforceable minimum terms and conditions regulated workers through MSOs and related measures; and
- providing appropriate remedies in relation to unfair terms of services contracts.

1471. These new additions would broadly reflect the purpose of the new provisions of the FW Act that would be inserted by Part 16.

Item 251: After paragraph 4(1)(b)

1472. This item would amend the Guide to the Act to insert new paragraphs 4(1)(ba) and (bb), to state the FW Act also:

- provides for minimum terms and conditions for regulated workers; and
- sets out measures to deal with unfair terms of services contracts.

Item 252: At the end of subsection 4(2)

1473. This item would amend subsection 4(2) to insert new paragraph 2(c). This would alert the reader to the fact that Chapter 1 also includes new Part 1-4—Road transport industry objective and advisory group into the FW Act.

Item 253: After section 6

4. This item would insert a new section 6A to set out the key elements of Chapter 3A.

Item 254: Section 12 (after paragraph (b) of the definition of *applies*)

1474. This item would insert the following paragraphs into the definition of ‘applies’ in the Dictionary in section 12:

- in relation to a minimum standards order – see section 536JD; and
- in relation to a collective agreement – see section 536JL.

Item 255: Section 12

1475. This item would insert the following signpost definitions into the Dictionary at section 12 of the FW Act:

- ‘collective agreement’ would be defined in section 15B;
- ‘consistent with the Digital Labour Platform Deactivation Code’ would be defined in subsection 536LJ(3);
- ‘consistent with the Road Transport Industry Termination Code’ would be defined in subsection 536LN(3);
- ‘consultation notice’ for a collective agreement would be defined in subsection 536ML(1);
- ‘contractor high income threshold’ would be defined in section 15C.

Item 256: Section 12 (after paragraph (c) of the definition of *covers*)

1476. This item would insert the following paragraphs into the definition of ‘covers’ in the Dictionary in section 12

- in relation to a minimum standards order – see section 536JE; and
- in relation to minimum standards guidelines – see section 536JG; and
- in relation to a collective agreement – see section 536JM.

Item 256A: Section 12

1477. This item would insert the following signpost definitions into the Dictionary at section 12 of the FW Act:

- ‘deactivated’ would be defined in section 536LG;
- ‘digital labour platform’ would be defined in section 15L;
- ‘Digital Labour Platform Deactivation Code’ would mean the code made under subsection 536LJ(1);
- ‘digital labour platform operator’ would be defined in section 15M;
- ‘digital platform work’ would be defined in section 15N;
- ‘employee-like worker’ would be defined in section 15P;
- ‘employee-like worker collective agreement’ would be defined in subsection 536MK(4);

- ‘employee-like worker guidelines’ would be defined in subsection 536KR(2);
- ‘employee-like worker minimum standards order’ would be defined in subsection 536JY(2).

Item 257: Section 12 (paragraph (d) of the definition of *fair work instrument*)

1478. This item would amend paragraph (d) of the definition of ‘fair work instrument’ in the Dictionary in section 12 to provide that the reference to an FWC order in that paragraph:

- would include an MSO – this is included for the avoidance of doubt;
- would not include an MSG – this would ensure that even where guidelines are made by order in accordance with subsection 598(4) of the FW Act, the guidelines would not be a fair work instrument.

Item 258: Section 12

1479. This item would insert the following signpost definitions into the Dictionary at section 12 of the FW Act:

- ‘minimum standards guidelines’ would be defined in section 15D;
- ‘minimum standards objective’ would be defined in section 536JX;
- ‘minimum standards order’ would be defined in section 15E;
- ‘protected from unfair deactivation’ would be defined in section 536LD;
- ‘protected from unfair termination’ would be defined in section 536LE;
- ‘regulated business’ would be defined in section 15F;
- ‘regulated road transport contractor’ would be defined in section 15Q;
- ‘regulated worker’ would be defined in section 15G;
- ‘Road Transport Advisory Group’ would be defined in section 40E;
- ‘road transport business’ would be defined in section 15R;
- ‘road transport industry’ would be defined in section 15S;
- ‘road transport collective agreement’ would be defined in subsection 536MK(5);
- ‘road transport guidelines’ would be defined in subsection 536KR(3);
- ‘road transport minimum standards order’ would be defined in subsection 536JY(3);
- ‘services contract’ would be defined in section 15H;
- ‘Road Transport Industry Termination Code’ would mean the code made under subsection 536LN(1);
- ‘terminated’ would be defined in section 536LL;

- ‘unfairly deactivated’ would be defined in section 536LF;
- ‘unfairly terminated’ would be defined in section 536LK;
- ‘unfairness ground’ would be defined in section 536JR.

Item 259: Section 12 (paragraph (b) of the definition of *workplace instrument*)

1480. This item would amend the definition of ‘workplace instrument’ in the Dictionary in section 12 to provide that ‘workplace instrument’ would also mean an instrument that concerns the relationship between:

- digital labour platform operators and employee-like workers; and
- road transport businesses and regulated road transport contractors.

1481. Instruments that concern these relationships would include MSOs, MSGs and collective agreements.

1482. ‘Workplace instrument’ is relevant to the general protections provided in Part 3-1 of the FW Act. Expanding this definition would mean that certain general protections relating to workplace instruments in Part 3-1 are expanded to cover those that would be covered by new Chapter 3A.

Item 260: After section 19

1483. This item would insert new section 19A, which would provide the meaning of industrial action in relation to regulated workers and regulated businesses.

1484. This definition would have consequences for the application of existing and proposed new provisions of the FW Act, including the definition of ‘engages in industrial activity’ in existing subsection 347(f).

1485. Subsection (1) would provide that new section 19A would apply to a regulated worker and regulated business if:

- the regulated worker is covered by an MSO, or is mentioned in the application for an MSO as a regulated worker that would be covered by the MSO if it is made; and
- the regulated business is covered by is covered by the same MSO, or is mentioned in application for the same MSO as a regulated business that would be covered by the MSO if it is made; and
- if the regulated business is a digital labour platform operator:
 - a. the regulated worker is an employee-like worker from whom the digital labour platform operator receive services under a services contract; or
 - b. the regulated worker is an employee-like worker who perform services under a services contract arranged or facilitated through or by means of the digital labour platform operator’s digital labour platform; and
- if the regulated business is a road transport business, the regulated road transport contractor performs work under the services contract for the regulated business.

1486. Subsection (2) would provide that industrial action, in relation to a regulated worker and regulated business, includes action of any of the following kinds:

- the performance of work by a regulated worker in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by a regulated worker, the result of which is a restriction or limitation on, or a delay in, the performance of the work;
- a ban, limitation or restriction on the performance of work by a regulated worker or on the acceptance of or offering for work by a regulated worker;
- a failure or refusal by regulated worker to attend for work or a failure or refusal to perform any work at all by regulated contractors who attend for work;
- the lockout of regulated worker by the regulated business (see subsection (4)).

1487. Subsection (3) would provide that the action referred to in subsection (2) must be directed against the regulated business, whether or not regulated business is a party to the services contract.

1488. Subsection (4) would provide that industrial action does not include the following:

- action by regulated workers that is authorised or agreed to by a regulated business covered by the same MSO as the regulated workers;
- lockout of the regulated workers by the regulated business if it is authorised or agreed to by, or on behalf of, regulated workers who are covered by the same MSO as the regulated business;
- action by regulated worker if:
 - a. the action was based on a reasonable concern of the regulated worker about an imminent risk to their health or safety; and
 - b. the regulated worker did not unreasonably fail to comply with a direction of the regulated business that engaged the regulated worker to perform other available work, whether at the same or another workplace, that was safe and appropriate for the regulated worker to perform.

1489. Subsection (5) would provide that the regulated business ‘locks out’ a regulated worker if:

- the regulated business prevents the regulated worker from performing work under a services contracts without terminating that services contract; or
- if the regulated business is a digital labour platform operator and it modifies, limits or suspends the employee-like workers’ access to the digital labour platform it operates.

Item 261: Subsection 134(2) (note)

1490. Consequential to the amendment proposed by item 262 below, this item would omit the word ‘Note’ and substitute ‘Note 1’.

Item 262: At the end of subsection 134(2)

5. Subsection 134(2) provides that the modern awards objective applies to the performance or exercise of the FWC's modern award powers. This item would insert a second note under subsection (2) to make clear that the FWC must take into account the road transport objective when performing certain functions (see new section 40D and subsection 617(10B)).

Item 263: After section 338

1491. This item would insert new section 338A, which would provide that a reference in Part 3-1 to an independent contractor includes a reference to a regulated worker. This is to ensure, for the avoidance of doubt, that relevant provisions in Part 3-1 would apply to regulated workers (which are a subset of independent contractors).
1492. The note would explain that a regulated worker must be an individual and refers the reader to section 15G and related definitions. This is because 'regulated worker' would be defined to mean a person who is an 'employee-like worker' or 'regulated road transport contractor'. Both these terms would require a person to be an individual (see sections 15G and 15Q).

Item 264: Subsection 342(1) (after table item 3)

Item 265: Subsection 342(1) (after table item 4)

Item 266: Subsection 342(1) (after table item 6)

Item 267: Subsection 342(1) (at the end of the table)

1493. These items would insert new table items 3A, 4A, 6A and 8 in the table in subsection 342(1). The table in subsection 342(1) sets out circumstances in which a person takes adverse action against another person for the purposes of certain protections in Part 3-1. The new table items would set out additional circumstances where conduct would constitute adverse action.
1494. Existing table items 3, 4, 6 and 7 of the table would already capture action taken by or against many regulated businesses and regulated workers. However, they may not capture all digital labour platform operators because certain digital labour platforms operate to facilitate services contracts between an employee-like worker and an individual rather than directly entering into a contract for services with an employee-like worker. As such, these items are intended to mirror the concepts in existing table items 3, 4, 6 and 7 but in relation to 'horizontal' arrangements between digital labour platform operators and the employee-like workers that use the digital labour platform they operate to perform work as appropriate.

Item 268: After subsection 350(2)

1495. This item would insert new subsection (2A) in existing section 350.
1496. Section 350 currently prohibits an employer from inducing an employee to take, or propose to take, membership action. It similarly prevents a person who has entered into a contract for services from inducing the independent contractor to take, or propose to take, membership action (subsection 350(2)).

1497. While subsection (2) would apply to most regulated businesses and regulated workers, it would not necessarily apply to those digital labour platforms that do not directly enter into a contract for services with an independent contractor. As such, new subsection (2A) would ensure these digital labour platform operators are covered. A note would explain that the new subsection 350(2A) is a civil remedy provision and refer the reader to Part 4-1.

Item 269: At the end of section 354

1498. This item will insert new subsection (3), which would provide that a person must not discriminate against a regulated business because:

- regulated workers in relation to the regulated business are covered, or not covered, by a particular type of workplace instrument (including a particular kind of workplace instrument within a type of workplace instrument); or
- it is proposed regulated workers in relation to the regulated business are covered, or not covered, by a particular type of workplace instrument (including a particular kind of workplace instrument within a type of workplace instrument).

1499. A note would explain that new subsection (3) would be a civil remedy provision and refer the reader to Part 4-1.

Item 270: Subsection 539(2) (table item 11, column 1)

Item 271: Subsection 539(2) (table item 11, column 1)

1500. These items would amend table item 11, column 1 in the table in subsection 539(2) to include reference to:

- new subsection 350(2A) (see item 268);
- new subsection 354(3) (see item 269).

1501. Table item 11 relates to certain general protections provisions that are civil remedy provisions. The above-mentioned subsections would be new general protections provisions.

Item 272: Subsection 539(2) (after table item 29AA)

1502. This item would insert new table item 29AB into the table in existing subsection 539(2), which would relate to section 536JB. Section 536JB would provide that a person must not contravene a term of an MSO.

1503. The following would have standing to apply for an order in relation to a contravention of section 536JB:

- a regulated worker covered by the MSO;
- a regulated business covered by the MSO;
- an organisation;
- an inspector.

1504. An application for an order in relation to a contravention of section 536JB could be made to the following courts:

- the Federal Court;
- the Federal Circuit and Family Court of Australia (Division 2);
- an eligible State or Territory Court.

1505. The maximum penalty that a court could impose for a contravention of section 536JB would be 600 penalty units for a serious contravention, or otherwise 60 penalty units.

1506. This item would insert new table item 29AC into the table in existing subsection 539(2), which would relate to section 536MG. Section 536MG would provide that a person must not contravene an order under new Part 3A-3 (Unfair deactivation or unfair termination of regulated workers) if it applies to them.

1507. The following would have standing to apply for an order in relation to a contravention of section 536MG:

- a party to the relevant services contract;
- an organisation;
- an inspector.

1508. An application for an order in relation to a contravention of section 536MG could be made to the following courts:

- the Federal Court;
- the Federal Circuit and Family Court of Australia (Division 2);
- an eligible State or Territory Court.

1509. The maximum penalty that a court could impose for a contravention of section 536MG would be 60 penalty units.

1510. This item would insert new table item 29AD into the table in existing subsection 539(2), which would relate to section 536JJ. Section 536JJ would provide that a person must not contravene a term of a collective agreement.

1511. The following would have standing to apply for an order in relation to a contravention of section 536JJ:

- a regulated worker covered by the collective agreement;
- a regulated business covered by the collective agreement;
- an organisation.

1512. An application for an order in relation to a contravention of section 536JJ could be made to the following courts:

- the Federal Court;

- the Federal Circuit and Family Court of Australia (Division 2);
- an eligible State or Territory Court.

1513. The maximum penalty that a court could impose for a contravention of section 536JJ would be 600 penalty units for a serious contravention, or otherwise 60 penalty units.

1514. This item would insert new table item 29AE into the table in existing subsection 539(2), which would relate to section 536NK. Section 536NK would provide that a person must not contravene an order under new Part 3A-5 (relating to unfair contract terms of service contracts).

1515. The following would have standing to apply for an order in relation to a contravention of section 536NK:

- a party to the relevant services contract;
- an organisation;
- an inspector.

1516. An application for an order in relation to a contravention of section 536NK could be made to the following courts:

- the Federal Court;
- the Federal Circuit and Family Court of Australia (Division 2);
- an eligible State or Territory Court.

1517. The maximum penalty that a court could impose for a contravention of section 536NK would be 60 penalty units.

Item 273: After subsection 540(7)

1518. This item would insert new subsection (7A), which would provide that regulated workers and regulated businesses may only apply for an order under Division 2 of Part 4-1 of the FW Act in relation to a contravention or proposed contravention of a civil remedy provision if they are affected by the contravention, or will be affected by the proposed contravention.

1519. This item would also insert new subsection (7B), which would provide that a person who is a party to a services contract to which an order under Division 4 of Part 3A-5 relates may only apply for an order under Division 2 of Part 4-1 of the FW Act in relation to a contravention or proposed contravention of a civil remedy provision if they are affected by the contravention, or will be affected by the proposed contravention.

Item 274: After paragraph 557(2)(oa)

1520. Subsection (1) provides that where the same person commits two or more contraventions of a civil remedy provision referred to in subsection 557(2), arising out of a course of conduct by that person, the contraventions are to be taken to constitute a single contravention for the purposes of Part 4-1.

1521. This item would insert a new paragraphs into subsection (2) so that subsection (1) applies to section 536JB (which would deal with contraventions of MSOs), section 536JJ (which would deal with contraventions of collective agreements) and section 536NK (which would deal with contraventions of orders regarding unfair contract terms of services contracts).

Item 275: After paragraph 576(1)(m)

1522. This item would insert additional paragraphs in existing subsection (1) to provide that the FWC also has functions conferred by the FW Act in relation to minimum standards for regulated workers, unfair deactivation or unfair termination, collective agreements for regulated workers and unfair contract terms of services contracts.

Item 276: After paragraph 581(b)

1523. This item would insert new subsection (c) to provide that the President is also responsible for ensuring that the FWC performs its functions and exercises powers in a manner that adequately serves the needs of persons that would be covered by new Chapter 3A.

Item 277: After paragraph 582(4)(ab)

1524. Existing subsection (4) lists some of the kinds of directions that the President can give under existing subsection 582(2).

1525. This item would insert new paragraph (4)(ac), which would provide that, without limiting the President's power to give directions, a direction under subsection (2) may be a direction about the exercise of powers under new Part 3A-2, which would relate to minimum standards for regulated workers.

Item 278: Paragraph 582(4)(c)

1526. Existing subsection (4) lists some of the kinds of directions that the President can give under existing subsection (2).

1527. This item would amend paragraph (4)(c) to add 'one or more Expert Panels'. This would emphasise that, without limiting the President's power to give directions, a direction under subsection (2) may be a direction that two or more matters be dealt with jointly by one or more single FWC Members, one or more Full Benches or one or more Expert Panels.

Item 279: Before subsection 582(5)

1528. This item would insert new subsections (4D) and (4E).

1529. New subsection (4D) would require the President to give a direction as to how the FWC would be required to prioritise its work under new Part 3A-2. This could include prioritising specified cohorts of workers.

1530. New subsection (4E) would require the FWC to publish the direction relating to prioritisation as soon as reasonably practical after the President gives the direction.

Item 280: Subsection 587(2)

1531. Subsection (1) allows the FWC to dismiss an application if it:

- is not made in accordance with the requirements of the FW Act;
- is frivolous or vexatious; or
- has no reasonable prospects of success.

1532. This item would amend subsection (2) to insert a reference to new section 536LU. New section 536LU would enable a person who has been deactivated or terminated to make an application to the FWC. The amendment would provide about the FWC must not dismiss an application under new section 536LU on the grounds of the application is frivolous or vexatious or has no reasonable prospects of success. This is consistent with the treatment of applications to relating to dismissal disputes for employees.

Item 281: Subsection 602(1)

Item 282: At the end of subsection 602(1)

1533. These items would amend subsection (1) to provide that the FWC's power under section 602 to correct any obvious error, defect or irregularity does not apply to MSOs or MSGs. This is because, as would be made clear by new note 3, the FWC would correct MSOs and MSGs under new subsections 536KQ(3) and 536KZ(3) respectively.

Item 283: After paragraph 603(3)(g)

1534. This item would insert new paragraphs under subsection (3) to provide that the FWC must not use its power to vary or revoke a decision under section 603 to:

- vary or revoke a decision under new Part 3A-2;
- vary or revoke a collective agreement under new Part 3A-4.

1535. This is because varying or revoking decisions under new Part 3A-2 and varying or revoking a collective agreement under Part 3A-4 would be covered by other provisions (see sections 536KQ, 536KZ and 536MU).

Item 284: Subsection 604(2) (note)

1536. This item would amend the note to make it clear that subsection (2) does not apply in relation to an application for unfair deactivation or an unfair termination (see section 536MA).

Item 285: Subsection 616(1)

Item 286: Subsection 616(3B)

Item 287: Subsections 616(3C) and (3D)

1537. These items would amend subsections (1), (3B), (3C) and (3D) and the note after subsection (3B) to provide that the requirements in these subsections for certain functions to be performed by a Full Bench would be subject to new subsection 617(10B). These subsections relate to the making or varying of modern awards. New subsection 617(10B) would require the Expert Panel for the road transport industry to make, vary or revoke modern awards that the President considers may relate to the road transport industry. This would mean that the requirement for the Expert Panel to perform this function to exercise these powers would supplement the existing

requirements that a Full Bench must perform the relevant functions or exercise the relevant powers in relation to modern awards.

Item 288: After subsection 616(4)

1538. This item would insert new subsection (4A), which would provide that the following decisions must be made by a Full Bench (subject to new subsections 582(4A) and 617(10D)):

- an ELMSO;
- a determination varying or revoking an ELMSO under subsection 536KQ(1);
- ELGs;
- a determination varying or revoking ELGs under subsection 536KZ(1).

1539. Note 1 would explain that a determination under subsections 536KQ(3) or 536KZ(3) (which would deal with minor technical variations) would not need to be made by a Full Bench.

1540. Note 2 would explain that new subsection 617(10D) would enable the President to direct that certain matters that relate to the road transport industry be dealt with by the Expert Panel for the road transport industry. In this case, an Expert Panel for the road transport industry would make these decisions instead of a Full Bench.

Item 289: Paragraph 622(2)(aa)

Item 290: Subparagraph 622(2)(aa)(ii)

Item 291: Subsection 622(4)

Item 292: Subsection 622(4)

1541. These items would amend paragraph (2)(aa), subparagraph 622(2)(a)(ii) and subsection 622(4) to insert references to new subsection 620(1E) (which would provide for the constitution of an Expert Panel for the road transport industry) and new paragraph 620(1E)(b) (which would require an Expert Panel for the road transport industry to have at least one Expert Panel member or other FWC Member who has knowledge of, or experience in, the road transport industry).

1542. These amendments would ensure that where an FWC Member is part of an Expert Panel for the road transport industry and the FWC Member becomes unavailable to continue dealing with the matter, the Expert Panel could continue to deal with the matter if the Expert Panel consists of at least three FWC Members, of whom:

- at least one FWC Member is the President, Vice President or Deputy President; and
- a majority of the FWC Members have knowledge of, or experience in, the road transport industry.

1543. Such a reconstitution may result in a minority of members of the Expert Panel having the requisite knowledge or experience. This would not affect the capacity of an Expert

Panel constituted under new proposed subsection 620(1E) to make any of the orders, determinations or instruments listed in new subsection 617(10A).

Item 293: At the end of subsection 627(4)

1544. This item would insert new paragraph (4)(k) so that road transport would be included as one of the fields the Minister must be satisfied that a person has knowledge of, or experience in, before the Governor-General appoints the person as an Expert Panel member.

Item 294: After paragraph 675(2)(k)

1545. This item would insert new paragraph (2)(l), which would provide that it would not be an offence for a person to engage in conduct that would contravene an MSO.

1546. This item would also insert new paragraph (2)(m), which would provide that it would not be an offence for a person to engage in conduct that would contravene an order made under regulation under new section 40J (which would deal with the road transport industry contractual chain).

Item 295: Paragraph 682(1)(a)

1547. This item would amend paragraph (1)(a) to include reference to regulated workers and regulated businesses. This would mean that the FWO's functions would be expanded to include providing education, assistance and advice to regulated workers and regulated businesses.

Item 296: Paragraph 682(1)(f)

1548. This item would amend paragraph (1)(f) to include reference to regulated workers. This would mean that the FWO's functions would be expanded to include representing regulated workers who are, or may become, a party to proceedings in a court, or a party to a matter before the FWC, under the FW Act or a fair work instrument (which would include an MSO – see item 257).

Item 297: At the end of section 682

1549. This item would insert new subsection (3). This would provide that the FWO's functions include providing education, assistance and advice, and producing best practice guides, in relation to MSGs.

Item 298: After subparagraph 712AA(1)(a)(vii)

1550. This item would insert new subparagraphs under paragraph 712AA(1)(a).

1551. Section 712AA provides that the FWO may apply to a nominated AAT presidential member for the issue of an FWO notice if the FWO believes on reasonable grounds that a person has information or documents relevant to an investigation by an inspector into a suspected contravention that relates, directly or indirectly, to the matters listed in paragraph 712AA(1)(a).

1552. The new subparagraphs would provide that the FWO may apply for an FWO notice in relation to the underpayment of monetary entitlements under an MSO, the unfair deactivation of an employee-like worker or unfair termination of a regulated road transport contractor.

1553. This is consistent with the treatment of underpayments for employees and unfair dismissals of employees, and would ensure the FWO's coercive powers continue to only be used for the intended purpose of facilitating investigations into the exploitation of vulnerable workers, specifically in relation to underpayments and entitlements.

Item 299: After paragraph 716(1)(fa)

1554. This item would insert a new paragraph in subsection (1) which would have the effect that an inspector could give a person a compliance notice if the inspector reasonably believes the person has contravened a term of an MSO. As outlined in the explanatory memorandum to the Fair Work Bill 2008, the ability to issue a compliance notice is restricted to what would be considered an 'entitlement provision'. A term of an MSO would fall into this category. This is also consistent with the treatment of modern awards.

Item 299A: At the end of Part 6-1

1555. This item would add new Subdivision E into existing Part 6-1 (Multiple actions).

1556. Within new Subdivision E, new subsection 734C(1) would provide that an application to review a services contract under Division 4 of new Part 3A-5 (unfair contract terms) must not be made if other review proceedings have commenced in relation to the services contract. The exceptions to this would be where the other review proceedings have been discontinued by the person who commenced them or failed for want of jurisdiction.

1557. New subsection 734C(1) would provide that a person must not commence other review proceedings in relation to a service contract if an application to review the contract has been made under Division 4 of new Part 3A-5 (unfair contract terms). The exceptions to this would be where the application has been discontinued by the person who commenced them or proceedings in relation to the application failed for want of jurisdiction.

1558. New subsection 734C(1) would define 'other review proceedings' as:

- proceedings under a provision of a law of a State or Territory that makes provision as mentioned in new paragraph 536JP(1)(c) (that is, it provides for a court, commission or tribunal to do certain things in relation to services contracts on an unfairness ground) and is not affected by the exclusion provisions; or
- proceedings in relation to services contract under provision of another law that is specified in the regulations.

1559. The intention is that new section 734C would prevent 'double dipping' by pursuing multiple remedies under different laws in relation to the same services contract.

1560. It is not intended that 'other review proceedings' would include proceedings that may be available at common law or equity in relation to a 'services contract' under a State or Territory law that makes provision as mentioned in new paragraph 536JP(1)(c).

Item 300: Section 735

Item 301: Section 735

1561. These items would amend the Guide to Part 6-2. This would outline that this Part also deals with disputes between regulated workers and regulated businesses. It would also outline that the FWC has the power to deal with disputes about instruments made under new Chapter 3A.

Item 302: After paragraph 738(b)

1562. This item would insert new subsections under section 738. Section 738 provides that Division 2 of Part 6-2 of the FW Act (which relates to dealing with disputes) applies where certain instruments include terms for dealing with disputes.

1563. The new subsections would have the effect that Division 2 of Part 6-2 would apply if an MSO or collective agreement includes a term that provides a procedure for dealing with disputes.

Item 303: At the end of subsection 738

1564. This item would insert a new subsection under section 738. Section 738 provides that Division 2 of Part 6-2 of the FW Act (which relates to dealing with disputes) applies where certain instruments include terms for dealing with disputes.

1565. The new subsection would have the effect that Division 2 of Part 6-2 would apply if an order made under regulations under new section 40J (which would deal with the road transport industry contractual chain) includes a term that provides a procedure for dealing with disputes.

Item 304: Section 796A

1566. This item would amend section 796A to provide that the regulations may confer powers, in addition to functions, on the FWC and general manager. This would ensure that the regulations made under section 40J (which would deal with the road transport industry contractual chain) could give the FWC and general manager additional powers, which may be required to give effect to dealing with the road transport industry contractual chain.

Item 305: At the end of section 798

1567. Existing section 798 enables the regulations to provide for civil penalties for contravention of the regulations. Subsection (2) limits the maximum penalty for contraventions to 20 penalty units for an individual and 100 penalty units for a body corporate.

1568. This item would add new subsection (3) which would provide that subsection 798(2) would not apply to civil penalties for contravention of regulations under new section 40J (which would deal with the road transport industry contractual chain), or an order made under regulations under new section 40J. This would enable the regulations to prescribe a higher civil penalty amount for contravention, as would be provided for in new paragraph 40J(2)(f), for example, to provide for penalties for contraventions of road transport contractual chain orders to match penalties for MSOs (60 penalty units and 600 penalty units for serious contraventions).

1569. As outlined in the explanatory memorandum to the Fair Work Bill 2008, the limit set in subsection (2) was set based on ‘the nature of the regulations that could be made’. Because the regulations under new section 40J have a different nature to the regulations that could be made under the original Fair Work Bill 2008, this limit is not appropriate in this instance.

Division 5—Amendments of the Independent Contractors Act 2006

Amendments to the *Independent Contractors Act 2006*

Item 306: After subsection 12(2)

1570. This item would insert new subsection (2A) into the IC Act. This would provide an application must not be made in relation to a services contract unless, the sum of the independent contractor’s annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is more than the contractor high income threshold within the meaning of the FW Act.

1571. This would give effect to the intention that high income earners would be covered by the IC Act’s unfair contract regime, and that people who are not high income earners would be covered by the FW Act’s unfair contract regime.

1572. New section 15C of the FW Act would define the contractor high income threshold. Under new subsection 536ND(2) of the FW Act, a person could not make an application for an unfair contract term remedy unless the sum of the person’s annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with regulations made under new subsection 536ND(2), is less than the contractor high income threshold within the meaning of the FW Act.

1573. A new note would indicate that new Division 3 of Part 3A-5 of the FW Act would set out when the FWC may order a remedy for unfair contract term.

Part 17—Technical amendment

Amendments to the *Fair Work Act 2009*

1574. This Part would make a technical amendment to repeal a sunsetted clause.

Item 307: Clause 27 of Schedule 1

1575. This item is a technical amendment which would repeal clause 27 of Schedule 1 to the FW Act. Schedule 1 to the FW Act contains application, saving and transitional provisions relating to amendments to the FW Act. Subclause 27(3) of Schedule 1 provides that the clause ceased to have effect on 1 January 2020. The item would therefore remove from the FW Act a clause that no longer has any effect.

Part 18—Application and transitional provisions

Amendments to the *Fair Work Act 2009*

1576. Part 18 would amend the FW Act to provide consequential application and transitional clauses arising from the amendments made by the Bill.

Item 308: At the end of Schedule 1

1577. Item 308 would insert new Part 15 at the end of Schedule 1 (Application, saving and transitional provisions relating to amendments to this Act) of the FW Act.

Part 15—Main amendments made by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*

Division 1—Definitions

Clause 91: Definitions

1578. New clause 91 would insert two new definitions that apply to new Part 15:

- ‘amended Act’ would mean the FW Act as amended by the Fair Work Legislation Amendment (Closing Loopholes) Act 2023; and
- ‘amending Act’ would mean the Fair Work Legislation Amendment (Closing Loopholes) Act 2023.

Division 2—Amendments made by Part 1 of Schedule 1 to the amending Act

Clause 92: Resolving uncertainties and difficulties about interaction between fair work instruments and the definition of casual employee and employee choice

1579. Clause 92 would empower the FWC to make a determination varying a fair work instrument that was made before the commencement of clause 92 on application, or on its own initiative if the fair work instrument is a modern award.

1580. An employer, employee or employee organisation covered by an enterprise agreement or workplace determination has standing to make an application for a variation to resolve an interaction issue (paragraph 92(1)(a)).

1581. An employer or employee organisation entitled to represent the industrial interests of an employee or employer covered by a modern award has standing to make an application to vary that modern award (paragraph 92(1)(b)).

1582. An order could be made to resolve an uncertainty or difficulty arising from the interaction between certain fair work instruments that were on foot prior to commencement of this clause and the definition of ‘casual employee’ as amended by this Bill, or to make the instrument operate effectively with the amended provisions (subclause 92(2)).

1583. A variation of this kind would operate from the day specified in the determination – including where the date specified is a day before the determination is made (subclause 92(3)).

1584. If a determination relates to a modern award, the FWC would be required to publish the varied award as soon as practicable on its website, or by other means it considers appropriate (subclause 92(4)).

Clause 93: Application of amendments

1585. This clause would provide for the application of amendments in Part 1 of Schedule 1 – Casual employment.

1586. For employment relationships entered into before, on or after 1 July 2024, the amended definition of ‘casual employee’ in new section 15A would apply on and after that date (subclause 93(1)).

1587. For the purposes of employment relationships entered into prior to 1 July 2024, conduct by the employer that occurred before that date is not relevant to either:

- the application of the considerations at new subsection 15A(2); or
- the application of the avoidance of doubt provisions at new subsection 15A(3) in relation to the employee (paragraph 93(2)(a)).

1588. Similarly, any period of employment as a casual employee that occurred before that date is not counted for the purposes of calculating the periods relevant to the giving of an employee notification under new paragraphs 66AAB(c) and (d) (subclause 93(6)).

1589. An employee engaged as a casual employee prior to 1 July 2024 would be taken to be casual within the meaning of new section 15A after that date and employers of those employees would be required to provide the Casual Employment Information Statement to those employees within 3 months of commencement of these provisions (subclauses 93(3) and (4)).

1590. For an employee engaged as a casual employee on a fixed term contract on or before commencement, they can remain employed on that basis, despite new subsection 15A(4) for the remainder of the term of that contract (paragraph 93(2)(b)). The effect of this is that fixed term contracts on foot will not be disrupted by the commencement of these amendments.

1591. Dispute resolution mechanisms provided for under existing sections 66M and 739 of the FW Act continue to apply as in force immediately prior to 1 July 2024 for the purposes of disputes about casual conversion that arose prior to that date (subclause 93(7)).

Clause 94: Transitional provision

1592. This item would insert clause 94 to provide that for the purposes of the anti-avoidance provisions that would be inserted by Items 13 and 14 of Part 1 of Schedule 1, references to ‘this Division’ in those provisions are to be taken to include a reference to Division 4A Part 2–2 as amended by Part 1 of Schedule 1.

1593. This is intended to ensure that an employer could not engage in conduct including reducing or varying an employee’s hours of work, changing an employee’s pattern of work or terminating an employee’s employment in order to avoid any right or

obligation that would arise under Division 4A Part 2-2 between the introduction of the Bill and the commencement of Part 1 of Schedule 1 to the Bill, in order to defeat the intended effect of the Bill.

Division 3—Amendments made by Part 2 of Schedule 1 to the amending Act

Clause 95: Application—section 121

1594. This clause would ensure that despite the operation of new paragraph 121(4)(d), the amendments to section 121 will only apply to employees whose employment has been terminated post-commencement and where the insolvent employer downsizing to become a small business employer occurred post-commencement.

Division 4—Amendments made by Part 4 of Schedule 1 to the amending Act

Clause 96: Replacement agreements

1595. New subclause 96(1) would make clear that new subsections 58(4) and (5) apply in relation to single-enterprise agreements made after commencement, whether the relevant single interest employer agreement or supported bargaining agreement was made before or after commencement.

1596. New subclause 96(2) would make clear that new section 180B and new subsection 240A(4) apply to proposed single-enterprise agreements from commencement, whether or not the related single interest employer agreement or supported bargaining agreement was made before or after commencement.

1597. New subclause 96(3) would make clear that new subsections 236(1B) and 238(2) apply from commencement to prohibit majority support determination applications and scope order applications being made in relation to a proposed single-enterprise agreement that would replace a single interest employer agreement or a supported bargaining agreement, whether the single interest employer agreement or supported bargaining agreement was made before or after commencement.

Clause 97: Variation of supported bargaining authorisations

1598. This clause would provide that new subsection 245(2) applies, after commencement, in relation to enterprise agreements and workplace determinations that come into operation before or after commencement. This would provide consistency in the operation of the legislation, to ensure employees to whom a single interest employer agreement or supported bargaining agreement applies are not prevented from making a single-enterprise agreement whether or not all employees specified on the supported bargaining authorisation are covered by an agreement or workplace determination.

Clause 98: Application of better off overall test to replacement agreements

1599. This clause is a transitional provision which would provide that sections 193 and 193A as amended by Part 4 would apply to a single-enterprise agreement made after commencement which, if it were to come into operation, would replace a single interest employer agreement or supported bargaining agreement made before or after commencement. This would allow the amended BOOT to apply to all new agreements made on and after commencement.

Division 5—Amendments made by Part 5 of Schedule 1 to the amending Act

Clause 99: Model terms and enterprise agreements

1600. New subclause 99(1) would provide that the amendments made by Part 5 of Schedule 1 to the amending Act do not apply to an enterprise agreement where, prior to the commencement of Part 5, an employer that will be covered by the proposed agreement asks its relevant employees to vote on the agreement, the employees by that vote (which may be before or after commencement) approve the agreement and the agreement is made, and the agreement is later approved by the FWC.

1601. New subclause 99(2) would provide that, after the commencement of Part 5 of that Schedule, the FWC is not to consider the amendments made by Part 5, including the model terms determined by the FWC, when deciding whether to approve an enterprise agreement covered by subclause 99(1).

Clause 100: Model terms and copied State instruments

1602. This clause would provide that where a model term has been taken to be a term of a copied State instrument prior to commencement of Part 5 of that Schedule, existing section 768BK continues to apply in relation to that model term as if the amendments made to that section by Part 5 had not been made.

Clause 101: Disallowance—model terms made before commencement

1603. This clause would provide that a determination made by the FWC before the commencement of Part 5 under new subsections 202(5), 205(3), 737(1) or 768BK(1A) is a legislative instrument to which section 42 of the Legislation Act (disallowance) does not apply.

1604. The effect is that a model term determined by the FWC between the passage and commencement of Part 5 in reliance on subsection 4(1) of the AI Act (as in force on 25 June 2009) would not be disallowable, consistently with the approach to terms made after commencement as described above.

1605. This exemption from disallowance is appropriate to avoid the commercial uncertainty, and potential impact on bargaining and enterprise agreement approval processes, that would arise if FWC model terms were disallowed in circumstances where no such terms were prescribed by the FW Regulations.

1606. The model terms may only be determined by the FWC after taking into account ‘best practice’ workplace relations and following public consultation, ensuring widespread opportunity for input into and comment on the making of the terms, and as such do not require Parliamentary scrutiny. It is appropriate that the FWC determine the model terms, as Australia’s expert and independent industrial relations tribunal, and given the limited capacity of the model terms to create or vary rights and obligations.

1607. Relying on subsection 4(1) of the AI Act as in force on 25 June 2009, this clause would make clear that a model term determined by the FWC between Royal Assent and the commencement of Part 5 would not be disallowable.

1608. The FWC has been provided 12 months to make the model terms to accommodate the public consultation required, however it is possible that the FWC will conclude the determination of the model terms prior to commencement. It is in the public interest that terms made prior to commencement be treated consistently and that the FWC not be required to delay making model terms in order to avoid potential disallowance.

Division 6—Amendments made by Part 6 of Schedule 1 to the amending Act

Clause 102: Application of amendments—regulated labour hire arrangement orders

1609. This clause would provide transitional arrangements for new Part 2-7A, which relates to regulated labour hire arrangement orders. It would provide that any obligations on an employer to pay a regulated employee at the protected rate of pay would apply on and after 1 November 2024 in relation to labour hire arrangements entered into at any time before, on or after that day.

1610. The anti-avoidance provisions in Division 4 of Part 2-7A would apply in relation to conduct on or after the day the Bill is introduced to Parliament. This will minimise the risk of businesses seeking to change their arrangements between introduction and Royal Assent to avoid being caught by the measure.

Division 7—Amendments made by Part 7 of Schedule 1 to the amending Act

Clause 103: Application of section 149E of amended Act

1611. This clause provides that new section 149E would apply in relation to a modern award that is in operation on or after 1 July 2024. This would capture all modern awards that are presently in operation, and not revoked before 1 July 2024, and all new modern awards that might come into operation after that day.

1612. This clause also provides that the failure of a modern award to comply with new section 149E would not affect the validity of that modern award.

Clause 104: FWC to vary certain modern awards

1613. This clause would require the FWC to vary all modern awards that are in effect on 1 July 2024 to include terms that deal with delegates' rights (as required by new section 149E) by 30 June 2024. This clause provides that determinations made as part of this process will only come into effect from 1 July 2024.

1614. This clause would also require the FWC to publish the varied award as soon as practicable, consistent with the general publication requirements on the FWC contained in existing section 168 of the FW Act.

Clause 105: Application of section 205A of amended Act

1615. This clause provides transitional arrangements for enterprise agreement compliance with new section 205A. Under subitem (1), new section 205A would not apply to an enterprise agreement if, before 1 July 2024, the employer concerned requests the relevant employees to approve the agreement by voting for it, those employees vote to approve the agreement and the agreement is approved by the FWC. Only the first step in this process (that is, the employer must have requested the relevant employees vote to approve the agreement) would need to have occurred prior to 1 July 2024.

1616. This would avoid the amendments applying to an enterprise agreement that had been substantially progressed prior to the requirement to comply with new section 205A coming into effect. Enterprise agreements which did not require a delegates' rights term to be included at the time the employer asked the employees to vote can still be approved by the FWC, provided that it has been voted on and approved by the employees of the workplace and the agreement would not otherwise be refused by the FWC.

1617. However, if an enterprise agreement was voted upon but rejected by employees, or not approved by the FWC due to another condition not being met, any future agreement that is subject to further workplace bargaining would be required to contain a delegates' rights term in compliance with new section 205A.

1618. Under subclause (2), the FWC must disregard the new section 205A in deciding after 1 July 2024 whether to approve an enterprise agreement mentioned in subitem (1).

1619. This item also means that new section 205A would not apply in relation to enterprise agreements approved by the FWC before 1 July 2024.

Clause 106: Application of subsections 273(6) and (7) of amended Act

1620. This clause provides that workplace determinations made on or after 1 July 2024 must include a delegates' rights term for the workplace delegates to whom the determination applies.

1621. A delegates' rights term in a workplace determination made on or after 1 July 2024 must not be less favourable than the delegates' rights term in any modern award that covers a workplace delegate to whom the determination applies.

1622. However, a workplace determination will not be invalid on or after 1 July 2024 only because it does not include a delegates' rights term. This ensures that the amendments do not affect the validity of workplace determinations made before 1 July 2024.

Division 8—Amendments made by Part 9 of Schedule 1 to the amending Act

Clause 107: Application of amendments

1623. This clause would provide that section 357, as amended by Part 9 of Schedule 1 of this Act, would apply only in relation to representations made on or after the commencement of Part 9 of Schedule 1 to this Act.

Division 9—Amendments made by Part 10 of Schedule 1 to the amending Act

Clause 108: Application of amendments—right of entry

1624. This clause would provide that the amendment to subsection 510(1) of the FW Act empowering the FWC to impose conditions on an entry permit as an alternative to suspending or revoking the entry permit when required to take action under that subsection (see item 118) would apply to entry permits held by a permit holder whether issued before, on or after the commencement of Part 10 of Schedule 1.

Division 10—Amendments made by Part 11 of Schedule 1 to the amending Act

Clause 109: Penalties for contravention of civil remedy provisions

1625. This clause sets out application provisions for the proposed civil pecuniary penalty increases, proposed changes to the ‘serious contraventions’ regime, and the introduction of ‘amount of the underpayment’ civil penalties under this Part. The provisions apply where there is a single course of (contravening) conduct, with some of the conduct occurring before, and some after, commencement.

1626. The overarching principle is that the changes apply prospectively; that is, in relation to conduct that occurs after commencement of the relevant provisions. For the relevant provisions (as described in subclauses 109(1) and (3)), conduct engaged in before the relevant commencement cannot constitute the same course of conduct as conduct engaged in after that commencement. This approach ensures that the proposed higher penalties, new kinds of penalties, or new rules for establishing ‘serious contraventions’ cannot apply retrospectively to any relevant conduct that occurred before commencement of the relevant new provisions.

1627. While the proposed application provisions would have the effect of dividing any ‘single course of conduct’ into 2, so that 2 rather than one penalty applies. However, the courts will apply the ‘totality’ principle in sentencing. The ‘totality’ principle, requires the courts to look at the entirety of the contraventions and determine the most appropriate sentence for all the contraventions taken together. In effect, it is an important safeguard against ‘double punishment’.

Division 11—Amendments made by Part 14 of Schedule 1 to the amending Act

Clause 110: Offence relating to failure to pay certain amounts as required

1628. This clause would make clear that the new offence for wage theft (in new section 327A) would apply prospectively, that is, in relation to conduct that occurs after commencement. If part of a single course of conduct occurs before, and some after, commencement, only conduct that occurs afterwards may be subject to prosecution.

Part 16—Amendments made by Part 15 of Schedule 1 to the Fair Work Legislation Amendment (Closing Loopholes) Act 2023

Division 1—Definitions

Clause 112: Definitions

1629. This clause would insert four new definitions that apply to new Part 16:

- ‘amended Act’ would mean the FW Act as amended by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*;
- ‘amending Act’ would mean the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*;
- ‘commencement’ would mean the commencement of item 237 of Part 15 of Schedule 1 to the amending Act;
- ‘old Act’ would mean the FW Act as in force immediately before commencement.

Division 2—Transitional provisions

Clause 113: Relationships in existence as at commencement or entered into on or after commencement

1630. This clause contains an application provision for new section 15AA.

1631. Subclause 113(1) would provide that section 15AA of the amended Act applies on or after commencement to a relationship between an individual and a person entered into:

- before commencement that is in existence as at commencement;
- on or after commencement.

1632. New subclause 113(2) would provide that despite section 40A of the FW Act, section 7 of the AI Act, as in force from time to time, applies in relation to the amendment made by item 237 of Part 15 of Schedule 1 to the amending Act. Section 40A of the FW Act provides that the AI Act as in force on 25 June 2009 applies to the FW Act, and that amendments of the AI Act made after that day do not apply to the FW Act. Existing section 7 of the AI Act, which is concerned with the effect of repeal or amendment of an Act, was inserted into the AI Act by amendments made after 25 June 2009. Existing subsection 7(2) of the AI Act preserves the previous operation of the affected Act or part of the Act, as well as accrued rights, privileges, obligations, or liabilities beyond the repealing of the Act, or the part of the Act, under which they arose.

1633. New subclause 113(2) would therefore mean that any rights, privileges, obligations, or liabilities accrued by an individual before commencement of new section 15AA would continue in effect after commencement.

1634. A legislative note under new subclause 113(2) would clarify the scope of section 7 of the AI Act.

Clause 114: References to employees etc. in fair work instruments made before commencement

1635. This clause would ensure that a reference in a fair work instrument made before commencement and in operation on or after commencement to an employee or an employer is taken, on and after commencement, to include a reference to an employee or an employer within the meaning of new section 15AA.

1636. This provision would clarify that individuals and persons who become employees or employers by operation of new section 15AA are covered by a modern award, enterprise agreement, workplace determination or FWC order made before commencement and in operation on or after commencement that is otherwise expressed to cover them. The intention is to avoid a situation where a fair work instrument continues to cover individuals who are employees within the common law meaning of that term, but does not also cover individuals who are employees by operation of new section 15AA.

Illustrative example: A new employee being covered by an enterprise agreement

Hamish is a security guard who has worked with the same security firm, Protect Pty Ltd (Protect), for the past four years. Hamish is engaged as an independent contractor, and the agreement between the two parties describes him as such.

Protect also employs 55 security guards who are covered by the Protect and United Workers' Union Enterprise Agreement 2022 (Protect EA). The Protect EA was approved on 1 December 2022 and is expressed to cover all employees of Protect who are employed as security guards. The nominal expiry date for the Protect EA is 1 December 2025.

On commencement of new section 15AA, Hamish becomes an employee of Protect. Despite the relationship being described as one of principal and contractor in the written agreement governing the relations between Hamish and Protect, various factors suggest that the relationship is one of employment. Among other things, Hamish is required to wear Protect branded attire, Protect tell him when and where he is required to work and Hamish has no capacity to delegate the services that he performs for Protect.

If Hamish becomes an employee of Protect because of the operation of new section 15AA, he will be covered by the Protect EA.

Clause 115: Entitlements determined by reference to length of a period of employment etc.

1637. This clause would provide that for the purposes of determining whether an individual who becomes an employee because of the operation of new section 15AA has a right or entitlement under the amended Act or under a fair work instrument calculated by reference to the individual's length of service or a minimum period of employment, the nature of the relationship in respect of a period or periods before commencement is to be ascertained in accordance with the FW Act as in force immediately before commencement.

1638. This clause would ensure that new section 15AA operates prospectively and any rights or entitlements accrued by an individual before commencement of new section 15AA would continue in effect after commencement.

Illustrative example: Recognising length of service

Sharon is a personal trainer and engaged as an independent contractor at a large gym franchise. She was engaged as an independent contractor on 1 April 2023.

Following commencement of new section 15AA, Sharon talks to the gym that engages her and they both agree she is better characterised as an employee under the new provisions.

Sharon has an eight year old daughter and wishes to enter into a flexible work arrangement so she can take her daughter to school three days a week. Under the FW Act, permanent employees who have worked for the same employer for at least 12 months can formally request flexible working arrangements in specified circumstances – including where they are a parent, or have the responsibility for the care, of a child who is school-aged or younger. The

employer must follow certain procedures, and the employee has the right to dispute resolution if the employers does not agree.

Sharon makes the request on 1 August 2024. Although Sharon has worked at the gym since 1 April 2023, a period of 16 months, she only became an employee on 1 July 2024.

Therefore, Sharon will need to wait until after 1 July 2025 before she is eligible to request a flexible working arrangement under the formal processes in the FW Act. This does not prevent Sharon and her employer from negotiating a flexible working arrangement earlier.

Clause 116: Old Act applies to proceedings on foot as at commencement

1639. Despite the amendments made by item 237 of Part 15 of Schedule 1, this clause would provide that the old Act continues to apply, on and after commencement, in relation to:

- an application made, or proceedings on foot, as at commencement (other than an application or proceeding prescribed by the regulations);
- an application for review of, or an appeal relating to, an application made or proceedings on foot at commencement (whether the application for review was made, or the appeal proceedings were brought, before, on or after commencement).

1640. Subclause 116(2) would make it clear that an application or proceedings will be considered on foot until all rights of review and appeal in relation to the application or proceedings have expired or have been exhausted.

Illustrative example: Unfair dismissal proceedings on foot

Henry was a cook engaged as an independent contractor to provide services to an off-site catering business. Henry began work in February 2022 and on 15 May 2024 had his services contract terminated.

On 1 June 2024, Henry applied to the Fair Work Commission (FWC) for an unfair dismissal remedy alleging that he was an employee of the catering business, not an independent contractor, and therefore protected from unfair dismissal. The respondent business objected to the FWC dealing with the application, contending that Henry was not a person protected from unfair dismissal on the basis that he was not an employee.

The FWC begins to deal with the application in June 2024, but the matter is still on foot on 1 July 2024 when the amendments commence.

As Henry lodged his application before the commencement of the amendments to the FW Act, the FWC must determine whether Henry was an employee within the meaning of that term according to the FW Act as in force immediately before commencement of the amendments until the matter is determined to finality. This is also the case if either party decides to appeal the single member decision to a Full Bench of the FWC.

Clause 117: FWC power to deal with uncertainties or difficulties arising from the operation of section 15AA of the amended Act

1641. This clause would empower the FWC to vary a fair work instrument to resolve uncertainty or difficulty arising as a result of, or in connection with, the amendment made by item 237 or Part 15 of Schedule 1 to the amending Act.
1642. By new subclause 117(2), the FWC would be able to make a determination varying a modern award on its own initiative, or on application by a specified party. It is intended that the standing requirements under new subclause 117(2) are consistent with those in existing section 160 of the FW Act.
1643. By new subclause 117(3), the FWC would be able to make a determination varying an enterprise agreement or a workplace determination on its own initiative, or on application by a specified party. It is intended that the standing requirements under new subclause 117(3) are consistent with those in existing section 218A of the FW Act.
1644. By new subclause 117(4), the FWC would be able to make a determination varying a FWC order on its own initiative, or on application by a specified party.
1645. New subclause 117(5) would specify that a variation under this clause operates from the day specified in the determination, which may be a day before the determination was made.
1646. It is intended that this process may be utilised where a fair work instrument is attempting to define ‘employee’, ‘employer’ or ‘employment’ in a way that may not align with the principle of interpretation in new section 15AA. New clause 117 would complement the FWC’s existing powers to vary fair work instruments.
1647. New subclause 117(6) would provide a regulation making power which would enable regulations prescribing that clause 117 applies, or does not apply, to a specified:
- fair work instrument;
 - class of fair work instrument;
 - uncertainty or difficulty;
 - class of uncertainty or difficulty.
1648. This regulation making power is necessary to deal with any unforeseen issues that may arise as a result of the amendments to the Fair Work framework. Any regulations would be subject to scrutiny by both Houses of Parliament and subject to disallowance.

Division 3—Regulations about transitional matters

Clause 118: General power for regulations to deal with transitional etc. matters

1649. This clause would include a regulation-making power which would enable regulations of a transitional, application or saving nature in relation to a person becoming an employer or an individual becoming an employee because of the amendments made by item 237 of Part 15 of Schedule 1. Any regulations would be subject to scrutiny by both Houses of Parliament and subject to disallowance.

Clause 119: Other general provisions about regulations

1650. This item would provide that subsection 12(2) of the Legislation Act does not apply to regulations made for the purposes of Part 16. Subsection 12(2) of the Legislation Act ensures against legislative instruments retrospectively adversely affecting rights.

1651. The ability to make regulations with retrospective application is necessary to provide the Minister with the discretion and flexibility to deal with any unforeseen developments that could require immediate or prompt changes. This is particularly important to ensure a smooth transition between the old Act and the operation of provisions under the amended Act. Any regulations would be subject to disallowance under the Legislation Act and therefore subject to Parliamentary scrutiny.

1652. While regulations under Part 16 could be made with retrospective application, subclause 119(3) would make it clear that a person could not be convicted of an offence or ordered to pay a pecuniary penalty for contravening a provision of the FW Act in relation to conduct before the registration date. As such, the rules would not be able to detrimentally affect any persons due to their retrospective application.

1653. Pursuant to table item 27(e) in section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (Exemption Regulations), any regulations made pursuant to this clause will not be subject to ordinary sunseting processes. The *Legislation (Exemptions and Other Matters) Amendment (2019 Measures No. 1) Regulations 2019* (Fair Work Exemption Amendment) amended the Exemption Regulations to include as exempt from sunseting, among other things, a regulation made under the FW Act. The Explanatory Statement to the Fair Work Exemption Amendment contains the justification as to why regulations made under the FW Act should be exempt from sunseting. In short, regulations and other like instruments made under the FW Act are exempt from sunseting because they form part of an intergovernmental scheme.

Part 17—Amendments made by Part 16 of Schedule 1 to the Fair Work Legislation Amendment (Closing Loopholes) Act 2023

Division 1—Definitions

Clause 120: Definitions

1654. New clause 120 would insert four new definitions that apply to this Part:

- ‘amended Act’ would mean the FW Act as amended by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*;
- ‘amending Act’ would mean the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*;
- ‘commencement’ would mean the commencement of item 238 of Part 16 of Schedule 1 to the amending Act;
- ‘old Act’ would mean the FW Act as in force immediately before commencement.

Division 2—Transitional provisions

Clause 121: Unfair deactivation and unfair termination

1655. Subclause (1) is a transitional provision that would provide that Part 3A-3 (Unfair deactivation or unfair termination of regulated workers) applies to a deactivation or termination that occurs after commencement.

1656. New subclause (2) would provide that for the purposes of determining under paragraph 536LD(c) whether an employee-like worker has been performing work for a period of at least six months, a period or periods before commencement are not to be counted. Meeting that six month threshold is a requirement for a person to be protected from unfair deactivation under paragraph 536LD(c).

1657. New subclause (3) would provide that for the purposes of determining under paragraph 536LE(c) whether a regulated road transport contractor has been performing work for a period of at least 12 months, a period or periods before commencement are not to be counted. Meeting that 12 month threshold is a requirement for a person to be protected from unfair termination under section 536LE.

Clause 122: New applications relating to unfair contracts

1658. Clause 122 would provide that an application to the FWC for an unfair contract terms remedy in relation to a services contract may be made under section 536ND only if the contract was entered into on or after the commencement of item 122.

Clause 123: Services contracts entered into before commencement

1659. Subclause (1) would confirm that this section applies to a services contract entered into before commencement.

1660. Subclause (2) would provide for the continued application of the IC Act in relation to services contracts entered into prior to commencement, despite the amendments of the IC Act made by the Amending Act.

SCHEDULE 2—AMENDMENT OF THE ASBESTOS SAFETY AND ERADICATION AGENCY ACT 2013

Part 1—Main amendments

Amendments to the Asbestos Safety and Eradication Agency 2013

1661. The increase in silicosis and other silica-related diseases is deeply concerning and has raised the need for urgent coordinated national action to reduce rates of silica-related diseases and to support affected workers and their families. The amendments in Schedule 2 would expand the functions of the well-respected ASEA to include coordinating action on silica safety and silica-related diseases. This includes developing, promoting and reporting on a Silica National Strategic Plan which will coordinate and track the progress of jurisdictions against nationally agreed targets. ASEA would be renamed the Agency to reflect these changes.
1662. Establishing and appropriately resourcing the renamed Agency as a national coordination mechanism for action on silica-related diseases acts on the recommendations of the NDDT. The NDDT was established in 2019, and in June 2021 submitted a final report to the then Minister for Health and Aged Care recommending a national approach to the prevention, early identification, control and management of silicosis and other occupational dust diseases in Australia. An All of Governments response to the NDDT's Final Report was published in April 2022.
1663. This Bill would amend the ASEA Act to broaden ASEA's functions which are currently confined to asbestos. The renamed Agency's functions would include responsibility for silica coordination, awareness raising, research, reporting and providing advice to the government on silica.
1664. The Bill would also expand the membership of the current ASEC to include appropriate representation from employee and employer representatives and an expert in asbestos or silica-related matters. Eligibility would be broadened to allow for persons with lived experience to be appointed to the Council. ASEC would be renamed the Asbestos and Silica Safety and Eradication Council to reflect these changes.
1665. The amendments would complement the establishment of the NORDR, which will require reporting of silicosis and is aimed at improving national data. There are links between the NORDR Bill and this Bill, but they are distinct as NORDR will remain the responsibility of the Department of Health and Aged Care. The amendments would move responsibility for the Silica National Strategic Plan from the Department of Health and Aged Care to the Agency.
1666. The amendments would not duplicate or undermine the role of other agencies, such as Safe Work Australia, the national work health and safety policy body that is currently undertaking a range of work related to respirable crystalline silica and silica-related diseases. Safe Work Australia is responsible for national work health and safety policy and the model work health and safety laws.
1667. It is intended that the Agency would work in lock step with other government departments and agencies. The Government believes there is value in identifying a

national coordination body, and for this body to focus on preventing silica-related diseases as a priority. The Agency is unique because it would report to both health ministers and work health and safety ministers in relation to silica and asbestos.

1668. The Statement of Compatibility with Human Rights outlines how these amendments would implement the NDDT's recommendations to promote safe and healthy working conditions for Australian workers.

Item 1: Title

1669. Item 1 would remove the word 'Asbestos' and substitute the words 'Asbestos and Silica' to amend the name of the ASEA Act to 'Asbestos and Silica Safety and Eradication Agency Act 2013'.

1670. This amendment would reflect the expansion of functions related to silica. The addition of functions related to the prevention of silica-related diseases is not intended to divert attention or resources away from ASEA's important work on eradicating asbestos from the built environment.

Item 2: Section 1

1671. Item 2 would amend the short title of the ASEA Act to reflect the new name.

Item 3: Section 2A

1672. Item 3 would repeal and replace the 'Objects' provision in the ASEA Act.

1673. New section 2A would add references to silica safety and silica-related diseases to reflect the broader remit. It would also implement Recommendation 3 of the 2019 ASEA Review, which identified inconsistencies in how ASEA's role is described. This amendment would clarify and strengthen the Agency's purpose and provide guidance on how it is to perform its existing asbestos-related functions alongside the new silica-related functions.

Item 4: Section 3 (definition of *Agency*)

Item 5: Section 3

1674. Section 3 of the ASEA Act contains definitions. Items 4 and 5 would amend section 3 to include three new terms which streamline existing provisions and reflect the amendments which would be made in this Schedule.

1675. Item 4 would repeal and replace the existing definition of 'Agency' to reflect the new name.

1676. Item 5 would add new definitions for:

- 'Asbestos and Silica Safety and Eradication Agency' with a cross reference to new section 6 to reflect the new name.
- 'Asbestos and Silica Safety and Eradication Council' with a cross reference to new section 28 to reflect the new name of the Council. A new definition is included because the existing ASEA Act is inconsistent in the way it refers to the ASEC where some provisions only use the term 'Council' and not its full name.
- 'Asbestos National Strategic Plan' with a cross reference to new section 5A.

Item 6: Section 3 (definition of *Asbestos Safety and Eradication Council*)

Item 8: Section 3

1677. Item 6 would repeal the existing definition of ASEC.

1678. Item 8 would update the way this body is referred to in the ASSEA Act. Rather than spelling out the name in full, it would be referred to as the ‘Council’ which is defined to mean the ‘Asbestos and Silica Safety and Eradication Council’. The ASEC would be renamed to reflect the expanded remit of the Agency.

Item 7: Section 3 (definition of *Chair*)

Item 9: Section 3 (definition of *Council member*)

1679. Items 7 and 9 would update definitions of ‘Chair’ and ‘Council member’. The new definition of Council means that the name does not need to be spelt out in full.

Item 10: Section 3 (definition of *National Strategic Plan*)

1680. Item 10 would repeal the existing definition of ‘National Strategic Plan’ which refers to the current asbestos plan (new section 5A). This Bill would provide for a new ‘Silica National Strategic Plan’ and the asbestos plan name needs to be updated to clearly distinguish the two.

Item 11: Section 3

1681. Item 11 would insert a new definition of ‘National Strategic Plans’ to provide for two separate national strategic plans for asbestos and silica. Throughout the ASSEA Act, where both plans are referred to, they would be referred to as the ‘National Strategic Plans’.

1682. Item 11 would also insert a new definition ‘Silica National Strategic Plan’ which would be defined in new section 5B.

1683. Item 11 would also insert a new, non-exhaustive definition of ‘silica safety’ which is similar to the existing definition of ‘asbestos safety’. Silica safety would include a broad range of matters including matters relating to awareness, education and information sharing in relation to respirable crystalline silica. This is intended to cover the full life cycle of silica products, including the manufacture, supply, use and disposal where appropriate. Not all forms of silica or silica products are hazardous. Although the definition of ‘silica safety’ is broad, it is not intended that the Agency would have a role in relation to silica which does not pose a risk to human health.

Item 12: Part 1A

1684. Item 12 would repeal and replace existing Part 1A of the ASEA Act, which would be renamed ‘National Strategic Plans’. The Bill provides for two similar but distinct plans- the Asbestos National Strategic Plan which already exists in the ‘National Strategic Plan’ and a new plan for silica-related diseases.

Asbestos National Strategic Plan

1685. Item 12 would insert a new definition of ‘Asbestos National Strategic Plan’ which is less prescriptive than the existing section 5A to provide flexibility in the future, where

priorities and actions can be changed as needed without being restricted by the ASSEA Act. This amendment would implement recommendation 2 of the 2019 ASEA Review, which identified that while some prescription is useful to guide the development of a National Strategic Plan, the legislation needs to provide sufficient flexibility to address emerging issues and new priorities.

1686. The new definition would reflect and expand the existing Asbestos National Strategic Plan which would be renamed shortly after commencement of this Bill. The aim of the Asbestos National Strategic Plan would be to eliminate asbestos-related diseases in Australia by preventing exposure to asbestos fibres and to support workers and others who are affected by asbestos-related diseases.

1687. New paragraph 5A(1)(b) would set out the matters which must be addressed in the plan to ensure there is a nationally consistent and coordinated approach to improving asbestos removal, national data and awareness about asbestos safety and asbestos-related diseases and facilitating international collaboration.

1688. New subsection 5A(2) would require a two-thirds majority of jurisdictions to agree to the Asbestos National Strategic Plan for it to be a valid plan. The current plan has been agreed to by all governments and this provision is included for clarity. It would provide a clear threshold for when a plan has sufficient support to be valid.

1689. On commencement the existing Asbestos National Strategic Plan would meet the requirements of new section 5A because it has been agreed to by governments and addresses the matters set out in new subparagraph 5A(1)(b).

Silica National Strategic Plan

1690. New section 5B ‘Silica National Strategic Plan’ would be similar to the definition of the Asbestos National Strategic Plan in new section 5A. The plan would aim to eliminate silica-related diseases by preventing exposure to respirable crystalline silica and supporting workers and others who are affected by silica-related diseases. New paragraph 5B(1)(b) would set out the matters which must be addressed in the plan, including eliminating or minimising exposure to respirable crystalline silica in workplaces, and improving research and national data.

1691. New subsection 5B(2) would require a two-thirds majority of jurisdictions to agree to the Silica National Strategic Plan for it to be a valid plan. This would recognise that the successful implementation of the plan requires commitment by the majority of governments.

1692. The Lung Foundation Australia is currently developing a Silica National Strategic Plan pursuant to Recommendation 3(a) of the 2021 NDDT’s Final Report to the Minister for Health and Aged Care. This work would provide an important foundation upon which the first Silica National Strategic Plan would be built.

1693. Responsibility for implementing the NDDT’s recommendations in relation to the development of a National Silicosis Prevention Strategy and associated National Action Plan, and a national coordination mechanism for action on silica-related diseases.

Item 13: Part 2 (heading)

1694. Item 13 would repeal the existing heading for this part and substitute a new heading ‘Asbestos and Silica Safety and Eradication Agency’ to reflect the new name.

Item 14: Section 6

1695. Item 14 would repeal section 6 of the ASEA Act, which establishes ASEA. The new section 6 would provide for the continuation of the body under a new name: the Asbestos and Silica Safety and Eradication Agency.

Item 15: Subsection 8(1)

1696. Section 8 of the ASEA Act sets out the functions of the Agency.

1697. Item 15 would repeal existing subsection 8(1) and substitute a new provision, which would build on and clarify the existing functions of ASEA. This reflects the proposed expanded remit of the Agency and would implement relevant recommendations of the 2019 ASEA Review. In particular:

- New paragraph 8(1)(c) would allow the Agency to provide advice to the Minister at any time and not only when requested.
- New paragraph 8(1)(d) would refer to the Agency’s function to collaborate, rather than merely liaise with, other governments, agencies, and bodies and expressly refers to international governments. This would better reflect ASEA’s current collaborative approach. For example, the Agency would be able to collaborate with Safe Work Australia about the development and implementation of the Silica National Strategic Plan.
- New paragraph 8(1)(e) would provide for the Agency to conduct, as well as commission, research about asbestos safety, asbestos-related diseases, silica safety and silica-related diseases.
- New paragraphs (8)1(f) to (h) would incorporate section 5 of the *Asbestos Safety and Eradication Agency Rule 2022* with modifications to include silica safety and silica-related diseases. These functions would relate to awareness raising and promoting consistent messages around asbestos safety, asbestos-related diseases, silica safety and silica-related diseases.

Item 16: Subsection 8(3)

1698. Item 16 would omit the words ‘performing it’ and substitute ‘performing its’ to correct a grammatical error in the existing provision.

Item 17: Subsection 8(3)

Item 30: Paragraphs 29(1)(c) and (d)

Item 52: Subsection 42(3)

1699. These items would make technical amendments to remove the words ‘National Strategic Plan’ and substitute ‘National Strategic Plans’ to reflect the change in the number of plans as there will be a separate National Strategic Plan for asbestos and silica.

Item 18: After section 8

1700. Item 18 would insert new section 8A and require the Agency to report on both asbestos and silica national strategic plans. This would be a key part of the Agency's coordination function providing a national snapshot on progress to the relevant Commonwealth and State and Territory ministers.

1701. The content of the reports would be flexible but is intended to cover progress in implementing the national strategic plans and achieving national targets, as well as any relevant activities that a jurisdiction is undertaking.

1702. The asbestos report would be provided to ministers with interest in work health and safety, health and environmental protection. For silica, the report would be provided to ministers with interest in work health and safety and health.

1703. New subsections 8A(3) and (5) would provide that reports must be prepared before 31 December in each financial year and must be made publicly available.

Item 19: Section 12 (heading)

Item 20: Subsections 12(1), (1A) and (2)

Item 23: Paragraph 24(1)(b)

Item 25: Division 1 of Part 5 (heading)

Item 27: Section 29 (heading)

Item 28: Paragraph 29(1)

Item 31: Subsections 29(2), (2A) and (3)

Item 32: Section 30 (heading)

Item 33: Subsections 30(1) and (2)

Item 34: Subsections 30A(1), (2) and (3)

Item 35: Division 2 of Part 5 (heading)

Item 36: Section 31

Item 41: Paragraph 40(d)

Item 42: Division 4 of Part 5 (heading)

Item 43: Section 41 (heading)

Item 44: Subsection 41(1)

Item 45: Subsection 41A(1)

Item 47: Paragraph 41A(2)(a)

Item 48: Sections 41B, 41C, 41D and 41E

Item 49: Subparagraph 41F(a)(ii)

Item 51: Subparagraph 41F(e)(iii)

1704. These items would be consequential amendments to Item 8.

1705. Since all references to the full name of ASEC would need to be amended to reflect the new functions related to silica, these amendments would remove the words ‘Asbestos Safety and Eradication’ and streamline the legislation by using the term Council instead of spelling out its full name.

Item 21: At the end of Division 1 of Part 3

1706. Item 21 would insert a new section 14A to allow the CEO to request information from a person in certain circumstances and an express permission for a person to provide the requested information. Information that may be disclosed could include personal information.

1707. It is appropriate provide for the collection of personal information for the following reasons:

- New paragraph 14A(1)(b) would provide that the CEO may request information where the information is necessary to perform certain functions and is not otherwise available. For example, the CEO could not request information which is publicly available.
- New subsections 14A(5) and (6) would provide an express permission that a person can rely on to provide the requested information, if they consider the disclosure to the Agency is appropriate. This express permission would not compel a person to provide information upon request.
- New subsection 14A(6) would provide that a person may disclose information to the Agency in response to a request despite anything in a law of the Commonwealth (other than the proposed ASSEA Act) or a law of a State or Territory. This means a non-disclosure provision in other legislation that would otherwise prevent information being disclosed to the Agency, does not prevent its disclosure. The purpose of the amendment is to ensure information necessary to support the Agency’s research, data and reporting functions can be collected. Silica issues are complex and require coordination and information sharing across portfolios as well as jurisdictions. This amendment is intended to facilitate information sharing between government agencies and bodies. New section 14A is framed broadly to provide flexibility for the future. For example, ASEA is very cooperative and in the future the Agency may form partnerships with non-Governmental organisations and request information from such bodies as well.
- Tracking progress against the national strategic plans and developing evidence-based research relies on input from a range of sources including all State and Territory governments. The amendments will ensure that persons with relevant information are able to provide that information to the Agency.
- The Agency’s coordination, advice and reporting roles would rely on input from a range of sources including all State and Territory governments. The amendments would ensure persons with relevant information are able to provide that information to the Agency. This would involve for example, data on number of diagnosed cases of silicosis or other silica-related diseases in each State and Territory. It would not include for example, a person’s medical record as that would not be necessary for

the performance of the Agency's functions. Failing to fulfil a request would not be an offence and broad discretion will be retained by the person holding information. There could be a range of legitimate reasons why a request may not be fulfilled, including if, for example, providing the information requested would cause unnecessary duplication of work and create an administrative burden on the person.

1708. The new Agency would be subject to a range of obligations to ensure that the information it obtains is handled appropriately:

1709. Personal information collected by the Agency is subject to the requirements of the *Privacy Act 1988* which governs its collection, use, disclosure, storage and disposal.

1710. As Australian Public Service (APS) employees, the Agency's employees would be bound by the APS Code of Conduct, including regulation 2.1 (duty not to disclose information) which applies to information obtained by the Agency related to the performance of its statutory functions. A breach of the Code of Conduct by an APS employee may lead to the imposition of sanctions up to and including termination of employment.

1711. The Criminal Code contains offences relating to the unauthorised disclosure of information by current (and former) Commonwealth officers, including APS employees, punishable by terms of imprisonment (of between two and seven years depending on the circumstances of the offence).

Item 22: Subsection 23A(1)

1712. Item 22 would provide that the CEO cannot delegate the new function under new section 14A to obtain information. Section 23A of the ASEA Act currently allows the CEO's functions or powers to be delegated to any ASEA staff member. Due to the small size of ASEA there are no senior executives who could be delegated to and allowing for delegation beyond senior executives would be inappropriate for this function.

Item 26: Section 28

1713. Existing section 28 of the ASEA Act establishes ASEC.

1714. Item 26 would provide that ASEC would continue to exist as the Asbestos and Silica Safety and Eradication Council. This will ensure continuity for the Council in its work relating to asbestos.

Item 29: Paragraph 29(1)(b)

1715. Item 29 would insert the words 'asbestos-related diseases, silica safety and silica-related diseases' after the word 'safety' to reflect the remit of the Agency.

Item 37: Paragraph 31(d)

1716. Item 37 would remove the words '1 member' and substitute '2 members' to increase the membership of the Council and provide for an additional member representing the interests of workers. Silica-related diseases are occupational in nature and greater representation from those representing workers is required.

Item 38: Paragraph 31(e)

1717. Item 38 would remove the words ‘1 member’ and substitute ‘2 members’ to increase the membership of the Council and provide for an additional member representing the interests of employers. Silica-related diseases are occupational in nature and greater representation from those representing employers is required.

Item 39: After paragraph 31(e)

1718. Item 39 would insert a new paragraph 31(ea) to provide that the Council must include a member with expertise relevant to asbestos safety, asbestos-related diseases, silica safety or silica-related diseases. This amendment would ensure the work of the Council is informed by a person who is an expert in relevant areas, for example an epidemiologist, occupational physician, respiratory physician, or occupational hygienist.

Item 40: Subsection 32(3)

1719. Item 40 would repeal the existing subsection 32(3) of the ASEA Act and substitute a new provision. This new provision would replicate some of the eligibility criteria in the existing subsection and add additional criteria.

1720. New paragraph 32(3)(a) would expand the eligibility for appointment as a Council member to include knowledge or experience in silica safety, silica-related diseases or representation of, or providing support to persons with silica-related diseases and their families.

1721. New paragraph 32(3)(b) would expand the eligibility for appointment to the Council as a non-government representative to include a person who has or has had asbestos or silica-related diseases or has lived experience as a family member of a person who is or has been affected by asbestos or silica-related diseases.

1722. There is some overlap between the new subparagraphs 32(3)(a)(iv) and (vii) and 32(3)(b)(ii) and (iv). New subparagraphs 32(3)(a)(iv) and (vii) would not require lived experience. A person with professional experience in victim advocacy or undertaking support groups for affected workers or their families would also be eligible. The new subparagraphs 32(3)(b)(ii) and (iv) in contrast require lived experience supporting an affected family member or as a carer or advocate. Persons with lived experience have a unique perspective and the amendments would make it clear that they are eligible to be appointed and contribute to the work of the Council as a member.

Item 46: Paragraph 41A(1)(b)

1723. Item 46 would remove the number ‘4’ and substitute ‘6’ to increase the number of other Council members that would be required to constitute a quorum of the Council. This would reflect the increase to Council numbers.

Item 50: Paragraph 41F(b)

1724. Item 50 would remove the word ‘Asbestos’ and substitute ‘Asbestos and Silica’ to reflect the new name of the Council.

Item 52: Subsection 42(3)

1725. Item 52 would remove the words ‘the National Strategic Plan’ and substitute ‘either of the National Strategic Plans’ to reflect the change in the number of plans as there would be a separate National Strategic Plan for asbestos and silica.

Item 53: At the end of section 42

1726. Section 5A of the ASEA Act currently provides that the Asbestos National Strategic Plan is taken to be a corporate plan for the purposes of the *Public Governance, Performance and Accountability Act 2013*. This section would be repealed and replaced by the Bill and Item 53 would add a new subsection 42(4) to the ASSEA Act to provide that the annual operational plan is taken to be a corporate plan for the purposes of the *Public Governance, Performance and Accountability Act 2013*.

1727. The National Strategic Plans set out what actions all governments will take and are not appropriate as a corporate plan. In contrast, the annual operational plan would set out the activities to be undertaken by the Agency and is a more appropriate plan to specify.

Item 54: Section 47

1728. Item 54 would repeal section 47 of the ASEA Act and substitute a new provision.

1729. This amendment would provide for a review of the Agency’s role and functions to be conducted five years after commencement of the amendment and completed within six months. The new provision would have the same terms as the previous review requirement. A review of the ASEA’s role and functions was previously completed in 2019.

Part 2—Application, saving and transitional provisions

Item 55: Definitions

1730. Item 55 sets out three definitions used in Part 2:

- ‘amended Act’ means the *Asbestos Safety and Eradication Agency Act 2013*, as in force after the commencement day;
- ‘Commencement day’ means the day this Part commences (day after Royal Assent);
- ‘Silica Plan agreement day’ means the day after the day the Silica National Strategic Plan has been agreed to by at least 6 of the governments of the Commonwealth and each State or Territory.

Item 56: Functions of the Agency – Silica National Strategic Plan

Item 60: Functions of the CEO of the Agency – annual operational plan

Item 61: Functions of the Council – Silica National Strategic Plan

1731. These items would provide that plan related functions of the new Agency, the CEO and the Council do not have effect until the Silica National Strategic Plan has been agreed upon by a two-thirds majority of jurisdictions.

1732. These transitional provisions do not have a sunseting date because it is expected that a Silica National Strategic Plan would be finalised and agreed to within one to two years at most. There is strong and unified commitment by governments to address this issue. In the unlikely event that a plan was not agreed to in a timely manner, the review of the Agency’s functions required in item 54 would provide an opportunity to review the insertion of silica-related functions. Such a review would need to consider whether it is appropriate to remove the additional functions and reconsider the purpose of the Agency.

Item 57: Functions of the Agency –annual report relating to implementation of Asbestos National Strategic Plan

1733. Item 57 would prescribe the timing for the first annual report relating to the Asbestos National Strategic Plan after commencement. This report would be due before the report relating to the National Silica Strategic Plan because there is already a well-established asbestos plan in existence. The current asbestos plan has been agreed to by all governments.

Item 58: Functions of the Agency – annual report relating to implementation of Silica National Strategic Plan

1734. Item 58 would prescribe the timing for the first annual report relating to the Silica National Strategic Plan after commencement. Annual reports are tied to financial years and there are two different dates contemplated to ensure that the content of the first report is provided as soon as practicable but is also sensible given plans will be in their very early stages.

1735. If the Silica National Strategic Plan is agreed to by the requisite number of Australian governments (the Silica Plan agreement day, see item 55) on a day in the first half of a

financial year, the first report would be due before the end of 31 December in the following year. The report would have to include information relating to matters covered by the Silica National Strategic Plan, for example, preventing exposure to respirable crystalline silica in the workplace and activities undertaken by governments in the period between the plan start date and the end of the first financial year (that is, 30 June the following year). This report would be a snapshot of activities already underway in jurisdictions and a benchmark which could be used to inform future reports. Because the plan would be in its very early days at this time there may be limited progress to report on and separate arrangements for the first report are necessary.

1736. If the Silica National Strategic Plan is agreed to by the requisite number of Australian governments (the Silica Plan agreement day, see item 55) on a day in the second half of a financial year, the first report would also be due before the end of 31 December in the following year. The content of the report would be different though and would be required to relate to progress made by governments in implementing the Silica National Strategic Plan. This could cover, for example, how governments have begun to set up monitoring and have begun implementing measures to meet targets.

Item 59: CEO of the Agency

Item 62: Members of the Council

1737. These items would preserve the appointments of the CEO and members of the Council.

SCHEDULE 3—AMENDMENT OF THE SAFETY, REHABILITATION AND COMPENSATION ACT 1988

Amendments to the *Safety, Rehabilitation and Compensation Act 1988*

1738. Schedule 3 would amend the SRC Act to introduce a rebuttable presumption that post-traumatic stress disorder suffered by specified first responders was contributed to, to a significant degree, by their employment.

Item 1: Before subsection 7(8)

1739. This item would introduce a heading before subsection 7(8) indicating that subsections 7(8)–(10) relate to ‘diseases suffered by firefighters’.

1740. This heading is to provide for consistency in section 7 and is not intended to alter the operation of subsections 7(8)–(10).

Item 2: At the end of section 7

1741. Subsection 7(11) would provide that unless the decision-maker is satisfied to the contrary, post-traumatic stress disorder suffered by specified first responders is to be taken to have been contributed to, to a significant degree, by their employment.

1742. Paragraph 7(11)(a) would specify that for the presumption to apply, the decision-maker must be satisfied that the employee’s post-traumatic stress disorder was suffered in accordance with a legislative instrument determined in accordance with new subsection 7(12).

1743. Subsection 7(12) would enable the Minister to make a legislative instrument specifying the circumstances in which an employee is taken to have suffered, or be suffering from, post-traumatic stress disorder. As paragraph 7(11)(a) requires that the post-traumatic stress disorder must have been suffered in accordance with such an instrument, an instrument would be required in order for the presumption to operate.

1744. Subsection 7(13) would provide an exhaustive list of ‘first responders’ to whom the presumption in subsection 7(11) would apply. Under new subsection 7(11), a person must have been employed as a first responder prior to the symptoms of post-traumatic stress disorder first becoming apparent. Subsection 7(13) would specify that a person, being an ‘employee’ within the meaning provided by existing section 5, was a first responder if they were:

- the Commissioner of the Australian Federal Police, a Deputy Commissioner of the Australian Federal Police, or an AFP employee (all within the meaning of the *Australian Federal Police Act 1979*);
- employed as a firefighter;
- employed as an ambulance officer or paramedic;
- employed as an emergency services communications operator; or
- a member of an emergency service within the meaning of the *Emergencies Act 2004* (ACT).

1745. New paragraph 7(14) would confirm that the presumption in new paragraph 7(11) does not limit, and is not limited by, the pre-existing presumptions in subsections 7(1) and (2).

Item 3: Application of amendments

1746. Item 3 specifies that the amendments to the SRC Act would apply to post-traumatic stress disorder sustained after the commencement of the amendments. The date on which diseases are taken to have been sustained is determined in accordance with existing subsection 7(4).

SCHEDULE 4—AMENDMENT OF THE WORK HEALTH AND SAFETY ACT 2011

Overview

1747. Schedule 4 would strengthen the offences and penalties framework in the WHS Act. A new offence of industrial manslaughter would be introduced. This would align Commonwealth WHS laws with the model Act which was recently amended to provide for industrial manslaughter within the model framework. The model Act does not prescribe the exact provisions of the model offence to enable each jurisdiction to implement (or maintain) an offence tailored to the criminal law framework of the jurisdiction. However, the model Act provides for an industrial manslaughter offence via a jurisdictional note and accompanying model penalties for the offence. The offence in this Bill reflects recommendations 23b of the Boland Review and 13 of the Senate Inquiry.

1748. The existing Category 1 offence and State and Territory general manslaughter offences may also apply when a worker or other person is killed at a workplace. A specific industrial manslaughter offence responds to genuine community concern that the WHS framework requires stronger penalties for the most egregious breaches of WHS duties that result in workplace fatalities.

1749. Schedule 4 would also:

- repeal and replace provisions dealing with criminal liability for bodies corporate, the Commonwealth, and public authorities. These amendments reflect recent changes to the model Act, with appropriate modifications and additional provisions where necessary;
- clarify that the Category 1 offence applies to officers of PCBU's;
- significantly increase Category 1 penalties;
- increase all penalties in the WHS Act by 39.03 per cent and provide for future indexing (giving effect to recommendation 22 of the Boland Review).

Part 1—Industrial manslaughter

Amendments to the *Work Health and Safety Act 2011*

Item 1: After section 30

1750. The Bill would insert new section 30A into the WHS Act providing for an industrial manslaughter offence. The new offence would apply to ‘officers’ and PCBUs whose negligent conduct or recklessness causes the death of an individual.

Core elements of new offence

1751. New subsection 30A(1) would provide for when a person commits an offence of industrial manslaughter, with each paragraph outlining one element of the offence.

1752. New paragraph 30A(1)(a) would require that a person either be a PCBU (as defined in section 5 of the WHS Act) or an officer of a PCBU (officer is defined in section 4 of the WHS Act). The new offence would apply to PCBUs and officers because of their elevated responsibilities within the workplace.

1753. Due to the operation of subsection 12F(2) of the WHS Act, strict liability applies to this element. Strict liability is appropriate for this element as the element is analogous to a jurisdictional element – that is, the element does not go to the substance of the offence. New paragraph 30A(1)(a) would ensure the offence only captures those within the Commonwealth’s WHS jurisdiction.

1754. The application of strict liability to a particular element means that the prosecution is not required to prove fault in relation to that matter. However, as per paragraph 6.1(2)(b) of the Criminal Code, the defence of mistake of fact under section 9.2 of the Criminal Code would be available in relation to these elements. This means where the accused produced evidence of an honest and reasonable, but mistaken, belief in the existence of certain facts which, if true, the conduct would not have constituted the offence, it will be incumbent on the prosecution to establish that there was not an honest and reasonable mistake of fact.

1755. New paragraph 30A(1)(b) would require that the person has a health and safety duty. Due to the operation of subsection 12F(2) of the WHS Act, strict liability applies to this element. As with paragraph 30A(1)(a), this element is analogous to a jurisdictional element as it does not go to the substance of the offence, but ensures the offence only captures those subject to the Commonwealth’s WHS jurisdiction.

1756. New paragraph 30A(1)(c) would require that the person intentionally engages in conduct. This would require that the person intentionally engaged in the conduct that constitutes the offence. As per the wording of the paragraph, intention (as defined in the Criminal Code) is the applicable fault element. Due to the operation of subsection 12F(2) of the WHS Act it is necessary to explicitly include ‘intentionally’, otherwise strict liability would apply to the paragraph. The new criminal responsibility provisions contained in Parts 3, 4 and 5 of Schedule 4 to the Bill deal with how intention can be proven in relation to bodies corporate, the Commonwealth, and public authorities (respectively).

1757. New paragraph 30A(1)(d) would require the conduct to have breached the health and safety duty. Due to the operation of subsection 12F(2) of the WHS Act, strict liability applies to this element. While breach of duty is central to the offence, it would not be appropriate to apply a fault element to this element. Most offences in the WHS Act, including the Category 2 and Category 3 offences are strict liability.
1758. Including strict liability as a feature of offences was carefully considered when the WHS Act was first introduced as the presumption of innocence can be seen to be impinged by removing the requirement for the prosecution to prove fault in relation to one or more physical elements of an offence. WHS offences arise in a regulatory context where, for reasons such as public safety, and the public interest in ensuring that regulatory schemes are observed, the sanction of criminal penalties is justified. The offences also arise in a context where a defendant can reasonably be expected, because of their professional involvement, to know what the requirements of the law are, and the mental, or fault, element can be justifiably excluded. The rationale is that people who owe WHS duties such as employers, persons in control of aspects of work, and designers and manufacturers of work structures and products, as opposed to members of the general public, can be expected to be aware of their duties and obligations to workers and the wider public. The industrial manslaughter offence would apply to PCBU's, and 'officers' (the most senior persons in an organisation).
1759. Other elements which interact closely with this element (specifically the requirement to *intentionally* engage in the conduct (paragraph 30A(1)(c)) and the requirement that the person was *reckless or negligent* as to whether the conduct would cause the death (paragraph 30A(1)(f)), provide sufficient application of fault to the offence.
1760. New paragraph 30A(1)(e) would require that the conduct caused the death of an individual. 'Causes' is defined in new subsection 30A(2) (see below). Causing the death of a person is central to this offence and the reason for the high penalties (see below).
1761. New paragraph 30A(1)(f) would provide that the relevant fault elements for paragraph 30A(1)(e) are that the person was reckless or negligent as to whether their conduct would cause the death of an individual. Recklessness and negligence are defined in the Criminal Code. Parts 3, 4 and 5 of Schedule 4 to the Bill deal with how negligence and recklessness can be proven in relation to bodies corporate, the Commonwealth, and public authorities (respectively).
1762. The Criminal Code definition of negligence reflects what is commonly referred to as 'gross negligence'. A person would be negligent in respect to causing a death if their conduct involves such a great falling short of the standard of care that a reasonable person would exercise in the circumstances and such a high risk that the conduct warrants criminal punishment.

Negligence as a fault element

1763. The application of negligence as a fault element to industrial manslaughter has been carefully considered. Negligence was recently inserted into section 31 of the WHS Act.

This change lowered the threshold for prosecution and gave effect to recommendation 23b of the Boland Review. Recommendation 23b arose because it was considered that the threshold to prove the fault element of recklessness was too high and difficult to establish in a WHS context, meaning the offence was failing to meet its objective of ensuring compliance through deterrence.

1764. Including negligence as a fault element is consistent with the Guide, which notes the use of negligence is supported where the context of negligence is a well-established indication of liability. The Guide expressly references WHS laws as an example because WHS duties require the proactive identification and management of risks. WHS breaches can result in substantial harm to workers including serious injury, illness or death.

Penalties

1765. New subsection 30A(1) would prescribe the penalties for an industrial manslaughter offence. The new penalties are a maximum of 25 years imprisonment for individuals and a fine of \$18 million for bodies corporate or the Commonwealth. The maximum penalty for individuals found guilty of industrial manslaughter (25 years' imprisonment) reflects manslaughter penalties in the Criminal Code. This is consistent with the Guide which states that where an offence is comparable to an offence in the Criminal Code, the penalty under the Criminal Code should be adopted.
1766. The maximum monetary penalty of \$18 million reflects the seriousness of the offence and is consistent with the penalty for industrial manslaughter in the model Act. This penalty provides a clear and effective punishment that acts as a deterrent against breaching WHS duties.

Causation

1767. New subsection 30A(2) would define 'causes' for the purpose of subsection 30A(1). Under this definition a person's conduct is taken to have caused a death if the conduct substantially contributes to the death. This ensures for example, that where a worker is seriously injured at a workplace and later dies in hospital, the death can be prosecuted as industrial manslaughter if other elements are made out. Where conduct is found to have substantially contributed to a workplace death, that is sufficient to satisfy paragraph 30A(1)(e) – the conduct need not be the sole cause of death. Egregious WHS failings are often a consequence of various elements, such as a failure of workplace management to provide and maintain effective WHS supervision and protections and the direct conduct of individuals.
1768. New subsection 30A(3) would disapply subsection 4B(2) of the Crimes Act which would otherwise allow a court to substitute a pecuniary penalty for a term of imprisonment. The intention of this subsection is to ensure that the deterrent effect of a maximum penalty of 25 years' imprisonment for individuals cannot be diluted.

Alternative verdicts

1769. New subsection 30A(4) would allow a court to find the defendant guilty of either a Category 1 or Category 2 offence should they be unsatisfied that the defendant is guilty of industrial manslaughter. This would be caveated by the requirement that the court

may only find the person guilty of the alternative offence if they have been accorded procedural fairness.

1770. New subsection 30A(5) would provide that any limitation period which would have applied to the alternative offence of which the accused is found guilty would not apply. This would mean that if the prosecution commenced industrial manslaughter proceedings outside the limitation period that applied to, for example, a Category 2 offence (two years after the offence first comes to the notice of the regulator or one year after a coronial finding – see section 232 of the WHS Act), it would not impact the ability of a court to find the accused guilty of a Category 2 offence in the alternative.

Item 2: Subsection 216(2)

Item 3: At the end of subsection 216(2)

1771. Item 2 would amend subsection 216(2) to align the language used in the rest of the section for clarity .

1772. Item 3 would amend subsection 216(2) to ensure that a WHS undertaking cannot be accepted in relation to an industrial manslaughter offence. Industrial manslaughter would be the most serious WHS offence and it would be inappropriate to allow enforceable undertakings in these circumstances. Existing section 216 provides that WHS undertakings are not available for an alleged contravention which is a Category 1 offence.

Item 4: Subparagraphs 231(1)(a)(i) and (ii)

Item 5: Subsection 231(3)

1773. Section 231 of the WHS Act would be amended to allow a person who reasonably believes an industrial manslaughter (or Category 1 or Category 2) offence has been committed but no prosecution has been brought to ask the regulator, in writing, to bring a prosecution. The existing procedure would not change.

Item 6: Before subsection 232(2)

Item 7: After subsection 232(2)

Item 8: Before subsection 232(3)

1774. Items 6 to 8 would amend section 232 of the WHS Act to ensure that no limitation period would apply to an industrial manslaughter prosecution and would also provide a clear categorisation of the definitions in this section. Because of the seriousness of the industrial manslaughter offence a limitation period is considered inappropriate.

Item 9: Application provision

1775. Item 9 would provide that the new offence in section 30A applies to conduct engaged in on or after the commencement of the Part.

Part 2—Category 1 offence

Amendments to the *Work Health and Safety Act 2011*

1776. Part 2 would make a technical change to paragraph 31(1)(b) of the WHS Act to clarify that an officer may commit a Category 1 offence. Officers are senior persons in an organisation who make decisions that affect the whole or a substantial part of the business or undertaking – for example, a CEO (see section 4 of the WHS Act). It has always been understood that these persons, like any duty holder, are liable for a Category 1 offence. The amendment would make this clear.

1777. New paragraph 31(1)(b) raises two scrutiny issues which have previously been explained in explanatory materials but are set out again here for clarity .

Negligence as a fault element

1778. A recent change to the Category 1 offence added negligence as a fault element in section 31 of the WHS Act (*Work Health and Safety Amendment Act 2023*). This change lowered the threshold for prosecution and gave effect to recommendation 23b of the Boland Review. This recommendation arose because it was considered that the threshold to prove the fault element of recklessness was too high and difficult to establish, meaning the offence was failing to meet its objective of ensuring compliance through deterrence.

1779. Including negligence is consistent with considerations outlined in the Guide, which notes the use of negligence is supported where the context of negligence is a well-established indication of liability. The Guide expressly references WHS laws as an example because WHS duties require the proactive identification and management of risks. The Category 1 offence has significant penalties (which would be increased by Part 6 of this Schedule). A Category 1 breach can result in substantial harm to workers including serious injury, illness or death.

Reasonable excuse

1780. The Category 1 offence is drafted to align with the model Act which includes a ‘reasonable excuse’ defence in paragraph 31(1)(b). The Guide cautions against the use of ‘reasonable excuse’ defences in Commonwealth laws and prefers to rely on the Criminal Code or specific defences. In this case, alignment with the model laws which furthers the harmonisation of WHS laws in Australia is preferred. For completeness, in these circumstances it is considered appropriate to impose the evidential burden associated with the ‘reasonable excuse’ defence on the defendant because the existence of an excuse would be peculiarly within the knowledge of the defendant.

Item 10: Paragraph 31(1)(b)

1781. An officer’s duty in section 27 of the WHS Act is expressed as being owed to a PCBU (to ensure the PCBU’s compliance with its WHS duties), rather than to an individual (as required by existing section 31). However, the penalties for a breach of section 31 include a penalty for a breach of the duty by an officer of a PCBU.

1782. This amendment would clarify that an officer may commit a Category 1 offence under section 31 of the WHS Act by specifying that the offence is committed if the officer of

a PCBU exposes an individual (to whom the PCBU owes a health and safety duty) to a risk of death or serious illness or injury.

Part 3—Corporate criminal liability

Amendments to the *Work Health and Safety Act 2011*

1783. A body corporate is an artificial entity that can only act and make decisions through individuals. Corporate criminal responsibility for WHS offences is currently dealt with in Part 2.5 of the Criminal Code, as noted in existing section 244 of the WHS Act.

1784. Part 3 of this Schedule would adopt recent amendments to the model Act, with minor modifications to ensure the provisions work alongside the Criminal Code which provides relevant definitions and a broader criminal law framework. This approach would depart from existing section 244 which allows the existing corporate criminal responsibility provisions in the Criminal Code to apply, rather than adopt the model provisions for bodies corporate.

1785. The model amendments are based on Part 2.5 of the Criminal Code, with modifications to adopt relevant recommendations of the Australian Law Reform Commission Report 136 (Corporate Criminal Responsibility). In particular, Part 3 of this Schedule includes a definition of ‘authorised person’ which allows for the conduct of officers, employees and agents acting within their actual or apparent authority to be attributed to a body corporate. This is broader than the approach in the Criminal Code which provides for attribution of the actions of ‘high managerial agents’ to a body corporate. A high managerial agent is a senior person within an organisation whose conduct could be fairly assumed to represent the body corporate’s policy (section 12.4 Criminal Code).

1786. Part 3 of this Schedule also includes a provision based on section 12.4 of the Criminal Code to ensure that the WHS Act deals with how negligence can be proven in relation to a body corporate. Negligence is not dealt with in the model provisions but has been included to maintain parity with the Criminal Code which would otherwise apply to a body corporate.

1787. Part 3 would repeal section 244 of the WHS Act and insert new sections 244A–244D. Sections 244A and 244B would set out the circumstances in which the physical and fault elements of an offence are attributed to a body corporate.

1788. New sections 244A and 244B would also allow for aggregation of conduct. This enables the conduct of authorised persons within a body corporate to be considered as a whole in determining whether the body corporate has committed an offence with the relevant state of mind for that offence. This means the same individual would not need to have engaged in the relevant conduct and also hold the relevant state of mind (fault element) in order to prove an offence against a body corporate.

Item 11: Section 4

1789. Item 11 would insert four new definitions into existing section 4. These defined terms are used in provisions inserted by Part 3. The definitions of ‘fault element’ and ‘physical element’ are used in provisions inserted by Part 4 as well:

- ‘authorised person’ – would be given the meaning in new section 244;

- ‘board of directors’ – would be given the meaning in new section 244;
- ‘fault element’, in relation to an offence, would be defined to have the same meaning as in the Criminal Code;
- ‘physical element’, in relation to an offence, would be defined to have the same meaning as in the Criminal Code.

Item 12: Before subsection 12F(1)

Item 13: Before subsection 12F(2)

1790. Items 12 and 13 would insert subheadings into existing section 12F.

Item 14: At the end of section 12F

1791. Item 14 would insert new subsection 12F(4). Subsection 12F(4) would provide that Part 2.5 of the Criminal Code, which currently applies to offences committed by a body corporate against the WHS Act, does not apply to an offence against the WHS Act. The Criminal Code needs to be disapplied because it applies by default to Commonwealth offences due to section 2.2 of the Criminal Code. As set out above, the provisions in this Bill would insert a ‘modified’ Criminal Code approach to establishing fault for bodies corporate. The rationale for applying WHS specific provisions instead of Part 2.5 is alignment with the model work health and safety laws.

Item 15: Section 244

1792. Item 15 would insert new sections 244–244E. These provisions are based on the model Act amendments, with some modifications where noted.

1793. New section 244 would define two terms used throughout the new sections:

- ‘authorised person’ for a body corporate would be defined to mean an officer, employee or agent of the body corporate acting within the officer’s, employee’s or agent’s actual or apparent authority. The definition of ‘authorised person’ incorporates the common law doctrine of actual and apparent authority. A person’s actual or apparent authority may extend beyond the actual or apparent scope of his or her employment. Actual authority derives from the relationship between the principal and the agent (*Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 [502]). Apparent authority is created by the relationship between the principal and the third party: An ‘apparent’ or ‘ostensible’ authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the ‘apparent’ authority, so as to render the principal liable to perform any obligations imposed upon him by such contract (*Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 [502]);
- ‘board of directors’ would be defined to mean the body, whatever it is called, exercising the executive authority of the body corporate.

1794. New section 244A would provide the situations in which the conduct of an offence would be attributed to a body corporate. Section 244A would provide that the conduct constituting the physical elements of an offence would be taken to have been committed by a body corporate if the conduct is committed by:

- the body corporate's board of directors; or
- one or more authorised persons for the body corporate; or
- one or more persons acting at the direction of or with the express or implied agreement or consent of:
 - a. an authorised person for the body corporate; or
 - b. the body corporate's board of directors.

1795. New section 244B would provide how the fault elements of an offence are attributed to a body corporate for fault elements other than negligence.

1796. Where it is necessary to establish a state of mind (fault element) of a body corporate in relation to the commission of the physical element of an offence, new subsection 244B(1) would provide that it is sufficient to show that:

- the body corporate's board of directors:
 - a. engaged in the conduct constituting the offence and had that state of mind in relation to that physical element; or
 - b. expressly, tacitly or impliedly authorised or permitted the conduct constituting the offence; or
- an authorised person for the body corporate:
 - a. engaged in the conduct constituting the offence and had that state of mind in relation to that physical element of the offence; or
 - b. expressly, tacitly or impliedly authorised or permitted the conduct constituting the offence; or
- a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to the conduct constituting the offence.

1797. New subsection 244B(3) would set out factors that are relevant to determining whether a corporate culture existed for the purposes of paragraph 244B(1)(c). These factors are not meant to be exhaustive.

1798. New subsection 244B(2) would create specific defences that provide paragraphs 244B(1)(b) and (c) do not apply if the body corporate proves it took reasonable precautions to prevent the conduct, authorisation or permission of the conduct. Subsection 244B(2) requires the defendant to discharge the legal burden in relation to that matter, that is, they must positively prove that such reasonable precautions were taken. Section 13.5 of the Criminal Code provides that a legal burden imposed on the defendant must be discharged on the balance of probabilities. This

reversal of the burden of proof is justifiable because the of steps taken to prevent WHS breaches are peculiarly within the knowledge of the defendant. Also, the inside access to specialised information and corporate knowledge available to the body corporate as to the actual steps taken, and the context for those choices, would mean that it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

1799. Additionally, the Guide provides that casting a matter as a defence is more readily justified if the conduct proscribed by the offence poses a grave danger to public health or safety. Conduct constituting a WHS breach often poses a such danger.

1800. Subsection 244B(4) would define ‘corporate culture’ and ‘corporate officer’ for the purpose of section 244B. Corporate culture is defined similarly to subsection 12.3(6) of the Criminal Code to mean one or more attitudes, policies, rules, courses of conduct or practices existing within the body corporate generally or in the part of the body corporate in which the relevant activity takes place. Corporate officer is defined by reference to section 9 of the Corporations Act.

1801. New section 244BA would provide that the test of negligence for a body corporate is that set out in section 5.5 of the Criminal Code. It would also replicate section 12.4 of the Criminal Code to explain how negligence is attributed to a body corporate. In a body corporate negligence often occurs across multiple layers of the organisation and in the actions of multiple persons. New section 244BA would provide that fault may exist where no individual employee, agent or officer of the body corporate has that state of mind but the body corporate’s conduct is negligent when viewed as a whole. This allows the conduct of multiple individuals to be aggregated and attributed to the body corporate.

1802. New subsection 244BA(2) would provide that negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

- inadequate management, control or supervision of the conduct of one or more of the body corporate’s employees, agents or officers; or
- failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

1803. New section 244C would provide a mechanism by which a body corporate can rely on the defence of mistake of fact, if mistake of fact is relevant to determining liability for an offence. A body corporate may rely on mistake of fact only if:

- the employee, agent or officer of the body corporate who engaged in the conduct constituting the offence was under a mistaken but reasonable belief about facts that, had they existed, would have meant the conduct would not have constituted the offence; and
- the body corporate proves it took reasonable precautions to prevent the conduct. The rationale for a reverse onus is explained in relation to new section 244B which is similar.

1804. New section 244D would set out factors that may be used to establish that a body corporate failed to take reasonable precautions, in relation to subsection 244B(2) and section 244C. A failure to take reasonable precautions may be evidenced by the fact that the conduct constituting the offence was substantially attributable to:

- inadequate management, control or supervision of the conduct of one or more of the body corporate's employees, agents or officers; or
- failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

1805. New section 244E is not a model Act provision. The section would provide that if a body corporate is a public authority, the Division applies in relation to the body corporate in accordance with new section 251.

Part 4—Commonwealth criminal liability

Amendments to the *Work Health and Safety Act 2011*

1806. Part 4 of the Schedule is mirrored on new Part 3, with necessary modifications to reflect the nature of the Commonwealth. This approach would allow criminal liability to be attributed to the Commonwealth in a similar way to a body corporate. The Commonwealth as a PCBU undertakes its work and activities through agencies. Without these provisions, the prosecution of the Commonwealth as a large, dispersed entity would be very difficult.

1807. Currently, criminal liability for the Commonwealth is set out in section 245 of the WHS Act and reflects the model Act provisions which apply to the Crown. Part 4 would repeal and replace those provisions, to align with the approach to corporate criminal liability in the model Act. As explained above, this approach is based on Part 2.5 of the Criminal Code, with modifications.

No Crown immunity from criminal prosecution

1808. The Crown cannot be held criminally responsible unless legislation provides to the contrary. The Guide provides that for the Crown to be bound by the provisions of a statute, there must be clear words or a necessary implication that the Crown is so bound. Section 10 of the WHS Act explicitly binds the Commonwealth.

1809. Commonwealth WHS duties are enforced by criminal offences because they can result in significant physical or psychological harm to persons and impact the community more generally. Other WHS jurisdictions, both domestic and international, do not include Crown immunity in their laws. The *National Review into Model Occupational Health and Safety Laws – First Report* which informed development of the model Act, noted this had not caused any difficulty. It is intended the Commonwealth would remain subject to the WHS Act in its entirety and that no Crown immunity exception would exist.

Item 16: Section 4

1810. Item 16 would insert two new definitions:

- ‘authorised person’ – see new section 245 below.
- ‘executive’ of an agency of the Commonwealth – see new section 245 below.

Item 17: Section 4 (definition of *officer*)

1811. Item 17 would repeal and replace the existing definition of ‘officer’. Minor changes would be made to the definition which do not affect the meaning of the existing term.

Item 18: Section 245

1812. Item 18 would repeal existing section 245 which sets out criminal liability and replace it with new sections 245–245E.

1813. New section 245 would insert three definitions which are used in the new Part:

- ‘authorised person’, for the Commonwealth would be defined to mean an officer, employee or agent of the Commonwealth acting within their actual or apparent authority;
- ‘executive’ of an agency of the Commonwealth, would be defined to mean the person or body, whatever the person or body is called, exercising the executive authority of the agency. This is intended to operate similarly to the definition of ‘board of directors’ in relation to a body corporate. It would cover for example, the executive board of an agency;
- ‘officer’ of an agency of the Commonwealth would be defined to mean a person who makes, or participates in making, decisions that affect the whole or a substantial part of the business or undertaking of the agency. A definition is required for this Part because of the way the corporate criminal liability provisions have been used as a base for provisions.

1814. New sections 245A–D are modelled on new sections 244A–D. Detailed explanations on those sections are set out above. The sections have been adapted to refer to the Commonwealth instead of a corporation and to the definition of executive rather than board of directors. Other minor modifications are made, for example the definition of ‘corporate culture’ refers to the culture within an agency of the Commonwealth.

1815. New section 245E would replicate existing subsection 245(1) which provides that the applicable penalty to the Commonwealth is the penalty applicable to a body corporate.

Part 5—Criminal liability of public authorities

Amendments to the *Work Health and Safety Act 2011*

Item 19: Section 251

1817. Part 5 deals with criminal responsibility for public authorities. Item 19 would repeal existing section 251 of the WHS Act and provide that Division 4 of Part 13 of the WHS Act (corporate criminal responsibility) applies to a public authority. The amendments to Division 4 are set out above.

1818. The existing definition of ‘public authority’ in section 4 of the WHS Act covers different bodies corporate, for example a body corporate established under a Commonwealth law.

Part 6—Penalties

Amendments to the *Work Health and Safety Act 2011*

1819. This Part would increase penalties for all Commonwealth WHS offences. It consists of three measures: a general increase to all penalties that would give effect to Recommendation 22 of the Boland Review to update the penalty levels in the model Act, a significant increase to the penalty for the Category 1 offence to reflect the seriousness of the offence, and a mechanism for future indexing of penalties to ensure penalties remain effective and appropriate.

1820. The general 39.03 per cent increase in monetary penalties represents the average increase in penalty units for non-WHS offences across all jurisdictions since 2011 (when the model Act was introduced).

1821. The significant increase to penalties for the Category 1 offence in this Part exceeds the similar increase in the recent amendments to the model Act. The decision to depart from the model Act was made to ensure the coherence of the Commonwealth WHS offence penalty scheme. Workplace fatalities could be prosecuted as either an industrial manslaughter offence or a Category 1 offence. Adopting the model penalty for Category 1 would conflict with the principle set out in the Guide which holds that a penalty should be consistent with penalties of a similar kind or of a similar seriousness.

1822. The significant increase to penalties for the Category 1 offence in this Part exceeds the similar increase in the recent amendments to the model Act. The decision to depart from the model Act was made to ensure the coherence of the Commonwealth WHS offence penalty scheme. Workplace fatalities could be prosecuted as either an industrial manslaughter offence or a Category 1 offence. Adopting the model penalty for Category 1 would conflict with the principle set out in the Guide which holds that a penalty should be consistent with penalties of a similar kind or of a similar seriousness.

1823. Given the number of individual penalty provisions and the introduction of annual indexation to adjust penalty amounts for changes in the national CPI, it was considered impractical to modify each penalty provision annually. Each offence penalty is currently expressed in a dollar figure which would require that after each annual indexation occurred hundreds of amendments would be required to update those figures in each provision. This would be unduly burdensome. To account for this, the following items would replace each individual penalty amount with a reference to the relevant penalty tier set out in new Schedule 4. Indexation will be applied to the penalty tier amounts set out in new Schedule 4 and as a result apply automatically to each provision that specifies that penalty tier as the maximum penalty amount for that offence or civil penalty provision.

1824. There would be three kinds of penalty tiers:

- Category penalties would be the penalties set for the three category offences in Part 2 of the WHS Act (sections 31–33).

- There would be nine different monetary penalty tiers used for the general offences in the WHS Act and Regulations reflecting the nine different penalty levels used in the WHS Act and Regulations.
- There would be four WHS civil penalty provision tiers for the four different civil penalty amounts used in Part 7 of the WHS Act.

1825. Penalties in this Bill and in the WHS Act are not expressed in penalty units which conflicts with the general principle set out in the Guide. However, the Guide also provides that in limited circumstances (including in the case of a national uniform scheme like the WHS scheme), penalties should be expressed in dollars rather than penalty units. This is supported by the *Protocol on Drafting National Uniform Legislation* which recommends that offences in such laws should also express penalties in dollars rather than penalty units to ensure uniformity.

1826. The method of indexation is also different to that provided by subsection 4AA(3) of the Crimes Act. To promote harmonisation of WHS laws and penalties across jurisdictions, a deliberate choice has been made to align with model penalty increases rather than Commonwealth penalty increases.

Division 1—Definitions

Item 20: Section 4

1827. This item would amend section 4 of the WHS Act to create new definitions for each of the penalty provision tiers. The new definitions take their meaning from the relevant clause of new Schedule 4, which is also where the monetary value of those penalties would be set out.

Division 2—Categorised monetary penalties for offences

Item 21: Subsection 31(1) (penalty)

1828. This item would amend subsection 31(1) to repeal the current penalty. It would set the new penalty for a Category 1 offence to the Category 1 monetary penalty (defined in new Schedule 4, see Item 72) or 15 years imprisonment or both for individuals, and the Category 1 monetary penalty (defined in new Schedule 4, see Item 72) for body corporates and the Commonwealth.

1829. This penalty is significant as the Guide specifies that offences should have penalties that are adequate to deter and punish a worst-case offence. Higher maximum penalties are justified where there are strong incentives to commit the offence, or where its consequences are particularly dangerous or damaging. The Category 1 offence and corresponding penalty are intended to capture some of the most egregious WHS breaches the consequences of which can be catastrophic – for example, where a person’s reckless conduct causes death.

1830. Following the decision of WHS Ministers to significantly increase the Category 1 penalty, the Commonwealth elected to further raise the penalty from that agreed by SWA members on the basis that to do so would provide a more coherent Commonwealth WHS penalty scheme (discussed above).

Item 22: Section 32 (penalty)

1831. This item would amend section 32 to remove the current Category 2 penalty and set the new penalty as the Category 2 monetary penalty defined in new Schedule 4.

Item 23: Section 33 (penalty)

1832. This item would amend section 33 to remove the current Category 3 penalty and set the new penalty as the Category 3 monetary penalty defined in new Schedule 4.

Division 3—Tier A monetary penalties for offences

Item 24: Subsections 104(1), 107(1), 108(1) and 109(1) (penalty)

Item 25: Section 197 (penalty)

1833. These items would amend subsections 104(1), 107(1), 108(1), 109(1) and section 197 to remove the current penalty and set the new penalty as the tier A monetary penalty defined in new Schedule 4.

Division 4—Tier B monetary penalties for offences

Item 26: Section 41 (penalty)

Item 27: Subsection 99(2) (penalty)

Item 28: Section 190 (penalty)

Item 29: Section 193 (penalty)

Item 30: Subsection 200(1) (penalty)

Item 31: Section 219 (penalty)

Item 32: Subsection 242(1) (penalty)

1834. These items would amend section 41, subsection 99(2), sections 190 and 193, subsection 200(1), section 219 and subsection 242(1) to remove the current penalty and set the new penalty as the tier B monetary penalty defined in new Schedule 4.

Division 5—Tier C monetary penalties for offences

Item 33: Subsections 42(1) and (2), 43(1) and (2) and 44(1) and (2) (penalty)

Item 34: Section 45 (penalty)

Item 35: Section 46 (penalty)

Item 36: Subsection 47(1) (penalty)

1835. These items would amend subsections 42(1) and (2), 43(1) and (2), and 44(1) and (2), sections 45 and 46, and subsection 47(1) to remove the current penalty and set the new penalty as the tier C monetary penalty defined in new Schedule 4.

Division 6—Tier D monetary penalties for offences

Item 37: Subsections 38(1) and 39(1) (penalty)

Item 38: Subsection 52(5) (penalty)

Item 39: Subsection 56(2) (penalty)

Item 40: Subsection 61(4) (penalty)

Item 41: Subsections 70(1) and (2), 71(2) and 72(7) (penalty)

Item 42: Subsections 79(1), (3) and (4) (penalty)

Item 43: Subsection 155(5) (penalty)

Item 44: Subsection 165(2) (penalty)

Item 45: Subsections 171(6) and 177(2) and (6) (penalty)

Item 46: Subsection 185(4) (penalty)

Item 47: Sections 188 and 189 (penalty)

Item 48: Subsections 271(2) and (4) (penalty)

1836. These items would amend subsections 38(1), 39(1), 52(5), 56(2) 61(4), 70(1) and (2), 71(2), 72(7), 79(1) and (3) and (4), 155(5), 165(2), 171(6), 177(2) and (6), 185(4) and sections 188 and 189, and subsections 271(2) and (4) to remove the current penalty and set the new penalty as the tier D monetary penalty defined in new Schedule 4.

Division 7—Tier F monetary penalties for offences

Item 49: Subsection 38(7) (penalty)

Item 50: Subsection 75(1) (penalty)

Item 51: Subsections 97(1) and (2) (penalty)

Item 52: Subsections 210(1) and (2) (penalty)

Item 53: Section 273 (penalty)

1837. These items would amend subsections 38(7), 75(1), 97(1) and (2), 210(1) and (2) and section 273 to remove the current penalty and substitute the tier F monetary penalty defined in new Schedule 4.

Division 8—Tier H monetary penalties for offences

Item 54: Subsections 53(1) and (2) (penalty)

Item 55: Subsections 57(1) and (2) (penalty)

Item 56: Subsection 74(1) (penalty)

1838. These items would amend subsections 53(1) and (2), 57(1) and (2) and 74(1) to remove the current penalty and set the new penalty as the tier H monetary penalty defined in new Schedule 4.

Division 9—Penalties for WHS civil penalty provisions

Item 57: Subsection 118(3) (penalty)

Item 58: Section 123 (penalty)

Item 59: Sections 124 to 126, 128 and 129 (penalty)

Item 60: Section 143 (penalty)

Item 61: Subsection 144(1) (penalty)

Item 62: Sections 145 and 146 (penalty)

Item 63: Subsection 147(1) (penalty)

Item 64: Section 148 (penalty)

Item 65: Subsection 149(1) (penalty)

Item 66: Section 150 (penalty)

1839. These items would amend provisions to remove the current penalty and set the new penalty as either a tier 1, 2, 3 or 4 WHS civil penalty provision penalty as defined in new Schedule 4.

1840. Section 123 would be amended to include a tier 1 WHS civil penalty provision penalty.

1841. Subsection 118(3), sections 124, 125, 126, 128, 129, 143, subsection 144(1), sections 145 and 146, subsection 147(1) and section 128 would be amended to include a tier 2 WHS civil penalty provision penalty.

1842. Section 150 would be amended to include a tier 3 WHS civil penalty provision penalty.

1843. Subsection 149(1) would be amended to include a tier 4 WHS civil penalty provision penalty.

Item 67: Paragraphs 254(1)(a) and (2)(a)

Item 68: Subsection 259(2)

1844. These items would amend paragraphs 254(1)(a) and (2)(a) and subsection 259(2) to make minor technical amendments consequential to other Division 9 amendments.

Item 69: Application provision

1845. This item would provide that Division 9 would only apply in relation to contraventions of WHS civil penalty provisions that occur on or after the commencement of the Division.

Division 10—Penalties prescribed by the regulations

Item 70: Paragraph 276(3)(h)

1846. This item would make a minor technical amendment to the Governor-General's regulation-making powers provisions to account for the changes to penalty indexing. The regulations currently allow the Governor-General to make regulations which prescribe a penalty for any contravention not exceeding \$30,000. This item would replace the monetary figure of \$30,000 with the following penalty tiers which may be prescribed as the penalty for an offence under regulations:

- a tier E monetary penalty;
- a tier F monetary penalty;
- a tier G monetary penalty;
- a tier H monetary penalty;
- a tier I monetary penalty.

Item 71: Transitional provision—existing penalty provisions

1847. This item is a transitional provision which would apply to provisions in the WHS Regulations which prescribe a monetary penalty for an offence. It would allow monetary penalty provisions to remain in force after the commencement of Division 10 despite the changes which would be made to regulation making powers by item 70.
1848. Subitem 71(3) would allow an existing penalty provision to be repealed or amended by regulations made under section 276 of the WHS Act.

Division 11—Penalty amounts

Item 72: At the end of the Act

1849. This item would introduce a new Schedule 4 to the WHS Act setting out monetary penalties for Categories 1 to 3, tiers A to I and the WHS civil penalty provisions tiers 1 to 4. The penalty amounts would be subject to indexation which is set out in clause 4 of the Schedule.
1850. Clause 1 would establish the maximum monetary penalties for offences under the WHS Act where a Category 1, 2 or 3 monetary penalty is specified. The maximum monetary penalty is set out in the table to clause 1 as indexed under clause 4 and rounded under clause 5.
1851. For categories 1 to 3 there are different maximum monetary penalties for an individual (as a PCBU or as an officer of a PCBU), an individual (otherwise) and a body corporate or the Commonwealth. The penalty amounts in the table to clause 1 include the 39.03 per cent increase to monetary penalties for Category 2 and 3 offences (which represents the average increase in penalty units for non-WHS offences across all jurisdictions since the introduction of the model Act in 2011), and the significant increase for Category 1 offences.
1852. Clause 2 would establish the maximum penalty for offences under the WHS Act and Regulations where a tier A, B, C, D, E, F, G, H or I monetary penalty is specified. The maximum penalty is set out in the table to clause 2 as indexed under clause 4 and rounded under clause 5.
1853. Clause 3 would establish the maximum penalty for WHS civil penalty provisions under Part 7 of the WHS Act where a tier 1, 2, 3, or 4 monetary penalty is specified. The maximum penalty is set out in the table to this subclause as indexed under clause 4 and rounded under clause 5.
1854. Clause 4 would provide for the indexation of penalty amounts in the WHS Act to reflect increases in CPI (discussed above). This is achieved by introducing an indexation formula to be applied annually to all monetary penalties in the WHS Act and Regulations.
1855. Subclause 4(1) would establish that each monetary penalty set out in clauses 1–3 must be indexed for the year commencing on 1 July 2024 and each subsequent year in accordance with clause 4.

1856. Subclause 4(2) would contain the formula for calculating the maximum amount of each monetary penalty that will apply in each year. This formula is adapted from the indexation formula used in subsection 242B(1) of the *Work Health and Safety Act 2011* (NSW).
1857. The denominator year of 2022 would apply because the calculation of the one-off increase (of 39.03 per cent) was for the period from the commencement of the model WHS law in 2011 until 2021.
1858. Subclause 4(3) would provide that if the maximum amount of a monetary penalty calculated for a year is less than the amount that applied in the previous year, then the amount for the previous year continues to apply. This ensures that penalty levels do not decrease.
1859. Clause 5 would specify that for penalties under \$10,000 and which are not a multiple of \$100, the maximum monetary penalty would be rounded down to the nearest \$100. Where the amount is a multiple of \$50 it is to be rounded down. For penalties more than \$10,000 and not a multiple of \$1000, the maximum amount of the penalty would be rounded to the nearest \$1000 and a multiple of \$500 would be rounded down.
1860. Clause 6 would provide that as soon as practicable after publication by the Australian Statistician of the CPI number for the March quarter each year, the regulator must give notice of the maximum amount of each monetary penalty calculated under Schedule 4 by notifiable instrument.
1861. Clause 7 defines ‘CPI number’ and ‘year’ for the purpose of Schedule 4.

Part 7—Tied amendments

Amendments to the *Work Health and Safety Act 2011*

1862. This item would amend the WHS Act and replace the referenced penalty provision to align it with the newly introduced tiered monetary penalty system.

Item 73: Subsections 272A(1) and 272B(1) (penalty)

1863. This item would amend the reference of maximum penalties available for these two offences to be a tier B monetary penalty.

1864. The offences in subsections 272A(1) and 272B(1) will be inserted by the *Work Health and Safety Amendment Act 2023* when it commences (which will occur no later than 21 September 2023). Item 73, which would commence after the commencement of that Act, would amend subsections 272A(1) and 272B(1) to ensure the new method of categorisation and indexation of penalties also applies to them.



Australian Government
Department of Employment
and Workplace Relations

Standing up for casual workers

(OBPR22-02412)

Impact Analysis Equivalent



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Standing up for casual workers (OBPR22-02412)

Assessment that the Senate Select
Committee on Job Security Inquiry and the
Review of the *Fair Work Amendment
(Supporting Australia's Jobs and Economic
Recovery) Act 2021* (Cth) are equivalent to
an impact assessment process

Introduction

The Department of Employment and Workplace Relations' (the department) view is two independent processes – the Senate Select Committee on Job Security, and the review of the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) - can be certified as equivalent to an impact assessment process.

Overview of the Senate Select Committee on Job Security Inquiry (the Job Security Inquiry)

The Senate Select Committee on Job Security was appointed by resolution of the Senate on 10 December 2020. Submissions closed on 2 December 2021. The [Job Insecurity Report](#), presented on 11 February 2022, concluded the committee's inquiry into job security and its examination and gathering of evidence relating to the terms of reference. The tabling of the final report on 30 March 2022 concluded the work of the committee. Further information can be found on the [committee's webpage](#).

The Job Security Inquiry received [230 written submissions](#) from unions, academics, state governments, local councils, community legal centres, employer groups and individual citizens. The Job Security Inquiry also held 27 public hearings from April 2021 to March 2022.

62 submissions specifically raised issues with casual employment, and many cited the need for a change to the definition of casual employee that was introduced in the *Fair Work (Supporting Australia's Jobs and Economic Recovery) Amendment Act 2021* (Cth). A list of submissions is at [Attachment A](#).

The Job Security Inquiry made 103 recommendations over 4 interim reports, with **11 recommendations related to casuals and casual conversion**. A copy of these recommendations is at [Attachment B](#).

The most relevant recommendation to the Government's proposed reforms to the definition of casual employee was **Recommendation 6** from the [Fourth interim report: the job insecurity report \(11 February 2022\)](#):

Rec 6	The committee recommends that the Australian Government urgently assesses the performance of the <i>Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021</i> (Cth). As the data collected through this inquiry suggests, the amendment has not had a positive impact on job security, and it should be repealed and replaced with a new statutory definition of casual employment that reflects the true nature of the employment relationship—rather than a definition which relies upon the employer's description of the relationship in an employment contract—and a new casual conversion provision.

Overview of the statutory review of the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) (the Review)

The *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) included a statutory requirement to review the operation of the legislative amendments 12 months after its commencement, which must:

- a) consider whether the operation of the amendments made are appropriate and effective
- b) identify any unintended consequences
- c) consider whether any legislative change is necessary to improve the operation of the amendments.

This was undertaken by an independent reviewer (KPMG). The Review had a public consultation process through both consultation sessions and a written submission process. The Review considered four elements:

- 1. The statutory definition of casual employee
- 2. The process for an employee to move in their job from being casual to permanent (often referred to as 'casual conversion')
- 3. The statutory offset mechanism, for situations where an employer has been paying a casual loading but should have been paying permanent employee entitlements
- 4. The Casual Employment Information Statement.

The Review found the elements of the current framework are, conceptually, appropriate but also clearly identified areas for improvement.

In addition to considering submissions to the Senate Standing Committee on Education and Employment on the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, and the Job Security Inquiry; the Review sought views from a range of stakeholders including employers, employees, State governments, Commonwealth entities, peak bodies, employer and employee representatives (including trade unions), interest groups, community legal centres, and academics.

The most relevant finding regarding the statutory definition was:

Finding 1 **Consideration should be given to whether the definition should focus solely on the terms of the initial offer and acceptance, and 'not on the basis of any subsequent conduct of either party' (per section 15A(4) of the *Fair Work Act 2009* (Cth)).**

A full list of all eight findings is at [Attachment C](#). The report of the Review was tabled in Parliament on 1 December 2022. The Government response to the Review was published on 15 December 2022. The Government response to the Review noted the report findings and evidence would be considered in implementing the Government's election commitment. Both the Review and the Government response are available on the department's website, at <https://www.dewr.gov.au/workplace-relations-australia/consultations/statutory-review-casual-employment-legislation>.

How each of the seven Impact Analysis elements were addressed by the two inquiry processes is outlined below.

1. What is the problem you are trying to solve and what data is available?

The Job Security Inquiry took extensive evidence on the problem of job insecurity, supported by data including personal testimonies, surveys and research commissioned by employee and employer representatives, workplace/company level data and academic research and analysis. Evidence received regarding the common characteristics of casual workers and individual submitter testimonies support the proposition that casual workers are more insecure.

Additionally, data and analysis on casual employment was expressly commissioned from the Australian Bureau of Statistics (ABS) and BETA, the behavioural economics team of the Australian Government, to inform the Review.

These two specific data projects have provided important insights into how the existing legislative settings have operated and informed design of the proposed new legislative settings.

- The first data project was undertaken by BETA and involved:
 - online surveys with approximately 1,200 current and recent casual employees and 800 employers of casual staff; and
 - qualitative interviews with 12 current and recent casual employees and 8 employers of casual staff.
- The second data project was undertaken by the ABS to analyse conversion rates from casual to permanent employment over recent years.

The reports of both these projects are publicly available on the department's website, at <https://www.dewr.gov.au/workplace-relations-australia/consultations/statutory-review-casual-employment-legislation>.

While some employees may choose to be casual because of the perceived benefit of the casual wage loading, or because it helps them to balance their work/life responsibilities, evidence heard by the Job Security Inquiry shows that casual employees can be exposed to the significant negative impacts of job insecurity, including:

- poorer physical and mental health (including susceptibility to bullying and drug use)¹³
- less ability to afford medical care, and less likely to take time off work to seek medical treatment, and are more likely to suffer from chronic illnesses¹⁴
- difficulty affording adequate housing, accessing credit for home loans or securing a rental, and increased risk of homelessness and long-term (even intergenerational) poverty¹⁵
- the negative consequences of not being able to access paid sick leave were demonstrated during the early stages of the COVID-19 pandemic, with many casual employees performing essential services but being unable to afford to take time off work to recover from illness or to care for sick family members.

The Review also identified problems with the current framework. It found, for example, that 'a key issue is the effect of s15A(4) to exclude consideration of the parties subsequent conduct from the assessment of casual employment'.¹⁶

It also found that the current review and appeal mechanisms may present barriers to discourage employees to pursue courses of action for secure employment (finding 5). The Review considered

¹³ Senate Select Committee on Job Security, [The job insecurity report](#), February 2022, pp 43-44 (Quoting submission from Professor Michael Quinlan and Dr Elsa Underhill)

¹⁴ Senate Select Committee on Job Security, [The job insecurity report](#), February 2022, p 49 (Quoting submission from the Australian Medical Association).

¹⁵ Senate Select Committee on Job Security, [The job insecurity report](#), February 2022, p 54 (Quoting submission from the Western Australian Council of Social Services).

¹⁶ KPMG, [Review of the Fair Work Amendment \(Supporting Australia's Jobs and Economic Recovery\) Act 2021 \(Cth\)](#), October 2022, p 71.

that 'as a matter of principle, it is appropriate for an employee to have the ability to seek review of outcomes pursuant to the *Fair Work Act 2009* (Cth) using 'a low-cost, or no-cost, review process'.¹⁷

2. What are the objectives, why is government intervention needed to achieve them, and how will success be measured?

The objective is to provide employees who have a firm advance commitment to continuing and indefinite work with a clearer path to permanent work, should they wish to pursue this.

The definition of casual employee and the process for changing to permanent (casual conversion) are currently set out in the *Fair Work Act 2009* (Cth). Government intervention through amending this legislation is needed to address current barriers to conversion. This includes where employees are stuck as casuals even if they are working regular hours similar to permanent workers, without job security and want to, but are unable to, convert to a permanent position.

Government intervention through legislation is also necessary to overcome the narrow interpretation of the concept of 'firm advance commitment' that was decided by the High Court in *WorkPac v Rossato* [2021] HCA 23.

Effects of long-term casual employment

For some workers, receiving a casual loading in lieu of paid leave entitlements and having flexibility around their schedule or shifts means casual employment can work for them in the immediate term. However, the Job Security Inquiry received evidence from a range of stakeholders on the detrimental aspects of casual work compared to permanent work, including:

- going to work sick
- not taking leave due to fears about endangering future employment
- the inability to 'properly balance' work, personal and caring responsibilities
- last minute changes to working hours
- 'sudden loss of what had been regular work', with no notice
- the 'lack of a career path'
- reduced access to training and lower workplace participation
- 'poorer health and safety outcomes'
- an 'inability' to secure a home loan or other finance.¹⁸

¹⁷ KPMG, [Review of the Fair Work Amendment \(Supporting Australia's Jobs and Economic Recovery\) Act 2021 \(Cth\)](#), October 2022, p 75.

¹⁸ Senate Select Committee on Job Security, [The job insecurity report](#), February 2022, pp 82-83 (Quoting submission from the National Foundation for Australian Women).

The Job Insecurity Inquiry further highlighted a 2015 *Household, Income and Labour Dynamics in Australia* (HILDA) Survey on casual employees' feelings about their job security, which found that casual workers were:

- 'less satisfied' with their level of job security
- 'less satisfied' with their 'hours worked'
- 'less satisfied' with their level of access to training and skill development
- almost twice as likely to be looking for another job as permanent employees.¹⁹

The Job Insecurity Inquiry also cited testimonials from individuals on the negative impact of insecure work on their working lives:

Kristie—a full-time casual teacher for 6 years

'Teachers, with degree qualifications, are working day to day casual or on temporary contracts for literal YEARS on end, not knowing what we are doing from one day to the next. Hopefully we get a contract, and then we spend time fighting others for our jobs each year, or with the everlasting threat of the permanent position we're covering going to someone else because of the weird, nepotistic way our system works. As casual teachers, we only have two pay grades, and while the casual rate is good, we are restricted to the school terms as to days we are able to work, and then we need to be engaged for every single available day to reach anything like a decent yearly salary'.²⁰

Mr Darcy Moran, a casual who has worked in the hospitality sector for 15 years.

'The precarious nature of the work makes it extremely hazardous for employees to challenge inept, corrupt or abusive managers. When you're a casual employee, you don't need to go through a dismissal process; you just stop being rostered, which means you don't have reasonable recourse and you don't feel that you can invoke regulation or support'.²¹

Current casual employment framework embeds job insecurity

Prior to 2021, the meaning of the term 'casual employee' had developed over time through common law decisions, developing a range of factors to determine the substance and totality of the employee/employer relationship.

The *Fair Work (Supporting Australia's Jobs and Economic Recovery) Amendment Act 2021* (Cth) introduced a statutory definition of casual employee, providing that the casual employee status is

¹⁹ Senate Select Committee on Job Security, [The job insecurity report](#), February 2022, p 79.

²⁰ Senate Select Committee on Job Security, [The job insecurity report](#), February 2022, p 80.

²¹ Senate Select Committee on Job Security, [The job insecurity report](#), February 2022, p 84.

determined at the point of the employee's engagement by the employer, and that post-contractual behaviour is not a factor in determining an employee's status.

Under strict application of this definition, an employee can be engaged as a casual employee initially but then go on to work for that same employer in a manner akin to permanent work, while remaining classified as a casual employee, with limited recourse to change their status. For example, the Review took evidence that the statutory definition:

- 'license[s] constructive impermanency and the downward pressure on wages' (the National Foundation for Australian Women)²²
- 'Casual employees continue to work full-time hours with their rosters set far in advance and without the option of being able to refuse shifts' (Electrical Trades Union of Australia)²³
- [contributed to the] 'prevalence of insecure work by enabling or encouraging some employers to engage employees as casuals' in circumstances where this relationship may not reflect the true nature of the employment relationship (Victorian Government).²⁴

Limited conversion has occurred under the current framework

Under the *Fair Work (Supporting Australia's Jobs and Economic Recovery) Amendment Act 2021* (Cth), some regular casual employees with 12 months' service are eligible for conversion to part-time or full-time employment, subject to the employer having 'reasonable grounds' not to convert the employee.²⁵ Noting the current framework has only been in place since March 2021, there is limited detailed evidence of its impact.

However, ABS data analysis of Labour Force Survey data, undertaken as part of the Review, showed that there was no discernible evidence that there was a shift in casual conversion rates, casual transition rates and incidence of casual employees in the period leading to, and after, the March 2021 reform:

A statistical test (the Chow test) was applied to the time-series of the metrics and the outputs of these tests indicated that there was insufficient evidence that there had been a statistically significant shift in the casual conversion rates, the casual transition rate, and the

²² KPMG, [Review of the Fair Work Amendment \(Supporting Australia's Jobs and Economic Recovery\) Act 2021 \(Cth\)](#), October 2022, p 43.

²³ Electrical Trades Union of Australia, *Submission to the Attorney-General Department's Review of Changes to Casual Employment Laws*, [D22 1651683 ETU Submission.PDF \(dewr.gov.au\)](#), p 2.

²⁴ KPMG, [Review of the Fair Work Amendment \(Supporting Australia's Jobs and Economic Recovery\) Act 2021 \(Cth\)](#), October 2022, p 70.

²⁵ For more information on the current conversion framework, see the Fair Work Ombudsman, [Casual Employment Information Statement](#).

*proportion of casual employees in the workforce in recent years, including the period after March 2021.*²⁶

This is supported by evidence provided to the Job Security Inquiry which showed that conversion has been limited under the current framework. The Review also found of the data available, the current casual conversion arrangements do not appear to have significantly impacted the number of casual conversions.

A survey of long-term casual employees undertaken by BETA²⁷ as part of the Review found that of those employees who were eligible for conversion since March 2021, 7 per cent have converted after being offered a permanent role by their employer, and 18 per cent have converted after they made a request to their employer.²⁸

BETA's survey also looked at the overall preference of long-term casual employees for casual vs permanent roles which found 26 per cent would prefer to convert to a permanent position. Further, of the 63 per cent of long-term casuals who would prefer their current role to remain casual, a third (33 per cent) of these people would be open to shifting to a different permanent role or becoming permanent at some point in the future.²⁹

Importantly the Review found further consideration should be given to methods of better facilitating access to dispute resolution for employees to mitigate against barriers which may discourage employees from seeking conversion (finding 5).

These statistical and case study findings are a strong indication that further action and policy intervention is required.

Measurement

Success will not be measured by a particular conversion rate. Rather, the objective is that eligible employees can move from casual to permanent employment if they choose to do so.

3. What policy options are you considering?

In the Secure Australian Jobs Plan, which formed part of the Government's 2022 election commitments, the Government committed to legislate an objective test of when an employee can

²⁶ Australian Bureau of Statistics (ABS), [Analysis of changes in casual conversion in Australia](#), July 2022.

²⁷ The survey, undertaken by BETA, the Behavioural Economics Team of the Australian Government, was not designed to deliver findings representative of the overall casual workforce.

²⁸ BETA, [Casual Employment: Research findings to inform independent review of SAJER Act](#), 2022, p 31

²⁹ A further 11 per cent of long-term casuals indicated no preference for a casual vs permanent role. BETA, [Casual Employment: Research findings to inform independent review of SAJER Act](#), 2022, p 11.

be classified as casual, including taking into account post-contractual conduct. This will provide employees with a clearer and stronger pathway to permanent work.

This option is consistent with recommendation 6 of the Job Security Inquiry, as reflecting the true nature of the employment relationship, including consideration of post-contractual conduct. It is also consistent with finding 1 of the Review, which said it should be reconsidered whether the definition should focus solely on the terms of initial offer and acceptance (to the exclusion of any post-contractual conduct).

The preferred approach would keep the existing conceptual framework (a statutory definition and statutory processes to allow employees to change from casual to permanent) while implementing the findings of the Review in order to improve its effectiveness, as discussed in the response to question 6 below.

This model will provide eligible employees with two pathways to change their status: through seeking a change of status with reference to the amended definition of casual employee (the new employee choice definition pathway), or through the existing casual conversion mechanism which will be retained. Provided an employee is appropriately classified on engagement, status will only change prospectively, meaning backpay liability will not accrue. The Fair Work Commission will have strengthened powers to resolve disputes. These changes are consistent with the findings of the two impact analysis equivalent processes.

The alternative is the status quo, which would not deliver on the election commitment or solve the identified problems. As noted in the Australian Government Guide to Policy Impact Analysis, when the proposed policy approach is an election commitment: ‘The Government has already committed itself to one policy approach in a public and accountable way and no alternative options need to be considered’.³⁰

4. What is the likely net benefit of each option?

As above, the recommended option is an election commitment, so is the only option considered.

For employers

Under the *Fair Work Act 2009* (Cth), employers have an ongoing responsibility to classify employees correctly at all times. The proposed reforms do not alter this requirement, but they do clarify the

³⁰ Office of Impact Analysis, [Australian Government Guide to Policy Impact Analysis](#), February 2023, pp 20-21.

legal classification of casual employee and continue to provide certainty about when an employee can be casual.

The Regulatory Impact Statement³¹ for the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) details the costs for businesses to implement the current status quo, which includes assessing the casual employee's status, and determining eligibility for casual conversion upon reaching 12 months of service.

The proposed reforms would not create any new requirement for employers to initiate any process to change an employee's status to permanent. It would only create requirements for employers to respond to those employees who utilise the new employee choice definition pathway and formally notify their employer that they believe they do not meet the definition of casual and wish to be permanent. Employers may already be having conversations with their casual employees about becoming permanent – the research undertaken by BETA indicated that casuals who become permanent often do so in the first 12 months, outside of current obligations.³² In this regard the kinds of conversations and actions employers will need to engage in are not new – they are a normal part of being an employer.

Under the proposed reforms, most employees can only access the employee choice definition pathway after 6 months of service. For employees of small businesses, the requirement is 12 months of service before they can access the definition pathway³³. There is no obligation on employers to monitor a casual employee's status against the new definition. If an employee does not exercise their right to access the employee choice definition pathway, consistent with current arrangements, the only time employers will need to consider the definition is to ensure employees are correctly classified on engagement.

It is intended that the Fair Work Ombudsman, as part of its functions as the national workplace relations regulator, will undertake an information and education campaign that targets the needs of small business to assist them in implementing the proposed changes.

As with the status quo, there will be a legislated dispute resolution process for employers and employees to resolve issues around the determination of an employee's status. This includes existing mechanisms through the Fair Work Commission, as well as the access to the small claims jurisdiction (introduced by the *Fair Work Amendment (Supporting Australia's Jobs and Economic*

³¹ The Regulatory Impact Statement is contained within the revised explanatory memorandum to the [Fair Work Amendment \(Supporting Australia's Jobs and Economic Recovery\) Bill 2021](#).

³² BETA, *Casual Employment: Research findings to inform independent review of SAJER Act*, 2022, pp 31-33

³³ Existing casual employees will also need to meet this qualifying period. That is, they must wait 6 months, or 12 months for employees of small business, after commencement of the laws before they can access the new employee choice definition pathway.

Recovery) Act 2021 (Cth)) to ensure that employers and employees have a low-cost, accessible and efficient process to resolve disputes about casual employment. Consistent with finding 5 of the Review the Fair Work Commission will have the power to arbitrate disputes, facilitating better access to outcomes.

This will benefit employers and employees by providing quick outcomes on an employee's status and prospects for conversion, rather than having to resort to long and expensive court processes.

For employees

The Review underscored the importance of change in employment status being dependent on the choice of the employee. For example, as mentioned above, BETA found that 63 per cent of long-term casual employees would prefer to remain in their current casual role at this point in time³⁴. The proposed approach will ensure employees are not stuck as casuals when they are working arrangements similar to permanent employees but do not receive the job security benefits of permanent employment. Employees in these situations will have a clear pathway to permanent work if this is their choice.

Casual employees can face significant negative impacts as a result of insecure work. While casual employees are entitled to receive a casual loading – usually 25 per cent – or receive a specific casuals rate of pay, they do not receive the entitlements that permanent employees do, such as paid personal/ carer's leave. This means they do not have an ongoing source of income in the event of illness or injury. An employee who re-classifies as a permanent employee will not be entitled to a casual loading, but will gain access to a number of entitlements under the National Employment Standards that are only available to part-time and full time employees, including personal/carers leave, annual leave and redundancy pay.

Beyond those immediate workplace entitlements, increasing an individual employee's job security is linked to improved financial stability as well as physical and mental health. Research conducted by BETA found that where employees wished to convert to a permanent role, the two main drivers were the stability and security of hours and income, and the benefits of having leave entitlements.³⁵ BETA also found that casual employees experiencing very high levels of financial stress are more likely to want to convert to a permanent role.³⁶

Further, initiatives to increase awareness and knowledge of the provisions through the development of an updated Casual Employment Information Statement by the Fair Work Ombudsman will assist employees and employers to understand their rights and obligations (as identified in findings 7 and 8

³⁴ BETA, [Casual Employment: Research findings to inform independent review of SAJER Act](#), 2022, p 11.

³⁵ BETA, [Casual Employment: Research findings to inform independent review of SAJER Act](#), 2022, p 13.

³⁶ BETA, [Casual Employment: Research findings to inform independent review of SAJER Act](#), 2022, p 11.

of the Statutory Review) including consideration of the trade off between casual loading and the benefits of permanent employment.

5. Who did you consult and how did you incorporate their feedback?

Consultation through the Job Security Inquiry

The Senate Select Committee Inquiry into Job Security (the Inquiry) was a public process that took place over the course of 16 months (from December 2020 to March 2022).

The Inquiry received 230 written submissions from unions, academics, state governments, local councils, community legal centres, employer groups and individual citizens. The Inquiry also held 27 public hearings from April 2021 to March 2022 where many stakeholders represented their views and spoke to their written submissions.

62 submissions specifically raised issues with casual employment, and many cited the need for a change to the definition of casual employee that was introduced in the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) (see [Attachment A](#) for the full list of submissions relevant to casual employment).

The department has carefully reviewed the Job Security Inquiry Report, and many of the Government's workplace relations policies reflect and align with the findings and recommendations from the Inquiry. These include Recommendation 6 from the Job Insecurity Report (copied above) to amend the definition of casual employment, as well as Recommendation 10 from the First Interim Report which recognises that casual employees and their employers must have a low-cost, accessible and efficient process to resolve disputes about casual employment, including access to arbitration.

Consultation through the Review

As noted previously, the current legislative settings, which took effect through the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth), included a requirement for a statutory review. This Review was tabled in Parliament on 1 December 2022. The Government response to the Review noted the report findings and evidence would be considered in implementing the Government's election commitment.³⁷

³⁷ Australian Government, [Australian Government Response to the Review of the Fair Work Amendment \(Supporting Australia's Job and Economic Recovery\) Act 2021 \(Cth\)](#), December 2022.

The consultation comprised five separate virtual consultation sessions with employment law academics, peak industry bodies, employee representatives, state and territory government representatives and Commonwealth entities. An in-person session was also held in Sydney. Stakeholders were able to make written submissions to the Review - 13 submissions were made by representatives of employers, employees and state governments. A further 8 submissions were made responding to an online questionnaire by employer groups, unions, and non-government organisations. Organisations who participated in these consultations are detailed in [Attachment D](#).

In addition to the consultation through the Job Security Inquiry and the Review, the Government has continually consulted with a broad range of stakeholders including union and employee representatives, employers and employer representatives, state and territory governments, community representatives and academics as part of the broader consultation process being undertaken to support the introduction of legislative reforms into the Australian Parliament in Spring 2023. As part of initial consultations, the department published information on the department's website covering key issues and considerations for discussions with stakeholders.³⁸ Written submissions were invited and in-confidence discussions were undertaken to help inform departmental advice to Government.

In Australia's national workplace relations system, there are also formal consultation requirements. For example, the *National Workplace Relations Consultative Council Act 2002* (Cth) establishes the National Workplace Relations Consultative Council. The purpose of the National Workplace Relations Consultative Council is to provide, in the public interest, a regular and organised means by which Government representatives, and representatives of employers and of employees (and, when the Minister considers it appropriate, representatives of other persons, bodies and organisations) may consult together on workplace relations matters of national concern.

The Committee on Industrial Legislation (COIL), a subcommittee of the National Workplace Relations Consultative Council, meets when required to provide technical input on draft workplace relations legislation. COIL met on 16 and 17 August 2023 to consider an exposure draft of the legislation to enact the reforms.

³⁸ Department of Employment and Workplace Relations, [Stand up for casual workers: Legislate an objective test to determine when an employee can be classified as casual](#).

6. What is the best option from those you have considered and how will it be implemented?

As above, the Senate Select Committee Inquiry thoroughly reviewed the status quo and sought views on alternate options for improving job security for casual employees.

The Government's reform proposal seeks to implement the policy change as per Recommendation 6 of the Fourth Interim Report.

The Government's reform proposal is also consistent with the analysis and findings of the Review to:

- incorporate post-contractual conduct into the definition (finding 1)
- increase deterrence for sham casual arrangements by legislating specific sham casual provisions and associated penalties for deliberate misclassification (finding 2)
- strengthen anti-avoidance measures to ensure employers actively consider conversion (finding 3)
- better facilitate access to dispute resolution for employees through the introduction of arbitration (finding 5), and
- increase knowledge and awareness of the framework by enhancing the utility of the Casual Employment Information Statement through providing it at commencement and again at 12 months employment (finding 7 and finding 8).

The reform will be implemented through legislative changes to the *Fair Work Act 2009* (Cth).

The Review identified implementation considerations which the department has considered. For example, the Review indicated that a tension exists between a definition of casual that allows for consideration of subsequent (post-contractual) conduct and providing the requisite level of certainty for both employers and employees.³⁹ This tension is being addressed in the proposed legislation by providing that employees engaged as casual employees remain so until they proactively and through their own choice go through a status change or conversion process. This will mean that employers have certainty as an employee's status will be fixed until a change process occurs and they will not be exposed to risk of backpay for permanent entitlements.

There will be changes to the existing Casual Employee Information Statement published by the Fair Work Ombudsman, for employers to give to casual employees to explain the definition of casual employee and procedures for dispute resolution. New provisions are proposed to commence on 1 July 2024, to allow sufficient time for employees and employers to understand their rights and

³⁹ KPMG, [*Review of the Fair Work Amendment \(Supporting Australia's Jobs and Economic Recovery\) Act 2021*](#) (Cth), October 2022, p 73.

obligations, and to allow the Fair Work Ombudsman to prepare and test for usability of the revised Casual Employment Information Statement.

The Fair Work Ombudsman will also undertake communications and education activities to increase awareness of the change and provide support to employers and employees, particularly small business.

7. How will you evaluate your chosen option against the success metrics?

As noted in the response to question 2, the objective is not to reach a particular rate of casual conversion. Rather it is to increase fairness and remove barriers to becoming permanent where an employee's working arrangement is akin to that of a permanent employee and they want to be classified as such.

Qualitative and quantitative data considered by the Job Security Inquiry and the Review will continue to be useful metrics for understanding how the new framework is being understood and implemented at the workplace level. For example, section 5.3 of the Review (pp 32-38) covered case law since the commencement of the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth). While the number of cases to be considered by the courts and the Fair Work Commission is expected to remain relatively low, the precedents from published decisions will create valuable clarity for employers and employees in understanding how the law should be applied. From an evaluation perspective, the outcomes of published decisions will assist in understanding whether the legislative settings are leading to outcomes consistent with the policy intent.

Section 5.3 of the Review also included administrative data on the outcomes of disputes under the Fair Work Commission existing dispute resolution processes for casual conversion.⁴⁰ The Fair Work Commission will continue to collect administrative data on dispute resolution under the proposed new framework. This will assist in evaluating timeliness and outcomes of disputes about changing from casual to permanent employment.

In addition to the analysis above, which identifies how data sources that are contained in the Job Security Inquiry and the Review will be relevant to the evaluation of the chosen option, the department has undertaken additional impact analysis that identifies other data sources and how an evaluation could be undertaken.

⁴⁰ KPMG, [*Review of the Fair Work Amendment \(Supporting Australia's Jobs and Economic Recovery\) Act 2021 \(Cth\)*](#), October 2022, pp 34-35.

New data to support monitoring and evaluation

Currently available Australian Bureau of Statistics (ABS) data (Characteristics of Employment) allows for analysis of a range of characteristics of employees who are without paid leave entitlements⁴¹ and other benefits related to permanent employment. For example, the Characteristics of Employment survey collects data on

- whether the employee expects to remain in their job for the next 12 months.
- whether the employee is guaranteed to work a minimum number of hours each week
- whether the employee earnings/income vary from one pay period to the next
- whether the employee usually worked the same number of hours each week.

Monitoring changes in this data, including changes within particular groups that can be identified in the data (for example, by gender or industry) will support the evaluation process.

Additionally, new ABS data on casuals will begin to become available through the Characteristics of Employment survey from December 2025. This follows a decision in the Mid-Year Economic and Fiscal Outlook 2020-21 to provide the ABS \$2.8 million over four years from 2020-21 to expand and improve labour market surveys to cover key gaps in industrial relations statistics – including the experiences of casual employees. This will be a critical data source which will allow the department to analyse the trends in not only the use of casual employment, but also the experiences of casual employees over time as the new casual employment framework becomes more established. The ABS has advised that the following high-level topics will be tested in a new the casual experience module in 2023/24, prior to being incorporated into the Characteristics of Employment survey:

- Broader population group – all respondents over 15 years of age with Labour Force Status of ‘employed’
- Leave - whether have paid sick and holiday leave & whether self-identify as casual
- Length of time working for employer (years)
- Employment expectation - whether expect to be working for employer in 12 months-time
- Hours:
 - whether have a regular pattern of hours each week
 - preference for more hours
 - say over hours/shift pattern
 - ability to reject work without consequence
- Preference for casual work and aspects like or don’t like about casual work
- Conversion:
 - whether conversation has occurred

⁴¹ ABS *Characteristics of Employment*, August 2022, unpublished Tablebuilder.

- whether would convert to permanent employment in next 12 months if available
- whether previously were casual and converted back and reason.

The provision of new ABS data will be supported by activities within the department to gain insights on the practical implementation of the new legislative settings. For example, the department will monitor data and outcomes from relevant Fair Work Commission matters. The department will ensure that relevant functions are appropriately resourced to undertake necessary monitoring and evaluation work and inform legal and policy advice to Government to ensure the new provisions are working as intended.

The department will also continue to engage in stakeholder consultation with employer groups and unions to gauge the impact of the reforms. In particular, the regular meetings of the National Workplace Relations Consultative Council allow the Commonwealth Government, unions, and employers to consult on workplace relations and work health and safety matters of national concern. Meetings are chaired by the Commonwealth Minister for Employment and Workplace Relations.

Standing up for casual workers - regulatory costings

The annual regulatory burden to business, community organisations or individuals as quantified by the Department of Employment and Workplace Relations (the department) using the Australian Government's Regulatory Burden Measurement framework is provided below.⁴²

Table 1: Summary table of annual costings

Change in costs	Business	Community organisations	Individuals	Total change in costs
Total, by sector	\$1,103,410	Nil	\$289,961	\$1,393,372

Table 2: Summary table of annual costings, by business type

Change in costs	Non-small business	Small business	Total cost to business
Total, by sector	\$729,571	\$373,840	\$1,103,410

Employee notification under casual definition

The aim of the policy is to provide a stronger pathway to permanent work for casual employees. This will particularly support people engaged as casual employees where it becomes apparent to them that the real nature of their employment is not casual.

Overview of definition

The new proposed definition of casual employee includes an objective test (the general rule) which is **based on whether the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work**. This absence is necessary to be a casual employee.

To assess whether a person is a casual employee within the meaning of the definition against this general rule, there are characteristics and considerations that include but are not limited to:

- the ability and actual practice of offering and accepting work
- whether continuing work is reasonably likely
- whether part time or full-time employees are undertaking similar roles
- whether the employee has a regular pattern of work.

⁴² Note that components will not always sum to totals due to rounding.

Available data sources

The best available data set to estimate the number of casual employees who may not meet the objective test and thereby calculate an associated regulatory impact is the ABS Characteristics of Employment Survey. This data set contains key characteristics that can be associated to casual employment, including:

- whether the employee expects to remain in their job for the next 12 months
- whether the employee is guaranteed to work a minimum number of hours each week
- whether the employee earnings/income vary from one pay period to the next
- whether the employee usually worked the same number of hours each week.

There is not explicit alignment between the statutory provisions and this data set. This is because the considerations that apply for purposes of the general rule are broader than these data points. The assessment whether someone is a casual employee is a holistic assessment of all relevant factors in the practical reality of the employment relationship, including understandings or expectations that occur after entering into the initial contract of employment. The application of the definition to an employee will be assessed on a case-by-case basis.

Therefore, assumptions are needed to provide an estimate of the number of casual employees who may be eligible to access the employee choice definition pathway to permanency, to provide a robust estimate of the outer limits of regulatory impact.

Assumptions

Regular casual employees

- The department has estimated that around 851,100 regular casual employees⁴³ (32.1 per cent of all 2.7 million casual employees) are most likely to be eligible to change status under the employee choice definition pathway.⁴⁴
- Based on the information collected in the ABS Characteristics of Employment publication (August 2022) this number is calculated based on casual employees who are guaranteed to work a minimum number of hours each week and meet at least one of two criteria:
 - earnings/income do not vary from one pay period to the next

⁴³ ABS, *Characteristics of Employment, August 2022*, unpublished Tablebuilder.

⁴⁴ Data on casual employment is available from a number of ABS publications, namely Characteristics of Employment and Quarterly Detailed Labour Force. Data from the Labour Force publication is more timely as it is released on a quarterly basis the month after the data was collected, but is limited in its ability to breakdown the headline figure. Characteristics of Employment is an annual publication but has considerably more information, including the demographic and work characteristics that have been used in much of the costing of these policies.

- usually worked the same number of hours each week
- These employees are most likely to have firm advance commitment to continuing and indefinite work, that is supported by the considerations of regularity, uniformity, predictability and consistency in the work being undertaken.
- This is supported by analysis of demographic features of these employees which shows for example, compared to other casual employees they are:
 - more likely to expect to remain in their current job for the next 12 months (85.3 per cent compared to 82.1 per cent of other casual employees);
 - more likely to work full time hours (44.6 per cent compared to 26.7 per cent of other casual employees);
 - less likely to be studying full time (18.3 per cent compared to 33.0 per cent of other casual employees); and
 - less likely to be young (27.3 per cent aged 15-24 years compared to 44.4 per cent of other casual employees).

Employees with these demographic features are more likely to be continuing to work in a manner akin to a permanent employee as, for example, their number of hours are less likely to vary and they are less likely to reject shifts because of other commitments such as study.

Additional eligible employees

ABS data shows that there are an additional 1,480,500 casual employees who are not regular casual employees (as defined above), but who expect to remain in their current job for the next 12 months.⁴⁵ There are likely to be employees in this cohort who may also be eligible to change status under the new employee choice definition pathway, but a clear identification of this cohort is challenging as there is not an explicit alignment between the statutory provisions and available data.

Analysis of ABS data shows that of the 1,480,500 casual employees who expect to remain in their current job for the next 12 months:

- 23.6 per cent usually worked the same hours each week and their pay did not vary from one pay period to the next;⁴⁶
- 27.1 per cent had been with their employer for 3 years or more;⁴⁷ and

⁴⁵ These casual employees expect to remain with their employer for the next 12 months and either meet the combined conditions of 'guaranteed minimum hours' + 'did not usually work same hours' + 'income varies from one pay period to the next' or are 'not guaranteed minimum hours'.

⁴⁶ This is a similar cohort to the 851,100 regular casual employees but they did not report having guaranteed minimum hours.

⁴⁷ ABS, *Characteristics of Employment, August 2022*, unpublished Tablebuilder.

- 28.1 per cent are working full time.

This cohort also report relatively high rates of studying (38.9 per cent) and are typically younger (46.2 per cent aged under 30 years).

On this basis, the department has assumed that **25 per cent** of the 1,480,500 casual employees (or 370,125) may also be eligible to change status under the new employee choice definition pathway.

Total eligible employees

The total number of eligible employees prior to adjustment for minimum periods of service is therefore assumed to be $851,100 + 370,125 = 1,221,225$.

Minimum periods of service are relevant because even if an employee is not a casual under the 'general rule' they must still have completed minimum period of service before they can notify their employer under the employee choice definition pathway - 6 months in a non-small business and 12 months in a small business. Applying an adjustment for these minimum periods of service, of the 1,121,225 eligible casual employees:

- 924,425 (75.7 per cent) have worked regularly for 6 months or more, with 634,156 (68.6 per cent of this group) assumed to be working in a non-small business and in scope of this policy;⁴⁸
- 694,050 (56.8 per cent) worked regularly for 12 months or more, with 217,932 (31.4 per cent of this group) assumed to be working in a small business and in scope of this policy.⁴⁹

That brings the **total number of eligible employees** to $634,156 + 217,932 = 852,087$.

Other assumptions

- Employer labour costs are \$79.63 per hour⁵⁰ and casual employee labour costs are \$29.20 per hour.⁵¹
- The share of casual workers employed by small business (less than 20 employees) is 31.4 per cent.⁵²

It is assumed that the incidence of employees being classified as casual but working in a manner akin to a permanent employee will fall over time – and hence the number of casual employees seeking to convert under the definition will also fall over time – as understanding and application of the new

⁴⁸ ABS, *Characteristics of Employment, August 2022*, unpublished Tablebuilder; ABS, *Employee Earnings and Hours, May 2021*.

⁴⁹ ABS, *Characteristics of Employment, August 2022*, unpublished Tablebuilder; ABS, *Employee Earnings and Hours, May 2021*.

⁵⁰ [Regulatory Burden Measurement Framework \(pmc.gov.au\)](https://pmc.gov.au/regulatory-burden-measurement-framework)

⁵¹ ABS, *Characteristics of Employment, August 2022*. Based on the median hourly wage of a casual employee in their main job at August 2022. The median has been used as it is less affected by outliers and skewed data.

⁵² ABS, *Employee Earnings and Hours, May 2021* (latest available data). Note: the ABS definition of a small business is less than 20 employees. This differs from the definition in the Fair Work Act 2009 which classifies a small business as employing less than 15 employees. Casual employees are not included in the count unless engaged on a regular and systematic basis. Further disaggregation of ABS data to align with the Fair Work Act definition is not readily available and as such the proportion of casual employees in a small business therefore is likely an overestimate as it captures those that work in businesses with 15-19 employees.

definition increases. The process followed by an employer in responding to a casual employee notification for conversion through the employee choice definition pathway is assumed to mirror that for the casual conversion steps in the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) (SAJER) provisions.

The costs to employers of casual employees will include time to:

- acknowledge and consider the notification from a casual employee for conversion AND
- notify the employee of the decision and discuss it with the employer if the employer disagrees with the notification OR
- notify the employee of the decision if the employer agrees, plus time for discussion with the employee, drawing up of a new contract and updating payroll and other systems.

There will also be a cost to employees, including time to:

- notify the employer that they do not meet the definition of casual AND
- discuss with the employer if the employer disagrees OR
- discuss with the employer if the employer agrees, plus time to read and sign a new contract.

The assumption in the SAJER Regulatory Impact Statement (RIS)⁵³ was that the casual conversion process would take 10 minutes for employers. It also assumed that efficiencies would be gained over time by repetition, through the availability of appropriate software from employer organisations and through support available from the Fair Work Ombudsman.

In this costing, it is assumed that it would take an employer 15 minutes to address a notification from an employee for conversion under the definition. This is slightly higher than the existing conversion pathway to reflect that the definition based pathway is a holistic assessment but also recognises a statutory conversion process has been in place since 2021 and would likely provide efficiencies for employers when considering notifications under the employee choice definition pathway.

The steps for an employee to determine whether to notify they no longer meet the statutory definition and therefore change to permanent employment and to discuss with the employer are similarly aligned with the employee's steps outlined in the SAJER RIS for casual conversion.

In this costing, it is assumed that the process will take 20 minutes for an employee: employees will have less experience than employers about casual employment and the definition of casual employment, and what they mean. But employers will be more familiar with the conversion process, which should ease the process for employees during discussions with their employer.

⁵³ Regulatory Impact Statement contained within the revised explanatory memorandum, [ParlInfo - Fair Work Amendment \(Supporting Australia's Jobs and Economic Recovery\) Bill 2021 \(aph.gov.au\)](https://aph.gov.au/ParlInfo/legislation/summarystatement/FairWorkAmendmentSupportingAustralia'sJobsandEconomicRecovery2021)

As outlined in the response to question 5, there has been extensive consultation on the policy problem and potential solution to supporting casual employees with a clearer pathway to permanent, secure work. With respect to consultation and testing of the specific data, methodology and assumptions used in this regulatory costing, the department can advise that:

- The core data underpinning the calculations is the ABS Characteristics of Employment. This publication has the widest range of data for casual employees produced by the ABS. As our national statistical agency, the data produced is independent and publicly used by both employer and union groups.
- The use of ABS Characteristics of Employment is consistent with data used by key stakeholders in analysis of casual work in Australia. For example, the Australian Industry Group's research report '*Casual work in the contemporary labour market*'⁵⁴ uses this source to identify characteristics and demographics related to casual work and identified that casual employment is most common amongst younger workers and is widely used by those studying.

The methodology and assumptions applied to the calculations – identification of cohorts of casual employees within the Characteristics of Employment dataset, conversion rates over the 10 year costing period, and times to undertake steps within the status change process – are consistent with the methodology that was used for the Regulatory Impact Statement⁵⁵ for the legislative reforms which introduced the initial statutory casual conversion process. That Regulatory Impact Statement was assessed as good practice by the Office of Best Practice Regulation (the predecessor to the Office of Impact Analysis).⁵⁶

- As is standard practice this Regulatory Impact Statement was included as part of the explanatory memorandum to the Bill that was tabled in the Australian Parliament, and therefore was fully accessible to all stakeholders.
- As part of parliamentary consideration of the Bill, the Senate Education and Employment Legislation Committee held a public inquiry into the Bill and received 134 submissions from stakeholders, including employer groups and unions. These submissions did not raise concerns with the data sources, methodology or assumptions outlined in the Regulatory Impact Statement.

⁵⁴ Australian Industry Group '*Casual work in the contemporary labour market*' [Casual work in the contemporary labour market | Ai Group](#), July 2023

⁵⁵ Regulatory Impact Statement contained within the revised explanatory memorandum, [ParlInfo - Fair Work Amendment \(Supporting Australia's Jobs and Economic Recovery\) Bill 2021 \(aph.gov.au\)](#)

⁵⁶ Attorney-General's Department, [Casual employment reform](#), 11 December 2020

Costing of employee notification

There are different conditions applying to small businesses – employees must have had a period of 12 months service before they are eligible to notify, whereas employees in other businesses are eligible to notify after 6 months service. The costings below are therefore differentiated between small businesses and other businesses.

Business excluding small business

Year 1 costs

Table 3 gives the **estimated cost for year 1** – for employers and employees – arising from casual employees wanting to convert under the new definition: **\$1,879,690**

In the first year, 10 per cent of eligible casual employees convert to a permanent role using the new employee choice definition pathway. This will apply to the 924,425 eligible casual employees who have been with their employer for at least 6 months but excludes the 290,269 estimated small business eligible casual employees.

Table 3: Estimated cost – year 1 – eligible casual employees wanting to convert under the new definition – excluding small business

	Labour cost/hour ⁵⁷	Time to make assessment (minutes) ⁵⁸	10 per cent of eligible casual employees employed for more than 6 months	Total cost
Employer	\$79.63	15	63,416	\$1,262,445
Employee	\$29.20	20	63,416	\$617,245
Total	-	-	-	\$1,879,690

Years 2 to 10 costs

Table 4 gives the **estimated annual cost for years 2 to 5** – for employers and employees – arising from casual employees wanting to convert under the new definition: **\$830,984 per year**.

Table 5 gives the **estimated annual cost for years 6 to 10** – for employers and employees – arising from casual employees wanting to convert under the new definition: **\$415,492 per year**.

For conversion under the new definition, the department estimates that the proportion of eligible casuals seeking conversion remains at 10 per cent over years 2-5, before dropping to 5 per cent for years 6-10, aligning with the assumption that the incidence of employees being classified as casual but working in a manner akin to a permanent employee will reduce as understanding and application of the new definition increases.

⁵⁷ Employer labour cost: [Regulatory Burden Measurement Framework \(pmc.gov.au\)](https://pmc.gov.au)

Casual employee labour cost: ABS, *Characteristics of Employment, August 2022*. Based on the median hourly wage of a casual employee in their main job at August 2022. The median has been used as it is less affected by outliers and skewed data.

⁵⁸ Based on SAJER estimates.

Table 4: Estimated annual cost – years 2 to 5, eligible casual employees seeking to convert under the new definition – excluding small business

	Labour cost/hour ⁵⁹	Time to make assessment (minutes) ⁶⁰	10 per cent of eligible casual employees employed between 6 and 12 months	Total cost
Employer	\$79.63	15	28,035	\$558,109
Employee	\$29.20	20	28,035	\$272,875
Total	-	-	-	\$830,984

Table 5: Estimated annual cost – years 6 to 10, eligible casual employees seeking to convert under the new definition – excluding small business

	Labour cost/hour ⁶¹	Time to make assessment (minutes) ⁶²	5 per cent of eligible casual employees employed between 6 and 12 months	Total cost
Employer	\$79.63	15	14,018	\$279,054
Employee	\$29.20	20	14,018	\$136,438
Total	-	-	-	\$415,492

10 years costs: average annual – excluding small business

The average annual cost is shown in Table 6.

Table 6: Estimated annual cost, eligible casual employees seeking to convert under the new definition – excluding small business

	Employer cost	Employee cost	Total cost
Regulatory cost	\$489,015	\$239,093	\$728,109

Small business

Year 1 costs

Since the provisions for small business do not come into effect until after an employee has completed at least 12 months service, there will be no regulatory cost in year 1.

⁵⁹ Employer labour cost: [Regulatory Burden Measurement Framework \(pmc.gov.au\)](https://pmc.gov.au/regulatory-burden-measurement-framework)

Casual employee labour cost: ABS, *Characteristics of Employment, August 2022*. Based on the median hourly wage of a casual employee in their main job at August 2022. The median has been used as it is less affected by outliers and skewed data.

⁶⁰ Based on SAJER estimates.

⁶¹ Employer labour cost: [Regulatory Burden Measurement Framework \(pmc.gov.au\)](https://pmc.gov.au/regulatory-burden-measurement-framework)

Casual employee labour cost: ABS, *Characteristics of Employment, August 2022*. Based on the median hourly wage of a casual employee in their main job at August 2022. The median has been used as it is less affected by outliers and skewed data.

⁶² Based on SAJER estimates.

Year 2 costs

Table 7 gives the **estimated cost for year 2** for small business – for employers and employees – arising from casual employees wanting to convert under the new definition: **\$645,968**

In the first year, 10 per cent of eligible casual employees in small businesses convert to a permanent role using the new employee choice definition pathway. This will apply to the 217,932 eligible casual employees who have been with their small business employer for at least 12 months.

Table 7: Estimated cost – year 2 – eligible casual employees wanting to convert under the new definition – small business

	Labour cost/hour ⁶³	Time to make assessment (minutes) ⁶⁴	10 per cent of small business eligible casual employees employed for 12 months or more	Total cost
Employer	\$79.63	15	21,793	\$433,848
Employee	\$29.20	20	21,793	\$212,120
Total	-	-	-	\$645,968

Years 3 to 10 costs

Table 8 gives the **estimated annual cost for years 3 to 5** – for employers and employees – arising from casual employees wanting to convert under the new definition: **\$164,203 per year**.

Table 9 gives the **estimated annual cost for years 6 to 10** – for employers and employees – arising from casual employees wanting to convert under the new definition: **\$82,101 per year**.

For conversion under the new definition, the department estimates that the proportion of eligible casuals seeking conversion remains at 10 per cent over years 3-5, before dropping to 5 per cent for years 6-10, aligning with the assumption that the incidence of employees being classified as casual but working in a manner akin to a permanent employee will reduce as understanding and application of the new definition increases.

⁶³ Employer labour cost: [Regulatory Burden Measurement Framework \(pmc.gov.au\)](https://pmc.gov.au)

Casual employee labour cost: ABS, *Characteristics of Employment, August 2022*. Based on the median hourly wage of a casual employee in their main job at August 2022. The median has been used as it is less affected by outliers and skewed data.

⁶⁴ Based on SAJER estimates.

Table 8: Estimated annual cost – years 3 to 5, eligible casual employees seeking to convert under the new definition – small business

	Labour cost/hour ⁶⁵	Time to make assessment (minutes) ⁶⁶	10 per cent of small business eligible casual employees employed for 12 months	Total cost
Employer	\$79.63	15	5,540	\$110,282
Employee	\$29.20	20	5,540	\$53,920
Total	-	-	-	\$164,203

Table 9: Estimated annual cost – years 6 to 10, eligible casual employees seeking to convert under the new definition – small business

	Labour cost/hour ⁶⁷	Time to make assessment (minutes) ⁶⁸	5 per cent of small business eligible casual employees employed for 12 months	Total cost
Employer	\$79.63	15	2,770	\$55,141
Employee	\$29.20	20	2,770	\$26,960
Total	-	-	-	\$82,101

10 years costs: average annual – small business

The average annual cost over 10 years is shown in Table 10.

Table 10: Estimated annual cost, eligible casual employees seeking to convert under the new definition – small business

	Employer cost	Employee cost	Total cost
Regulatory cost	\$104,040	\$50,868	\$154,908

⁶⁵ Employer labour cost: [Regulatory Burden Measurement Framework \(pmc.gov.au\)](https://pmc.gov.au/regulatory-burden-measurement-framework)

Casual employee labour cost: ABS, *Characteristics of Employment, August 2022*. Based on the median hourly wage of a casual employee in their main job at August 2022. The median has been used as it is less affected by outliers and skewed data.

⁶⁶ Based on SAJER estimates.

⁶⁷ Employer labour cost: [Regulatory Burden Measurement Framework \(pmc.gov.au\)](https://pmc.gov.au/regulatory-burden-measurement-framework)

Casual employee labour cost: ABS, *Characteristics of Employment, August 2022*. Based on the median hourly wage of a casual employee in their main job at August 2022. The median has been used as it is less affected by outliers and skewed data.

⁶⁸ Based on SAJER estimates.

All businesses

10 years costs – all businesses

The average annual cost for all businesses over 10 years is shown in Table 11.

Table 11: Estimated annual cost, eligible casual employees seeking to convert under the new definition – all businesses

	Employer cost	Employee cost	Total cost
Regulatory cost	\$593,055	\$289,961	\$883,017

Over 10 years, the total cost would be \$8,830,167⁶⁹

- **Non-small business**
 - Total employer cost = year 1 employer cost + 4 x year 2 employer cost + 5 x year 6 employer cost = \$1,262,445 + 4 x \$558,109 + 5 x \$279,054 = \$4,890,153
 - Total employee cost = year 1 employee cost + 4 x year 2 employee cost + 5 x year 6 employee cost = \$617,245 + 4 x \$272,875 + 5 x \$136,438 = \$2,390,932
 - Total cost = total employer cost + total employee cost = \$4,890,153 + \$2,390,932 = \$7,281,085
- **Small business**
 - Total employer cost = year 1 employer cost + year 2 employer cost + 3 x year 3 employer cost + 5 x year 6 employer cost = \$0 + \$433,848 + 3 x \$110,282 + 5 x \$55,141 = \$1,040,401
 - Total employee cost = year 1 employee cost + year 2 employee cost + 3 x year 3 employee cost + 5 x year 6 employee cost = \$0 + \$212,120 + 3 x \$53,920 + 5 x \$26,960 = \$508,681
 - Total cost = total employer cost + total employee cost = \$1,040,401 + \$508,681 = \$1,549,082
- **All businesses**
 - Total non-small business cost + total small business cost = \$7,281,085 + \$1,549,082 = \$8,830,167

Potential regulatory cost saving

Assuming that a proportion of eligible casual employees convert to permanent employment under the new definition means there will be fewer casual employees eligible for conversion after 12 months as per the existing conversion process. The cost of processing those casual employees who have been converted before 12 months will be removed for businesses.

⁶⁹ Note this figure has not been adjusted to account for inflation over the 10-year period.

The department has not calculated the potential regulatory cost savings attributable to this, noting this would require recalculation of costs under SAJER to adjust to changes in population. Both the *Standing up for casual workers* costing and the SAJER costing do not include adjustments for population growth over time.

Provision of revised Casual Employment Information Statement (CEIS) to all casual employees

The transitional provisions will require employers to send the revised Casual Employment Information Statement (CEIS) to all casual employees within 3 months of the laws commencing.

The following assumptions are made:

- the CEIS is sent to all casual employees
- it takes the employer 1 minute to give the CEIS to an employee (which can be given to the employee in person, by mail, by email, by emailing a link to the FWO website page, by emailing a link to a copy of the CEIS available on the employer's intranet, by fax, or by another method)⁷⁰
- as at May 2023 there are 2.6 million casual employees⁷¹
- there is no cost to employees.

Table 12 shows the estimated one-off cost: **\$3,506,640**.

Table 12: Estimated annual cost – provision of revised CEIS to casual employees

	Labour cost/hour	Time per business to send CEIS to casual employee (minutes)	Casual employees	Total cost
Employer	\$79.63	1	2,642,200	\$3,506,640
Employee	-	-	-	-
Total				\$3,506,640

Provision of Casual Employment Information Statement (CEIS) after 12 months to all casual employees

All employers are already required to provide the CEIS to casual employees when they are hired. The proposed reforms will require that the CEIS is provided to casual employees again at 12 months of employment to increase knowledge and awareness of their rights and entitlements.

Employers who are not small businesses under the *Fair Work Act 2009* are required to offer casual conversion to their casual employees (or inform them of the reason they aren't making an offer of casual conversion) within 21 days of the employee having been employed for 12 months. Although

⁷⁰ See [Casual Employment Information Statement - Fair Work Ombudsman](#).

⁷¹ ABS, *Labour Force, Detailed, Quarterly, May 2023*. This is the most recent data on the number of casual employees, but there is no associated characteristics information which was used in the costing of the casual definition (most recent data for that is ABS, *Characteristics of Employment, August 2022*).

not currently required to provide the CEIS to casual employees, these businesses are required to send other documents to casual employees at this 12-month point. The assumption is that the CEIS can be attached to this other information at negligible cost to employers.

Small business employers are currently not required to provide any information to casual employees at 12 months (since they are not required to offer casual conversion).

The following assumptions are made:

- the CEIS is sent to small business casual employees who have been employed for 12 months
- it takes the employer 1 minute to give the CEIS to an employee (which can be given to the employee in person, by mail, by email, by emailing a link to the FWO website page, by emailing a link to a copy of the CEIS available on the employer's intranet, by fax, or by another method)⁷²
- 383,200 casual employees were employed for 12 months⁷³
- the share of casual workers employed by small business (less than 20 employees) is 31.4 per cent⁷⁴
- there is no cost to employees.

Table 13 shows the estimated annual cost: **\$159,691**.

Table 13: Estimated annual cost – provision of CEIS to casual employees by small businesses

	Labour cost/hour	Time per business to send CEIS to eligible casual employee (minutes)	Casual employees employed for 12 months by small business	Total cost
Employer	\$79.63	1	120,325	\$159,691
Employee	-	-	-	-
Total				\$159,691

Dispute Resolution

The Office of Impact Analysis's Guidance Note on the Regulatory Burden Measurement Framework⁷⁵ advises that certain costs are excluded from the Regulatory Burden Measurement Framework and are not required to be considered when quantifying an estimate of burden. Relevantly, this includes 'Non-compliance and enforcement costs', including costs incurred in court and tribunal processes.

⁷² See [Casual Employment Information Statement - Fair Work Ombudsman](#).

⁷³ ABS, Characteristics of Employment, August 2022, unpublished Tablebuilder.

⁷⁴ ABS, Employee Earnings and Hours, May 2021 (latest available data)

⁷⁵ [Regulatory Burden Measurement Framework \(pmc.gov.au\)](#)

In accordance with this advice, costs associated with the dispute resolution through the workplace tribunal, the Fair Work Commission, are not included in the costings. Specific outcomes may depend on the approach that independent parties – such as employers, unions and the Fair Work Commission – take in response to the provisions. This is consistent with the approach taken to the impact analysis for the SAJER reforms.

Employers and employees will only utilise the Fair Work Commission's dispute resolution processes in circumstances where a party is of the view that an action taken by another party is not consistent with their legislative obligations – for example if an employee has exercised their right to change to permanent because they believe they do not meet the statutory definition of a casual employee but the employer is of the view that the employee still meets the definition of a casual employee. The time and financial cost would vary from dispute to dispute but noting that the Fair Work Commission is a tribunal it would be lower cost and quicker than court processes.

While the volume of disputes may increase in comparison to current levels – noting there will be a new pathway for casual employees to become permanent – it is expected to remain low overall. Under the existing Fair Work Commission casual conversion dispute resolution processes, in the period from 27 March 2021 (when the provisions commenced) until 31 March 2023 there have been a total of 86 disputes lodged with the Fair Work Commission.

Given the inherent uncertainty in how independent parties will respond to this policy and the employee choice definition pathway is a new jurisdiction, the department has determined that estimations of the dispute costs would not be sufficiently robust to contain a meaningful estimate of the costs.

Submissions to the Job Security Inquiry

Submissions can be accessed at [Submissions – Parliament of Australia \(aph.gov.au\)](https://aph.gov.au/submissions)

Note: Some submissions reflect the endorsement of other peak organisations within the submission.

1 La Trobe Casuals Network

2 Professor Michael Quinlan & Dr Elsa Underhill

6 Australian Institute of Employment Rights

7 Law Society of New South Wales

11 National Foundation for Australian Women

13 Victorian Council of Social Service (VCOSS)

15 Queensland Nurses and Midwives' Union (QNMU)

16 Victorian Government

26 Migrant Workers Centre

27 Australian Nursing and Midwifery Federation

29 National Retail Association

30 Per Capita

32 National Youth Commission Australia

37 Mr George Stribling, Lauren Kavanagh, Shirisha Nampalli, Quyen Nguyen,

Joshua Paveley and Maddy Yates

41 Australia Institute, Centre for Future Work

45 The Salvation Army

46 Australasian Centre for Corporate Responsibility

47 National Tertiary Education Union (NTEU)

49 ACT Government

50 Youth Action NSW

55 Dr Veronica Sheen

56 Springvale Monash Legal Service

59 The University of Sydney Casuals Network

60 Minerals Council of Australia

61 Science & Technology Australia

63 The National and State Youth Peaks

64 Council of Australian Postgraduate Association (CAPA)

71 Australian Chamber of Commerce and Industry (ACCI)

78 Unions NSW

88 Emeritus Professor David Peetz FASSA

90 Retail and Fast Food Workers Union

91 Jesuit Social Services

92 Kingsford Legal Centre and Redfern Legal Centre

94 Anglicare Australia

95 Job Watch Inc.

96 Unions ACT

98 Australian Council of Trade Unions (ACTU)

99 Young Workers Centre, Unions ACT

100 Western Australian Government

101 Queensland Teachers' Union

102 Community and Public Sector Union (CPSU)

104 Queensland Government

113 Construction, Forestry, Maritime, Mining & Energy Union (CFMEU)

116 Rail, Tram and Bus Union

117 Queensland Council of Unions

118 Western Australian Council of Social Service Inc.

119 UnionsWA

122 Australian Manufacturing Workers' Union

125 The WorkPac Group

179 National Union of Students

184 Isaac Regional Council

186 Hunter Workers

199 Australian Workers' Union

201 Australian Education Union Federal Office

204 Finance Sector Union of Australia

206 Unions Tasmania

209 Working Women's Centre SA

211 United Services Union

219 Australian Community Industry Alliance

220 Hunter Jobs Alliance

Recommendations from the Job Security Inquiry related to casuals and casual conversion

First interim report: on-demand platform work in Australia (24 June 2021)

- Rec 10** The committee recommends that the Australian Government empowers the Fair Work Commission (FWC) to provide pathways to permanency via arbitrations for casual conversion. Any disputes with regards to work status, contractual arrangements, or casual conversion should be able to be arbitrated via a low cost, accessible process, whether via the FWC or another body, to ensure workers are able to practically enforce their rights, and both workers and employers can have matters adjudicated- quickly.
-

Second interim report: insecurity in publicly-funded jobs (19 October 2021)

- Rec 23** The committee recommends that the Australian Government Department of Education, Skills and Employment works closely with universities, workers, experts, the National Tertiary Education Union, and relevant sector bodies, to design a system of casual and fixed-term conversion that would be appropriate for the higher education sector.

This system should include sector-appropriate definitions of casual and fixed-term work, and limit the use of casual and fixed-term employment to genuinely non-ongoing work.

- Rec 24** The committee recommends that the Australian Government requires all universities to provide a more detailed report of their staffing composition to the Department of Education, Skills and Employment, including:
- annualised data on permanent, fixed-term and casual staff in terms of both headcounts and full-time equivalents;
 - annualised data on the use of labour hire and other external contractors; and
 - annualised detailed data around gender, cultural diversity, age, earnings, length of service and retention rates for casual staff, and compared with permanent staff.
-

- Rec 25** The committee recommends that the Australian Government requires, as a condition of receiving public funding, universities to set publicly-available targets for increasing permanent employment, and reducing casualisation, and report their progress against these targets on an annual basis. The targets should be established in consultation with industry experts, workers and the National Tertiary Education Union (NTEU).
-

The Department of Education, Skills and Employment should review the impact of this measure after three years, and—if it has not been effective in reducing the level of casualisation—the Australian Government should then work with universities and the NTEU to impose meaningful but achievable funding-linked targets.

Rec 27 The committee recommends that the Australian Government offers permanent employment opportunities to all long-term casual employees currently performing roles which relate to ongoing stable work.

Rec 28 The committee recommends that the Australian Government eliminates the utilisation of long-term casual employment across the Australian Public Service for roles which are not irregular or intermittent in nature, unless genuinely preferred by the employee.

Fourth interim report: the job insecurity report (11 February 2022)

Rec 6 The committee recommends that the Australian Government urgently assesses the performance of the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth). As the data collected through this inquiry suggests, the amendment has not had a positive impact on job security, and it should be repealed and replaced with a new statutory definition of casual employment that reflects the true nature of the employment relationship—rather than a definition which relies upon the employer's description of the relationship in an employment contract—and a new casual conversion provision.

Rec 8 The committee recommends that the Australian Government provides encouragement and incentives for businesses to hire permanent staff instead of casuals through investigating the use of:

- education campaigns around the benefits of ongoing employment for businesses and employers;
- training and employment subsidies with secure, ongoing employment requirements attached to the funding;
- increasing reporting requirements for publicly-listed companies in relation to work status, pay and conditions; and
- introducing a procurement framework to prioritise firms that favour a permanent, directly engaged workforce.

Rec 9 The committee recommends that the Australian Government provides increased resources for the Fair Work Ombudsman, unions and employer associations to provide tripartite support and education to small businesses about their regulatory obligations—and their employees about

their industrial rights—in order to increase the proportion of permanent employment in the small business sector.

Rec 15 The committee recommends that the Senate give consideration to the referral of an inquiry to the Community Affairs References Committee, examining:

The extent and impact of on demand platform employment, increasing casualisation, use of labour hire/agency work, and contract labour in aged care, disability care, social services and health care more broadly, with specific regard to:

- impacts of on-demand platform employment models on care workers' experiences of work and sense of job satisfaction;
- pay and conditions for workers engaged through platforms, labour hire and agency roles, and casual staff, compared with permanent staff;
- training and career progression for on-demand platform workers and labour hire/agency workers;
- impacts of work status and worker experiences on retention and motivation to stay in the sector;
- the interactions of gender and migration/visa status with work status in the care sectors;
- any evidence regarding the impacts of different employment models on pay rates and conditions across the sectors more broadly; and
- any related matters.

If such an inquiry were referred, that the committee or any subcommittee have power to consider and make use of the evidence and records of the former Select Committee on Job Security appointed during the 46th Parliament.

Rec 20 The committee recommends that the Senate give consideration to the referral of an inquiry to the Education and Employment References Committee, examining:

The extent, growth and impact of insecure work in Australia, with specific regard to:

- definitions and measures of insecure and precarious work, and the need to develop national measures, and a national data set, to understand changes over time;
 - the growth in insecure work since the 1970s and the impacts of government policies on this growth;
 - the impacts of the pandemic on the growth of insecure and precarious jobs, including those in the on-demand platform sector;
 - job insecurity among vulnerable workers, including migrants and temporary residents;
-

-
- the experiences of workers in insecure jobs, their pay and conditions, and the impacts on their health, wellbeing, social connection and prosperity;
 - perspectives of employers on the use of casual, fixed-term contract, labour hire and platform workforce arrangements;
 - impacts on the level of casual and insecure work of the reforms made in 2021 to the *Fair Work Act 2009* (Cth) through the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth), particularly those concerning casual conversion;
 - the adequacy of existing legislative and regulatory regimes to address the challenges of insecure and precarious work; and
 - any related matters.

If such an inquiry were referred, that the committee or any subcommittee have power to consider and make use of the evidence and records of the former Select Committee on Job Security appointed during the 46th Parliament.

Recommendations of the Review of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Cth)

Finding 1: consideration should be given to whether the definition should focus solely on the terms of initial offer and acceptance, and 'not on the basis of any subsequent conduct of either party' (as per section 15A(4) of the *Fair Work Act 2009* (Cth)).

Finding 2: Consideration should be given to including a suitable anti avoidance provision in section 15A of the *Fair Work Act 2009* (Cth), to exclude sham casual employment arrangements from meeting the statutory definition. Further regard should also be had to whether the *Fair Work Act 2009* (Cth) provides a sufficient deterrence for parties to enter into such arrangements, or whether additional deterrence is necessary.

Finding 3: Notwithstanding the operation of section 66L of the *Fair Work Act 2009* (Cth), strengthening of the compliance and enforcement mechanisms could guard against circumstances where an employer uses termination of employment and re-engagement as a method to avoid the requirement to offer casual employees' conversion.

Finding 4: On the data available, the casual conversion arrangements introduced by the FW (SAJER) Act (that consists of both employer offer and employee request avenues) do not appear to have significantly impacted the number of casual conversions.

While the implementation of the amendments may require further time to realise the legislative intent, the casual conversion mechanism could be refined with a focus on:

- measuring the utility of the employer offer avenue of conversion, particularly having regard to conversion rates and the associated regulatory impost or administrative burden on employers to comply with the requirements; and
- how casual employees of small businesses can receive access to conversion opportunities that are no less favourable than opportunities that are provided to casual employees of medium or large businesses.

Finding 5: The current review and appeal mechanisms may present barriers that discourage employees to pursue such courses of action. Further consideration should be given to methods of better facilitating access to dispute resolution for employees.

Finding 6: Consideration should be given to whether an anti-avoidance provision is inserted into section 545A of the *Fair Work Act 2009* (Cth), which would have the effect of precluding employers

who have knowingly or recklessly misclassified employees from relying on the statutory offset mechanism.

Finding 7: Consideration should be given to placing an obligation on employers to provide the Casual Employment Information Statement (CEIS) to casual employees at multiple points in the employment lifecycle (in addition to commencement of employment). Appropriate stages in the employment lifecycle could include the point in time that a casual employee becomes eligible to convert to permanent employment.

Finding 8: Further initiatives to increase awareness and knowledge of the content of the CEIS could assist to achieve the legislative intent of, and compliance with the amendments.

**Written submissions to the Review of the *Fair Work Amendment
(Supporting Australia's Jobs and Economic Recovery) Act 2021 (Cth)***

Submissions can be accessed at [Statutory Review of casual employment legislation - Department of Employment and Workplace Relations, Australian Government \(dewr.gov.au\)](https://www.dewr.gov.au/statutory-review/casual-employment-legislation)

Australian Council of Trade Unions

Australian Industry Group

Australian Retailers Association

Business Council of Australia

CFMEU Construction

Electrical Trades Union

Housing Industry Association

Master Grocers Australia and Timber Merchants Australia

Motor Trades Association of Queensland

National Foundation for Australian Women

National Road Transport Association

National Tertiary Education Union

Recruitment, Consulting and Staffing Association

South Australian Wine Industry Association Incorporated

Unnamed Community Legal Centre

Unnamed Not-for-profit Research Organisation

Victorian Automotive Chamber of Commerce

Victorian Government

Western Australian Government

Attendees at consultation sessions as part of the *Review of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Cth)*

Stakeholder Employment law academics, 5 July 2022

Professor Andrew Stewart

Employer representatives, 6 July 2022

Business Council of Australia

Housing Industry Association

Australian Chamber of Commerce and Industry

Australian Higher Education Industrial Association

Recruitment, Consulting and Staffing Association

Australian Industry Group

Master Grocers Australia

Motor Trades Association Queensland

National Retail Association

National Farmers' Federation

Minerals Council of Australia

Employee representatives, 8 July 2022

Legal Aid NSW

Retail and Fast Food Workers Union

State and Territory representatives, 11 July 2022

Department of Premier and Cabinet (Victoria)

Office of Industrial Relations (Queensland)

Department of Justice (Tasmania)

Department of Mines, Industry, Regulation and Safety (Western Australia)

Commonwealth entities 14 July 2022

Australian Public Service Commission

Australian Small Business and Family Enterprise Ombudsman

Fair Work Commission

Fair Work Ombudsman

Federal Circuit and Family Court of Australia Federal Court of Australia

Sydney in person session, 15 July 2022

Motor Traders' Association of NSW

Council of Small Business Organisations Australia

Australian Retailers Association

Association of Professional Staffing Companies

Australia Electrical Trades Union

Business Council of Australia

Australian Industry Group



Australian Government
Department of Employment
and Workplace Relations

Annexures to Certification Letter OBPR22-02409

Closing the labour hire loophole
August 2023



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Summary of the Reviews and how they address Impact Analysis Questions 1-3

Summary of the Reviews

The Reviews

After consulting with the Office of Impact Analysis (**OIA**) in accordance with the 2023 Australian Government Guide to Policy Impact Analysis, the independent reviews listed below (**Reviews**) have been considered and relied upon by the Department of Employment and Workplace Relations (**the department**) to satisfy impact analysis for Impact Analysis Questions 1-3,⁷⁶ for the Government's 'Closing the labour hire loophole' election commitment:

- [Victorian Inquiry into the Labour Hire Industry and Insecure Work](#) (Report, 31 August 2016) (**Victorian Inquiry Report**)⁷⁷
- [Senate Select Committee on Job Security, Third interim report: labour hire and contracting](#) (Report, November 2021) (**Third Interim Report**)⁷⁸
- [Senate Education and Employment Legislation Committee, Fair Work Amendment \(Equal Pay for Equal Work\) Bill 2022](#) (Report, October 2022) (**EPEW Report**)⁷⁹

Victorian Inquiry Report

On 13 October 2015, the Victorian Government established the Victorian Inquiry into the Labour Hire Industry and Insecure Work (**Victorian Inquiry**) to report on the extent, nature, and consequence of labour hire employment in Victoria.⁸⁰

The Victorian Inquiry received 695 primary written submissions (comprising 91 from organisations and 604 from individuals) and heard from 221 witnesses during 113 hearing sessions, over 17 days of hearings held from November 2015 to March 2016.⁸¹ The Victorian Inquiry heard evidence from stakeholders that it is common for the applicable rate of pay for labour hire workers at a site with an enterprise agreement to be less than the rates provided by the host's enterprise agreement.⁸²

⁷⁶ Impact Analysis Questions 1-7 can be found at: Office of Impact Analysis, *Australian Government Guide to Policy Impact Analysis* (March 2023) p 9.

⁷⁷ Victorian Inquiry into the Labour Hire Industry and Insecure Work (Final Report, 31 August 2016) <www.vgls.vic.gov.au/client/en_AU/search/asset/1293786/0> (**Victorian Inquiry Report**).

⁷⁸ Senate Select Committee on Job Security, Third interim report: labour hire and contracting (Report, November 2021) <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Job_Security/JobSecurity/Third_Interim_Report> (**Third Interim Report**).

⁷⁹ Senate Education and Employment Legislation Committee, Fair Work Amendment (Equal Pay for Equal Work) Bill 2022 (Report, October 2022) <aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/EqualPayBill2022/Report> (**EPEW Report**).

⁸⁰ Victorian Inquiry Report, p 37.

⁸¹ Ibid, p 14.

⁸² Ibid, p 101. Further, the Productivity Commission has acknowledged that the capacity of an employer to contract with lower cost or more flexible forms of labour (such as labour hire) may undermine collective bargaining power in reaching enterprise agreements, but concluded this was unlikely to occur to a great extent: see Victorian Inquiry Report, p 105, citing Productivity Commission, Workplace Relations Framework Report (2015) p 815.

In making its recommendations, the Victorian Inquiry had regard to the limitations of Victoria's state-based legislative powers over workplace relations and the Victorian Government's capacity to regulate these matters.⁸³ The Victorian Inquiry Report recommended that labour hire workers should have the opportunity to be covered by enterprise agreements applying at a host's workplace, and that this *could* occur by a voluntary decision of the labour hire employer to apply the host's enterprise agreement, or by application of a pay parity clause in the host's enterprise agreement.⁸⁴

Third Interim Report

On 10 December 2020, the Senate Select Committee on Job Security (**Job Security Committee**) was appointed by resolution of the Senate.⁸⁵ The Job Security Committee was 'established to enquire into and report on [among other things] the impact of insecure or precarious employment on the economy, wages, social cohesion and workplace rights and conditions', with particular reference to the extent and nature of insecure or precarious employment in Australia.⁸⁶

The Job Security Committee published the following reports:

1. The First Interim Report on on-demand platform work in Australia (June 2021)
2. The Second Interim Report on insecurity in publicly-funded jobs (October 2021)
3. The Third Interim Report on labour hire and contracting (November 2021)
4. The Fourth Interim Report on job insecurity (February 2022)
5. The Final Report on the matter of possible privilege (March 2022)

The Third Interim Report is directly relevant to the Government's 'Closing the labour hire loophole' proposal.

When the Third Interim Report was published in November 2021, the Job Security Committee had held 20 public hearings, 6 private hearings, and received and published 219 submissions.⁸⁷ The Job Security Committee heard from workers, employers, unions, experts, sector organisations and industry bodies, and collected a significant amount of data and information from government agencies, private companies, and not-for-profit services providers.⁸⁸

The Third Interim Report recommended that the Government amend the *Fair Work Act 2009* (**Fair Work Act**) to ensure the wages and conditions of labour hire workers are at least equivalent to those that would apply had those workers been directly employed by their host entities.⁸⁹

EPEW Report

On 10 February 2022, the Fair Work Amendment (Equal Pay for Equal Work) Bill 2022 (**EPEW Bill**) was introduced to the Parliament by Senator Malcolm Roberts. On 28 July 2022, the EPEW Bill was

⁸³ Ibid p 38.

⁸⁴ Ibid p 19, Recommendation 2. The common effect of a parity clause (or jump up clause) is to provide that where a labour hire worker is performing work which is the subject of an enterprise agreement, that employee is entitled to be paid at the same rate, and receive the same conditions, as a direct employee of the host performing that work.

⁸⁵ Parliament of the Commonwealth of Australia, *Senate Journals No. 81—10 December 2020*, pp 2890–2.

⁸⁶ Job Security Committee, *Terms of Reference*.

⁸⁷ Third Interim Report, p 4 [1.21].

⁸⁸ Ibid, p 4-5 [1.21], [1.24].

⁸⁹ Ibid, p ix Recommendation 1.

referred to the Senate Education and Employment Legislation Committee (**SEEL Committee**). On 24 October 2022, the SEEL Committee issued a report on the EPEW Bill, having held one public hearing, and having received and published 18 submissions.

While recommending that the EPEW Bill not be passed (including because of its limited scope), the SEEL Committee supported calls for the Government to work with stakeholders to give effect to the policy intent behind the EPEW Bill in a more comprehensive manner,⁹⁰ given the Committee broadly supported the aim of the EPEW Bill to ensure that a labour hire worker doing the same job as a directly engaged employee receives the same rate of pay.⁹¹ The Government's 'Closing the labour hire loophole' proposal broadly aligns with this policy intent, with respect to limiting the circumstances in which the use of labour hire undercuts the wages in enterprise agreements.

Impact Analysis Question 1:

What is the problem you are trying to solve and what data is available?

The policy problem the Government is addressing with its 'Closing the labour hire loophole' proposal is that bargained wages in enterprise agreements can be undercut by the use of labour hire employees who are paid less than the wages set out in the host employer's enterprise agreement.

Addressing the disparate wage payments made to some labour hire employees, compared with the wages paid to host employees under a host's enterprise agreement, is consistent with the Government's Secure Australian Jobs election commitment to address circumstances in which workers doing comparable work on the same site, working the same shifts, are paid differently.

This issue does not impact all labour hire employees or have a direct impact on the majority of Australian workers. However, the undercutting of bargained wages – which have been agreed by employees and their employer as minimum rates of pay for a workplace – by the use of labour hire is a loophole in the workplace relations framework that the Government seeks to close.

Emphasising the confined scope and impact of the issue being addressed (and the solution proposed by the Government), it is important to note that labour hire workers represent only around 2.3 per cent of employed people in Australia (around 319,900 of 13,852,900).⁹² However, evidence accepted in the Reviews suggests that some employers engage in sharp business practices and use labour hire to undercut wages in enterprise agreements.⁹³ For example, in the Third Interim Report, the Job Security Committee acknowledged submissions made about issues regarding workforce arrangements in the mining, agriculture and transport and distribution sectors.⁹⁴ However, the issues identified – particularly in relation to labour hire employees being paid less than what they would be paid under a host's enterprise agreement – are not unique to those industries.

Many labour hire firms operate in a fair way to support business to deal with a genuine need to bring on additional workers. However, some labour hire firms provide workers to businesses at lower wages than what they would be paid if they were directly employed by the host. This arises in both 'external' labour hire arrangements (where a labour hire provider is a distinct business from the host

⁹⁰ EPEW Report, p 22 [2.55].

⁹¹ Ibid, p 21 [2.52].

⁹² ABS, *labour hire workers, June 2022* (released 6 December 2022) using ABS, *Labour Account, June 2022*, though the ABS notes limitations with this data within this cited resource.

⁹³ See, e.g., Victorian Inquiry Report; Third Interim Report. See also: Senate Education and Employment References Committee, *Corporate avoidance of the Fair Work Act 2009* (September 2017); Senate Economics References Committee, *Systemic, sustained and shameful: Unlawful underpayment of workers' remuneration* (March 2022).

⁹⁴ Third Interim Report, pp 39-62; 63-84; 85-118.

employer) and in ‘internal’ labour hire arrangements (where labour is provided from one corporate entity to another). The result is that labour hire employees are sometimes paid less, and have less job security, than if they had been directly hired by a host. This loophole in the Fair Work Act allows businesses to bypass genuinely bargained wages intended to apply at a particular workplace.

The Reviews each speak to this as an issue in the federal workplace relations system. This shows that the Fair Work Act has not kept pace with the changing nature of work and working arrangements across Australian businesses, which has led to greater insecurity and inequitable treatment between workers. The Government’s proposal, alongside others proposed for introduction to the Parliament in Spring 2023, seeks to address that insecurity and inequitable treatment, and the emergence of sharp business practices with respect to the use of labour hire and the undercutting of wages.

Victorian Inquiry Report

The Victorian Inquiry found some labour hire employers seek to use enterprise agreements as a mechanism to drive down employment conditions.⁹⁵ Further, the fact that host enterprise agreements do not generally apply to labour hire workers results in lower pay for some of those workers when compared with directly engaged employees.⁹⁶ The problem becomes more pronounced, and has become common in some sectors, where labour hire workers work at the site of one host over a lengthy period.⁹⁷

Third Interim Report

In the context of labour hire, the Job Security Committee observed that host enterprise agreements do not commonly apply to labour hire workers working within the host, resulting in differential treatment between labour hire workers and directly engaged employees.⁹⁸ The Committee expressed that it was ‘very concerned’ that labour hire workers ‘commonly receive lower pay’ than those workers who are directly employed.⁹⁹

EPEW Report

A finding of the EPEW Report was that the use of labour hire had become an established mechanism for lowering business operating costs by undercutting wages.¹⁰⁰ It set out concerns from SEEL Committee members that labour hire workers in some industries may be earning 30 to 40 per cent less than directly-employed employees in the same role, despite performing the same duties.¹⁰¹ Additional comments in the EPEW Report also acknowledged evidence of pay disparity in some sectors, for example, coal mining, where the average wage is estimated to be \$144,000 compared with the average pay for labour hire workers in that sector estimated to be \$120,000.¹⁰²

Available data regarding the problem to be solved

Data limitations and their influence on estimating regulatory burden and costs

Estimates in these Annexures regarding the extent of the problem, the regulatory burden of any proposed response, and cost of the Government’s ‘Closing the labour hire loophole’ proposal, have

⁹⁵ Victorian Inquiry Report, p 84, Finding 3.6.

⁹⁶ Ibid, p 84, Finding 3.7.

⁹⁷ Ibid.

⁹⁸ Third Interim Report, p 2 [1.8].

⁹⁹ Ibid, p 60 [3.62].

¹⁰⁰ EPEW Report, p 20 [2.47].

¹⁰¹ Ibid, p 21 [2.50].

¹⁰² Ibid, pp 25-6, [1.16], [1.21].

been informed by available data on, for example, the use of labour hire in Australia. However, there are several limitations with current data, and they are described below.

Where reliable data is unavailable with respect to one or more elements of the Government's proposal, this is noted at relevant sections throughout the Annexures (including where a particular cost or impact cannot reasonably be quantified). This has been done to minimise the extent to which analysis about the impact of the proposal would be speculative without supporting data. However, limitations are expressly noted in the analysis to ensure estimated costs and impacts are considered by decision-makers with appropriate caveats front of mind.

Overall, data limitations mean estimating the regulatory impact of the proposal is complex, and calculating costs other than at a very high level is challenging.

The data

The Australian Bureau of Statistics (ABS) releases data on the volume and characteristics of labour hire workers, drawn from different sources.¹⁰³ However, the multi-party nature of labour hire work makes it challenging to assess statistically.

For example, there is no authoritative data on the prevalence of *internal* labour hire arrangements within corporate groups. This has required the department to base internal labour hire cost analyses on a rudimentary assumption about the number of workers who *may* be captured by the concept of internal labour hire, with a clear caveat that this number may be higher, and consequently, may result in higher costs.

Also, as ABS data is only available at the aggregate level, a direct comparison of the earnings of labour hire workers with the earnings of directly engaged employees performing work that would be covered by the same enterprise agreement classification is not possible.

There is also limited information on the arrangements between labour hire providers and host employers. For example, there is no reliable data on how many Australian businesses use labour hire. This means the department is unable to estimate the number of businesses that may be affected by the proposal or consider a range of potential distributional impacts (such as whether smaller businesses may be impacted differently to larger businesses). That noted, hosts that are small businesses within the meaning of section 23 of the Fair Work Act – that is, a business that employs fewer than 15 employees – will be excluded from this proposal. Further details about the scope of the proposal are set out under Impact Analysis Question 3.

Further, published data from the ABS shows that, despite a high number of labour hire workers working full-time hours (81 per cent), those workers are comparatively low paid when assessed against all full-time employees. Median hourly earnings for full-time labour hire employees stood at \$34.80 in August 2022, compared with \$40.70 for all full-time employees (see Table 1 below).¹⁰⁴ While this 'all full-time employees' statistic includes labour hire workers, they are a small proportion of all employed persons (2.3 per cent), and it is standard practice by the ABS to compare statistics by form of employment with those statistics for all employees. The department has adopted this approach.

¹⁰³ ABS, *Labour hire workers*, June 2022.

¹⁰⁴ Ibid, using *Characteristics of Employment*, August 2022.

Table 1: Median hourly earnings for employees paid by a labour hire firm, August 2022

	Median hourly earnings		
	Employees paid by a labour hire firm	All Employees	Difference
Full-time	\$34.80	\$40.70	-\$5.9
Part-time	\$35.50	\$30.50	+\$5
Permanent	\$30.00	\$40.60	-\$10.6
Casual	\$35.20	\$29.20	+\$6
Total	\$34.90	\$37.30	-\$2.4

Source: ABS, *Labour hire workers, June 2022*, using *Characteristics of Employment, August 2022*.

Table 1 shows the difference in median hourly earnings for employees paid by a labour hire firm and all employees. These differences, however, are to some extent due to labour hire workers having different characteristics to the larger group of ‘all employees’. For instance, Managers (median hourly earnings of \$52.00) and Professionals (median hourly earnings of \$52.60) have median hourly earnings almost 50 per cent higher than any other of the 8 broad occupation groups.¹⁰⁵ However, just 21.4 per cent of labour hire employees work as ‘Managers’ or ‘Professionals’, compared with 38.4 per cent of all employees.

In addition, labour hire workers are not a homogeneous group. The difference in median hourly earnings is largely driven by full-time and permanent workers paid by a labour hire firm, who earn less than ‘all employees’.¹⁰⁶ Conversely, part-time and casual labour hire workers often earn more.¹⁰⁷ This is consistent with other research undertaken into labour hire. For example, Laß and Wooden (2019)¹⁰⁸ used data from the Household Income and Labour Dynamics (HILDA) Survey and conducted analysis incorporating fixed effects, removing the effect of unobserved person-specific traits.¹⁰⁹ They found that labour hire workers at the top end of the income distribution experience a wage premium, while those at the bottom end appear to receive a small penalty. Laß and Wooden also outlined that there may be a range of circumstances as to why an individual might be in a labour hire arrangement. For example, a labour hire arrangement may exist so that low paid temporary workers can be hired to accommodate fluctuations in demand. Another arrangement might be that labour hire is required so that high paid temporary workers (with far greater bargaining power) can be

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Wooden, M and Laß, I 2019, The Structure of the Wage Gap for Temporary Workers: Evidence from Australian Panel Data, *British Journal of Industrial Relations* 57:3, pp 453-478, 474.

¹⁰⁹ The department considers that the ABS estimate of labour hire workers is preferable to HILDA data. The HILDA survey uses self-identification to classify employees as temporary agency workers, which is different from the ABS Labour Account publication, which uses industry disaggregated data. The ABS conducted a review into Labour Hire data in 2022 which concluded that using industry disaggregated data is a better measure of the headline number of labour hire workers, as collecting labour hire information in a household survey can result in an undercount as individuals are not always able to identify that they are in a labour hire arrangement, due to employment and payment arrangements in the labour hire industry. In addition, given labour hire arrangements comprise a small proportion of overall employment in Australia (2.3 per cent in June 2022), sample size concerns make it challenging to provide data at highly disaggregated levels. This is particularly the case with the HILDA labour hire data, where in 2021, just 177 respondents identified as being in a labour hire arrangement. Further, any differences in the ABS labour hire data and results from Wooden and Laß’s paper may, in part, reflect that Wooden and Laß use 2015 HILDA data, which is less recent than ABS data from June 2022 (headline figure for number of labour hire workers) or August 2022 (earnings figures).

engaged to meet sudden or short-term demand for specific skills.

That noted, there is no data on the proportion of labour hire employees that are paid less, the same, or more than what they would be paid under a host's enterprise agreement. Some labour hire employees may be paid the same,¹¹⁰ some may be paid less, and some may be paid more. This makes it challenging to estimate what proportion of labour hire employees may receive a pay increase once the Government's 'Closing the labour hire loophole' proposal is legislated, and how much the proposal may cost business (high-level estimates are set out in answer to Impact Analysis Question 4). However, further analysis of ABS data on the distribution of earnings shows that there may be a premium for labour hire employees at the top and bottom ends of the earnings distribution, but a penalty for the bulk of employees in the middle of the distribution.¹¹¹

Taking these issues together, accurately estimating the scope of the problem and anticipated impact of the Government's 'Closing the labour hire loophole' proposal is difficult, but reliance on latest data from sources such as the ABS has informed commentary to supplement the additional analysis in these Annexures.

Impact Analysis Question 2:

Why is government action needed?

The policy problem – that is, the use of labour hire undercutting bargained wages in a host's enterprise agreement – arises because the Fair Work Act currently allows this to occur. Addressing this can only be achieved by government action (that is, legislative amendment to the Fair Work Act), which broadly aligns with recommendations from each of the Reviews.

Victorian Inquiry Report

The Victorian Inquiry found there were two aspects of the Fair Work framework regarding enterprise agreements and bargaining in the labour hire context that gave rise to the issues that will be addressed by the 'Closing the labour hire loophole' proposal: first, some labour hire providers seek to use enterprise agreements as a mechanism to drive down employment conditions; second, host enterprise agreements do not generally apply to labour hire workers, which can result in differential treatment (that is, in some instances, lower pay).¹¹²

Having regard to these issues, the Victorian Inquiry Report recommended that labour hire workers should have the opportunity to be covered by host enterprise agreements, and that this could occur through the voluntary decision of the labour hire provider to apply host rates of pay or by including pay parity clauses in enterprise agreements.¹¹³

Third Interim Report

The Job Security Committee recommended the Fair Work Act be amended to 'ensure that the wages and conditions of labour hire workers are at least equivalent to those that would apply had these workers been directly employed by their host entities.'¹¹⁴

¹¹⁰ Evidence accepted by the Victorian Inquiry indicated that some labour hire providers voluntarily pay site rates already: see Victorian Inquiry Report, p 100.

¹¹¹ ABS, *Labour hire workers*, using *Characteristics of Employment*, August 2022.

¹¹² Victorian Inquiry Report, p 106.

¹¹³ Ibid, p 107, Recommendation 2.

¹¹⁴ Third Interim Report, p 33 [2.85].

EPEW Report

The EPEW Report broadly supported steps being taken to ensure that labour hire workers doing the same job as directly engaged workers receive the same rate of pay,¹¹⁵ and stakeholder calls for all parties to work with the Government on legislation that gives effect to that policy intent more comprehensively than what was proposed in the EPEW Bill.¹¹⁶ However, in additional comments made in the EPEW Report, Coalition Senators stated that a one-size-fits-all approach risks overlooking the nuances of the labour hire industry and leading to unintended consequences, such as impacts on flexibility and other benefits.¹¹⁷

The need for Government action

The Victorian Inquiry handed down its findings in 2016, recommending that the issue to be addressed by the Government's proposal could be resolved by labour hire providers voluntarily paying host enterprise agreement wages to their workers, or by exploring pay parity clauses in enterprise agreements.

However, following the Victorian Inquiry Report, the Third Interim Report and the EPEW Report (handed down in 2021 and 2022, respectively) found that labour hire workers often receive lower pay than what they would receive if a host's enterprise agreement applied. These findings, and the time passed since the conclusion of the Victorian Inquiry, suggest a continuing market failure that has not since been resolved through voluntary action by labour hire providers or host employers, and that Government action is required.

In the absence of Government action, there are also risks that only *some* workers would benefit from a voluntary approach by industry participants to address discrepancies in pay to labour hire employees. Power imbalances inherent in the bargaining system can lead to disparate outcomes, even within the same industry. This would extend to differences with respect to the inclusion of pay parity clauses in enterprise agreements – that is, if only some hosts include pay parity clauses but not others, that action will only benefit labour hire employees provided to those hosts and not labour hire workers of hosts without such clauses. Taking this into account, it is unlikely that voluntary behavioural change will comprehensively address the problem the Government's proposal seeks to address.

Impact Analysis Question 3:

What policy options are you considering?

This proposal addresses an issue considered by the Government in its Secure Australian Jobs election commitment. Therefore, the policy options considered are:

- Option 1: Legislate a 'Closing the labour hire loophole' measure
- Option 2: Take no action (that is, maintain the status quo)

The findings and recommendations of the Reviews support pursuing Option 1 – that is, pursuing legislative amendments to the Fair Work Act to give effect to the Government's proposal. Such amendments are intended to reflect the following parameters.

¹¹⁵ EPEW Report, p 21 [2.52].

¹¹⁶ Ibid, p 22 [2.55].

¹¹⁷ Ibid, p 23 [1.6].

When the measure is activated

The Government's 'Closing the labour hire loophole' proposal is an application-based model. This means obligations on businesses, and entitlements for workers, are not activated until an application is made to the Fair Work Commission and an order is made that activates these obligations and entitlements.

Applications can be made before and after obligations under this reform are proposed to take effect – 1 November 2024. The Fair Work Commission must make an order if it is satisfied that:

- a labour hire employer supplies or will supply one or more *employees* to a host to perform work for the host (meaning the proposal does not apply to independent contractors);
- an enterprise agreement¹¹⁸ applies to the host and would apply to the labour hire employees being provided to work for the host, if they were directly employed by the host; and
- the host is not a small business employer.

However, the Fair Work Commission must not make an order if it is satisfied that it is not fair and reasonable to do so, having regard to any of the following matters:

- the pay arrangements applying to the labour hire employees and the host's employees (which, for example, may demonstrate that the labour hire employees are being paid more than directly engaged employees such that an order does not need to be made);
- whether the work being performed by the labour hire employees is the provision of a service, rather than the supply of labour (for example, under a service contracting arrangement), having regard to factors including:
 - the labour hire employer's involvement in matters about the performance of work;
 - the extent to which the labour hire employer directs, supervises or controls the labour hire employees when they are working for the host; and
 - the extent to which the work for the host is of a specialist or expert nature.
- the history of industrial arrangements applying to the host and labour hire employer;
- the relationship between the host and labour hire employer – such as whether they are related bodies corporate;
- the terms and nature of the arrangement under which work is done for the host; and
- any other matter the Fair Work Commission considers relevant.

What happens when an order is made

When an order is made by the Fair Work Commission and applies to an arrangement between a labour hire employer and a host, the labour hire employer must pay affected employees no less than the 'protected rate of pay' for the employee in connection with the work they perform for the host, calculated with reference to the host's enterprise agreement. The 'protected rate of pay' is the

¹¹⁸ Or, for public sector employers, a public sector collective employment instrument described in the Bill.

‘full rate of pay’¹¹⁹ that would be payable if the host’s enterprise agreement applied. However, the protected rate of pay does not include benefits that cannot reasonably be provided by the labour hire employer to a labour hire employee, or benefits that cannot reasonably be converted to an amount of money.

Assuming other criteria are satisfied, if a labour hire employee is a casual employee and works for a host with an enterprise agreement that does not provide for work to be performed on a casual basis, the protected rate of pay is calculated by adding a 25 per cent loading to the ‘base rate’ component of the full rate of pay that would be payable to that employee.

There are exemptions to when an order of the Fair Work Commission applies. Orders do not apply to labour hire employees if a training arrangement also applies to them in relation to their work for the host, nor does an order apply to labour hire arrangements of less than 3 months (the ‘default exemption period’) – or a different period of time if, by application by one or more parties, the Fair Work Commission extends or shortens the exemption period.

The Fair Work Commission will also have the power to determine an ‘alternative protected rate of pay’, if satisfied that it would be unreasonable for the labour hire employer to pay its employees no less than the protected rate of pay (such as, for example, where the rate would be excessive).

Once an order is made, labour hire employers can request additional information from a host in order to calculate the protected rate of pay. The host must either provide the information requested or inform the labour hire employer what to pay affected employees. This second option provides hosts with a pathway to complying with information sharing obligations if there are concerns that sharing information (for example, internal company policies) may expose confidential or commercially sensitive information.

Parties will be bound by anti-avoidance provisions in the Bill, including those that prohibit actions to prevent a Fair Work Commission order being made or to avoid obligations after an order is made.

How are disputes resolved

When disputes arise, parties must take steps at the workplace level to seek to resolve the issue. If these discussions are unsuccessful, disputes can be brought to the Fair Work Commission for resolution by way of mediation, conciliation and arbitration.

Unless by consent of the parties, the Fair Work Commission will not be able to order backpay if a dispute reveals that a labour hire employer has paid employees less than the protected rate of pay – resolving backpay issues remains a matter for court proceedings, in line with the current operation of the Fair Work system.

Affected parties and the Fair Work Ombudsman will be able to commence court proceedings, including in relation to alleged avoidance behaviour and underpayments, and existing ‘small claims’ and ‘serious contravention’ provisions in the Fair Work Act will apply.

¹¹⁹ Defined in section 18 of the *Fair Work Act 2009*, and includes incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates, and other separately identifiable amounts.

Supplementary analysis to address Impact Analysis Questions 4-7

Annexure B sets out supplementary analysis to answer Impact Analysis Questions 4-7 regarding the Government's 'Closing the labour hire loophole' proposal and should be read with Annexure A.

Impact Analysis Question 4:

What is the likely net benefit of each option?

The policy options being considered (as described in answer to Impact Analysis Question 3) are:

- Option 1: Legislate a 'Closing the labour hire loophole' measure
- Option 2: Take no action (that is, maintain the status quo)

To inform an assessment of the benefits, costs and impacts of these two options, the department has undertaken extensive stakeholder consultation with employers and their representatives, unions and academics, which commenced in 2022. In April 2023, the department published a detailed consultation paper about the proposal (**Consultation Paper**).

Through the Consultation Paper, stakeholders were asked to consider and provide views on a broad range of policy considerations, including the scope, application, and potential cost impacts that may flow to affected parties and the broader economy.¹²⁰ The impacts identified by stakeholders are described in the analysis below about the costs and benefits for businesses (hosts and labour hire employers) and individuals (labour hire employees and host employees) (for further detail on consultation generally, see Impact Analysis Question 5).

With the benefit of views provided by stakeholders during consultation, the department has assessed the two options with reference to the following guiding principles (noting these are informed by, and have developed from, the guiding principles in the Consultation Paper):

- a) Business should be able to access labour hire for genuine work surges and short-term needs.
- b) Labour hire employees should be paid at least the amount provided in a host's enterprise agreement, where that agreement would apply if they were directly employed.
- c) Hosts should not be able to undercut bargained wages by using labour hire.
- d) The proposal should only impose a reasonable regulatory burden on businesses.

These principles reflect the Government's aim to close the loophole in the Fair Work Act that allows the use of labour hire to undercut bargained wages. Overall, Options 1 and 2 lead to different net benefits and impacts on hosts, labour hire employers, labour hire employees and host employees. These are outlined below.

¹²⁰ Australian Government, *Same Job, Same Pay consultation paper* (April 2023) (Consultation Paper), pp 12-3.

Option 1 – Legislate a ‘Closing the labour hire loophole’ measure

Summary of net benefit and impact

Option 1 gives rise to varied impacts across workplaces and industries. This is because, for example, the use of labour hire differs across industries, and the terms and conditions of employment that apply to hosts and labour hire employers is often disparate.

It is difficult to estimate how many labour hire arrangements may be the subject of a Fair Work Commission order that activates relevant obligations and entitlements. There may be a number of reasons why an eligible labour hire employee does not apply for an order (see below for further details). In summary, and with regard to available data, pursuing Option 1 is expected to have the following calculable impact on businesses and individuals (further details at Annexure C):¹²¹

<u>Regulatory burden estimate table</u>			
Annual regulatory costs (from business as usual)			
Change in costs (\$ million)	Business	Individuals	Total change in costs
Total, by sector	-\$510.8m	(\$510.6m)	-\$0.2m

This cost estimate is at the upper limit of the estimated increase to costs and is informed by the assumption that all in-scope labour hire employees will be covered by a Fair Work Commission order and receive a wage increase, and by a consideration of:

- how many businesses and individuals are expected to be impacted by the proposal; and
- for those groups, the estimated cost of engaging and complying with relevant obligations.

How many businesses and individuals are expected to be impacted by the proposal?

The following section provides an overview of how many businesses and individuals may be captured by this proposal. However, because the proposal relies on parties applying to the Fair Work Commission and an order being made, only a limited number of those employers and employees *potentially* within scope will *actually* be caught by this proposal’s obligations and entitlements.

Hosts

It is unclear how many hosts may be impacted by the proposal, because there is no reliable data on how many businesses use internal or external labour hire.

In the absence of, for example, ABS data on the prevalence of labour hire use, the department has considered whether information published by companies that are required to report publicly on their operations (for example, information published by ASX100 companies in annual reports) may help discern the impact of Option 1. However, it has been observed that few companies disclose whether they use labour hire, and if they do disclose this information, they do not generally report on the size

¹²¹ Data limitations mentioned previously may mean these figures are higher than what can be estimated accurately.

of their labour hire workforce.¹²² The lack of reliable data on how many businesses use labour hire makes it difficult to estimate how many businesses will be affected by Option 1.

Labour hire employers

Hosts use a variety of third-party labour arrangements, including to supplement their workforce. This proposal will affect labour hire employers that provide employees to work for a host (directly or indirectly), including within the same corporate group. The proposal is not intended to capture arrangements where one company provides a service to another company that is distinct from the supply of labour only – the factors that may be considered by the Fair Work Commission before deciding whether to make an order reflect this proposal intent, while giving the Commission the opportunity to scrutinise circumstances to determine the nature of an arrangement between parties.

Assuming companies that provide services, rather than labour, to others (for example, under service contracting arrangements) can demonstrate to the Fair Work Commission the nature of their arrangements such that an order is not made, the number of providers expected to be covered by this proposal can be estimated with reference to the number of labour hire providers in Australia.

The only reliable data on labour hire providers available is ABS data showing that as of 30 June 2022, there were 13,195 actively trading labour hire providers in Australia.¹²³ However, there were only 6,245 *employing* businesses in Labour Supply Services,¹²⁴ and only these businesses would be able to provide labour hire to hosts for the purposes of the Government's proposal – because the proposal is limited to labour hire *employers* who provide *employees* to hosts.

For completeness, this figure does not include *internal* labour hire arrangements (those where entities within the same corporate group provide labour from one to another), which will also be covered by the proposal subject to relevant criteria being met and exemptions not applying. There is no reliable data on the number of such arrangements (see further discussion below).

Labour hire employees

Labour hire employees represent only around 2.3 per cent of employed people in Australia (around 319,900 of 13,852,900).¹²⁵ However, this does not include *internal* labour hire employees. The ABS estimate of labour hire employees is unlikely to count employees in internal labour hire arrangements, as the ABS estimate is a count of the number of workers in the Labour Supply Services industry. An internal labour hire employee would likely be counted as employed in the main industry of their host (for example, an internal labour hire employee in a mining corporate group would be expected to be counted as employed in Mining, rather than Labour Supply Services).

For the purposes of estimating the impact of this proposal on internal labour hire arrangements, the department has built into estimates an assumption that 6,000 employees will be working in these arrangements and be caught by the proposal, in addition to the employees captured by ABS data. The figure is used as a broad estimate only. It should not be read as determinative with respect to the number of internal labour hire arrangements that *may* be impacted but is used here in the

¹²² Hepworth, K, 2020, *Labour Hire and Contracting Across the ASX100*, Australasian Centre for Corporate Responsibility, <www.accr.org.au/research/labour-hire-contracting-across-the-asx100/>.

¹²³ ABS, *Counts of Australian Businesses, including Entries and Exits, July 2018 – June 2022* (see ANZSIC code: 7212 Labour Supply Services). Note, if a business is captured by this proposal but is *not* counted by the ABS under 'ANZSIC code: 7212 Labour Supply Services', there may be discrepancies with this figure.

¹²⁴ ABS, *Counts of Australian Businesses, June 2022*.

¹²⁵ ABS, *Labour hire workers, June 2022*; using *Labour Account, June 2022*.

interests of quantifying a high-level estimated impact, rather than not accounting for costs to internal labour hire arrangements at all.

This estimate of 6,000 employees has been informed by publicly available information about some corporate arrangements that may be described as internal labour hire arrangements. For example, Operations Services within BHP's corporate group are reported as employing around 4,500 people,¹²⁶ but the estimate of 6,000 employees also accounts (to some degree) for additional corporate arrangements over which the department does not have visibility and for which there is no reliable data. While noting these figures, the Government's proposal is only estimated to impact a *subset* of the 2.3 per cent of employed people in Australia that can be attributed to labour hire, given the confined scope of, and exemptions that apply to, the proposal.

In relation to the 319,900 labour hire employees referred to in ABS data, the department has made a number of adjustments to estimate how many of these employees may be eligible to apply for an order from the Fair Work Commission once the proposal is implemented. These adjustments allow for an accurate interpretation of aggregated ABS data and take into account differing characteristics with respect to type of employment (full-time, casual), the number of labour hire employees recorded as working in their job for greater than 3 months (to account for the default exemption period),¹²⁷ and the estimated number of labour hire employees provided to a host with an enterprise agreement.

Applying these adjustments and noting data limitations, the department estimates approximately 66,446 labour hire employees (60,446 external and 6,000 internal) will be eligible to be covered by orders from the Fair Work Commission. However, given the application-based nature of this proposal, it is estimated fewer labour hire employees than this will actually be covered by an order at any given time (see Annexure C).

For hosts, labour hire employers and employees – what is the cost of the proposal?

Estimating the economic impacts of workplace relations reforms can be difficult. Specific outcomes may depend on the approach that independent parties – such as employers, unions and the Fair Work Commission – take in response to proposed measures. It can also be difficult to isolate the impact of individual measures from other external factors, such as changes in the economic climate. However, addressing the loophole that allows the use of labour hire to undercut the wages in enterprise agreements will lead to an increase in the wages of some labour hire employees. This added income security and increases to pay may allow labour hire employees to make ends meet with elevated living costs, and allow them to afford to make purchases they are currently unable to, providing a boost to their local economies.

With that frame of reference, the tables below set out estimated costs for hosts, labour hire employers and labour hire employees (and their representatives), respectively, noting that where costs are difficult to quantify based on a lack of reliable data, assumptions have been informed by, for example, stakeholder feedback obtained during consultation.

1. Estimating cost impacts for hosts

¹²⁶ Clun, Rachel, 'BHP claims proposed labour-hire policy would cost company \$1.3b per year', *The Sydney Morning Herald*, 22 May 2023.

¹²⁷ Costings have been based on the default 3-month surge exemption period, noting the Fair Work Commission's capacity to extend or reduce that exemption period in limited circumstances.

Cost category	Analysis
Reviewing guidance materials on the application process	The department anticipates that businesses that use or <i>may</i> use labour hire may take time to read guidance material made available by the Fair Work Commission and Fair Work Ombudsman on the operation of this measure once legislated – for example, guidance on how applications may be handled by the Fair Work Commission and what is expected of businesses involved in that process. However, given the lack of data available about how many Australian businesses use labour hire, it is difficult to estimate accurately the breadth of this administrative cost. However, using the Office of Impact Analysis' \$79.63 per hour 'work related labour rate', the department estimates that hosts who read this guidance material may take 30 minutes to do so, at a cost of \$39.82 per host (see Annexure D).
Reviewing contractual arrangements with labour hire employers	Some hosts may revisit contracts in place with labour hire employers to ensure they are not inconsistent with new obligations, assuming they are involved in a Fair Work Commission application and the subject of an order. The extent of contractual reviews will be informed by, for example, whether labour hire employees are already being paid more than the rates in the host's enterprise agreement. For example, evidence provided to the Victorian Inquiry by Australia Wide Personnel (a large organisation providing labour hire across trades, warehousing, and food industries) was that where a host has an enterprise agreement on its site, Australia Wide Personnel will 'always' pay labour hire employees according to the site agreement, even if it is not required to do so. Chandler McLeod gave similar evidence to the Victorian Inquiry, submitting that in many instances, productivity is retained or enhanced on a site where pay parity is maintained between labour hire employees and host employees.¹²⁸ The department is unable to quantify the cost to hosts that may arise from reviewing contracts with labour hire employers due to a lack of visibility over the volume, content and complexity of such contracts. However, <i>if</i> contracts are revisited and the cost of using labour hire is <i>increased</i> in light of a higher wage cost, this should not be treated as separate to the wage cost set out further below regarding the wage impact on labour hire employers under this proposal. Put another way, if the cost of higher wages is passed on from labour hire employers to hosts, it should not be counted twice when estimating the impact of this proposal. The increased wage cost will fall to labour hire employers in the first instance – whether it is passed on to hosts will be a matter for affected entities to negotiate.
Cost of making an application	It will be open to hosts to apply for an order from the Fair Work Commission under this measure. Hosts may wish to do so to seek confirmation about their

¹²⁸ Victorian Inquiry Report, p 100.

to the Fair Work Commission	obligations from the outset of a labour hire arrangement, or may wish to ensure their labour hire provider pays their workers the protected rate of pay under an enforceable decision of the Commission. Where hosts choose to apply to the Commission for an order, they will need to pay the application fee when lodging their application for an order with the Fair Work Commission, which is currently \$83.30. As the department is not able to estimate how many hosts may make an application, this cost is noted for completeness.
Engaging with a Fair Work Commission application	Some hosts may be named in applications to the Fair Work Commission for an order activating entitlements and obligations under this proposal. While the department is unable to quantify how many applications may be made to the Fair Work Commission (see Annexure C), for those hosts involved in applications, the time and financial cost of engaging with that process is expected to vary greatly depending on the circumstances, noting the Fair Work Commission is intended to be a lower cost and more efficient forum than the courts. The Fair Work Commission can consider various factors when deciding whether to make an order, and the complexity of applications will vary greatly depending on how many of these factors the Commission considers, or how many issues a host may wish to draw to the Commission's attention. This potential variance between circumstances means it is not possible to quantify accurately the cost of engaging with Fair Work Commission applications. For example, a host using labour hire simply to supplement its existing workforce may have less complicated submissions or evidence for the Fair Work Commission that, for example, a host actually engaging in a service contracting arrangement, which may require additional evidence about how the service contract work differs from work undertaken from host employees. While the duration, complexity and practical requirements of responding to applications will be informed by the specific circumstances, it is anticipated that these applications may require preparing submissions and evidence (including in relation to business operations and the rates payable under the host's enterprise agreement) and attending conferences and hearings of the Fair Work Commission while an application is considered.
Providing information to a labour hire employer	If a Fair Work Commission order is made, a labour hire employer may request additional information from a host in relation to calculating the correct rates of pay for employees covered by the order. Complying with these requests will attract some administrative cost, however the department is unable to estimate accurately: • the number of labour hire employers that may be subject to a Fair Work Commission order, and of these, how many may request additional information to be able to calculate the correct rate of pay under the host's enterprise agreement; and • if a request is made, the volume or complexity of that information.

	If hosts receive a request for additional information, the cost of complying with this obligation is estimated to accrue at \$79.63 per hour (using the Office of Impact Analysis' work related labour rate), but the actual length of time it may take to comply is not able to be estimated due to a lack of relevant data about the complexity and frequency of any requests that may be made.
Engaging with disputes	If a dispute arises about a Fair Work Commission order or a party's obligations, the time and financial cost of engaging with the dispute will vary between circumstances and is therefore difficult to quantify, noting however (as above) that the Fair Work Commission is intended to be a lower cost and more expedient forum than the courts. As with engaging in a Fair Work Commission application, engaging with a dispute may require preparing submissions and evidence and attending conferences and hearings of the Fair Work Commission. In addition, the Office of Impact Analysis's Guidance Note on the Regulatory Burden Measurement Framework¹²⁹ advises that certain costs are excluded from the Regulatory Burden Measurement Framework and are not required to be considered when quantifying an estimate of burden. Relevantly, this includes 'Non-compliance and enforcement costs', including costs incurred in court and tribunal processes. If a dispute in court concludes that a host has deliberately not complied with their obligations under this proposal, regulatory impacts relating to engaging with the dispute can be taken to have been avoidable had the host complied with their obligations in the first place. This regulatory impact should not be treated as an <i>additional</i> burden on business.
Cost from engaging more employees instead of using labour hire	The Government's proposal may cause some hosts to consider engaging more employees instead of using labour hire. The number of hosts that may consider this, and any associated costs, cannot be quantified because they will vary between circumstances and will be informed by, among other things, the exact pay rates in a host's enterprise agreement and the nature of the employee's engagement. That noted, relevant costs are likely to relate to wages paid directly to new employees, and other overhead costs associated with onboarding, training, and developing those new employees (which are costs that may have otherwise been absorbed by a labour hire provider). Paying a worker directly may, in some circumstances, result in an immediate cost saving. This is because, if a host was paying a labour hire employer a fee in recognition of the labour hire employee's wage plus an additional amount, that additional amount would not need to be paid if the labour hire employee were employed directly – noting that, if more people are employed directly, the onboarding and training costs referred to above may be incurred.

2. Estimating cost impacts for labour hire employers

¹²⁹ OIA, *Regulatory Burden Measurement Framework* (25 May 2023) <<https://oia.pmc.gov.au/resources/guidance-assessing-impacts/regulatory-burden-measurement-framework>>.

Cost category	Analysis
Reviewing guidance materials on the application process	As with hosts, labour hire employers may also incur administrative costs by reviewing guidance materials on this proposal (including on the Fair Work Commission application process and related obligations), once legislated. While quantifying this cost is difficult in relation to hosts, data is available on the number of labour hire employers in Australia, with reference to the number of <i>employing</i> businesses in Labour Supply Services according to ABS data¹³⁰ – that is, 6,245. Using this figure, and adopting the same assumption used above in relation to the review of guidance material taking 30 minutes per business the department estimates labour hire employers will, collectively, incur \$248,676 in the first year of the proposal (see Annexure D for supporting rationale).
Reviewing contractual arrangements with labour hire employers	As above, some labour hire employers may revisit contracts in place with hosts to ensure they are not inconsistent with new obligations, assuming they are involved in a Fair Work Commission application and the subject of an order. The department is unable to quantify the cost to labour hire employers that may arise from reviewing contracts with hosts due to a lack of visibility over the volume, content and complexity of such contracts, but that fact that some cost will be incurred by this exercise is noted here for completeness.
Engaging with a Fair Work Commission application	The content in the table above on the costs that may be incurred by hosts from engaging with a Fair Work Commission application is equally applicable to the costs that may be incurred by labour hire employers in this circumstance. As above, the department is unable to quantify the number of applications that may be made to the Fair Work Commission (see Annexure C), however the time and financial cost of engaging with applications will vary depending on the circumstances. This variance means it is not possible to quantify accurately the cost of engaging with Fair Work Commission applications, once one is made. For completeness, and as above, it is anticipated that these applications may require preparing submissions and evidence (including in relation to business operations and the rates payable under the host's enterprise agreement) and attending conferences and hearings of the Fair Work Commission while an application is considered.
Calculating the correct rate of pay for labour hire employees covered by a Fair Work Commission order	If a labour hire employer is covered by a Fair Work Commission order and is required to calculate a new 'protected rate of pay' for labour hire employees also covered by that order, in accordance with a host's enterprise agreement, the time take to do so will also incur administrative costs. The department is unable to quantify the actual cost of this exercise to labour hire employers, because doing so is dependent on understanding how long a labour hire employer may take to do these calculations, the relative complexity of the host's enterprise agreement, and how often a labour hire employer may

¹³⁰ ABS, *Counts of Australian Businesses*, June 2022.

	be required to interpret the same host's, or different host's, enterprise agreements in any given (depending on, for example, roster changes under the same arrangement, or entering into multiple arrangements with different hosts with different enterprise agreements, in any given period). Stakeholder consultation on this (and other) administrative costs did not yield specific information about what this cost may be, however the length of time taken to make these calculations will be informed by factors including the complexity of a host's enterprise agreement, the roster a labour hire employee works (which is relevant for determining whether penalties or allowances may apply), and whether the labour hire employer needs additional information from the host.
Estimated increase to wage costs	Given the number of labour hire employees eligible to apply to the Fair Work Commission for an order, the department estimates the direct increase in wage costs as a result of the proposal will be \$510.6 million per year, representing an increase of just 0.05 per cent of the total wages and salaries paid in Australia per year, calculated as \$1,006,234,000,000.00.¹³¹ This figure is the top of the department's estimate and assumes every labour hire employee eligible to benefit from a Fair Work Commission order is, in fact, covered by an order within the first year of the proposal being legislated. This outcome is unlikely for several reasons, and the number of employees covered by an order is expected to be much smaller (see Annexure C).
Cost of dealing with disputes	The previous table describes the department's consideration of potential costs incurred by hosts if a dispute arises in relation to this proposal, once legislated, and concludes that quantifying those costs for hosts is not possible due to the variance between circumstances that may trigger a dispute. The same rationale is applied here in relation to labour hire employers such that the cost of engaging with disputes cannot be quantified defensibly.

3. Estimating costs for labour hire employees (and their representatives)

Cost category	Analysis
Reviewing guidance materials on the application process	Given this proposal adopts an application-based model, it is reasonable to expect that some labour hire employees and their representatives may also read Fair Work Commission guidance material about who is eligible to seek an order, how applications will be handled, and the outcome if the Fair Work Commission makes an order. The department anticipates that not all labour hire employees will, in fact, read guidance made available by the Fair Work Commission, and in the absence of reliable data regarding the proportion of these employees that will, or will not, read the guidance material, the department is unable to quantify this cost defensibly here. However, assuming a labour hire employee reads the Fair Work Commission's guidance on work time, and takes around 30 minutes

¹³¹ ABS, *Australian National Accounts: National Income, Expenditure and Product, March 2023*.

	to do so, costs will accrue at \$39.82 per employee.
Cost of making an application to the Fair Work Commission	Labour hire employees (and their representatives) will need to pay the application fee when lodging their application for an order with the Fair Work Commission, which is currently \$83.30. As the department is not able to estimate how many labour hire employees will make an application to the Fair Work Commission, this cost is noted for completeness.
Engaging with a Fair Work Commission application	Labour hire employees (and their representatives) will incur administrative costs when applying to the Fair Work Commission for an order, in addition to the actual application fee that is expected to attach to the proposal. However, as above in relation to hosts and labour hire employers, the time and financial cost of engaging with applications will vary depending on the circumstances, and this variance means it is not possible to quantify accurately the cost of engaging with Fair Work Commission applications. That noted, it is anticipated that these applications may require preparing submissions and evidence and attending conferences and hearings of the Fair Work Commission while an application is considered.
Engaging with disputes	The previous table describes the department's consideration of potential costs incurred if a dispute arises and concludes that quantifying those costs is difficult due to the variance between circumstances that may trigger a dispute. The same rationale is applied here in relation to labour hire employees such that the cost of engaging with disputes cannot be quantified defensibly.

What benefits are expected to flow from the proposal?

For hosts and labour hire employers

While there are a number of costs for business associated with the proposal, it also has the potential to generate benefits for hosts and labour hire employers (noting that, as a result of the above-mentioned data limitations, these benefits are framed here conceptually). For example, as mentioned above, the Victorian Inquiry heard evidence from some labour hire employers that voluntarily paying host enterprise agreement rates to labour hire employees has an observable impact on productivity, insofar as it was retained or enhanced on sites where pay parity exists between host employees and labour hire employees.¹³²

The Third Interim Report also contains observations from the Job Security Committee regarding adverse health and safety outcomes associated with labour hire and contract work when compared to ongoing full-time employment. Specifically, the Committee heard that the insecurity of work, such as labour hire work, led to higher incidences or frequency of injuries, poorer physical and mental health, and less willingness to raise health and safety concerns.¹³³ Arguably, if implementing this proposal leads to hosts engaging more direct employees, there may be an observable increase in work health and safety outcomes in those workplaces, to the benefit of employers and employees.

¹³² Victorian Inquiry Report, p 100.

¹³³ Third Interim Report, pp 27-8.

The proposal will not have a direct impact on small business host employers (that is, with fewer than 15 employees), as they are excluded from scope. Small businesses who are labour hire employers can be covered by a Fair Work Commission order and will face the same obligations as larger labour hire employers in the same circumstances.

Further, some stakeholders have suggested to the department that this proposal may also give labour hire employers the opportunity to generate more revenue as a result of higher wage costs being passed on to hosts. For example, if a labour hire employer's business model relies on a percentage on top of a payment to cover the wage of a labour hire employee placed in the host's workplace, a higher wage cost will lead to a higher 'on top' percentage. Whether this materialises for labour hire employers is not able to be determined as part of this analysis.

For labour hire employees

Benefits for labour hire employees from implementing this proposal are set out in the table below:

Benefits	Analysis
Improvement in wages	This proposal will ensure labour hire employees covered by a Fair Work Commission order are paid at least what they would be paid under a host's enterprise agreement if they were directly employed by the host. For some labour hire employees, this will result in a wage rise. As outlined above, the increased wages bill under this proposal is estimated to be up to \$510.6 million per year (with respect to the cohort of 66,446 labour hire employees estimated as eligible to apply for a Fair Work Commission order). If this wage increase were averaged across each of the 66,446 labour hire employees, each employee would receive on average an additional \$7,684 per year (or \$295.53 per fortnight).¹³⁴ Further details are at Annexure C.
Benefits to job security	Implementing the Government's proposal will strengthen job security for host employees where a Fair Work Commission order applies. If this proposal is not legislated, the economic incentive for hosts to use labour hire, who are not covered by the host's enterprise agreement and who are paid lower rates, will remain. It follows that by legislating the Government's proposal, this economic incentive will be reduced (if not eliminated entirely, having regard to the exemptions that apply to, and confined scope of, the proposal). This proposal will also positively impact labour hire employees with respect to job security in a new role, if they are engaged directly by hosts as a result. This increased job security (in a labour hire employee's new role, if obtained) arises because this proposal aims to remove an economic incentive for hosts to prioritise externally sourced labour over direct employment. This is relevant to addressing issues including that labour hire employees often lack leave entitlements (and other entitlements generally attributable to permanent employment). The majority of labour hire employees (84 per cent) do not have paid leave entitlements,¹³⁵ which means they are more likely to be casual

¹³⁴ Noting the distribution of these increased wages will not be equal for affected workers, and noting the data limitations with respect to the number of workers who may be captured by this proposal (which affects the calculation of the overall wages increase and the value of that increase when divided equally across affected workers).

¹³⁵ ABS, *Labour Hire Workers, June 2022, using Characteristics of Employment, August 2022*.

	employees. If hosts choose to engage more employees directly as a result of this proposal (some of whom may currently be labour hire employees), it follows that if those employees obtain permanent employment with a host, they are likely to experience increased job security. Further, the contractual terms under which labour hire employees are engaged means these employees are often subject to arrangements where their term of engagement with the host can be terminated at very short notice.¹³⁶ Secure, well-paid jobs are a key Government objective, and this proposal contributes to ongoing efforts to generate secure employment opportunities for Australian workers (including via direct engagement with hosts).
Distributional effects	As ABS data shows that 61 per cent of labour hire employees are male, it is more likely that male employees will benefit from this proposal, while female labour hire employees will also benefit.¹³⁷ However, the Office for Women has indicated to the department this proposal is likely to have generally positive impacts for women arising from reduced wage inequality (such as, for example, between female labour hire employees and host employees). However, due to data gaps that limit the department's ability to assess and measure gender impacts, it is difficult to say whether this measure will have substantial benefits to women relative to men and contribute to reducing the gender pay gap. The National Indigenous Australians Agency have also advised they anticipate the policy will have positive impacts for Indigenous Australians. This is because Indigenous Australians engaged as labour hire employees, who currently receive less pay than what they would if they were paid under a host's enterprise agreement, will benefit from the proposal.¹³⁸

Alignment with similar proposals implemented in international jurisdictions

Other countries have implemented measures conceptually similar to the Government's 'Closing the labour hire loophole' proposal (see below). Implementing the Government's proposal would bring Australia's workplace relations framework into alignment with these international efforts to address pay disparities impacting labour hire employees.

Jurisdiction	Description
European Union	In 2008, the European Union (EU) issued Directive 2008/104/EC to member states, establishing the equal treatment principle (ETP) for labour hire workers to receive the same 'basic working and employment conditions' as directly engaged employees.¹³⁹ Exemptions are provided for collective opt-outs (for example, for certain industries in Germany), for receiving pay between assignments, and there is a

¹³⁶ See, e.g., Third Interim Report, p 72 [4.43].

¹³⁷ ABS, *Labour Hire Workers, June 2022*, using *Jobs in Australia, 2019-20*.

¹³⁸ Noting data is limited with respect to identifying the number of Indigenous Australians who may be engaged as labour hire workers and who may be impacted by the proposal.

¹³⁹ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

	qualifying period. Member states are obliged to enact anti-avoidance measures which prevent labour hire agencies providing successive short-term assignments to circumvent the qualifying period. Equal treatment rules in the EU vary from state to state, reflecting differences in industrial relations frameworks.¹⁴⁰ A European Commission report indicated all but two Member states said the Directive itself did not create a significant administrative burden, and that of 768 small to medium enterprise surveyed, only 59 (7.68%) identified the Directive as being particularly administratively burdensome.¹⁴¹
United Kingdom	In the United Kingdom (UK), a labour hire agency is responsible for ensuring that the treatment of their workers is consistent with workplace laws. Similar to the Government's 'Closing the labour hire loophole' proposal, the UK model includes a qualifying period of 12 weeks before workers are entitled to receive equal treatment with respect to pay and conditions, after which time the worker becomes eligible for the same basic terms and conditions of employment as if they were employed directly by the host organisation.¹⁴² In the UK, the concept of 'basic terms and conditions of employment' includes pay, duration of working time, penalty rates and entitlements, rest periods, breaks, and annual leave. Equal treatment can be established by referencing terms and conditions ordinarily set out in the contracts of directly recruited employees, which may include an employment contract, pay scales, collective agreements, or internal policy. The administration of this rule relies on an 'as if' principle – that is, the labour hire worker is entitled to the same basic terms and conditions of employment <i>as if</i> they were a directly engaged employee. The Government's proposal differs slightly to the UK model, insofar as the Government's proposal relates only to employment arrangements where hosts have an enterprise agreement, avoiding the complexity and potential issues arising from requiring businesses to make comparisons and calculations with reference to the arrangements of a host employee.
Japan	Japan prohibits unreasonable and discriminatory disparity in treatment between regular and non-regular employees, where reasonableness of disparity in treatment must be considered against the nature and purpose of such disparity.¹⁴³ Employers must consider individual working conditions and be satisfied that this obligation is not contravened, including with respect to base salary, bonus and other treatments.

¹⁴⁰ See, e.g., OECD, *Detailed description of employment protection legislation, 2012-2013* (2013); European Commission, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2008/104/EC on temporary agency work* (2014) 4.2.

¹⁴¹ *Ibid*, 15-6.

¹⁴² *Ibid*, 18.

¹⁴³ Act on Improvement, etc. of Employment Management for Part-Time and Fixed-term Workers 1993, Article 8.

Option 2 – Maintain the status quo

The Fair Work Act currently allows labour hire employees to be paid less than what they would be paid under a host's enterprise agreement if they were directly employed. This is the loophole that the Government seeks to address with this proposal.

Maintaining the status quo would allow hosts to continue using labour hire to supplement their workforce when and as needed (as does Option 1), but Option 2 does not protect the bargained wages that a host has agreed is the value of the work performed at its workplace.

For hosts, labour hire employers and labour hire employees – what will the costs and benefits of the proposal be?

Parties	Analysis of costs and benefits
Hosts	Maintaining the status quo would not give rise to additional costs for hosts. Hosts would be able to continue entering into arrangements with labour hire employers to receive workers being paid less than what they would receive under the host's enterprise agreement. There would be no express obligation on hosts to engage with labour hire employers when, for example, responding to requests for information about interpreting the host's enterprise agreement to make correct payments to labour hire employees.
Labour hire employers	Maintaining the status quo would not give rise to additional costs for labour hire employers. There would be no obligation to pay labour hire employees at least what they would be paid under a host's enterprise agreement. Existing industrial arrangements could continue operating uninterrupted, without the potential impacts on revenue that may arise under Option 1.
Labour hire employees	By maintaining the status quo, some labour hire employees would continue to receive wages lower than what they would be paid under a host employer's enterprise agreement. Maintaining the status quo would be unlikely to give rise to any benefits to labour hire employees. That said, some stakeholders relayed to the department during consultations that the status quo currently allows labour hire employers greater flexibility with respect to setting their own industrial arrangements, and consistency with respect to relying on those industrial arrangements to be able to calculate lawful wage payments to employees. Some stakeholders suggested that by requiring labour hire employers and hosts to comply with proposed new obligations if a Fair Work Commission order is made, revenue and profitability would be put at risk – and, by extension, risking the job security of affected labour hire employees. In this regard, the benefit that could be taken from the status quo is that job security for labour hire employees <i>in their current labour hire jobs</i> may be maintained (as a result of maintaining existing profitability for affected business). However, and importantly, the department is unable to verify these stakeholder assertions and does not have access to data that would suggest the increased wage cost flowing from this proposal would displace profitability and job security to a measurable degree.

Put another way, the department does not have data to suggest that the Government's proposal would adversely impact profitability and job security to a degree that might suggest maintaining the status quo should be preferred. Nevertheless, stakeholder views about this issue have been considered by the department in the course of consultations and preparing this analysis.

Having weighed Options 1 and 2, what is the net benefit of the Government's proposal?

The Government considers there is a loophole in the Fair Work Act which allows bargained wages in enterprise agreements to be undercut by the use of labour hire. This is because the Fair Work Act currently allows labour hire employees to be paid less than what they would be paid if they were directly employed by a host and paid under the host's enterprise agreement. This has informed the Government's election commitment to address the pay differential currently adversely impacting some labour hire employees.

Progressing the Government's proposal will lead to an increase in labour costs for labour hire employers and hosts covered by a Fair Work Commission order, where affected labour hire employees are being paid less than what they would be paid under a host's enterprise agreement. Labour hire employers and hosts will also face costs when engaging with applications made to the Fair Work Commission. However, these costs will be tempered by the reduced number of labour hire employees that are expected to apply for and be covered by a Fair Work Commission order.

The number of labour hire employees in Australia is low (2.3% of all workers, or 319,900), and the fact that of those 319,900, only around 60,446 are estimated to be eligible to apply for a Fair Work Commission further reduces the impact of this proposal directly impacted by the proposal – noting, again, the data limitations with identifying the number of workers potentially affected, and noting that, when adding broad estimates for internal labour hire workers, this figure rises to 66,446.

With this front of mind, and with regard to the various benefits to labour hire employees and the protection of bargained wages, the department has weighed the costs and benefits of the options described above and recommends pursuing Option 1: Legislate the Government's 'Closing the labour hire loophole' proposal.

Impact Analysis Question 5:

Who did you consult and how did you incorporate their feedback?

Purpose and objectives of consultation

Consultation is a core element of policy making and workplace relations reform. An effective consultation process can lead to better policy outcomes and greater acceptance of a policy in the community, particularly among those who will be affected by its implementation. Various stakeholders are involved by the department in consultation processes in relation to workplace relations reform, including employer groups, community organisations, employee representatives, academics, and civil society.

In workplace relations, consultation can take place through several avenues. For example, the *National Workplace Relations Consultative Council Act 2002* establishes the National Workplace Relations Consultative Council (NWRCC). The purpose of the NWRCC is to provide, in the public interest, a regular and organised means by which Government representatives, and representatives

of employers and of employees (and, when the Minister considers it appropriate, representatives of other persons, bodies and organisations) may consult together on workplace relations matters of national concern.¹⁴⁴ The Committee on Industrial Legislation (COIL) also meets when required to provide technical input on draft or existing workplace relations legislation.

The department also engages in ongoing consultation with a broad range of stakeholders on workplace relations legislation implementation and operation.

Consultation process undertaken by the department regarding this proposal

The department has engaged in open public consultation on the Government's 'Closing the labour hire loophole' proposal. During initial consultations undertaken in 2022, the department met with over 40 stakeholders including employers, peak industry and employer groups, labour hire providers, unions and State and Territory governments across 15 consultation meetings. The purpose of those initial consultation sessions was to seek to understand how and why different businesses use labour hire, how labour hire providers operate, and to invite stakeholder views on how a 'Closing labour hire loopholes' measure might work in practice.

More detailed consultations occurred from February to August 2023, with more than 45 consultation sessions on this proposal, held with over 75 stakeholders. The purpose of these more detailed consultations was to understand concerns and suggestions that stakeholders had in relation to implementing this proposal, test key policy parameters with stakeholders, and inform analysis ahead of final policy decisions being made by Government.

In order to support consultation and discussions with stakeholders about the impact of the Government's proposal, the department also called for written submissions via its public website and direct emails to identified stakeholders. Responses were sought to an initial one page summary of the proposal, which informed a subsequent detailed Consultation Paper released in April 2023.

The detailed Consultation Paper invited stakeholder views on each aspect of the proposal and anticipated costs and impacts. The department received over 80 written submissions from stakeholders about this proposal. All consultation sessions and written submissions are treated by the department as confidential, to encourage stakeholders to provide frank feedback about proposals and potential impacts on corporate arrangements, individual businesses, and the broader economy (noting some of these details may be commercially sensitive).

This was followed by meetings of the NWRCC and of Workplace Relations Ministers to discuss the Government's proposals at a high level on 8 June 2023. Both meetings were Chaired by the Minister for Employment and Workplace Relations.

The department held a further full day of consultations with key employer and union stakeholders on 16 June 2023. Participants provided the department with feedback, examples and suggested options in response to the details discussed.

In addition to views provided in response to consultation conducted directly by the department, the department also considered various stakeholder views that informed the Third Interim Report, EPEW Report, and Victorian Inquiry Report. Each of those reports was informed by extensive stakeholder consultation, and collectively, received more than 900 written submissions accompanied by 140 hearings.

¹⁴⁴ *National Workplace Relations Consultative Council Act 2002*, s 5.

Following further stakeholder consultations in mid-2023 on a preferred model for this proposal, and in light of additional stakeholder feedback (including from employer representatives), the department gave further consideration to the mechanics of this measure, such as how entitlements might be triggered and the administrative burden on business. This consideration informed the Government's proposal to have this measure apply by application-only, to provide certainty to business about when obligations apply while still providing labour hire employees and their representatives a pathway to being paid at least the rates calculated under a host's enterprise agreement.

Summary of stakeholders' main views

Stakeholders were asked to provide the department with any assumptions, data sources or workings in relation to any assessment of costs that may arise from the

Government's proposal. Stakeholders were also invited to comment on any other positive or negative consequences of this proposal that may arise for affected parties (including, where relevant, small business).

During early consultation, few stakeholders addressed directly the questions set out in the Consultation Paper regarding costs and impacts. For example, the following two employers provided a monetary estimate about what this specific proposal would cost them (noting the information described has been made publicly available by relevant stakeholders, or has been anonymised to avoid disclosing identifying information):

1. BHP estimated the proposal would cost them \$1.3 billion per year.¹⁴⁵ At the department's request, BHP provided further information with respect to this modelling, on a confidential basis. The department has considered this information and does not consider that it aligns with the scope and anticipated application of this proposal.
2. A meat wholesaler with over 1,500 employees estimated the proposal would cost them \$2 million annually, if legislated. The stakeholder did not indicate how many labour hire employees they receive in any given time period, so the department is unable to determine any potential pay difference between labour hire employees and their own employees.

Many stakeholders noted during consultation the difficulty in quantifying costs, as pay rates and project costs often vary from business to business or project to project. Others noted that costs will vary depending on business size, composition, and reliance on labour hire. The department acknowledges stakeholders' views about the complexity associated with quantifying the impacts of the proposal, which have informed the caveats in this analysis about the underpinning assumptions and limitations of the costs that have been estimated.

Overall, employer stakeholders identified a number of other perceived negative impacts from the proposal, including on bargaining, productivity, the ability to deal with surge requirements and seasonal fluctuations, inflation, jobs and investment. For example, employer representatives submitted that the proposal could be a disincentive for labour hire employers to bargain, as bargained agreements that apply to labour hire employers and their employees will be 'overridden' by host enterprise agreement wage rates where they are higher. The department notes that the risk of labour hire employers seeking to avoid enterprise bargaining in the wake of this proposal is mitigated (at least, to a degree) by the recent enterprise bargaining reforms in the *Fair Work Legislation Amendment (Secure Jobs, Better Pay Act) 2022*. These include reforms to make it easier

¹⁴⁵ Coorey, Phillip, 'BHP "right to fear" \$1.3b wages hit', *Australian Financial Review*, 23 May 2023.

for employees to commence bargaining for a replacement agreement and to strengthen the Fair Work Commission’s power to resolve intractable bargaining disputes.

Employer representatives also submitted that the Government’s proposal would drive up labour costs, making hosts less likely to use labour hire and leading to labour hire employers becoming unprofitable and ceasing operations. Employer stakeholders submitted that this, in turn, would lead to losses in productivity as hosts would not be able to access labour hire when they need to.

While the ‘Closing the labour hire loophole’ proposal will lead to increased labour costs in some circumstances, the proposal is intended to protect bargained wages and address pay disparities for labour hire employees. It is also intended to remove an economic incentive for hosts to prioritise externally sourced labour over direct employment, especially where work is ongoing as part of the host’s business. If the proposal does result in a reduction in the use of labour hire, an increase in direct employment is reasonable to expect if hosts still need work to be performed.

Employer representatives also raised concerns that the Government’s proposal would reduce their ability to deal with fluctuations in demand or cover absences. The proposal does not prohibit hosts from using labour hire to respond to a short-term increase in demand for goods or services, seasonal fluctuations, or to cover temporary absences. Instead, it will ensure that where a host requires labour hire for longer than 3 months (by default), the labour hire employees must be paid at least the same as the rates in the host’s enterprise agreement. Additionally, during the application process for a Fair Work Commission order, hosts can apply to the Fair Work Commission have the default period extended, or recur annually, in exceptional circumstances.

Some employers submitted during consultation that the proposal would lead to increases in inflation, due to an increase in wages. This is unlikely, given the relative number of labour hire employees who could be impacted and entitled to higher pay. The current inflationary environment has been principally driven by global price shocks, including pandemic-related supply chain disruptions and the Russian invasion of Ukraine. Analysis from the Reserve Bank of Australia (RBA) notes that supply shocks account for around three quarters of the pick-up in inflation.¹⁴⁶ While wages growth has increased over the last few years, it has not kept pace with the rapid rise in inflation, and the RBA estimates that due to structural differences in the labour market since the 1970s, the effect of wage rises on inflation is low.¹⁴⁷

Areas of agreement and difference between stakeholders, and how stakeholder views informed the design of the preferred approach (Option 1)

The following section summarises areas of agreement and difference between employers and their representatives, and employees and their representatives, expressed during consultation on this proposal. The views of individuals and specific organisations have not been included, given consultations with the department were undertaken on a confidential basis.

1. When the measure is activated	
Areas of agreement	This proposal having an application-based model was not expressly referred to in the department’s Consultation paper, but the scope of this proposal, questions about when and how obligations under this measure would be activated and

¹⁴⁶ Reserve Bank of Australia, *Statement on Monetary Policy – February 2023*.
¹⁴⁷ Suthaharan, N and Bleakley, J, ‘Wage-price dynamics in a high inflation environment: the international evidence’, *Reserve Bank of Australia, Bulletin – September 2022*, p 59.

	imposed on businesses, was a central point of discussion. Employers and employee groups generally did not agree on the scope of the proposal, including who should be captured. There was some level of agreement between stakeholders that labour hire should not be used to deliberately undercut enterprise agreements and that businesses that engage in sharp business practices to undercut bargained wages should be the focus of the proposal. Stakeholders disagree about the extent to which this occurs, if at all. Similarly, there is some level of agreement that an exemption for the use of 'specialist' skills should be considered, though stakeholders generally disagree about the extent of any specialist exemption.
Areas of difference	Employers generally wanted a narrow scope and suggested this proposal should be limited to 'traditional' labour hire arrangements (that is, where third party labour hire employers provide employees to work in a host business). Where employers made submissions about defining 'labour hire' for the purpose of this proposal, they generally favoured the definition found in the <i>Labour Hire Licensing Act 2018</i> (Vic),¹⁴⁸ or the definition of 'on-hire' set out in modern awards.¹⁴⁹ Many employers and their representatives suggested various exclusions from the scope of the proposal. These included service contracting and outsourcing arrangements, independent contractors, entities within the same corporate group, high-income earners, surge periods, small businesses and labour hire employers covered by an enterprise agreement of their own. Labour hire employers who participated in consultation opposed the proposal generally, but acknowledging the Government's election commitment, generally advocated for the proposal to have broad application to all arrangements regarding the provision of labour. These submissions appeared to be informed by a view that it would be unfair (with respect to commercial competitiveness) to limit the proposal to labour hire and not capture other arrangements. Employee organisations advocated for the proposal to have broad coverage with few exemptions (for example, arrangements captured by the transfer of business provisions in the Fair Work Act, and the provision of temporary specialist work). Other stakeholders, such as academics, supported the scope of the proposal covering traditional labour hire arrangements, and State and Territory governments emphasised the importance of aligning any definitions of labour hire with existing labour hire licensing schemes. In later stages of consultation, some employer representatives suggested that obligations should only apply where an application is made to the Fair Work Commission, rather than the obligation automatically applying across all hosts and labour hire employers.
How views informed the	The preferred option for the proposal has been developed to capture only those arrangements where a labour hire employer supplies an employee to work for a

¹⁴⁸ *Labour Hire Licensing Act 2018* (Vic), s 7.

¹⁴⁹ See, e.g., *Aircraft Cabin Crew Award 2020* [MA000047], cl 2.

design of the preferred option	host, and the host has an enterprise agreement that would apply to the employee if they were directly employed by the host. Independent contractors will not be captured by the measure. The preferred option will also capture the supply of workers between entities within the same corporate group (referred to by the department in general terms as ‘internal labour hire’). This is because labour exchanged between these entities can still undermine bargained wages within enterprises.¹⁵⁰ The proposal has also been designed in response to stakeholder feedback so that the provisions, by default, do not apply to arrangements of 3 months or less – unless that exemption period is altered by the Fair Work Commission in exceptional circumstances. This exemption accommodates situations where labour hire is required to meet surge work or fill temporary absences, and can be ordered by the Fair Work Commission as a recurring period if satisfied it is appropriate to do so (to avoid the need for hosts to apply to the Fair Work Commission an extension of the exemption period each year). The preferred option also responds to stakeholder feedback about the complexity of specialist work and service contracting arrangements.¹⁵¹ Labour hire employers and hosts in these service contracting arrangements can draw this to the Fair Work Commission’s attention if an application is made, with the view to the Commission balancing that information and determining that an order should not be made (noting this remains a matter for the Commission to decide). In response to feedback from some employer representatives, employees under training arrangements that apply to their work for the host are also excluded from the proposal. Arrangements where the host is a small business employer are also excluded, noting the department heard from stakeholders that small businesses do not use labour hire to the same extent as larger businesses but that when they do, they are more heavily reliant on it to fill labour shortages.

2. What happens when an order is made

Areas of agreement	Many stakeholders agreed that an obligation to pay a labour hire employee a higher rate of pay should be determined with reference to a host’s enterprise agreement. Some employer and employee representatives made submissions advocating for a direct and hypothetical comparator employee, though employee representatives submitted that the proposal should be triggered even if a host did not employ a person doing the same job as a labour hire worker.
Areas of difference	When consideration was still being given to this proposal being one under which obligations were imposed on labour hire employers and hosts automatically (rather than only by application), some employer representatives raised concerns with the administrative burden on labour hire employers to figure out

¹⁵⁰ See, e.g., Third Interim Report, p 61 [3.67].

¹⁵¹ See, e.g., Australian Resources and Energy Employer Association, *Same Job, Same Pay: Resource employers urge Gov to exclude contractors*, 12 June 2023 <www.areea.com.au/news-media/media-center/media-release-job-pay-resource-employers-urge-gov-exclude-contractors/>.

whether they were covered by the measure, and then to work out the correct rate of pay. Concerns were also raised regarding a lack of certainty for business about whether an arrangement was covered by the measure. For example, concerns were raised by a number of employer representatives about service contracting being caught by the measure, and asserted that these arrangements should be differentiated from labour hire and excluded outright.

Before an application-based model was canvassed with stakeholders, some employer representatives supported obligations being enlivened where a worker would be covered by a classification in a host's enterprise agreement, submitting this was a practical and transparent method for determining when a worker should be entitled to a higher rate of pay, in a way that aligns with the overall intent of the proposal – that is, to protect *bargained* wages from being undercut. One peak employer body noted that classifying an employee under an industrial instrument is a practice that has been applied in Australia for decades and there is stable jurisprudence associated with such a task.

Most employer groups advocated for using 'base rate of pay' to calculate a labour hire employee's entitlements under this proposal, whereas employee organisations and academics supported using the concept of 'full rate of pay' (which has ultimately been adopted).

Employer stakeholders argued that going beyond the base rate of pay to calculate loadings, allowances, overtime, and penalty rates would be onerous and unworkable for business. Employer representatives argued the complexity of using 'full rate of pay' by referring to, for example, different pay periods and methods for calculating entitlements that can arise between industrial instruments, the need for labour hire providers to consider Single Touch Payroll compliance, and that requiring a labour hire employer to apply rules regarding these entitlements – as prescribed in a host enterprise agreement, where these differ from the labour hire employer's ordinary practices – would lead to heightened administrative burden and compliance risks.

Many employers also raised concerns with the inclusion of incentive and performance-based pay, arguing these would be difficult for labour hire employers to calculate. Labour hire employers generally supported what they referred to as 'identifiable' pay in an agreement and requested clear guidance on how to calculate entitlements.

Employers also raised concerns with labour hire employees being paid the same as host employees without taking into account differences in skills, experience and qualifications. They argued that requiring labour hire employees with little to no experience to be paid the same as more qualified or experienced host employees would be an adverse outcome of the proposal.

Few stakeholders addressed how enforcement of the proposal should work. Of the employer organisations that did address enforcement, some submitted that penalties should only apply to *deliberate* breaches of statutory obligations. Employee organisations wanted unions to have the power to enforce relevant provisions and supported civil penalties for breaches, and for breaches to be treated as underpayments.

	Where employers addressed the topic of transition, they requested a long transition period (more than 12 months after Royal Assent). A number of employer representatives advocated for that period to be at least 1-2 years.
How views informed the design of the preferred option	The final design of the proposal is an application-based model where obligations on business will only be activated by application to the Fair Work Commission. During this application, it will be open to business to draw to the Fair Work Commission's attention the nature of the arrangement in place, including whether it is a service contracting arrangement, which will inform whether the Commission will make an order. The capacity for parties to address this in the Commission is intended to address concerns raised by employer representatives who sought clarity on the types of arrangements to which this measure applies. During an application, information is expected to be provided by a host to the Fair Work Commission and other parties about how to interpret their enterprise agreement and the rates that would be payable to affected labour hire employees if they were directly engaged. The disclosure of this information during the application process, and the fact that the Fair Work Commission may set out the correct rate of pay in an order, should allay concerns from labour hire employers about not having sufficient information to be able to comply with a Fair Work Commission order. When an order is made, payments to labour hire employees will be calculated with reference to the 'full rate of pay' in the host's enterprise agreement. While stakeholders raised administrative burden as a reason for limiting this proposal to the 'base rate of pay', for many workers a notable portion of their income comes from penalties, loadings and allowances – to exclude these from the proposal would be insufficient to protect bargained wages and would risk labour hire employees being paid less than host employees under such agreements. In order to address concerns about labour hire employees being paid the same as host employees with disparate skills and experience, the proposal will operate so that where there are multiple classifications and/or multiple pay points for a classification in a host's enterprise agreement that are distinguished based on employee skills, qualifications and/or experience, the obligation on labour hire employers is to pay pursuant to the pay point referable to the employee's skills, qualification, experience.

3. How disputes are resolved	
Areas of agreement	Most stakeholders supported the Fair Work Commission having a role in resolving disputes. Few stakeholders opposed the Fair Work Ombudsman regulating the proposal.
Areas of difference	Employer groups proposed that parties be required to attempt to resolve disputes at the workplace level before applying to the Fair Work Commission. Most employer representatives did not support the Commission having the power to arbitrate disputes, <i>unless</i> by consent of the parties. A small number of employer representatives did not want the Commission to have a role in

	resolving disputes at all. Employees and employee organisations supported the Commission having broad powers to deal with disputes in any way it sees fit, including arbitration and the ability to make orders determining correct pay rates. Some stakeholders supported a process for affected parties (such as labour hire employees) to be able to apply to the Commission for guidance prior to the commencement of a labour hire arrangement to obtain clarity about their entitlements and obligations. Regarding commencement timeframes, employer representatives sought a lengthy period before the measure commences (1-2 years). Employee representatives sought for all provisions to commence immediately.
How views informed the design of the preferred option	If disputes arise after a Fair Work Commission order has been made, the proposal requires that resolution is attempted at the workplace level <i>before</i> applying to the Commission for dispute resolution. If parties consent, the Commission will have the power to arbitrate, including to order backpay and prospectively determine the correct rate of pay. If parties do not consent, the Commission can only prospectively determine the correct rate of pay, with backpay only available through court action. Consistent with the Fair Work Ombudsman's role as regulator of the Fair Work Act, the Ombudsman will be able to enforce entitlements and obligations under this proposal. The proposal includes anti-avoidance provisions that prohibit behaviour intended to prevent a Commission order being made. Few stakeholders gave feedback on anti-avoidance measures. Those employer organisations who did sought simple and confined measures, while employee organisations supported broad anti-avoidance provisions to prevent a multitude of corporate behaviours that may be designed or used to circumvent obligations. Taking into account stakeholder requests for a transition period after Royal Assent that would give businesses time to prepare for new obligations, orders made by the Commission will only be enforceable on and from 1 November 2024, however applications can be made from Royal Assent to clarify entitlements and obligations in advance. Anti-avoidance provisions will apply retrospectively from the introduction of the Bill to the House of Representatives, to deter hosts and labour hire employers from altering their arrangements to avoid the new obligations before the Bill is passed.

Impact Analysis Question 6:

Which is the best option and how will it be implemented?

Which is the best option?

The Government is seeking to amend the Fair Work Act to limit circumstances in which the use of labour hire undercuts bargained wages. Option 1 (legislating the Government's 'Closing the labour hire loophole' proposal) achieves this and aligns with the principles considered by the department during the design of this policy (see above under Impact Analysis Question 4, and the table below).

The issue addressed by this proposal has been considered extensively in (at least) three. The Job Security Committee and the Victorian Inquiry thoroughly reviewed the status quo and sought views on alternate options for addressing the operation of the Fair Work system that allows the use of labour hire to undercut bargained wages. Legislating the 'Closing the labour hire loophole' proposal is consistent with the findings and recommendations of these Reviews.

The department's assessment of Options 1 and 2 against its four guiding principles is, in summary:

	Option 1: (Legislative measure)	Option 2: (Status quo)
Business should be able to access labour hire for genuine work surges and short-term needs	Very Good	Very Good
Labour hire employees should be paid at least the amount provided in a host's enterprise agreement, where that agreement would apply to the employee if they were directly employed	Very Good	Poor
Employers should not be able to undercut enterprise agreements through the use of labour hire	Very Good	Poor
The proposal should only impose a reasonable regulatory burden on affected parties	Good	Very Good

Note: The department has assessed each Option against these four principles, having regard to the impacts on stakeholders. 'Very good' is considered to be an optimal outcome for stakeholders intended to benefit from the proposal. 'Good' is considered to be a positive outcome for stakeholders. 'Fair' is considered to be an adequate outcome with little impact on stakeholders. 'Poor' is considered a negative outcome for stakeholders.

Which option is the most effective, appropriate, efficient, and least costly?

Option 1 is the preferred measure because it is, on balance, the most effective, appropriate and efficient option for achieving the Government's aims to prevent the use of labour hire undercutting bargained wages. It is the most effective option because it involves legislating to address the regulatory shortfall in the Fair Work Act which currently allows labour hire employees to be paid less than what they would be paid under a host's agreement, and is appropriate and efficient because it is structured as an application-based model. This means that only those labour hire arrangements in which labour hire employees are paid less will be covered by a Fair Work Commission order, insulating hosts and labour hire employers from additional administrative burden in industries where the use of labour hire does not, or does not *often*, undercut bargained wages, without the need to expressly carve out entire industries of the Australian economy from the scope of the proposal.

Option 1 addresses the problem identified by Government and does not prevent business from accessing labour hire for genuine work surges and short term needs. Businesses can also still access labour hire longer term, but labour hire employees must be paid no less than what they would be paid under the host's enterprise agreement if they were directly employed, in cases where a successful application has been made. This removes an economic incentive for employers to undercut bargained rates through the use of labour hire.

Conversely, Option 2 (maintaining the status quo) does not meet the Government's election commitment or adequately align with the guiding principles considered above in relation to measuring an effective resolution to address identified issues. While maintaining the status quo essentially means a continuation of existing labour hire arrangements and does not impose

additional regulatory burden on business, it does not ensure that labour hire employees are paid at least the rates in a host's agreement, meaning the use of labour hire could continue to undercut those rates.

Option 1 is a targeted measure that will only apply to businesses as a result of a Fair Work Commission order, and the Fair Work Commission will be empowered to resolve disputes in an efficient and cost-effective manner. Anti-avoidance measures will ensure parties are aware of prohibited behaviours and will deter them from attempting to avoid their obligations.

It is acknowledged that Option 1 is likely to increase costs for some businesses, due to the increased labour and administrative costs for those responding to an application for a Fair Work Commission order (and bound by such an order if one is made). These costs are considered reasonable to ensure bargained wages are not undercut.

While Option 2 imposes no new costs on hosts and labour hire employers by retaining current arrangements, it does not address concerns identified by Government and articulated in its election commitment. It also does not address some of the secondary benefits outlined above, such as improvements in job security and work health and safety outcomes, including mental health outcomes. The World Health Organisation (WHO), for example, has outlined how decent work supports good mental health by providing a livelihood, and improved confidence and social functioning.¹⁵² Higher paying and quality jobs can deliver better outcomes, including improved financial freedom, improved health outcomes, and a stronger link between the employer and employee leading to higher staff retention, increased investment in education and training, and improved productivity.¹⁵³

Decision-making process

As set out above, the Government made an election commitment to legislate this proposal. The department has consulted over a considerable period of time with a broad range of stakeholders on the design of the policy and its costs and impacts. Consultation involved extensive meetings and the review of written submissions in response to the Consultation Paper. The department has had regard to stakeholder submissions and arguments in the design of the policy, particularly where submissions spoke to the operation and practicality of its implementation.

How will the option be implemented?

Implementing Option 1 will require legislative amendments to the Fair Work Act. The Fair Work Commission, as the tribunal that will handle applications from employees, will play a central role in the implementation of the policy. The Government has allocated \$3.4 million over 4 years to the Fair Work Commission as part of the 2023-24 Budget to prepare for the commencement of this proposal. The Fair Work Commission will be required to publish guidance about the operation of this proposal, which will assist parties navigate their entitlements and obligations. The Fair Work Commission may establish a dedicated practice area and case management practices to support Members dealing with disputes.

The Fair Work Ombudsman will publish guidance about the operation and application of the proposal, including the roles and responsibilities of host employers, labour hire providers and workers. Parties will be able to access information and assistance from the Ombudsman about

¹⁵² World Health Organization, 'Mental health at work', September 2022.

¹⁵³ OECD, *Measuring and Assessing Job Quality: The OECD Job Quality Framework*, 2015.

understanding and meeting the new obligations, and about dealing with disputes that may arise under the provisions.

The Fair Work Commission and the Fair Work Ombudsman will both play roles in dispute resolution and enforcement, with the Fair Work Commission able to deal with disputes that arise after an order is made.

Implementation risks regarding this proposal are considered to be low. There is a risk that some labour hire employees eligible to apply to the Fair Work Commission may choose not to do so, perhaps with reservations about adverse treatment from their employer if they are seen to be pursuing higher rates of pay in the Fair Work Commission. For example, casual labour hire employees may be concerned that applying to the Fair Work Commission may result in their rostered hours being reduced. As 84 per cent of labour hire employees are employed casually, this concern may affect a significant proportion of employees eligible to seek an order. It would be open to any employees who experience adverse action as a result of exercising workplace rights under this proposal to explore their rights and options for recourse under the Fair Work Act's General Protections provisions.¹⁵⁴

Further, some labour hire employers, hosts and affected employees may take some time to become aware of the proposal, even after it is legislated, unless given guidance. However, this risk will be mitigated through the advisory and stakeholder engagement work that forms part of the Fair Work Ombudsman and Fair Work Commission's roles, and an express obligation in this proposal for the Commission to make clear guidance material available to the public.

There is also a risk that employers may develop new practices or alter corporate structures to avoid new obligations or prevent Fair Work Commission orders from being made. This risk, however, will be mitigated by the anti-avoidance provisions to be included in the Fair Work Act, capable of enforcement by affected parties and the Fair Work Ombudsman.

In addition (though separately to this proposal), the Government has allocated \$25.1 million over 3 years to the Productivity, Education and Training (PET) fund. The PET fund is for key employer and employee representative organisations to engage with Government on workplace reforms, and to support the development and roll out of training and education activities for their members. Funding supports an understanding and implementation of the Government's workplace relations reforms at the workplace level, including the 'Closing the labour hire loophole' proposal.

Impact Analysis Question 7:

How will you evaluate your chosen option against the success metrics?

Consistent with its existing remit to monitor and advise on the implementation of recent Government reforms, and the operation of workplace relations laws and policies generally, the department will incorporate evaluation practices relating to this proposal into its current functions upon this proposal being legislated.

In order to provide timely and accurate advice to Government, in real time, about the impact of this proposal once legislated, the department will monitor Fair Work Commission decisions with respect to applications for orders to activate the proposal, including the Commission's consideration of the various discretionary factors to be included in the Fair Work Act (to identifying whether the Commission is affording weight to those factors in a manner consistent with pre-legislative

¹⁵⁴ See ss 365 and 372 of the *Fair Work Act 2009*

expectations). Policy and legal teams in the department will update tasking priorities to include tracking these Fair Work Commission decisions, having regard to, for example:

- the number of orders applied for and made
- the pay disparity between labour hire employees and host employees, and any subsequent pay increase for labour hire employees after orders are made
- the common industries in which businesses responding to applications belong
- the types of exemptions considered and determined by the Fair Work Commission in its decision making
- the rate of disputes that are lodged with the Fair Work Commission for resolution after an order is made

Advice to Government, particularly in the first 1-2 years of its operation, will inform policy considerations with respect to whether further amendments to the Fair Work Act may be needed, or other action is necessary to ensure the Government's policy intent is met.

Broadly, the Government's proposal will be considered effective if there is an observable increase in the wages paid to labour hire employees. Specifically, key metrics for successful implementation of this proposal, and indicators as to whether the proposal is effective in achieving its intended outcome, will include:

- a reduction in the wage gap between labour hire employees and host employees within industries and/or occupations where there had been a negative wage gap; and
- an increase in direct employment in industries with high rates of labour hire use.

ABS wage data will be matched with outcomes from Fair Work Commission orders over time, to evaluate whether the proposal is leading to an increase in wages for covered labour hire employees.

Data to assess these metrics will be derived from ABS publications on the use of labour hire and on median wages of labour hire employees compared to all employees. As noted throughout this analysis, there are limitations in the ABS data that will continue to impact the department's ability to measure the impact of the proposal in detail.

The proposal will also be considered effective if disputes are handled efficiently and effectively by the Fair Work Commission. Key metrics with regard to this are expected to include:

- Parties impacted by the provisions understanding their rights and obligations and, where relevant, complying with the provisions (this will be informed by data captured by the Fair Work Ombudsman and rates of court litigation to enforce these provisions).
- Low levels of disputes notified to the Fair Work Commission regarding this proposal.
- Key Performance Indicators within the Fair Work Commission regarding frequency and settlement timeframes for disputes reducing over time.

In addition to all of the above, the department will also continue to use its existing processes for consultation and engagement with employers and employees and their representatives in relation to workplace relations matters, in order to evaluate how the measure is working in practice – for example, through NWRCC, and other opportunities for stakeholder engagement that arise over time.

Detailed wage costings

Summary and methodology

The Government's 'Closing the labour hire loophole' proposal will lead to an increase in wages for labour hire employees who are currently seeing their wages undercut. This increase in wages is estimated to be up to \$510,552,085 per year, with a 10 year cost of up to \$5.1 billion.

This estimate of around \$510.6 million per year is the upper limit of the estimated wage bill. This figure is informed by the assumption that 66,446 labour hire employees may be eligible to be covered by a Fair Work Commission order (that is, those employees who meet requisite criteria and experience a negative wage differential compared to host employee – the department estimates that those labour hire employees currently earn on average \$4.79 per hour *less than* non-labour hire employees).

However, the department expects that a notable proportion of these 66,446 workers will *not* be covered by a Fair Work Commission order, and that as a result, the total wage bill will be less than the \$510.6 million per year that has been estimated. Reasons for this may include:

- that an individual labour hire employee, or group of labour hire employees, may not apply to the Fair Work Commission for an order without assistance from a representative, meaning they may not benefit from an order; and
- where the difference between labour hire employees' wages and host employees' wages is minimal, some labour hire employees and/or their representatives may consider the administrative cost of engaging with the Fair Work Commission outweighs any monetary benefit to be gained (in which case, labour hire employers and hosts will not incur costs engaging with applications).

It may also be the case that labour hire employees are, at first, unaware that they are eligible to make an application, or that some labour hire employees may be disincentivised from applying due to a risk of adverse treatment from their employer for seeking higher wages in the Fair Work Commission and causing a business expense (noting the General Protections in the Fair Work Act will mitigate this risk).

However, in the absence of reliable data to reduce the proportion of labour hire employees who may bring an application, or have an application brought on their behalf, it not possible to defensibly reduce this wage cost estimate.

That noted, estimating the upper bound of an increase in labour hire employee wages means considering:

- a. the number of labour hire employees estimated to be in-scope of the proposal (that is, the number of employees that may be covered by a Fair Work Commission order following a successful application);
- b. the negative wage difference between labour hire employees and non-labour hire employees; and
- c. the average number of hours worked by labour hire employees in a year.

This means the increase in labour hire employee wages can be calculated with the following formula:

$$\text{Number of labour hire employees eligible to be covered by a Fair Work Commission order} \times \text{negative wage difference} \times \text{average weekly hours worked} \times \text{average weeks worked in a year} = \text{Annual wage increase}$$

Therefore:

$$66,446 \times \$4.79 \text{ (approx.)} \times 38.1 \text{ hours per week (approx.)} \times 42.1 \text{ weeks per year (approx.)} = \text{around } \$510.6 \text{ million}^{155}$$

Estimating the number of labour hire employees eligible to be covered by a Fair Work Commission order

The department estimates **66,446** labour hire employees may be eligible to be covered by a Fair Work Commission order. This figure excludes certain workers from headline ABS data about the total number of labour hire employees in Australia and includes an estimate for internal labour hire (where an employer provides labour to another employer in the same corporate group).

Exclusions

ABS data shows there are 319,863 labour hire employees in Australia (rounded elsewhere to 319,900).¹⁵⁶ However, the following employees within that headline figure can be excluded from these calculations:

Exclusion	Rationale
Part-time labour hire workers	Part-time labour hire employees who have been employed for between 3 months and 2 years earn on average \$9.67 per hour more than part-time non-labour hire workers.¹⁵⁷ This means the Government's proposal is unlikely to apply to part-time labour hire employees (because there is no negative wage differential to justify the making of a Fair Work Commission order, because it would have no work to do), and they can be excluded from calculations. ABS data show that 81.2 per cent of labour hire employees work full-time.¹⁵⁸ Therefore: $319,863 \times (81.2\%) = \text{around } 259,676$ (that is, the total number of labour hire employees, excluding part-time labour hire employees).
Labour hire engagements of 3 months or less	The default 3 month surge exemption will generally exclude arrangements of 3 months or less. ABS data show that around 75.4 per cent of full-time labour hire employees work in their jobs for more than 3 months,¹⁵⁹ meaning 24.6 per cent of the 259,676 labour hire employees can be excluded from calculations. Therefore: $259,676 \times (\text{approx. } 75.4\%) = \text{around } 195,869$¹⁶⁰

¹⁵⁵ Note: Figures in the component parts of this formula have been rounded for readability. Final statistics have been calculated with regard to precise data points in ABS source material.

¹⁵⁶ ABS, *Labour hire workers, June 2022*; using *Labour Account, June 2022*.

¹⁵⁷ ABS, *Labour hire workers, June 2022*, using *Characteristics of Employment, August 2022*.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid, using unpublished Tablebuilder.

¹⁶⁰ Note: Figures here have been rounded for readability. Final statistics have been calculated with regard to precise data points in ABS source material.

Host employers without an enterprise agreement or that are a small business employer	The Government's proposal only applies where the host has an enterprise agreement that would apply to the labour hire employee if they were directly employed, and where the host is not a small business (employing fewer than 15 employees). This means any labour hire employees working in hosts without an enterprise agreement, or working in hosts that have fewer than 15 employees, can be excluded from calculations. Enterprise agreement coverage varies significantly across industries. However, using ABS data on how labour hire employees are distributed across industries and the proportion of host employees covered by enterprise agreements in those industries, the department can estimate the number of labour hire employees placed in hosts with an enterprise agreement. In summary, ABS data suggest around 31.4 per cent of labour hire employees will be working in workplaces where the host has an enterprise agreement.¹⁶¹ While data are not available on the size of host employers, ABS data show that just 1.8 per cent of employees on enterprise agreements are employed in small businesses. Put another way, 98.2 per cent of labour hire employees on enterprise agreements can be estimated as work in hosts where the Government's proposal will apply.⁸⁹ Therefore: $195,869 * (\text{approx. } 31.4\%) * (\text{approx. } 98.2\%) = \text{around } 60,446$.¹⁶²

Accounting for internal labour hire

The 60,446 figure above does not account for internal labour hire arrangements. As set out in answer to Impact Analysis Question 4, the department has incorporated an additional 6,000 workers into calculations to account for internal labour hire, bringing the total number of workers to **66,446**.

Estimating the negative wage difference

The department estimates a negative wage difference for labour hire employees of **-\$4.79 per hour**. This figure is calculated by applying the following exclusions and adjustments.

Exclusions

Exclusions	Rationale
Excluding part-time labour hire workers	As above, ABS data show that on average part-time labour hire employees earn \$9.67 more than part-time non-labour hire workers. ¹⁶³ This means the proposal will not apply to lift part-time labour hire employee wages, and they can be excluded from calculations.
Excluding arrangements	It is important to exclude data that may skew calculations. Data about the

¹⁶¹ See together: ABS, *Characteristics of Employment, August 2022*, unpublished Tablebuilder; ABS, *Labour hire workers, June 2022*; using *Labour Account, June 2022*; ABS, *Employee Earnings and Hours, May 2021*, unpublished Tablebuilder.

¹⁶² Note: Figures here have been rounded for readability. Final statistics have been calculated with regard to precise data points in ABS source material.

¹⁶³ ABS, *Labour hire workers, June 2022*, using *Characteristics of Employment, August 2022*.

with more than two years' duration	wages of people in their jobs for more than 2 years falls into this category. ABS data¹⁶⁴ show that the median wage of people in their job for <u>more</u> than two years is 19.1 per cent higher than the median wage of those in their job for <u>less</u> than two years. Further, 56.5 per cent of non-labour hire workers have been in their job for more than two years, but this is only 19.4 per cent for labour hire employees (reflecting the transient nature of most labour hire work). This means that if labour hire employee wages are compared against non-labour hire worker wages, non-labour hire worker wages will be skewed higher because, on average, they are in their jobs for longer. To account for this, the department has only compared labour hire wages with non-labour hire wages, where people have worked in their jobs for between 3 months and 2 years (the 3 month minimum reflects the proposal's default 3 month surge exemption). Confining data to those workers who have worked in their jobs for less than 2 years means average labour hire employee wages are \$35.46 per hour, and average non-labour hire worker wages are \$37.30 per hour. This means labour hire employees are paid on average \$1.84 less than non-labour hire workers, before adjustments.¹⁶⁵

Adjustments

Excluding arrangements that are longer than 2 years and part-time labour hire arrangements suggests the wage difference between labour hire workers and non-labour hire worker is **-\$1.84 per hour**. However, this hourly rate does not account for:

- casual loadings (including data suggesting labour hire employees who work full-time hours are more likely to be casuals than non-labour hire workers working full-time hours); and
- wage differences by occupation.

The table below takes the -\$1.84 per hour figure and accounts for these, to come to **-\$4.79 per hour**.

Adjustments	Rationale
Accounting for casual loading	Having calculated a negative wage difference of -\$1.84, it is important to account now for casual loadings, using ABS data.¹⁶⁶ Around 80.5 per cent of labour hire employees working full-time hours do not have paid leave entitlements, compared with only around 14.7 per cent of non-labour hire workers working full-time hours not having paid leave entitlements.¹⁶⁷ This suggests that, despite working full-time hours, many labour hire employees are likely to be casuals. Further, this means that despite generally

¹⁶⁴ Ibid.

¹⁶⁵ Note: Figures here have been rounded for readability. Final statistics have been calculated with regard to precise data points in ABS source material.

¹⁶⁶ ABS, *Labour hire workers, June 2022*, using *Characteristics of Employment, August 2022*.

¹⁶⁷ Note: Figures here have been rounded for readability. Final statistics have been calculated with regard to precise data points in ABS source material.

	receiving a casual loading (usually 25 per cent), labour hire employees working full-time hours are still receiving \$1.84 per hour <u>less than</u> non-labour hire counterparts (who are more likely to be permanent, given only 14.7 per cent do not have paid leave entitlements). To ensure calculations are comparing ‘like for like’ cohorts, it is necessary to reduce casual loadings from existing calculations in a way that reflects the likelihood of those workers actually being casuals (80.5 per cent and 14.7 per cent, respectively). Using ABS data on median wages for permanent and casual employees, and accounting for the percentages above of labour hire and non-labour hire workers without paid leave entitlements and estimated to be casuals,¹⁶⁸ the department estimates average wages are around \$29.08 per hour for labour hire employees and around \$36.41 for non-labour hire workers. This means the negative wage difference estimate comes to -\$7.33, which is the figure used for the final adjustment in the next row (see Table 2).¹⁶⁹
Accounting for occupational differences	The -\$7.33 per hour figure does not account for wage differences between occupations. ABS data show labour hire employees tend to work in lower paid occupations than non-labour hire workers (see Table 3).¹⁷⁰ To account for this, the department has adjusted calculations to account for different wage gaps between occupations, which brings average wages to \$31.62 per hour for labour hire employees and \$36.41 per hour for non-labour hire workers. This means the actual negative wage differential for labour hire employees, taking all of the above exclusions and adjustments into account, is -\$4.79 per hour (see Table 4).¹⁷¹

Estimating average hours worked

ABS data show that on average full-time labour hire employees work 38.1 hours per week for 42.1 weeks per year, where they have worked in their main job for more than 13 weeks (which, as a period of greater than 3 months, exceeds the default exemption period that will be considered when an application is made to the Fair Work Commission).¹⁷² These data are used in the formula above.

Limitations

Labour hire employees and labour hire employers represent a small proportion of the overall labour market.¹⁷³ Available data on the labour hire workforce has significant limitations as result of the small

¹⁶⁸ Ibid.

¹⁶⁹ Note: Figures here have been rounded for readability. Final statistics have been calculated with regard to precise data points in ABS source material.

¹⁷⁰ ABS, *Labour hire workers, June 2022*, using *Characteristics of Employment, August 2022*.

¹⁷¹ Note: Figures here have been rounded for readability. Final statistics have been calculated with regard to precise data points in ABS source material.

¹⁷² ABS, *Labour hire workers, June 2022*, using *Characteristics of Employment, August 2022*; ABS, *Jobs and Income of Employed Persons 2019-20*. Note: Figures here have been rounded for readability. Final statistics have been calculated with regard to precise data points in ABS source material.

¹⁷³ In August 2022, 2.3% of all employed persons in Australia had a job in labour supply services: ABS, *Labour hire workers, June 2022* (released 6 December 2022), using ABS, *Labour Account, June 2022*.

sample size.¹⁷⁴ The department acknowledges these calculations contain a high degree of uncertainty as a result. Data limitations include the following:

- Precise statistical data taken from ABS sources has been rounded for readability. Final calculations regarding monetary costs, adjustments, and the number of employees falling into different categories (including exemption categories) are based on precise figures in source data and may reflect minor discrepancies above once added together.
- Available data do not identify individual circumstances. For example, while on average part-time labour hire employees are paid more than their non-labour hire worker counterparts, there will be occasions where a part-time labour hire employee is paid less.
- ABS's estimate of the number of labour hire employees (319,900) cannot be disaggregated by characteristics such as hours worked, hourly wage, industry or occupation of employment.
- ABS data is limited to businesses and their employees classified to the ANZSIC 4-digit industry class of 'labour supply services'. This includes a small number of 'direct' employees of labour hire firms (e.g., administrative, managerial and support staff).¹⁷⁵ If arrangements that may be caught by the Government's proposal have been classified using a different industry class, they will not be reflected in the calculations above.
- ABS data on internal labour hire employees and their working arrangements is not available through the Labour Supply Services industry disaggregation. As set out in answer to Impact Analysis Question 4, it is assumed the characteristics of this group of approximately 6,000 labour hire employees are the same as the characteristics of the broader group of labour hire employees, for whom there is ABS data available on earnings and working arrangements.
- It is assumed there are no changes, aside from a wage increase for the eligible employees, to the working arrangements of labour hire employees.
 - Specific outcomes, such as changes in hours worked, are dependent on the approach that different parties take to the amended provisions.
 - In order to include a more detailed estimate about potential changes to working arrangements in labour hire employer businesses, further assumptions would need to be made about the behaviour and decisions of independent parties, as well as the interaction between various other measures in the bill and other government reforms, and any changes in broader economic conditions.
- It is assumed that the coverage of enterprise agreements in hosts reflects the coverage of enterprise agreements for all employers within relevant industries. This assumption has been made because there is no data available on how many businesses use labour hire and whether those businesses have enterprise agreements.
- It is assumed that the proportion of labour hire employees working for hosts that are small businesses with enterprise agreements reflects the proportion of all employees in small businesses on enterprise agreements.

¹⁷⁴ The ABS notes that data sources relevant to understanding labour hire work 'have relative strengths and limitations': ABS, *Labour hire workers, June 2022* (released 6 December 2022).

¹⁷⁵ Ibid.

- In addition, while ‘small business’ for the purposes of this proposal is a business employing less than 15 employees, ABS data typically define small businesses as those with less than 20 employees. Accordingly, the estimate of 1.8 per cent of employees on enterprise agreements that are employed by small businesses refers to those with less than 20 employees, which is likely to be a minor overestimate in comparison to the share of businesses with less than 15 employees.
- As a result, the final estimated cost to business is likely to be a very minor underestimate, as it will exclude labour hire employees working for hosts that employ between 15 and 19 people (to whom the policy would apply). Assumptions have been incorporated in relation to the default 3 month surge exemption period, noting parties can apply to the Fair Work Commission to extend or reduce this period in exceptional circumstances.

Tables

Table 1: Estimating host employers with an enterprise agreement by industry

Industry	Share of labour hire employees ¹	Estimated number of labour hire employees ²	Proportion of employees on enterprise agreements ³	Estimated number of labour hire employees on enterprise agreements ²
Agriculture, Forestry and Fishing	2.2%	7,168	0.0%	0
Mining	5.4%	17,248	37.2%	6,410
Manufacturing	13.0%	41,663	21.4%	8,916
Electricity, Gas, Water and Waste Services	3.2%	10,080	59.8%	6,028
Construction	4.1%	13,216	15.2%	2,007
Wholesale Trade	6.9%	22,175	10.3%	2,285
Retail Trade	3.2%	10,080	38.0%	3,835
Accommodation and Food Services	3.6%	11,424	16.3%	1,857
Transport, Postal and Warehousing	8.8%	27,999	42.2%	11,810
Information Media and Telecommunications	0.9%	2,912	31.0%	903
Financial and Insurance Services	5.9%	18,815	32.1%	6,045
Rental, Hiring and Real Estate Services	1.3%	4,032	7.5%	302
Professional, Scientific and Technical Services	5.6%	17,920	6.7%	1,203
Administrative and Support Services	16.2%	51,743	13.6%	7,040

Public Administration and Safety	7.5%	23,967	80.2%	19,232
Education and Training	4.6%	14,784	82.2%	12,150
Health Care and Social Assistance	6.7%	21,503	47.8%	10,281
Arts and Recreation Services	0.0%	0	30.9%	0
Other Services	1.0%	3,136	8.4%	263
Total		319,863		100,566

¹ Source: ABS, *Characteristics of Employment, August 2022*, unpublished Tablebuilder.

² Source: Derived estimate applying proportions in table to overall estimate of labour hire workers from ABS, *Labour hire workers, June 2022*; using *Labour Account, June 2022*.

³ Source: ABS, *Employee Earnings and Hours, May 2021*, unpublished Tablebuilder.

For the table above, it is noted that:

- The estimated number of labour hire workers working in workplaces with an enterprise agreement is $100,566/319,863 = 31.4\%$ (this is the figure applied above).
- As enterprise agreement coverage varies significantly by industry (from 82.2 per cent of employees in Education and training to 6.7 per cent of workers in Professional, scientific and technical services), estimating the number of labour hire workers working for a host that has an enterprise agreement is done at the industry level.
- The table above sets out a percentage breakdown, by industry, of enterprise agreement coverage insofar as that relates to directly engaged employees and the estimated number of labour hire workers working within that industry (from which the department can draw an estimate of the percentage and number of labour hire workers working in host employers with an enterprise agreement in each industry, providing at the end a global figure on which to base subsequent calculations).

Table 2: Accounting for casual loading

Full-time employees	Labour hire worker	Non-labour hire worker	Wage difference
Initial median hourly wage	\$35.46	\$37.30	-\$1.84
Post casual adjustment median hourly wage	\$29.08	\$36.41	-\$7.33

For the table above, and with reference to ABS Characteristics of Employment data:¹⁷⁶

- Median wage for permanent employees (19.5% of full-time labour hire) = \$27.34
- Median wage for casual workers (80.5 per cent of full-time labour hire) = \$36.88
- Median wage for casual workers after 25 per cent casual loading is removed = \$29.50
- $(19.5\% \times \$27.34) + (80.5\% \times \$29.50)$ = median hourly wage after casual adjustment of \$29.08

Also,

- Median wage for permanent employees (85.3 per cent of full-time non labour hire) = \$38.55
- Median wage for casual workers (14.7 per cent of full-time non labour hire) = \$30.00
- Median wage for casual workers after 25 per cent casual loading is removed = \$24.00
- $(85.3\% \times \$38.55) + (14.7\% \times \$24.00)$ = median hourly wage after casual adjustment of \$36.41

¹⁷⁶ ABS, *Characteristics of Employment, August 2022*, unpublished Tablebuilder.

Table 3: Median wages by occupation

Occupation	Full-time labour hire share of employment ¹	Full-time non-labour hire share of employment ¹	Median wage full-time ¹	Contribution to hypothetical median wage under full-time labour hire occupation share	Contribution to hypothetical median wage under full-time non-labour hire occupation share
Managers	3.8%	12.9%	\$48.13	\$1.85 (= \$48.13 * 3.8%)	\$6.23 (= \$48.13 * 12.9%)
Professionals	18.9%	29.6%	\$52.11	\$9.86	\$15.45
Technicians and Trades Workers	15.7%	16.2%	\$33.02	\$5.18	\$5.35
Community and Personal Service Workers	3.1%	7.6%	\$31.68	\$0.97	\$2.42
Clerical and Administrative Workers	20.8%	13.2%	\$36.23	\$7.53	\$4.80
Sales Workers	0.0%	5.8%	\$30.70	\$0.00	\$1.79
Machinery Operators and Drivers	24.0%	7.7%	\$31.61	\$7.59	\$2.44
Labourers	13.7%	6.8%	\$28.46	\$3.90	\$1.93
Total				\$36.88	\$40.40

¹ Source: ABS, *Characteristics of Employment, August 2022*, unpublished Tablebuilder.

Table 4: Adjusted wage figures accounting for casual loading and occupation

Full time employees	Labour hire worker	Non-labour hire worker	Wage differential
Post casual adjustment median hourly wage	\$29.08	\$36.41	-\$7.33
Post casual and occupation adjusted median hourly wage	\$31.62	\$36.41	-\$4.79

Costing administrative burden of reviewing guidance materials

In various sections in previous Annexures, reference is made to hosts and labour hire employers reading guidance materials made available by the Fair Work Commission about this proposal, and that doing so would attract a cost. This Annexure sets out how 'reading guidance materials' is costed, and where possible, the cost to different parties.

Time taken to read guidance materials and underlying cost assumptions

The Office of Impact Analysis provides an hourly rate of \$79.63 for 'work related labour rates', which can be used here for calculating time-based costs relating to reading guidance material.¹⁷⁷ In relation to the amount of time affected parties may take to read guidance material made available by the Fair Work Commission, the department has assumed 30 minutes to quantify a minimum amount of time for these calculations. Examples of similar guidance produced by the Fair Work Ombudsman and Fair Work Commission can be found on their respective websites, and it is assumed similar guidance would be prepared for the 'Closing the labour hire loophole' proposal, once legislated.¹⁷⁸

Feedback received from stakeholders during consultation did not generally describe or quantify a compliance burden that may arise in relation to reading publicly available guidance material on the proposal. In light of this, an estimate of 30 minutes has been informed by taking into account similar time considerations used in previous impact analyses for workplace relations reforms, such as:

- 25 minutes, in relation to assessing the regularity of a casual employee's engagement and calculating cost liabilities if the casual employee has been misclassified;¹⁷⁹
- 15 minutes, in relation to reading, understanding and implementing new provisions regarding part-time flexibility provisions;¹⁸⁰ and
- 15 minutes, in relation to considering guidance materials from the Fair Work Ombudsman to determine obligations regarding the sunseting of 'zombie agreements' (noting this '15 minute' window is also cited with respect to considering guidance material and understanding obligations with respect to single and multi-enterprise bargaining, and changes to the Better Off Overall Test, respectively).¹⁸¹

With these previous figures taken into account, the department acknowledges that obligations arising under this proposal may be less familiar than, for example, obligations relating to casual employment or bargaining (though the above-listed measures did introduce new obligations previously unfamiliar to affected parties). Nonetheless, the department considers it appropriate to allow for 30 minutes for parties to consider publicly available guidance to determine the scope of the proposal and how applications made to the Fair Work Commission may be handled.

¹⁷⁷ OIA, *Regulatory Burden Measurement Framework*, p 11.

¹⁷⁸ See, e.g., Fair Work Ombudsman, *New rules for enterprise agreements and bargaining* (Web page) <www.fairwork.gov.au/tools-and-resources/fact-sheets/rights-and-obligations/enterprise-bargaining>; Fair Work Commission, *Secure Jobs Better Pay Act – what's changing* (Web page) <www.fwc.gov.au/about-us/secure-jobs-better-pay-act-whats-changing>.

¹⁷⁹ Attorney-General's Department, *Regulatory Impact Statement: Casual Employment Reforms* (December 2020), pp 10-1.

¹⁸⁰ Attorney-General's Department, *Regulatory Impact Statement: Part-time flexibility* (December 2020), p 9.

¹⁸¹ Department of Employment and Workplace Relations, *Enterprise bargaining outcomes from the Australian Jobs and Skills Summit, Regulation Impact Statement* (October 2022), pp 48, 53, 58.

The cost to hosts

As mentioned in previous Annexures, it is not possible to calculate the cost to hosts of reading guidance materials made available by the Fair Work Commission, because there is no available data on how many businesses use labour hire. However, hosts should be aware that they will accrue a cost if they review guidance materials, which can be quantified on a case by case basis at \$79.63 per hour (using OIA's figures), or \$39.82 (if 30 minutes is taken to do so).

Additionally, it is noted that as well as spending 30 minutes reviewing guidance from the Fair Work Commission, it is also open to business to choose to use existing membership arrangements with employer representative organisations and industry groups – such as, for example, the Australian Chamber of Commerce and Industry, Australian Industry Group, and the Business Council of Australia – to seek advice about this proposal. Where business chooses to engage with industry groups to seek such advice, this would not represent an additional regulatory burden imposed on business arising from this proposal. Rather, this would be business volunteering to seek guidance separate to that which is made available by the Fair Work Commission, but is still expected to assist in understanding obligations and complement available guidance materials.

The cost to labour hire employers

As mentioned in previous Annexures, it is estimated that there are 6,245 employing labour hire businesses in Australia. Assuming each of these labour hire employers takes 30 minutes to consider guidance material made available by the Fair Work Commission about this proposal, the cost to labour hire employers of doing so can be calculated using the following formula:

$$\text{Number of labour hire employers} \times (\$79.63/2) = \text{Cost of reading guidance materials}$$

Therefore:

$$6,245 \times \$39.82 = \text{around } \$248,676 \text{ per year (in the first year of the proposal alone)}^{182}$$

Of note, this cost is only counted once in the headline cost figure for this proposal, on the assumption that labour hire employers will only likely read this guidance material once upon the enactment of relevant provisions. If labour hire employers read this guidance material on multiple occasions (either within the first year of this measure, or in subsequent years) costs will increase.

Observations above about businesses seeking advice from representative organisations also applied to labour hire employers, as well as hosts.

¹⁸² Note: Figures in the component parts of this formula have been rounded for readability. Final statistics have been calculated with regard to precise data points.



Australian Government
Department of Employment
and Workplace Relations

Minimum standards and increased access to dispute resolution for independent contractors (OBPR22-02873)

Annexure A - Supplementary Analysis to Impact Analysis
Equivalent process

23 August 2023



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2. Introduction and key terms

This Impact Analysis Equivalent process and supplementary analysis responds to proposed changes to two pieces of legislation that cover workers in Australia – the *Fair Work Act 2009 (Cth)* (Fair Work Act) and the *Independent Contractors Act 2006 (Cth)* (Independent Contractors Act).

The Fair Work Act governs employment relationships in Australia

Employees are engaged under a *contract of service* and entitled to a safety net of minimum conditions under the Fair Work Act, modern awards and other workplace legislation. By contrast, independent contractors are engaged under a *contract for services*.

The National Employment Standards in the Fair Work Act, together with modern awards and national minimum wage orders provide a safety net of minimum wages and entitlements for national system employees. The Object of the Fair Work Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians.¹⁸³ The Fair Work Act also provides, for example, employers with access to a range of types of employment to offer their employees, ensuring flexibility in how working time is arranged.

The Independent Contractors Act governs contracts *for service*

The Independent Contractors Act sets up a national unfair contracts remedy scheme for independent contractors. The principal objects of the Act are to protect the freedom of independent contractors to enter into services contracts, to recognise independent contracting as a legitimate form of work arrangement that is primarily commercial and to prevent interference with the terms of genuine independent contracting arrangements.¹⁸⁴

Most digital platform workers do not receive minimum standards

Over the past decade, digital platform work has become embedded across the economy in both Australia and internationally. This document will refer to the marketplace of these services as the ‘digital platform economy’ (also known as the gig economy).

There is no universal definition of digital platform work. This document will refer to digital platform workers as persons who use a digital labour platform to find work, and then, are engaged to do paid work through a digital platform.

There are numerous models of digital platform work. While digital platforms can directly hire employees, in most cases they are engaged as independent contractors by a platform, or by another person via a platform. Digital platforms can be loosely categorised as ‘horizontal’ or ‘vertical’ structures, while noting that there are many hybrid models that fall between these categories.¹⁸⁵ ‘Horizontal’ platforms are also known as ‘crowd-work systems’ and facilitate a ‘marketplace’ of transactions between service providers and clients, with varying levels of platform regulation of

¹⁸³ Section 3, *Fair Work Act 2009* (Cth).

¹⁸⁴ Section 3, *Independent Contractors Act 2006* (Cth).

¹⁸⁵ Department of Premier and Cabinet (DPC), [Report of the Inquiry into the Victorian On-Demand Workforce](#), Industrial Relations Victoria, DPC, Victorian Government, 2020, p 15.

these contracting relationships. ‘Vertical’ (or ‘on-demand’) platforms directly allocate tasks to available workers to complete for a client.

Digital platform work is common in passenger transport, food delivery and disability and aged care support services. However, the digital platform economy also includes other types of work such as professional services, ‘odd jobs’ and maintenance, writing and translation, clerical and data entry, creative and multimedia, software development and technology, skilled trades work, sales and marketing support, education and personal services.¹⁸⁶

These services can provide broader economic benefits through efficiencies in matching buyers and sellers, creating new markets, and innovating to provide improved services. However, independent contracting arrangements operate without many of the protections that apply to employees, such as minimum rates of pay. This is despite many digital platform workers exhibiting characteristics that are ‘employee-like’, including low bargaining power or autonomy over their own work.¹⁸⁷

Additionally, in some circumstances, the infrastructure of digital labour platforms does not allow workers to set their own prices. This feature is common in sectors such as food delivery and rideshare, where digital labour platforms often set the price for work based on factors such as time, distance and demand.

Proposed changes to strengthen protections for certain independent contractors

The Government proposes to strengthen protections for certain independent contractors with three distinct but inter-related measures:

1. Minimum standards for independent contractors who are ‘employee-like’

This Impact Analysis Equivalent process responds to an Australian Government’s 2022 election commitment to empower the Fair Work Commission to set minimum standards for workers in ‘employee-like’ forms of work, including those in the digital platform economy.

2. Minimum standards in the road transport industry

An outcome of the Jobs and Skills Summit held on 1-2 September 2022 was to ‘consider allowing the Fair Work Commission to set fair minimum standards to ensure the Road Transport Industry is safe, sustainable and viable’.¹⁸⁸

3. Greater protection against unfair contracts for independent contractors

A further outcome of the Jobs and Skills Summit was to ‘amend relevant legislation to give workers the right to challenge unfair contractual terms’.¹⁸⁹

The Department of Employment and Workplace Relations (the department) has developed this Impact Analysis Equivalent process and supplementary analysis in accordance with the *Australian*

¹⁸⁶ P McDonald. et al, [Digital Platform Work in Australia: Prevalence, Nature and Impact \(Digital platform work in Australia\)](#), commissioned by the Victorian Department of Premier and Cabinet, 2019, p 40.

¹⁸⁷ Department of Premier and Cabinet (DPC), [Report of the Inquiry into the Victorian On-Demand Workforce](#) <https://engage.vic.gov.au/inquiry-on-demand-workforce> Industrial Relations Victoria, DPC, Victorian Government, 2020, pp. 65-69.

¹⁸⁸ Australian Government, [Jobs + Skills Summit: Outcomes 1-2 September](#), Australian Government, 2022, p 7.

¹⁸⁹ Australian Government, *Jobs + Skills Summit*, p 6.

Terms used throughout this document

The measures assessed in this Impact Analysis Equivalent process and supplementary analysis consider forms of work where there is limited regulation. As such, the measures introduce new concepts, which this document will refer to throughout. Terms used to refer to these concepts for the purposes of the Impact Analysis Equivalent process and supplementary analysis are included in the following table. Where applicable, these are intended to be simplified versions of the definitions that appear in the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023.

Term	Explanation
Deactivation	An action taken by a digital labour platform to prevent a digital platform worker from accessing work via the platform. This is also sometimes referred to as 'deplatforming', 'termination' or 'suspension' from a platform.
Digital labour platform	An online enabled 'app', website or system (platform) operated to arrange, allocate or facilitate labour services, where the platform engages independent contractors directly or indirectly, or acts as an intermediary for users, and the platform processes payments for the work.
Digital platform work	Work facilitated by a digital labour platform.
Digital platform worker	Workers who perform digital platform work who are eligible for proposed Fair Work Commission minimum standards. These workers must also be found to have employee-like characteristics, i.e. being paid less than an employee performing comparable work, having less authority over their work or having low bargaining power.
Digital platform economy	The marketplace of on-demand services provided through digital labour platforms. This is also referred to as the 'gig economy' or 'on-demand economy'.
Last-mile delivery	The 'final step' in a delivery process when a good is delivered from a delivery hub or warehouse to the end client. For the purposes of this Impact Analysis Equivalent process, this is workers and businesses in the Postal and courier pick-up and delivery services Australian and New Zealand Standard Industrial Classification (ANZSIC) 3-digit industry.
On-demand work	Any work in the labour market being procured 'on-demand' (including casual employment and self-employed workers/independent contractors (Victorian Government definition)). ¹⁹⁰ This encompasses 'digital platform work'.

¹⁹⁰ DPC, *Report of the Inquiry into the Victorian On-Demand Workforce*, p 11.

Rideshare	Passenger transport services mediated by a digital labour platform that connects a driver and passenger.
Road transport industry	In legislation, this will refer to industries within the meaning of specified road transport modern awards. For the purposes of this Impact Analysis Equivalent process, this refers to workers and businesses in the Road freight transport, and Postal and courier pick-up and delivery services Australian and New Zealand Standard Industrial Classification (ANZSIC) 3-digit industries. This is because as independent contractors are not covered by modern awards, there is no data corresponding to modern award coverage.

3. Reviews certified as Impact Analysis Equivalent processes

The department has certified five independent reviews as having undertaken Impact Analysis Equivalent processes and analysis to respond to Impact Analysis question 1 and in part to Impact Analysis question 2:

Question 1: What is the problem you are trying to solve and what data is available?

Question 2: What are the objectives, why is government intervention needed to achieve them, and how will success be measured?

The independent reviews are:

- The Victorian Government's Inquiry into the Victorian On-Demand Workforce (Victorian Government Inquiry)¹⁹¹
- Volume 7 of the report of the Productivity Commission's 5-Year Productivity Inquiry (Productivity Commission Inquiry)¹⁹²
- The inquiry of the Senate Select Committee on Job Security (Job Security Inquiry)¹⁹³
- The Senate Rural and Regional Affairs and Transport References Committee Inquiry into the Importance of a viable, safe, sustainable and efficient road transport industry (Road Transport Inquiry)¹⁹⁴; and
- The Select Committee on the impact of technological and other change on the future of work and workers in New South Wales (New South Wales Government Inquiry).¹⁹⁵

Victorian Government Inquiry

The Victorian Government established the Inquiry into the Victorian On-Demand Workforce in 2018. The Inquiry's Terms of Reference included that it would 'inquire into, consider and report to the Minister for Industrial Relations on the extent and nature of the on-demand economy in Victoria, for the purposes of considering its impact on both the Victorian labour market and Victorian economy more broadly'. The Inquiry commissioned Australia's 'largest ever published survey' on on-demand work in Australia, surveying more than 14,000 people across the nation – *Digital Platform Work in Australia – Prevalence, Nature and Impact* (the 'Victorian National Survey').¹⁹⁶ The Inquiry also

¹⁹¹ DPC, *Report of the Inquiry into the Victorian On-Demand Workforce*.

¹⁹² Productivity Commission, [5-Year Productivity Inquiry report – Volume 7: A more productive labour market](#), Productivity Commission, Australian Government, 2023.

¹⁹³ Parliament of Australia, [Senate Select Committee on Job Security](#), Parliament of Australia, Australian Government, 2021.

¹⁹⁴ Parliament of Australia, [Senate Rural and Regional Affairs and Transport References Committee – Without Trucks Australia Stops: the development of a viable, safe, sustainable and efficient road transport industry](#), Parliament of Australia, Australian Government, 2021.

¹⁹⁵ Parliament of New South Wales (NSW), [Select Committee on the impact of technological and other change on the future of work and workers in New South Wales](#), Parliament of NSW, Government of NSW, 2022.

¹⁹⁶ P McDonald et al, [Digital Platform Work in Australia: Prevalence, Nature and Impact \(Digital platform work in Australia\)](#), commissioned by the Victorian Department of Premier and Cabinet, 2019.

considered submissions from over 90 individuals and organisations ahead of publishing its final report in July 2020.¹⁹⁷

Productivity Commission Inquiry

The Productivity Commission began its most recent 5-Year Productivity Inquiry *Advancing Prosperity* in February 2022. The review considered over 200 submissions and conducted two public hearings on 7 and 8 November 2022. The Productivity Commission's 7th interim report *5-year Productivity Inquiry: A more productive labour market* was published in February 2023 and considered digital platform work in detail.¹⁹⁸

Job Security Inquiry

The Senate Select Committee on Job Security was established on 2 December 2020 to inquire into the impact of insecure or precarious employment on the economy, wages, social cohesion and workplace rights and conditions, including with reference to 'workplace and consumer trends and the associated impact on employment arrangements in sectors of the economy including the 'gig' and 'on-demand' economy. The Job Security Inquiry's first interim report considered 'on-demand platform work in Australia' and was released in June 2021.¹⁹⁹ The Inquiry's final list of recommendations is in the fourth interim report, *The Job Insecurity Report*, released in February 2022.²⁰⁰

Road Transport Inquiry

On 11 September 2019, the Senate moved that the Rural and Regional Affairs and Transport References Committee inquire into the importance of a viable, safe sustainable and efficient road transport industry. The Inquiry's terms of reference included that it would have particular reference to 'the importance of an enforceable minimum award rate and sustainable standards and conditions for all stakeholders in the road transport industry'. The Inquiry published its report *Without Trucks Australia Stops: the development of a viable, safe, sustainable and efficient road transport industry* in August 2021.²⁰¹

New South Wales Government Inquiry

The select committee was established on 24 March 2020 to inquire into and report on the impact of technological and other change on the future of work and workers in New South Wales. The select committee received 53 submissions and held eight hearings in the course of its inquiry. The Inquiry's

¹⁹⁷ DPC, [Report of the Inquiry into the Victorian On-Demand Workforce](#).

¹⁹⁸ Productivity Commission, [5-Year Productivity Inquiry report – Volume 7](#).

¹⁹⁹ Parliament of Australia, [Senate Select Committee on Job Security - First interim report](#).

²⁰⁰ Parliament of Australia, [Senate Select Committee on Job Security - Fourth interim report: the job insecurity report](#), Parliament of Australia, Australian Government, 2022.

²⁰¹ Parliament of Australia, [Without Trucks Australia Stops](#).

first report *The Gig Economy* was released in April 2022²⁰² and its second report *Workplace Surveillance and Automation* was released in November 2022.²⁰³

Alignment of reviews and Impact Analysis questions

Question 1: What is the problem you are trying to solve and what data is available?

Together, the five reviews identified an overarching problem of independent contractors having inadequate access to workplace protections and entitlements, to varying degrees. This problem can be categorised as having three broad components:

Lack of minimum standards for digital platform workers

The Victorian Government Inquiry and Job Security Inquiry found that while estimates of pay rates in the digital platform economy vary and data is limited, some digital platform workers earn below the equivalent of the minimum wage. The Productivity Commission Inquiry noted that “evidence suggests that the per-take fees offered by some platforms in food delivery may be on average less than the adult minimum wage for casuals based on assumptions about how many tasks were completed per hour and available public data on earnings.” The Productivity Commission Inquiry also acknowledged the difficulty of estimating pay rates in the digital platform economy due to a lack of data, and that in some industries platform workers may earn in excess of the relevant award rate.

In examining digital platform work or ‘on-demand work’ in Victoria, the Victorian Inquiry identified six ‘aspects of our current system which are not serving us well [which are]:

- *The inherent uncertainty of the work status test (i.e. whether a worker is an employee or independent contractor)*
- *The fragmented and limited nature of advice and support about work status*
- *Inaccessible resolution pathways to determine work status*
- *The emergence and conduct of platforms*
- *High incidences of low-leveraged workers accessing work via platforms and working under ‘borderline’ work status*
- *Inadequate protections for non-employee ‘small business’ platform workers.’²⁰⁴*

²⁰² Parliament of NSW, [Select Committee on the impact of technological and other change on the future of work and workers in New South Wales – First report: the gig economy](#), Parliament of NSW, Government of NSW, 2022.

²⁰³ Parliament of NSW, [Select Committee on the impact of technological and other change on the future of work and workers in New South Wales – Final report: workplace surveillance and automation](#), Parliament of NSW, Government of NSW, 2022.

²⁰⁴ DPC, [Report of the Inquiry into the Victorian On-Demand Workforce](#), p 185.

The Victorian Government Inquiry found that while work status is pivotal to determining a workers' entitlements, 'some ["borderline"] workers arrangements have features of both employment and self-employed arrangements'.²⁰⁵ It also found that low-leveraged workers, including those who are low-skilled, more likely to be young and from a migrant background, are prominent in digital platform work.²⁰⁶ Low-leveraged workers are in a precarious position in the labour market, and while platforms offer opportunities to earn income, there is minimal autonomy over their working arrangements and low income security.²⁰⁷

The New South Wales Inquiry found: 'that New South Wales is falling behind other states and comparable nations in developing laws that establish decent work in the gig economy; that the failure to provide gig workers with a minimum wage and other workplace entitlements is increasing inequality in that state; that gig workers currently lack the power to interact and negotiate with on demand platforms as equals in New South Wales; and, that the failure to provide gig workers with access to a low-cost independent tribunal empowered to hear and decide disputes is leading to injustice in New South Wales.'²⁰⁸

The Productivity Commission Inquiry also found that while income varies by industry, digital platform workers in occupations such as food delivery and rideshare often have low pay, which can be below the National Minimum Wage.²⁰⁹ It also found that digital platform workers are exposed to risk in the event of voluntary administration or liquidation as they are considered unsecured creditors.²¹⁰ However, the Productivity Commission noted that comparisons of piece rates earned by digital platform rates and employee wages can be difficult and is complicated by a lack of data.²¹¹

The Productivity Commission Inquiry found that internal and external dispute resolution mechanisms for digital platform workers are poor, and that digital platform workers have limited options to appeal a suspension or termination from a digital platform.²¹²

In relation to available data, while the Australian Bureau of Statistics (ABS) has recently introduced a survey module seeking data on digital platform work, it has not yet begun publishing these statistics. The Victorian National Survey remains the most comprehensive data source on digital platform work.

Lack of minimum standards for independent contractors in the road transport industry

The Road Transport Inquiry thoroughly considered the impact of the lack of minimum standards applying to independent contractors in the road transport industry, finding that it contributes to inadequate incomes for workers and poor outcomes for road users. The Inquiry found that issues faced by road transport workers include wide disparities in pay rates and unpaid wages, despite high operating costs.²¹³ It considered the prevalence of long contracting chains in the road transport

²⁰⁵ DPC, [Report of the Inquiry into the Victorian On-Demand Workforce](#), p 192.

²⁰⁶ DPC, [Report of the Inquiry into the Victorian On-Demand Workforce](#), p 187.

²⁰⁷ DPC, [Report of the Inquiry into the Victorian On-Demand Workforce](#), p 187.

²⁰⁸ Parliament of NSW, [First report – The gig economy](#), p xii.

²⁰⁹ Productivity Commission, [5-Year Productivity Inquiry – Volume 7](#), p 143.

²¹⁰ Productivity Commission, [5-Year Productivity Inquiry – Volume 7](#), p 143.

²¹¹ Productivity Commission, [5-Year Productivity Inquiry – Volume 7](#), pp 151-152.

²¹² Productivity Commission, [5-Year Productivity Inquiry – Volume 7](#), pp 158-163.

²¹³ Parliament of Australia, [Without trucks Australia stops](#), pp 28-34.

industry and found that pressures created by the influence of a client at the ‘top’ of this chain can lead to road transport workers at the ‘bottom’ having little ability to negotiate prices.²¹⁴ It further found that inadequate pay rates create pressures for workers to complete trips quickly to earn an adequate income, which can encourage risk-taking behaviour.²¹⁵

Barriers to disputing an unfair contract

The Victorian Government Inquiry, Job Security Inquiry and Productivity Commission Inquiry found that independent contractors lack access to dispute resolution over unfair contract terms. The Victorian Inquiry found that ‘existing unfair contracts remedies (in the Independent Contractors Act and Australian Consumer Law) are confusing in their operation and interaction with respect to platform workers... [and] unfair contracts remedies would offer very confined and limited relief and are not sufficient to ensure fairness in work arrangements with platform workers’.²¹⁶ The Productivity Commission further found that these existing provisions are ‘only partial in scope and not an accessible mechanism’.²¹⁷

Question 2: What are the objectives, why is government intervention needed to achieve them, and how will success be measured?

Introducing minimum standards for more workers and improving external dispute resolution processes are measures only government intervention can achieve. Each of the reviews identified a need for further regulation, for example:

- The Victorian Government Inquiry identified a ‘compelling case for change’, noting that the growth of digital platforms in Australia has ‘intensified the imperative to ensure our labour market regulation meets the needs of modern ways of working’.²¹⁸ It identified ‘six reasons to act now to revise our current system’: the inherent uncertainty of the work status test, the fragmented and limited nature of advice and support about work status, inaccessible resolution pathways to determine work status, the emergence and conduct of platforms, high incidences of low-leveraged workers accessing work via platforms and working under ‘borderline’ work status, and inadequate protections for non-employee ‘small-business’ platform workers.²¹⁹
- The Productivity Commission Inquiry found that ‘given the gaps in, and barriers to using, dispute processes, there are grounds to create more systematic, low-cost and accessible means for parties to seek to resolve problems’.²²⁰ It recommended that the Government empower the Fair Work Commission to resolve disputes including over suspension or termination from a platform, as ‘existing avenues for dispute settlement... do not provide an

²¹⁴ Parliament of Australia, [Without trucks Australia stops](#), August 2021, pp 28-34.

²¹⁵ Parliament of Australia, [Without trucks Australia stops](#), August 2021, pp 28-29.

²¹⁶ DPC, [Report of the Inquiry into the Victorian On-Demand Workforce](#), p 165.

²¹⁷ Productivity Commission, [5-Year Productivity Inquiry – Volume 7](#), March 2023, p 160.

²¹⁸ DPC, [Report of the Inquiry into the Victorian On-Demand Workforce](#), p 185.

²¹⁹ DPC, [Report of the Inquiry into the Victorian On-Demand Workforce](#), pp 185-187.

²²⁰ Productivity Commission, [5-Year Productivity Inquiry report – Volume 7](#), p 162.

accessible or systemic solution', and 'there is rationale for a new institutional arrangement to serve that role'.²²¹

- The Job Security Inquiry identified a need to regulate digital platform work, finding that 'Governments cannot continue to rely on courts and tribunals to resolve the current issues in on-demand platform work', particularly given the growth of these forms of work and likely future expansion.²²²
- Finding that underlying economic and contracting pressures drive poor safety outcomes for road transport workers, the Road Transport Inquiry noted that without addressing these structural issues, 'efforts by governments, regulators and the road transport sector to improve safety will be in vain.'²²³
- The New South Wales Government Inquiry considered the need for regulatory intervention, finding that international initiatives to regulate the digital platform economy, as well as the findings of the Victorian Government Inquiry and Job Security Inquiry highlight that government action is needed.²²⁴

Together, the reviews consider all three proposals assessed by this Impact Analysis Equivalent process and made recommendations for government intervention (at either the Commonwealth or state and territory level), presented in Table 1.

Legislating to empower the Fair Work Commission to set minimum standards for 'employee-like' workers, including those in the digital platform or 'gig' economy was an election commitment made by the Government in its Secure Australian Jobs Plan. The Government further committed, as outcomes of the Jobs and Skills Summit, to consider minimum standards for road transport workers and to amend laws to allow workers to challenge unfair contracts.

²²¹ Productivity Commission, [5-Year Productivity Inquiry report – Volume 7](#), p 162.

²²² Parliament of Australia, [Senate Select Committee on Job Security - First interim report](#), p 163.

²²³ Parliament of Australia, [Without Trucks Australia Stops](#), p 179.

²²⁴ Parliament of NSW, [First report – The gig economy](#), p 28.

Table 1 - Relevant review recommendations

Measure	Review	Relevant recommendation(s)
Minimum standards for 'employee-like' digital platform workers	Victorian Government Inquiry	Recommendation 1 - That the Commonwealth Government, in collaboration with state governments and other key stakeholders, lead the delivery of the recommendations in this report regarding the national workplace system.
		Recommendation 6 - That the FW (Fair Work) Act be amended to: (a) codify work status on the face of relevant legislation (rather than relying on indistinct common law tests) (b) clarify the work status test including by adopting the 'entrepreneurial worker' approach, so that those who work as part of another's enterprise or business are 'employees' and autonomous, 'self-employed' small business workers are covered by commercial laws. (c) provide that the: (i) provision of safety protections and entitlements such as superannuation, training, occupational health and safety and worker consultation is not disincentivised because of the potential impact on work status (ii) party asserting a worker is not an employee, bears the onus of proving work status, and (iii) the relative bargaining positions of each party are expressly considered when determining work status
		Recommendation 16 – 'That the FWC [Fair Work Commission] work with relevant stakeholders, including platforms and representatives of workers and industry, about the application of modern awards to platform workers, with a view to ensuring fit-for-purpose, fair arrangements that are compatible with work enabled by technology'.
	Job Security Inquiry	First interim report, Recommendation 7 – The committee recommends that the Australian Government expands the definitions of 'employment' and 'employee' in the <i>Fair Work Act 2009</i> to capture new and evolving forms of work. In addition to an expanded definition of 'employment' and 'employee' under the Fair Work Act, there should be a mechanism by which the Fair Work Commission can extend coverage of those rights when necessary to workers falling outside the expanded definition of employment, including low-leveraged and highly dependent workers so they can be provided with standards and protections under the Act

Measure	Review	Relevant recommendation(s)
		First interim report, Recommendation 9 - The committee recommends that the Australian Government gives the Fair Work Commission (FWC) broad powers to resolve disputes and make orders for minimum standards and conditions in relation to all forms of work. The expanded remit of the FWC would include: • adjudicating in cases where there is a dispute in relation to the appropriate status of workers; • setting binding minimum standards and conditions in relation to non-standard forms of work, regardless of employment status; and • the capacity to resolve disputes (including where necessary through binding decisions) in a low-cost and effective manner. The FWC should be empowered to make determinations and orders for groups and categories of workers, not just individuals.
		Fourth Report, Recommendation 10 – The committee recommends that the Australian Government amends the <i>Fair Work Act 2009</i>, expanding the scope of the Act to encompass all forms of work, and empowering the Fair Work Commission to: • determine fair rates and conditions for all categories of workers, including contractors; • arbitrate on contracts with independent contractors that are unfair or harsh; and • make orders and determinations for groups or classes of workers.
	New South Wales Government Inquiry	Recommendation 1 – That the NSW Government commit to greater protections for gig economy workers, regardless of work status.
		Recommendation 2 – That the NSW Government establish a tribunal or extend the jurisdiction of the existing tribunal, with the power to set minimum pay and conditions for gig workers that provide labour to on-demand platforms regardless of work status, to the extent permitted by the state’s constitutional authority.

Measure	Review	Relevant recommendation(s)
		Recommendation 3 – That the NSW Government introduce legislation to extend Chapter 6 of the Industrial Relations Act 1996 to include at least rideshare and food delivery workers as well as those engaged to deliver bread, milk and cream.
		Recommendation 6 – ‘That the NSW Government mandate improved transparency between platforms and workers concerning average earnings, most profitable times to work, real time use of the platform, data collection and utilisation, and performance management systems.’
		Recommendation 8 – ‘That the NSW Government publicly affirm the right of gig workers to freely associate by joining (or not joining) a union.’
		Recommendation 9 – ‘That the NSW Government legislate to establish a system of collective bargaining for workers providing labour to on-demand platforms, to the extent permitted by the state’s constitutional authority.’
		Recommendation 10 – ‘That the NSW Government amend Chapter 6 of the Industrial Relations Act 1996 to establish a collective bargaining system that includes rideshare, food delivery and parcel delivery workers.’
		Recommendation 11 – ‘That the NSW Government give the tribunal envisaged in recommendation 2 the power to recognise an agreement reached by an on-demand platform and its workers (or their representatives) that improves the minimum conditions a worker is otherwise entitled to.’
		Recommendation 15 – ‘That the NSW Government introduce discrete and enforceable codes of conduct for work performed by on-demand platforms in the rideshare, food delivery, parcel delivery and disability care sectors of the gig economy.’
Minimum standards for workers in the	Road Transport Inquiry	Recommendation 1 – ‘The committee recommends that the government establishes or empowers an independent body that will, in consultation with industry, set universal and binding standards (including binding standards with respect to pay) which: • ensure the safe performance of work and eliminate unsafe economic and contracting practices; and

Measure	Review	Relevant recommendation(s)
road transport industry		• apply to all road transport supply chain participants, including transport operators, online/on demand operations, and workers (regardless of their employment or work status), and throughout supply chains. The independent body shall also act as a dispute resolution body providing all road transport industry participants access to comprehensive binding dispute resolution capable of addressing all issues associated with, and general powers to resolve, disputes between some or all supply chain participants.'
		Recommendation 2 – 'The committee recommends that the proposed initial priorities of the independent body should include to: • ensure that all workers, whether owner drivers or employee drivers, are paid for all work time, including driving and non-driving time, and that any costs or efficiency dividends associated with this change are allocated fairly throughout the supply chain; • institute a system of demurrage rates to help drivers and operators recoup costs for waiting and loading times, and that any costs or efficiency dividends associated with this change are fairly distributed through the supply chain; and • establish binding industry payment terms ensuring that all road transport workers and operators are paid in full upon-delivery.'
Improving access to unfair contracts dispute resolution	Victorian Government Inquiry	Recommendation 17 – 'that governments clarify, enhance and streamline existing unfair contracts remedies so that they: a) are accessible to low-leveraged workers b) enable system-wide scrutiny of platforms' arrangements. c) introduce penalties and compensation to effectively deter unfair contracts

Measure	Review	Relevant recommendation(s)
		d) allow materially similar contracts to be considered together and orders made with respect to current and future arrangements.'
	Productivity Commission Inquiry	Recommendation 7.18 – 'The Australian Government should introduce an external, independent dispute resolution function within the Fair Work Commission that can provide conciliation and arbitration services relating to suspension or termination disputes or non-payment of earnings.'
	Job Security Inquiry	Fourth Report, Recommendation 11 – 'The committee recommends that the Australian Government support independent contractors who are sole traders by establishing and promoting accessible low-cost pathways for dispute resolution.'
	New South Wales Government Inquiry	Recommendation 5 – 'That the NSW Government give the tribunal envisaged in recommendation 2 the power to advise on, oversee and make binding rulings on disputes between gig workers and on-demand platforms, to the extent permitted by the state's constitutional authority.'

Principles for measuring success

To implement its election commitment and outcomes of the Jobs and Skills Summit, the Government set five Guiding Principles for reform. The Guiding Principles have been informed by the election commitment and were developed following initial stakeholder roundtable meetings in August 2022.

These Guiding Principles have formed a basis for subsequent stakeholder consultation (see Section 4) and have remained consistent throughout this period. This includes their inclusion in a public consultation paper on the proposed measures.²²⁵ The supplementary analysis taken as part of the Impact Analysis Equivalent process will assess options against these Guiding Principles in addition to considering their regulatory burden.

The proposed changes will be considered effective if they advance each of these guiding principles.

Guiding Principles

1. Australia's workplace relations system must reflect modern working arrangements and be capable of evolving with emerging forms of work and business practices.
2. All workers should have access to minimum rights and protections regardless of whether they are characterised as an employee or an independent contractor, including access to freedom of association and dispute resolution.
3. Businesses should benefit from a level playing field among industry participants while promoting competition and innovation.
4. The Fair Work Commission should set minimum standards that:
 - are fair, relevant, proportionate, sustainable and responsive
 - reflect workers' independence and flexible working arrangements, for example choosing which tasks to accept and refuse, how to undertake their work, where and when they work, and which businesses to contract with
 - mitigate to the greatest extent possible unintended consequences for workers, businesses, consumers and other aspects of the labour market
5. The standard-setting framework should be accessible, transparent, fair and offer a high degree of certainty to affected parties.

²²⁵ Department of Employment and Workplace Relations (DEWR), [Employee-like' forms of work and stronger protections for independent contractors: Consultation paper](#), DEWR, Australian Government, 2023.

4. Background

Legislative framework applying to independent contractors

A worker's status as an independent contractor or employee is currently determined at common law

The common law test to determine an individual's work status is set out in the High Court's decisions in *ZG Operations v Jamsek (Jamsek)*²²⁶ and *CFMMEU v Personnel Contracting (Personnel Contracting)*.²²⁷ The test provides that where the terms of a working relationship are comprehensively provided for in a written contract, and the contract is not a sham or otherwise varied or waived by subsequent conduct, the nature of the relationship is determined by reference to the rights and obligations established by the contract. If the contractual terms illustrate that the parties have entered into a relationship of independent contracting rather than employment, no further inquiry, including into the parties' subsequent practices, is relevant or required.

This is in contrast to the 'multi-factorial' test set out in a considerable body of case law (including *Stevens v Brodribb Sawmilling Co Pty Ltd*²²⁸ and *Hollis v Vabu*²²⁹) and previously thought by many to be the correct test in determining whether a relationship was one of employment or of principal and contractor. Where courts applied a multifactorial test, a worker's status was determined having regard to the 'totality of the relationship' after considering multiple factors including, but not limited to, the terms of their contract. No criterion was decisive. This 'multi-factorial test' evolved over time and included consideration of various indicia including things like control and authority over work, and whether the worker could delegate work, was required to wear a uniform or be responsible for providing and maintaining their own tools and equipment (see Figure 1 for a non-exhaustive list).

²²⁶ *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.

²²⁷ *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1.

²²⁸ *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] 160 CLR 16

²²⁹ *Hollis v Vabu Pty Ltd* [2001] HCA 44.

Figure 1 – Non-exhaustive list – multi-factor test

EMPLOYEE	factor	INDEPENDENT CONTRACTOR
Perform under direction and control of employer	<i>control</i>	High level of control over how work is performed
Hours of work usually standard or set	<i>time</i>	Decides what hours are worked to complete task
Bears little or no financial risk	<i>risk</i>	Bears risk for profit/loss and liability for work quality
Paid regularly in accordance with award or agreement	<i>pay</i>	Will invoice for work completed
Skilled or unskilled work	<i>skill</i>	Generally more highly skilled profession or trade
Requirement to wear uniforms or logos of employer	<i>uniforms</i>	No requirement for uniform of other business
Work generally performed at business premises	<i>location</i>	Work performed at own premises or otherwise
Worker presented as part of the business	<i>business</i>	Worker presented as running own business
Goodwill generated by worker lies with business	<i>goodwill</i>	Goodwill etc. typically lie with worker
Restriction on ability to delegate or sub-contract work	<i>delegation</i>	Generally entitled to delegate or sub-contract

The decisions in *Jamsek* and *Personnel Contracting* most significantly impact those workers who, prior to these two decisions, were on the border between employment and independent contracting. These workers are more likely to be those with low bargaining power who do not genuinely run their own business. As a result of the contract-centric approach espoused in *Jamsek* and *Personnel Contracting*, these workers are now more likely to be found to be independent contractors than under the multi-factorial test previously applied.

The Independent Contractors Act regulates independent contractors

The Independent Contractors Act applies to services contracts to which an independent contractor is a party, if the contract relates to the performance of work by the independent contractor. The Act broadly operates to:

- exclude certain state and territory laws (Part 2)
- set out protections from unfair contracts (Part 3).

The remaining provisions of the Act set out preliminary matters (Part 1), transitional provisions (Part 5) and regulation-making powers (Part 6).

The Explanatory Memorandum to the Independent Contractors Bill 2006 states that the legislation aims to ‘enshrine the freedom of independent contractors to enter into arrangements that are primarily commercial relationships, free from prescriptive workplace relations regulation.’²³⁰ This was a departure from previous federal and state arrangements, which provided unfair contract protections to independent contractors within workplace relations legislation.

²³⁰ [Explanatory Memorandum, Independent Contractors Bill 2006](#), p 1.

Independent contractors can access limited dispute resolution about workplace issues

Disputes can arise between independent contractors and the entities that engage them over workplace matters. For disputes about unfair contractual terms in a services contract, independent contractors currently have access to two Commonwealth unfair contracts jurisdictions under the Independent Contractors Act and the Australian Consumer Law. Common law contractual remedies and equitable remedies may also apply.

Independent Contractors Act

Under Part 3 of the Independent Contractors Act, independent contractors can apply to the court to review a contract for services on the grounds that it is 'unfair' or 'harsh'. If the court determines that a term is unfair or harsh, it can make an order setting aside or varying the contract.

The Independent Contractors Act provides that an 'unfairness ground' in relation to a services contract includes circumstances where 'the contract provides for remuneration at a rate that is, or is likely to be, less than the rate of remuneration for an employee performing similar work'. However, these provisions have not been successful in ensuring that employee-like workers within the scope of the proposed measures receive remuneration at rates that an employee performing similar work would receive.

Recent data from the Federal Court of Australia indicates that, as at 27 April 2023, there have been 68 applications to dispute an unfair contract term made under section 12 of the Independent Contractors Act since the commencement of that Act. Only three applications have been successful or partially successful.

In relation to digital platform workers, the Productivity Commission Inquiry noted that applicants to this jurisdiction incur their own costs, and that digital platform workers are unlikely to have the financial resources or knowledge to access these provisions.²³¹

Australian Consumer Law

The Australian Consumer Law (Schedule 2, *Competition and Consumer Act 2010*) enables small businesses (including independent contractors) to dispute unfair terms in standard form contracts. Unlike Part 3 of the Independent Contractors Act, these provisions do not deal with the price payable under the contract.

The Government recently passed the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* which made unfair contractual terms unlawful and introduced a civil penalties regime.

A lack of clear avenues to dispute an unfair contract termination

The Productivity Commission Inquiry noted that workplace disputes between platforms and workers may relate to suspension or termination decisions. Stakeholder consultation (see Section 3) also

²³¹ Productivity Commission, [5-Year Productivity Inquiry – Volume 7](#), p 160.

indicated that this is a common dispute category. However, it is unclear if the court can generally order remedies in relation to unfair termination disputes under the existing unfair contracts provisions.²³²

There is some existing regulation of road transport work

At the national level, the *Heavy Vehicle National Law* and regulations regulate heavy vehicles over 4.5 tonnes gross vehicle mass and apply in the Australian Capital Territory, New South Wales, Queensland, South Australia, Tasmania and Victoria.²³³ The objects of the Heavy Vehicle National Law include that it should facilitate and regulate the use of heavy vehicles to promote public safety, manage impacts on the environment, roads and public amenities, promote industry productivity and efficiency, and encourage and promote productive, efficient, innovative and safe business practices.²³⁴ Workplace matters within the scope of this regulation include rest time, work hours and work diary requirements, however do not include minimum pay rates.

Until its abolition in 2016, the Road Safety Remuneration Tribunal could set enforceable road safety remuneration orders covering matters including minimum pay and conditions for road transport workers (including independent contractors), approve collective agreements and resolve disputes. The system covered road transport drivers, employers, hirers and supply chain participants in the road transport industry and operated from 2012 to 2016.

While federal minimum standards-setting mechanisms no longer exist, there is some state-based regulation of minimum standards:

- Chapter 6 of the *Industrial Relations Act 1996* (NSW) allows the New South Wales Industrial Relations Commission to set binding minimum terms and conditions under a contract determination for contracts of carriage (i.e. for the transportation of goods by means of a motor vehicle or bicycle in the course of a business of transporting goods) and contracts of bailment (generally covering public taxis and public hire vehicles).
- Victoria publishes guidance rates and costs schedules for certain groups of owner drivers, including courier or messenger owner drivers who supply a 1 tonne van,²³⁵ under the *Owner Drivers and Forestry Contractors Act 2005* (Vic). Victoria also requires hirers that engage an owner driver for 30 days or more to provide the owner driver with the relevant rates and costs schedule.
- In Western Australia, the *Owner-Drivers (Contracts and Disputes Act 2007)* (WA) applies to owner-drivers of freight vehicles over 4.5 tonnes. It sets out guidelines for setting appropriate pay rates and allows for collective bargaining between a group of owner-drivers and hirers in certain circumstances.

²³² Productivity Commission, *5-Year Productivity Inquiry – Volume 7*, p 160.

²³³ National Heavy Vehicle Regulator (NHVR), *Heavy Vehicle National Law and Regulations*, NHVR website, n.d., accessed 16 June 2023.

²³⁴ *Heavy Vehicle National Law Act 2012* (Qld), s 3.

²³⁵ Department of Premier and Cabinet (DPC), *Transport Industry Council, Rates and costs schedule 2022-23: 1 Tonne Van, Courier/Messenger: Road Transport and Distribution Award 2020 Category 2*, Industrial Relations Victoria, DPC, 2022.

- Under Queensland's *Industrial Relations and Other Legislation Amendment Act 2022 (Qld)*, Chapter 10A would allow the Queensland Industrial Relations Commission to set minimum standards for 'independent courier drivers'. Chapter 10A would commence on proclamation, which has not yet occurred.

Emerging state-based regulation of the digital platform economy

Some states and territories are moving towards regulation of digital platform work:

- Victoria introduced its Voluntary Fair Conduct and Accountability Standards²³⁶ for on-demand platforms, which commenced operating on 1 May 2023. The Victorian Government indicates that 'Phase 2' of this process will include introducing legislation to implement the standards.²³⁷
- Queensland's proposed regulation of independent courier drivers could include digital platform workers providing food delivery or other couriership services.
- The New South Wales Government committed to 'modernise laws to respond to the gig economy'. This includes extending Chapter 6 of the *Industrial Relations Act 1996* (NSW) to include gig economy workers in the transport industry, introduce workers compensation benefits for gig workers and establish a portable entitlements scheme.²³⁸

Available data

Digital platforms

Data on the digital platform workforce in Australia is sparse. The ABS has begun work on the collection of this data, however the initial findings will not be released until the end of 2023.²³⁹

The ABS publishes data on the number of workers and independent contractors in Australia, with recent estimates showing that there are 13.6 million workers in Australia and 1.1 million independent contractors (8.3 per cent of all employed persons).²⁴⁰ However, this estimate of 1.1 million independent contractors refers to people who are independent contractors in their *main job* (job in which most hours are usually worked). By contrast, evidence suggests that the majority of digital platform workers engage in digital platform work as a second job. The Victorian National Survey found that only 2.7 per cent of current platform workers derive all of their income from their digital platform work, with the vast majority (80.7 per cent) reporting that digital platform work

²³⁶ Department of Premier and Cabinet (DPC), [Voluntary Fair Conduct and Accountability Standards for Platforms](#), Industrial Relations Victoria, DPC, Victorian Government, 2022.

²³⁷ Department of Premier (DPC), [Roadmap to introducing Victorian Standards for the Gig Workforce and Gig Worker Support Service](#), Industrial Relations Victoria, DPC, Victorian Government, 2022.

²³⁸ Parliament of New South Wales (NSW), [2023 ALP election policy costings – Modernise laws to respond to the gig economy](#), Parliamentary Budget Office, NSW Parliament, 2023.

²³⁹ Australian Bureau of Statistics (2021), [Employment arrangements – Labour Statistics: Concepts, Sources and Methods](#) ABS Website, accessed 29 May 2023.

²⁴⁰ Australian Bureau of Statistics, [Characteristics of Employment, Australia, August 2022](#)

makes up less than half of their total annual income.²⁴¹ The ABS measure of independent contractors, which refers to people who are independent contractors in their main job, is therefore problematic to use to estimate the digital platform economy.

In the absence of ABS data on the digital platform economy, a number of groups have made their own estimates of the size of the digital platform economy. These are summarised in Table 2 below.

²⁴¹ P McDonald et al., '[Digital Platform Work in Australia: Prevalence, Nature and Impact](#) (Digital platform work in Australia)', commissioned by the Victorian Department of Premier and Cabinet, 2019, p. 5.

Table 2 - Summary of different estimates of size of the digital platform economy

Source	Estimate	Year of estimate	Definition	Notes
Victorian National Survey ²⁴²	7.1 per cent Equates to 909,500 workers	March/April 2019	Survey respondents who are currently working (or offering to work) through a digital platform or have done so within the last 12 months.	- This survey was informed by an extensive literature review and similar surveys undertaken in Europe. The sample of over 14,000 useable responses was representative of the Australian population in relation to gender, age, and State/Territory. - This estimate is likely an overestimate of people who are currently working in the digital platform economy because: - it is based on those who had worked sometime in the last 12 months including many who are not currently working in the digital platform economy. - the sample over-represented respondents with a university qualification and respondents living in major cities, both of which are groups that are more likely to work in the digital platform economy.
Industry Super ²⁴³	275,000	2019	Unclear - appears to have been estimated using the Victorian National Survey, Uber estimates of their	

²⁴² P McDonald et al., '[Digital Platform Work in Australia: Prevalence, Nature and Impact](#) (Digital platform work in Australia)', commissioned by the Victorian Department of Premier and Cabinet, 2019.

²⁴³ T Samardzija et al., '[Extending the super guarantee to gig workers](#)', Industry Super Australia, 2023.

			workforce and their own analysis.	
Actuaries Institute ²⁴⁴	250,000 Equates to 2.0 per cent of workforce	2019	Estimate is based on Uber's self-reported estimate of 60,000 workers in 2019 and the market share of Uber from the Victorian National Survey of 22.7 per cent.	- This survey used transaction data from electronic bank transactions to identify a sample of 8,008 digital platform economy workers and 1 million digital platform consumers to quantify the digital platform economy's rise in terms of growth. - This data only looked at workers who engaged in digital platform economy work in 2018 or 2019 with at least one of the five following platforms: Didi, Freelancer, Ola, Uber, and Uber Eats. As such, it is likely an underestimate and not a representative sample of all digital platform workers.
The Association of Superannuation Funds of Australia ²⁴⁵	150,000	2018	Number of 'regular' gig workers. Estimate is derived from worker numbers from discrete platforms. Where regular workers cannot be identified, they have been derived from the data available.	This was an increase of 50 per cent from its estimate in the previous year (of 100,000 workers).

²⁴⁴ Actuaries Institute, '[The rise of the gig economy and its impact on the Australian workforce](#)', Green paper, December 2020, p. 5.

²⁴⁵ A Craston, '[Superannuation and the Changing Nature of Work: Discussion Paper](#)', The Association of Superannuation Funds of Australia, 2017, p. 4.

Uber ²⁴⁶	150,000	2023	Number of workers who work on Uber or Uber Eats.	This is Uber's own estimate of its workforce. This has increased from an estimate of 60,000 in 2019.
Airtasker ²⁴⁷	148,000	2022	Number of individual users who have completed a task.	This is Airtasker's own estimate of its workforce.
HILDA Report ²⁴⁸	0.8 per cent Equates to roughly 100,000 workers	2020	Number of people who worked via a digital platform in the last 4 weeks.	The HILDA survey undercounts migrants. As this is a group that has been identified as more likely to participate in the digital platform economy (the Victorian National Survey noted that temporary residents are 3 times more likely to be a current platform worker than Australian citizens)²⁴⁹, this suggests the digital platform worker estimate is also an undercount.

²⁴⁶ Uber, 'Elevating the voices of 150,000 Australian gig workers', March 2023, <https://www.uber.com/en-AU/newsroom/flexibility-works/>, [accessed 7 June 2023].

²⁴⁷ Airtasker, 'Annual Report FY22', Airtasker Limited, 2022.

²⁴⁸ R Wilkins et al., '[The Household, Income and Labour Dynamics in Australia Survey: Selected Findings from Waves 1 to 20](#)', Melbourne Institute: Applied Economic & Social Research, University of Melbourne, 2022, p. 89.

²⁴⁹ P McDonald et al., '[Digital Platform Work in Australia: Prevalence, Nature and Impact](#) (Digital platform work in Australia)', commissioned by the Victorian Department of Premier and Cabinet, 2019, p. 3.

Table 2 above shows that there are a range of estimates from different groups on the number of digital platform workers in the Australian economy. These estimates range from 0.8 per cent of the workforce, or approximately 100,000 workers (HILDA), to 7.1 per cent of the workforce, or 909,500 workers (Victorian National Survey).

The New South Wales Government's 2022 inquiry into the digital platform economy compiled estimates of the digital platform economy from other sources, including digital platforms themselves, but noted that the New South Wales Government does not collect data on the number of digital platform economy workers in New South Wales, or their wage rates.²⁵⁰

Most of these estimates are also before the onset of COVID-19. There is not readily available information about the changes to the digital platform economy since the COVID-19 pandemic and how the size of the digital platform workforce may have changed since then. However, Uber indicated in 2023 that more than 150,000 rideshare and food delivery workers use the Uber platform to work each month.²⁵¹

Most of the estimates in Table 2 are based at least in part on the Victorian Government Inquiry. Given the sample size and robustness of this estimate, this is the starting point for the estimate of digital platform workers that the department has adopted. However, in the costing below, we have made several adjustments to make sure that this estimate is as fit-for-purpose as possible. These include downgrading the estimate of digital platform workers to exclude those who engage in digital platform work less than once a month; accounting for hours worked of different occupations (which range from 3 to 15 hours per week on average); and accounting for weeks worked in a year (estimated at 44.8 weeks in a year, less than the 52 weeks assumed for full-time permanent workers). These adjustments have been made at a granular level for occupations, where data allows.

The Victorian National Survey²⁵² found that digital platform workers perform the following types of work on digital platforms:

- Transport and food delivery (18.6%)
- Professional services (16.9%)
- Odd jobs and maintenance work (11.5%)
- Writing and translation (9.0%)
- Clerical and data entry (7.8%)
- Creative and multimedia (7.7%)
- Software development and technology (7.2%)

²⁵⁰ Parliament of New South Wales (NSW), [Select Committee on the impact of technological and other change on the future of work and workers in New South Wales](#), Parliament of NSW, Government of NSW, 2022, accessed 22 June 2023, p. 6.

²⁵¹ Uber, 'Flexibility works', <https://www.uber.com/au/en/u/gig-reform/>, accessed 28 June 2023.

²⁵² P McDonald et al., '[Digital Platform Work in Australia: Prevalence, Nature and Impact](#) (Digital platform work in Australia)', commissioned by the Victorian Department of Premier and Cabinet, 2019, p. 40.

- Caring (7.0%)
- Skilled trades work (5.8%)
- Sales and marketing support (5.0%)
- Education (1.2%)
- Personal services (0.9%)

Road transport

There are multiple definitions of the road transport industry, with implications for estimates of its size. The Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 defines the road transport industry by reference to modern award coverage, including the Road Transport and Distribution Award 2020, the Road Transport (Long Distance Operations) Award 2020, the Waste Management Award (2020), the Transport (Cash in Transit) Award 2020 and the Passenger Vehicle Transportation Award (2020)²⁵³. However, as independent contractors are not covered by awards, there is no available data corresponding to this definition.

Due to these data limitations, the department will use the ABS' detailed industry classification system called the Australian and New Zealand Standard Industrial Classification (ANZSIC) for the purposes of this supplementary analysis. Industries are classified as falling under a 1, 2, 3, or 4-digit classification, with 1 being the least detailed, and 4 being the most. 'Road transport' is an ABS defined 2-digit industry, however throughout this Impact Analysis Equivalent the department uses the phrase 'road transport' to denote workers and businesses in the 2-digit Road transport, and Postal and courier pick-up and delivery services industries. The Postal and courier pick-up and delivery services industry is included, as it is in scope of the policy. The 2-digit Road transport industry will include some workers who are out of scope, e.g. taxi and tram drivers, but it is not possible to disaggregate the industry further with available data. As such, the number of businesses and workers affected will likely be an overestimate.

Unlike the digital platform workforce, workers in the road transport sector are likely to be independent contractors in their main job, and therefore are captured in ABS data. As outlined in the section on digital platforms, the latest data shows that in Australia there are 1.1 million workers who are independent contractors in their main job (8.3 per cent of all employed persons).²⁵⁴ Looking specifically at the road transport sector, in August 2022 there were 57,200 independent contractors, which represented 15.6 per cent of the road transport sector workforce.

The ABS also publish data on the number of businesses in each industry, however, there is no data on the number of businesses that engage independent contractors. In June 2022, there were 140,974 businesses in the road transport sector, with the majority (71.6 per cent) of these non-employing.²⁵⁵ As these business counts only provide data on whether a business has employees, these non-

²⁵³ While not including the transport of passengers by electric tramway, monorail or light rail (paragraph 4.2(c)).

²⁵⁴ ABS, [Characteristics of Employment, August 2022](#).

²⁵⁵ ABS, [Counts of Australian Businesses, including Entries and Exits, July 2018 to June 2022](#)

employing businesses could be engaging independent contractors, and therefore be in scope of the proposed policy.

Throughout this Impact Analysis Equivalent process, the department has estimated costs on a per business basis where there is not data available on number of businesses affected.

5. Consultation

The department conducted an extensive consultation process on the measures considered by this Impact Analysis Equivalent process and supplementary analysis. This process included targeted and public consultation taking place between August 2022 and August 2023.

As consultation examined sensitive topics such as stakeholders' business structures, consultation discussions and written submissions are confidential. Confidentiality was essential to allow stakeholders to share information with the department to inform policy development. The supplementary analysis will consider broad de-identified views put forward by stakeholders, while maintaining their confidentiality.

Timeline of consultation

Consultation took place over several stages, as displayed in Table 3. These more formal stages of consultation are in addition to informal, ad-hoc discussions held with stakeholders throughout this period.

Table 3 - Stages of consultation

Stage	Timeframe	Description
1	26 August 2022 to March 2023	Initial discussions to understand stakeholders' high-level positions on the following measures: • Empower the Fair Work Commission to set standards for 'employee-like' workers. • Consider allowing the Fair Work Commission to set minimum standards for workers in the road transport industry. • Consider the most appropriate definition of 'employee' under the Fair Work Act. • Consider the right kinds of protections for independent contractors, including the capacity to challenge unfair contract terms.

Stage	Timeframe	Description
2	24 March to 6 April 2023	Public consultation seeking written submissions in response to a one-page summary of the proposals published on the department's webpage. ²⁵⁶ This process was part of broader consultation on workplace relations measures planned for introduction in the second half of 2023. Bilateral and group discussions held with stakeholders to discuss responses to the on-page summary.
3	13 April to 23 May 2023	Public consultation seeking further written submission in response to a consultation paper entitled 'Employee-like forms of work and stronger protections for independent contractors'. ²⁵⁷ Bilateral and group discussions held with stakeholders to discuss responses to the consultation paper.
4	8 June 2023	The Minister convened a National Workplace Relations Consultative Committee meeting and a Meeting of Ministers to discuss the measures being considered for introduction in the second half of 2023.
5	16 June 2023	Confidential briefings and discussion on the details of the measures being considered for introduction in the second half of 2023 were held by the Department with key business and union representatives.
6	16 – 18 August 2023	Confidential consultation on draft legislation occurred prior to introduction to the Parliament with state and territory officials and members of the Council on Industrial Legislation, which is a

²⁵⁶ Department of Employment and Workplace Relations (DEWR), [2023 Workplace Relations Reform Consultations](#), DEWR, Australian Government, 2023.

²⁵⁷ Department of Employment and Workplace Relations (DEWR), [Employee-like forms of work and stronger protections for independent contractors: Consultation paper](#), DEWR, Australian Government, 2023.

Stage	Timeframe	Description
		subcommittee of the National Workplace Relations Consultative Committee. ²⁵⁸

Number of consultation participants

The department has met with 92 stakeholders to discuss the 3 measures – Employee-like, road transport and unfair contracts, and received written submissions from 101 stakeholders, as displayed in Table 4. In addition to these numbers, the department conducted a technical consultation on draft legislation with state and territory officials and members of the Council on Industrial Legislation.

Table 4 - Number of consultation participants

Stakeholder category ²⁵⁹	Stakeholders met with	Written submissions
Digital platforms	13	9
Other businesses and business/ industry representatives	25	41
Unions and worker representatives	5	10
Academics and community organisations	24	23
Australian Government agencies	17	4
State and territory governments	8	7
Individual citizens	-	7
Total	92	101

Key themes from consultation

Key views raised by broad stakeholder groups are summarised below. This feedback has been used to shape policy options to address the problems identified by the independent reviews. Further information on how stakeholder views have formed each option is in Section 5.

Minimum standards for digital platform workers

Stakeholders generally supported the concept of national minimum standards for digital platform workers, particularly in the food delivery, rideshare and ‘care’ sectors. However, views diverged on how to implement minimum standards, with key feedback outlined below.

²⁵⁸ Australian Government, [National Workplace Relations Consultative Council](#), www.directory.gov.au, 2023, accessed 13 June 2023.

²⁵⁹ While not included in these figures, some peak bodies (for example, union or business peak bodies) chose to invite affiliate organisations to consultation meetings.

Digital labour platforms and other businesses supported minimum rates of pay and some other protections for their workers such as dispute resolution. However, these stakeholders did not want changes that would significantly disrupt their business models, stifle innovation or reduce flexibility for workers. In particular, they opposed any changes that would deem their workers to be employees or require them to adopt minimum standards that mirror award conditions (for example, minimum shift lengths). Some businesses criticised changes that would extend beyond minimum rates of pay, such as agreement-making.

Unions, worker representatives and academics also supported minimum standards, including those that extend beyond minimum rates of pay. For example, some stakeholders in this group called for measures to improve the transparency of algorithmic decision-making affecting workers, remedies for suspension from a platform and access to collective bargaining processes, including the ability to take protected industrial action.

Some stakeholders, particularly represented amongst state and territory governments, unions and worker representatives and academics called for a statutory definition of employee as an essential component of implementing the employee-like commitment. These stakeholders considered that a potential adverse outcome of providing minimum standards to employee-like workers could be to incentivise the use of independent contractors instead of employees, leading to a cohort of workers losing access to the safety net and protections that employment provides. As the common law definition of employee does not assess the totality of the relationship, they raised concern that this could result in businesses shifting from employing to contracting models on a large-scale. These stakeholders argued that a statutory definition of employment that considers the totality of the relationship rather than focusing on the terms of the contract would help to ensure that workers are appropriately classified as an employee or independent contractor.

However, digital platforms and other businesses generally opposed any change to the current common law definition of employee, arguing that the common law definition provides certainty and that change could result in the reclassification of their workers as employees.

Minimum standards in the road transport industry

Unions and academics strongly advocated for minimum standards in the road transport industry. Additionally, some road transport organisations expressed support for confined minimum standards, particularly following an industry roundtable held in August 2022 where participants agreed to principles for a ‘safe, sustainable and fair road transport industry’. During consultation, some road transport stakeholders also expressed that while this would increase the regulatory burden for some road transport businesses, it is a necessary step to ensure the fairness and viability of the industry.

Most businesses opposed changes that would resemble a return to the former Road Safety Remuneration Tribunal model. In particular, they emphasised the need for guardrails to safeguard driver viability, supported by appropriate contractual chain arrangements, and for extensive industry consultation before introducing minimum standards for road transport workers.

Access to dispute resolution over unfair contracts

Unions and academics generally supported improving access to dispute resolution over unfair contracts by introducing a Fair Work Commission jurisdiction. Some businesses noted that the existing unfair contract provisions in the Independent Contractors Act and Australian Consumer Law are sufficient, while acknowledging that they have been rarely used.

6. What policy options have been considered?

Summary of reform options

This Impact Analysis Equivalent process assesses options to i) extend minimum standards to more workers, and ii) improve access to dispute resolution of unfair contracts. Together, these measures would strengthen protections for independent contractors in Australia.

Table 5 – Options for extending minimum standards to more workers

Extending minimum standards to more workers			
Option 1	Option 2	Option 3	Option 4
Status quo	Empower the Fair Work Commission to set minimum standards for employee-like digital platform workers.	Empower the Fair Work Commission to set minimum standards for employee-like digital platform workers and road transport workers	Empower the Fair Work Commission to set minimum standards for employee-like digital platform workers and road transport workers with an interpretive principle in the Fair Work Act for the terms 'employee' and 'employment'.

Table 6 – Options for improving access to dispute resolution of unfair contractors

Improving access to dispute resolution of unfair contracts		
Option 1	Option 2	Option 3
Status quo	Allow the Fair Work Commission to resolve disputes about unfair contracts for digital platform workers and road transport workers	Allow the Fair Work Commission to resolve disputes about unfair contracts for independent contractors

Minimum standards

Option 1: Status quo

This option will preserve the current arrangements that apply to independent contractors, as detailed in Section 3.

Option 2: Minimum standards for employee-like digital platform workers

This option would implement the Government's election commitment to introduce minimum standards for employee-like workers, including those in the digital platform economy. Stakeholders supported introducing minimum standards for employee-like digital platform workers during consultation, including digital platform businesses that this measure would directly impact. Providing minimum standards to employee-like digital platform workers was also recommended by the following independent reviews (full list in Section 2):

- **Job Security Inquiry, Fourth Report, Recommendation 10**, 'The committee recommends that the Australian Government amends the *Fair Work Act 2009*, expanding the scope of the Act to encompass all forms of work, and empowering the Fair Work Commission to... determine fair rates and conditions for all categories of workers, including contractors...and make orders and determinations for groups or classes of workers.'²⁶⁰
- **New South Wales Government Inquiry, Recommendation 1**, 'That the NSW Government commit to greater protections for gig economy workers, regardless of work status.'²⁶¹
- **New South Wales Government Inquiry, Recommendation 2**, 'That the NSW Government establish a tribunal or extend the jurisdiction of the existing tribunal, with the power to set minimum pay and conditions for gig workers that provide labour to on demand platforms regardless of work status, to the extent permitted by the state's constitutional authority.'²⁶²

An amendment to the Fair Work Act would empower the Fair Work Commission to set minimum standards for classes of employee-like digital platform workers by issuing a minimum standards order. The Fair Work Commission would also be able to issue guidance-only standards. Regulations would be able to adjust the scope of the jurisdiction to include or exclude certain types of work, sectors or specific platforms.

Independent contractors who are well paid and have a high degree of control and autonomy over their work, such as skilled tradespeople who use online marketplaces to advertise services, are not intended to be covered by this proposal. The Fair Work Act would limit the Fair Work Commission's powers to set minimum standards to digital platform workers who are 'employee-like', defined as

²⁶⁰ Parliament of Australia, [Senate Select Committee on Job Security - Fourth interim report: the job insecurity report](#), Parliament of Australia, Australian Government, 2022, p xix.

²⁶¹ Parliament of New South Wales (NSW), [Select Committee on the impact of technological and other change on the future of work and workers in New South Wales](#), Parliament of NSW, Government of NSW, 2022, p 46.

²⁶² Parliament of New South Wales (NSW), [Select Committee on the impact of technological and other change on the future of work and workers in New South Wales](#), Parliament of NSW, Government of NSW, 2022, p 47.

workers who satisfy one or more of the following: being paid less than employees performing similar work, having low authority over their work, or having low bargaining power.

Legislated ‘guardrails’

Most stakeholders agreed that there is a need for minimum standards to ensure fairness for employee-like digital platform workers. An additional view was that any changes should not disturb certain benefits that the digital platform economy provides to workers, particularly flexibility over the hours and times of day they work. These considerations have helped inform the development of proposed ‘guardrails’, that would be legislated, to guide Fair Work Commission’s decision-making. This will ensure that the proposal can establish a safety net of minimum standards for certain cohorts of digital platform workers, without fundamentally shifting the nature of contracting across the economy nor jeopardising the benefits workers enjoy from this work.

In determining the standards that should apply to a cohort of workers, the Fair Work Commission’s decision making would be balanced by the following proposed ‘guardrails’ set out in the Fair Work Act:

- Requiring the Fair Work Commission to first be satisfied that classes of workers are employee-like before considering minimum standards.
- A ‘Minimum Standards Objective’ (‘Objective’). The Objective would direct the Fair Work Commission on the factors it must consider in setting minimum standards. The Objective will include factors such as the need for standards to be clear, fair, recognise workers’ perspectives, not to change the form of workers’ engagement, be tailored to the industry and type of work and not unreasonably impact competition, business viability and the economy.
- Flexibility to set mandatory or non-binding guidance standards.
- Prohibiting the Fair Work Commission from setting standards on certain matters, such as those that would change a worker’s status away from independent contracting.
- Limiting applications for minimum standards orders to be made by registered employee organisations, registered employer organisations, digital labour platforms and the Minister, with the capacity for the Fair Work Commission to set standards on its own motion.

Consistent with its existing functions in relation to modern awards, the Fair Work Commission will also be obliged to follow rules of procedural fairness by ensuring persons covered by a prospective Minimum Standards Order have the opportunity to be involved in informing its deliberations, such as via consultation, conferences and responding to draft orders. There will also be provisions for Minimum Standards Orders to be varied or revoked (processes that mirror the adoption of standards in the first place) to ensure the body of standards remains up-to-date and fit for purpose.

Content of standards

The Fair Work Act will include a non-exhaustive list of matters that the Fair Work Commission may include in the content of Minimum Standards Orders. These will include payment terms, record-keeping, insurance, consultation and cost recovery, though actual standards will depend on the

application at hand. The Fair Work Commission would be able to make Minimum Standards Orders that are either mandatory or guidance only. A mandatory Minimum Standards Order would override the mandatory terms of applicable state and territory laws to the extent of any inconsistency.

To further ensure that digital platform workers could continue to benefit from the flexibility of working on a digital platform, the Fair Work Act would also list matters that the Fair Work Commission could not make standards in relation to, including overtime rates, rostering arrangements, and terms that would change the form of engagement of the workers covered by the order. This responds to a key concern raised by digital platform businesses during consultation about the need for workers to be able to retain choice over their hours and times of work, and for minimum standards not to alter their form of engagement.

Consent agreements

Some stakeholders, including those representing workers, and academics raised that the proposed Fair Work Commission jurisdiction should enable collective agreements to be struck covering digital platform workers. Others, including digital platform businesses, were less supportive of collective agreement-making functions. To address these concerns, this option would allow agreements to be made by consent only, with no power to compel parties to negotiate an agreement. Legislation will also place limitations on the content of a collective agreement, including 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.

Where registered employee organisations and digital labour platforms choose to negotiate consent-based collective agreements, these may be registered with the Fair Work Commission. Where a Minimum Standards Order applies to the covered workers, the more beneficial provision would apply. The agreement-making framework would be supported by a limited exemption to the *Competition and Consumer Act 2010*.

Dispute resolution and protection from unfair deactivation²⁶³

The Fair Work Commission will be empowered to deal with disputes about matters arising under a Minimum Standards Order in a similar fashion to how it deals with other matters under the Fair Work framework, e.g. by conciliation, mediation and where possible, arbitration (subject to constitutional limits).

Employee-like digital platform workers who have worked under a services contract on a regular basis for at least 6 months will be able to dispute unfair 'deactivation' from a digital labour platform. Digital labour platforms will be required to hold a valid reason for the deactivation and to follow a process set out in a Digital Labour Platform Deactivation Code to be made by legislative instrument. For example, without pre-empting the content of the code, this could include using internal dispute resolution processes in the first instance.

²⁶³ While some of the independent reviews raised the need to provide protections from deactivation or unfair contract terminations as part of unfair contracts changes, these options include deactivation and unfair termination protections as part of the minimum standards measures.

If the Fair Work Commission determines that a 'deactivation' is unfair, it will be able to order reinstatement to a digital labour platform and where appropriate, make an order to restore lost pay. This responds to concerns raised by stakeholders representing workers about the need to mitigate the power imbalance that allows platforms to arbitrarily deactivate a worker without meaningful recourse.

Option 3: Minimum standards for digital platform workers and road transport workers

This proposal would implement Option 2, in addition to the Jobs and Skills Summit outcome regarding the road transport industry. It also responds to the recommendation of the Road Transport Inquiry to:

Recommendation 1 – 'The committee recommends that the government establishes or empowers an independent body that will, in consultation with industry, set universal and binding standards (including binding standards with respect to pay) which:

- ensure the safe performance of work and eliminate unsafe economic and contracting practices; and
- apply to all road transport supply chain participants, including transport operators, online/on demand operations, and workers (regardless of their employment or work status), and throughout supply chains.

The independent body shall also act as a dispute resolution body providing all road transport industry participants access to comprehensive binding dispute resolution capable of addressing all issues associated with, and general powers to resolve, disputes between some or all supply chain participants.'

Worker representatives and academics generally supported providing the Fair Work Commission with broad powers to set minimum standards in the road transport industry. Some road transport organisations have expressed support for confined minimum standards, particularly following an industry roundtable held in August 2022. However, employers and business representatives are largely opposed to a model that would resemble the former Road Safety Remuneration Tribunal.

Amendments to the Fair Work Act would empower the Fair Work Commission to set minimum standards in the road transport industry. As with Option 2, the terms of road transport Minimum Standards Orders would override the mandatory terms of state and territory laws to the extent of any inconsistency.

As with Option 2, this option would include a process for registered organisations and transport companies to make consent collective agreements covering road transport contractors engaged by the company. The Fair Work Commission will have the function of registering these consent agreements. Agreements will only be permitted to be made by consent, with no framework to take protected industrial action. Agreements will not be able to deal with purely commercial matters that do not have implications for labour. Where a Minimum Standards Order applies and an agreement is made, the more beneficial arrangement will apply.

Road transport workers would have access to a limited unfair contract termination jurisdiction, similar to the 'deactivation' protections for digital platform workers. The Fair Work Commission will be able to order remedies including compensation and reinstatement.

To respond to stakeholder concerns about the need for strong industry consultation before introducing minimum standards, this option would include strong checks and balances in legislation, particularly:

- The Fair Work Commission would be required to issue a notice of intent to make an order, along with the draft order. The notice of intent to make an order must then have been in place for at least 24 months to allow parties to consider the order and make submissions to the Fair Work Commission before it becomes mandatory.
- If the Fair Work Commission revises the draft order following or during the 24 month consultation period, it will be required to publish another notice of intent and consult for at least a further 12 months on the revised draft order.
- Road Transport Minimum Standards Orders and consent agreements would not be able to deal with certain matters including purely commercial matters that do not affect the terms and conditions of regulated workers covered by the order, matters that would change the form of engagement of the regulated workers, work health and safety matters or matters comprehensively dealt with by the Heavy Vehicle National Law.
- The Fair Work Commission would be required to convene a Road Transport Advisory Group. The Group would be required to have representatives from organisations that are entitled to represent road transport contractors and those that are entitled to represent road transport businesses, appointed by the Minister for Employment and Workplace Relations. The Group would provide a forum for industry stakeholders to discuss emerging issues, identify areas where there is common ground for action and make recommendations to the Fair Work Commission about making minimum standards.
- An Expert Panel for the road transport industry would also be established within Fair Work Commission to ensure it has access to the necessary industry expertise and ensure decisions across the sector are consistent.
- Additional legislative guardrails would apply where the Fair Work Commission is considering making a Minimum Standards Order. This includes that in addition to considering the Minimum Standards Objective, the Fair Work Commission would need to consider a Road Transport Objective.
- Before making a Minimum Standards Order, the Fair Work Commission would also need to take into account that it:
 - has genuinely engaged with the parties to be covered by an order
 - has consulted the Road Transport Advisory group
 - followed other legislated consultation processes
 - has had regard to the commercial realities of the road transport industry; and

- is satisfied that a mandatory minimum standards order would not unduly impact viability and competitiveness of owner-drivers or similar persons.
- As a ‘failsafe’ mechanism, regulations may empower the Fair Work Commission to conduct a merits review of a Road Transport Minimum Standards Order.

This gradual, consultative, and evidence-based approach to standard setting, with industry views taken into account at each stage of the process, will minimise the risk of potential negative outcomes where minimum standards are not informed by genuine engagement with owner drivers or do not reflect the commercial realities of the sectors of the industry to which they apply. These were key criticisms of the former Road Safety Remuneration Tribunal. The 2016 Review of the Road Safety Remuneration System concluded that the two orders made by the Road Safety Remuneration Tribunal would result in a net cost to the economy of over \$2 billion over 15 years from 2023.²⁶⁴ By contrast, this option includes legislative guardrails and institutional arrangements (i.e. the establishment of an Expert Panel and Advisory Group) that would ensure that the Fair Work Commission responds to commercial realities and the views of owner-drivers and industry.

Option 4: Minimum standards for digital platform workers and road transport workers with an interpretive principle in the Fair Work Act

This option would implement Option 3, with an additional amendment to introduce an interpretive principle that applies to determining the ordinary meaning of ‘employee’ and ‘employment’ under the Fair Work Act. This option responds to significant stakeholder feedback raised during consultation about the need to move away from the current contract-centric common law definition of employment. It also responds to Recommendation 6 of the Victorian On-Demand Inquiry.

This is an important measure to improve the operation of proposed minimum standards. In particular, it would clarify the distinction between workers that are eligible for protections and entitlements under the Fair Work Act and those eligible for new minimum standards under Options 2 and 3.

The interpretive principle would no longer require a focus in most cases on contractual terms (the approach espoused by the High Court’s decisions in *Personnel Contracting* and *Jamsek*) when determining a workers’ status as an employee or independent contractor. The principle would instead allow decision makers to consider the totality of the relationship. This would include the way the contract is performed in practice, in addition to the contractual terms governing the relationship. In practice, the intention is to reinstate a test that more closely reflects the multi-factorial test prior to the decisions in *Jamsek* and *Personnel Contracting*.

²⁶⁴ PricewaterhouseCoopers (PwC), [Review of the Road Safety Remuneration System: Final Report](#), report to the Australian Government Department of Employment, PwC, 2016, p iv.

Improving access to unfair contracts protections

Option 1: Status quo

The unfair contracts provisions in the Independent Contractors Act and Australian Consumer Law outlined in the background section would remain unchanged.

Option 2: Allow the Fair Work Commission to resolve disputes about unfair contracts for digital platform and road transport workers

The Fair Work Commission would be able to deal with unfair contracts disputes under the existing unfair contracts provisions by an amendment to the Fair Work Act. Compared to a court, the Fair Work Act provides low-cost and accessible dispute resolution. The Fair Work Commission will be able to deal with unfair contracts claims by conciliation, mediation or compulsory arbitration, subject to constitutional limitations. If it finds that a contract term is unfair, it will be able to make orders varying or voiding all or part of the contract to remedy the unfairness.

Under this option, the Fair Work Commission would be able to resolve unfair contracts disputes from digital platform and road transport workers only.

Eligibility to make an unfair contracts application to the Fair Work Commission would be further limited by a high income threshold. The high income threshold will be set out in regulations. It will be set at a level that takes into account the high income threshold in the Fair Work Act for employees, and factors in the additional costs faced by independent contractors compared to employees. The intent of the high income threshold is to ensure that the policy addresses low-leveraged independent contractors who lack the means to apply to a court for dispute resolution. Independent contractors whose incomes are above this threshold will continue to be able to apply to a court to dispute an unfair contract under the Independent Contractors Act.

Option 3: Allow the Fair Work Commission to resolve disputes about unfair contracts for all independent contractors

This option would take the same approach as under Option 2 but expand eligibility to make a dispute about unfair contracts at the Fair Work Commission available to any independent contractor, subject to a high income threshold.

7. What is the likely net benefit of each option?

This supplementary analysis assesses each option against their:

- **regulatory burden** under the Australian Government's Regulatory Burden Measurement framework; and
- consistency with the **Guiding Principles** for the development of the Government's commitments, as presented in Section 2.

Who will the options impact?

Key groups that the options are likely to impact are:

- **Independent contractors**
- **Businesses that engage independent contractors**
- **Consumers**
- **Third party businesses in the digital platform economy (such as restaurants)**
- **Government.**

The specific impacts of each option on these groups is explored in further detail in the following sections.

Independent contractors

Independent contractors are the primary intended beneficiaries of the proposed options. The options consider protections for different groups of independent contractors. Unfair contracts protections are proposed for all independent contractors, while minimum standards are only proposed in relation to digital platform workers who are employee-like and road transport workers (shown in Figure 2).

Figure 2 – Protections considered for groups of independent contractors



There are 1.1 million people who work as independent contractors in their main job in Australia.²⁶⁵ This represents 8.3 per cent of all employed people and has remained broadly stable over the last decade. The majority of independent contractors are:

- **Male** (69.5 per cent of all independent contractors),
- **Older** (55.5 per cent of independent contractors are 45 years or older, compared to 36.3 per cent for all employees),
- **Full time** (59.8 per cent, although this is lower than the proportion of all employees, at 69.3 per cent), and
- **Able to work on multiple active contracts at the same time** (70.5 per cent).

Independent contractors were more likely to be multiple job holders (11.4 per cent compared to 6.0 per cent for all employees).

More than half of all independent contractors were employed as Technician and trade worker (27.2 per cent) and Professional (26.9 per cent) occupations.

The largest 3 industries that independent contractors are employed in are the Construction industry (28.2 per cent), the Professional, scientific and technical services industry (15.7 per cent), or the Health care and social assistance industry (12.3 per cent). In the Construction industry, 25.1 per cent of all workers are independent contractors.

²⁶⁵ All data for independent contractors in this section is from Australian Bureau of Statistics (ABS), [Characteristics of Employment, August 2022](#), [TableBuilder].

The Transport, postal and warehousing industry has a higher than average incidence of independent contractors – 12.5 per cent of all employed persons in this industry are independent contractors, compared with 8.3 per cent for all industries.

Employee-like digital platform workers

The Government's 'employee-like' commitment intends to directly benefit employee-like digital platform workers by providing them with minimum standards for their work. The options also consider providing these workers with improved dispute resolution processes in the event of their 'deactivation' from a platform.

The Victorian National Survey found that digital platform workers are more likely to be:

- **Young** (11.0 per cent of those aged 18-34 worked through digital platforms within the last 12 months, the highest incidence of all age groups),
- **Male** (9.1 per cent of all men had worked through a digital platform in the last 12 months, compared to 5.0 per cent of women),
 - However, workers in **caring**, clerical and data entry, sales and marketing support and writing and translation services **were more likely to be women**.
- **Work in a major city** rather than in regional and remote areas,
- From a **non-English speaking background** (13.0 per cent had worked through a digital platform in the last 12 months, compared to 5.6 per cent from an English speaking background).
- **Temporary or permanent residents** (3 times and 1.7 times more likely to have worked through a digital platform in the last year than Australian citizens); and
- **Aboriginal or Torres Strait Islander** (16.9 per cent had worked through a digital platform in the last 12 months, compared to 6.8 per cent of non-Aboriginal and Torres Strait Islander people).

Over a third (35.2 per cent) of digital platform workers worked across multiple platforms.²⁶⁶ 11.4 per cent were registered on 4 or more platforms, and 3 of the most used platforms were for rideshare or food delivery.

Most digital platform workers do not earn all their income from digital platform work and may use this work to supplement income earned elsewhere. The Victorian National Survey found that only 15.4 per cent of digital platform workers were reliant on this income, with a further 24.5 per cent saying that it was 'an important part of overall income, but not essential'.²⁶⁷ Reliance on income earned through digital platforms is likely to be higher for employee-like digital platform workers. For

²⁶⁶ P McDonald et al., '[Digital Platform Work in Australia: Prevalence, Nature and Impact \(Digital platform work in Australia\)](#)', commissioned by the Victorian Department of Premier and Cabinet, 2019, p. 3.

²⁶⁷ P McDonald et al., '[Digital Platform Work in Australia: Prevalence, Nature and Impact \(Digital platform work in Australia\)](#)', commissioned by the Victorian Department of Premier and Cabinet, 2019, p. 30.

example, the Victorian National Survey found that transport and food delivery drivers were much more likely to say that they earned all their income from digital platform work.²⁶⁸

Road transport workers

The Government's Jobs and Skills Summit outcome in relation to road transport workers would benefit independent contractors working in the road transport industry, subject to appropriate checks and balances.

In August 2022 (latest available data) there were 367,300 workers in the road transport sector. Of these, 57,400 (or 15.6 per cent) were independent contractors.²⁶⁹ Independent contractors in this sector are more likely to be:

- **Born overseas** (67.7 per cent compared to 36.4 per cent of all independent contractors),
- **Male** (96.3 per cent compared to 69.5 per cent of all independent contractors),
- **Full time** (75.5 per cent compared to 59.8 per cent of all independent contractors),
- Employed as a **Machinery operators and drivers** (69.9 per cent compared to 7.6 per cent of all independent contractors),
- **Reside in a capital city** (75.3 per cent compared to 69.4 per cent of all independent contractors).

Independent contractors in this sector are more likely to have authority over their own work (55.6 per cent versus 38.4 per cent for all independent contractors). 48.6 per cent of independent contractors in these industries are able to work on multiple active contracts at once, lower than the 70.5 per cent recorded for all independent contractors.

Digital labour platform businesses

Introducing minimum standards for digital platform workers will have a regulatory impact on the digital labour platforms that engage them.

Given that the content of minimum standards will depend on the decision-making of the independent Fair Work Commission, it is difficult to estimate the impact that minimum standards for digital platform workers will have on businesses. There are a few different types of businesses that may be affected:

- Digital platform businesses e.g. Uber, DoorDash, Mable
- Businesses that use digital platform workers as part of their operations e.g. restaurants who offer delivery via DoorDash/Uber Eats

²⁶⁸ P McDonald et al., '[Digital Platform Work in Australia: Prevalence, Nature and Impact \(Digital platform work in Australia\)](#)', commissioned by the Victorian Department of Premier and Cabinet, 2019, p. 30.

²⁶⁹ Australian Bureau of Statistics (ABS), '[Characteristics of Employment, August 2022](#)', [TableBuilder].

- Businesses who are competitors or work in similar industries e.g. taxi drivers, delivery drivers, caring workers.

The first group of digital platform businesses have been consulted extensively. As indicated in Section 4, stakeholders in this group generally supported the concept of national minimum standards for digital platform workers, with views diverging on how to implement minimum standards. This is the group for whom there will be the most direct cost impact of minimum standards for digital platform workers. The costs to this group of businesses are the focus of this Impact Analysis Equivalent process.

The second group of businesses that use digital platforms as part of their operations is more difficult to find data on. The department is not aware of data that shows how many businesses use digital platforms as part of their work. Depending on the extent to which digital platform businesses choose to pass on costs, introducing minimum standards may increase the cost to these businesses of using digital platforms to reach consumers. However, without data available on how many businesses this will affect and how costs may be impacted, the department is unable to make an estimate of the size of this flow-on effect.

The third group of competitor businesses is even more difficult to quantify. There may be flow-on effects affecting the competitive advantage of different types of labour and employee relationships with the introduction of minimum standards for digital platform workers. However, these effects are not able to be modelled and as such the department is unable to make an estimate of the size of these potential effects.

Entities engaging road transport workers

Introducing minimum standards for road transport workers will have a regulatory impact on the entities that engage them.

As outlined in the available data section above, the ABS produces data on businesses in Australia however, it does not go into detail on the employment relationships that business may have (beyond a headcount of number of employees). Given that these statistics would not capture how many businesses use independent contractors, or the nature of these contracts, the department is unable to provide accurate information on the number of businesses that may be impacted by these legislated changes.

There is data available on the number of businesses in specific industries. Two industries within scope of the policies outlined in this document are the Road transport (2-digit ANZSIC code 46) and Postal and courier pick-up and delivery services (2-digit ANZSIC code 51) industries. In June 2022, there were 98,216 actively trading businesses in the Road transport industry, and 67,867 of those (69.1 per cent) were non-employing businesses. In June 2022, there were 42,758 actively trading businesses in the Postal and courier pick-up and delivery services industry, and 33,089 (77.4 per cent) of those were non-employing businesses. This means that within these 2 industries, there were 140,974 businesses actively trading as at June 2022, including 100,956 which did not have employees.

Consumers (of digital platform and road transport services)

The Actuaries Institute used ‘transaction data’ to estimate that consumers spent \$6.3 billion in the digital platform economy in 2019, growing nine-fold since 2015. However this is relatively small when compared with other sectors.²⁷⁰ At the national level, it is estimated that 46 per cent of Australian residents have used at least one digital platform as a consumer.²⁷¹ The Actuaries Institute found that the COVID-19 pandemic had a significant impact on consumption in the digital platform economy. For example, in October 2020, economic activity in the meal delivery sector was up more than 100 per cent and private transport was down 20 per cent compared to the pre-COVID-19 period.²⁷²

More recent data published by digital platform businesses suggests that consumption in the digital platform economy is strong. For example, a 2022 report released by Uber indicated that 40 per cent of respondents to a poll had used the Uber app in the last two years and estimated that Uber and Uber Eats produced \$6.6 billion in consumer surplus for Australians in 2021.²⁷³

The Productivity Commission outlined the benefits of digital platforms to consumers in their latest productivity review.²⁷⁴ These included improving consumer choice and providing better quality and variety of services (through increased competition in the sector). Digital platforms deliver better matching between suppliers and consumers through reducing transaction costs, simplifying search functions, intuitive algorithms, and real-time pricing, all of which can deliver a better experience for consumers.

NDIS participants and other clients of care-related services are a growing group of consumers in the digital platform economy. With regard to the care sector, the Productivity Commission stated *‘some digital platforms have underpinned greater consumer empowerment, improving the quality of service. In aged and disability care, platforms allow people to choose individual carers. This reduces people’s search costs in finding carers that meet their preferences and that understand their care requirements, without the need to re-familiarise with a new carer.’*²⁷⁵

Government

The options would have a direct impact on:

- The Fair Work Commission, which will implement the new jurisdiction including by setting minimum standards and resolving unfair contracts disputes; and
- The Fair Work Ombudsman, which will provide information and advice on the changes and enforce compliance with minimum standards orders.

²⁷⁰ Actuaries Institute, [‘The rise of the gig economy and its impact on the Australian workforce’](#), Green paper, 2020.

²⁷¹ Actuaries Institute, [‘The rise of the gig economy and its impact on the Australian workforce’](#), Green paper, 2020, p. 15.

²⁷² Actuaries Institute, [‘The rise of the gig economy and its impact on the Australian workforce’](#), Green paper, 2020, pp. 31-32.

²⁷³ Uber, [‘The Impact of Uber in Australia, 2022’](#).

²⁷⁴ Productivity Commission, [5-Year Productivity Inquiry – Volume 7](#), p. 136.

²⁷⁵ Productivity Commission, [5-Year Productivity Inquiry – Volume 7](#), p. 138.

Applying minimum standards to digital platform workers providing aged care and NDIS support services could also have a further impact on the Government funding arrangements for these sectors, depending on the final content of the minimum standard.

Minimum standards

Scenarios for estimating net benefits

The options to introduce minimum standards for certain cohorts of independent contractors would require the Fair Work Commission to i) determine the cohort that an order setting minimum standards will apply to, and ii) the content of any minimum standards, including pay rates. The net impact therefore would depend on a decision of the independent Fair Work Commission, guided by factors set in legislation. This is likely to be a highly complex and detailed process, and include a consideration of actual pay rates, costs incurred by workers, the views of the parties and other relevant economic considerations.

Therefore, the department has assessed the impact that would occur under scenarios detailed under each option. The department chose likely scenarios based on key areas of concern raised during consultation, while noting that impacts may be felt in sectors outside of these scenarios.

Scenario 1 – Rideshare and food (and other goods) delivery workers

Estimated cohort size – 150,000

This group consists of workers performing rideshare, taxi services, food delivery, or other goods delivery via digital platforms. Examples of platforms in this space include Uber, Uber Eats, Ola Cabs, Taxify, and Sherpa. During consultation, digital platforms engaging transport and food delivery workers, unions, state and territory governments, academics and others identified this group as a key cohort requiring minimum standards.

The Victorian Government survey identified that ‘transport and food delivery’ workers make up 18.6 per cent (or 121,300 workers) of all digital platform workers (department estimates based on the Victorian Government Inquiry). However, Uber has recently identified that it engages 150,000* rideshare and food delivery workers, who work at least once a month.

We have therefore used the 150,000 estimate for the number of food delivery drivers and rideshare. While Uber is not the only digital platform in transport and food delivery, it is the largest (with 22.7 per cent of digital platform workers performing work via Uber, compared with 8.2 per cent working via Deliveroo, and 7.2 per cent working via Ola at the time of the Victorian National Survey). Additionally, transport and food delivery workers had a high likelihood of working on three platforms, or four or more platforms, so it is likely that there is significant overlap between those workers who work for Uber and who work for other similar platforms e.g. DoorDash, Ola, Didi.**

* Uber, ‘Elevating the voices of 150,000 Australian gig workers’, March 2023, <https://www.uber.com/en-AU/newsroom/flexibility-works/>, [accessed 26 June 2023].

** McDonald, P. et al., ‘Digital Platform Work in Australia: Prevalence, Nature and Impact (Digital platform work in Australia)’, commissioned by the Victorian Department of Premier and Cabinet, 2019, p. 15, 18.

Scenario 2 – ‘Care’ workers

Estimates of cohort size – 16,300 workers or 2.5 per cent of all current digital platform workers (department estimates based on the Victorian Government Inquiry)

During consultation, aged care and NDIS support services delivered through digital platforms were also identified as an area of primary concern. The number of workers covered by any Minimum Standards Order that the Fair Work Commission may set will be dependent on the scope of the order/s.

The Victorian National Survey identified that 7.0 per cent of all digital platform workers performed ‘caring’ work. However, the survey defined this group broadly, including workers performing aged or disability care, as well as workers who would not be within a scope of a likely order, i.e. those providing pet services, babysitting, and nanny services. The department has therefore excluded 4.5 per cent of digital platform workers, which is the proportion of survey respondents who had engaged via MadPaws, a pet sitting platform. This results in an estimate of 2.5 per cent of digital platform workers who perform ‘caring’ work, or 16,300 workers. Mable estimated its own workforce size at 10,000 workers in 2021.* After considering that there are other digital platforms operating in this sector, and that some workers are likely to use multiple platforms to seek work, this estimate appears to be consistent with the Mable data.

*Mable Technologies, ‘Pre-Budget 2021 Submission’, 2021, https://treasury.gov.au/sites/default/files/2021-05/171663_mable_technologies_0.pdf.

Road transport workers

Scenario 3 - Last-mile delivery workers

Estimated cohort size – 19,100

Unlike digital platform gig workers, data on these workers is available from the ABS. They are part of the Transport, postal and warehousing industry (ANZSIC category I) which employed 698,200 people in August 2022 (5.2 per cent of all workers). The Postal and courier pick-up and delivery services sub-industry employed 99,000 workers, of which 19,100 were independent contractors. As in the estimates above, not all independent contractors will be impacted by the proposed changes and as such, this figure is an upper limit of those affected by the policy.

The department has identified the ‘last mile courier’ sector as a likely area of action for mandatory standards. This assumption is due to its competition with parts of the gig economy, in addition to feedback from road transport stakeholders during consultation that there may be a higher proportion of contractors with low bargaining power in this sector.

Option 1: Status quo

The minimum standards options propose introducing minimum standards for employee-like digital platform workers and independent contractors in the road transport industry, and to include an interpretive principle in the Fair Work Act applying to determining the meaning of ‘employee’ and ‘employment’. The impacts in this option consider the status quo in relation to these measures.

Digital platform economy

There are no existing minimum standards applying to digital platform workers. However, the state - based regulation of road transport and/or digital platform work described in section 3 means that there is an existing regulatory burden in relevant states. This regulatory burden is expected to be the greatest for businesses that operate across multiple states and which must comply with multiple regulations.

Pay rates

There is limited data available from the ABS on the earnings of independent contractors. The Victorian National Survey includes evidence on earnings for digital platform workers. It is worth noting that the payment structure for digital platform workers tends to be quite different to a traditional employment payment design, with 59.0 per cent of current platform workers reporting that they are paid by completed task or job, 22.0 per cent being paid for the time or hours they work, 5.1 per cent receiving a fixed daily/weekly/monthly income and 7.6 per cent being paid by some combination of some or all of the above.²⁷⁶ Current platform workers were also asked to estimate approximately how much per hour they usually got paid for tasks undertaken through their main digital platform, but a significant proportion (40.0 per cent) answered ‘I don’t know’ to this

²⁷⁶ P McDonald, et al., ‘[Digital Platform Work in Australia: Prevalence, Nature and Impact \(Digital platform work in Australia\)](#)’, commissioned by the Victorian Department of Premier and Cabinet, 2019, p. 18.

question.²⁷⁷ As such, the following earnings data should be treated with caution as a significant proportion of platform workers were unable to estimate their earnings, and it is unclear whether this group may have skewed the average earnings up or down.

For those current platform workers who estimated their hourly income, the median response for pre-tax dollars was \$25.00 and the mean was \$32.16.²⁷⁸

For transport and food delivery workers, the trimmed mean hourly rate was \$22.19. For care workers, the trimmed mean hourly rate was \$21.60. For comparison, at the time of the survey the casual National Minimum Wage rate was \$23.66.

During consultation, stakeholders raised concerns about digital platform workers generally earning less than they would if they were employees performing similar work. For these 3 types of work, the award rates for a casual employee as at April 2019 (the time of the Victorian National Survey) were all above the average hourly rates reported by digital platform workers. These are averages and do not reflect the individual situations of every worker – but on average, digital platforms are likely to be worse off than if they were entitled to minimum rates of pay set at a level similar to the casual hourly rate under the relevant award. Conversely, the status quo appears to have an economic benefit to digital platform businesses, who pay lower labour costs than if they were an employer and were bound by the relevant award. The department has estimated the cost of increasing the wage to the relevant award rate under Option 2.

Prevalence of ‘deactivations’

Digital platform workers can have their access to a digital platform ‘deactivated’ without notice and with limited avenues to dispute the action.²⁷⁹ Unfortunately no data exists at present on how often digital platform workers have their access to a digital platform ‘deactivated’. The ABS’ *Participation, Job Search and Mobility* publication includes data on the number of people who were dismissed from their job over the year. This was only 26,100 people, or 0.2 per cent of all workers, in February 2022, and this cohort made up only 5.0 per cent of all workers who lost their job for a range of involuntary reasons.²⁸⁰ In the absence of data on the prevalence of digital platform deactivations, we have considered that this proportion of 0.2 per cent can be applied to digital platform workers to estimate how many may face deactivations, noting the differences in legislative protections between the 2 groups.

²⁷⁷ P McDonald, et al., ‘[Digital Platform Work in Australia: Prevalence, Nature and Impact \(Digital platform work in Australia\)](#)’, commissioned by the Victorian Department of Premier and Cabinet, 2019, p. 19.

²⁷⁸ P McDonald, et al., ‘[Digital Platform Work in Australia: Prevalence, Nature and Impact \(Digital platform work in Australia\)](#)’, commissioned by the Victorian Department of Premier and Cabinet, 2019, p. 18.

Note also that this earnings data does not account for costs of operation e.g. petrol, car or bike maintenance.

²⁷⁹ Parliament of Australia, [Senate Select Committee on Job Security - First interim report](#), Select Committee on Job Security, June 2021 p 79.

²⁸⁰ Australia Bureau of Statistics (ABS), [Participation, Job Search and Mobility, February 2022](#) [TableBuilder].

Consumers and third party businesses

Consumers can benefit from the innovation, efficiency and often lower prices provided by the digital platform economy.²⁸¹ Consumer benefits specific to the scenarios for analysis include:

- **Rideshare services** – consumers benefit from improved reliability, better matching and ability to see fixed prices ahead of the trip, compared to taxi services.²⁸² A report by Deloitte Access Economics found that using 2016 service levels, consumers saved \$31 million per year by using rideshare, and that consumers had an annual benefit of \$49.6 million.²⁸³
- **Food delivery services** – consumers (as well as third party businesses) benefit from lower delivery prices. The Victorian Government Inquiry cited evidence stating that on-demand food delivery workers can be less than half the cost of engaging an employee to perform the same work.²⁸⁴
- **Care services** – the Productivity Commission’s Study Report on Aged Care Employment found that care services provided through digital platforms can provide benefits for clients including through improved services (for example, as independent contractors have a business incentive to deliver quality services to attract more customers), allowing consumers to choose workers that better meet their diverse needs, and improve clients’ continuity of care by directly sourcing personal care workers or nurses through platforms.²⁸⁵

Road transport

As indicated in Section 3, businesses operating in the road transport industry, including those engaging independent contractors, currently have to comply with the National Heavy Vehicle Law and Regulations, as well as certain state-based regulations. In New South Wales, this includes minimum standards applying to some road transport independent contractors, in addition to agreement-making and dispute resolution rights.

As mentioned in the section above on digital platform work, estimates of earnings for independent contractors are limited. The department has used the methodology created by PWC in a regulatory impact statement for the establishment of the Road Safety Tribunal in 2011. While the road transport policy outlined in this document is very different to that costed by PWC, the methodology of using income bands from Census data is one the department has adopted. This provides an estimate of median weekly earnings for the cohort in scope of the policy.

Census Tablebuilder data does not provide detailed information on form of employment (i.e. whether a worker was an employee, independent contractor, or another business operator). In the

²⁸¹ Productivity Commission, [5-Year Productivity Inquiry – Volume 7](#), pp 136-140.

²⁸² DPC, [Report of the Inquiry into the Victorian On-Demand Workforce](#), p 97; Productivity Commission, [5-Year Productivity Inquiry – Volume 7](#), p 136.

²⁸³ Deloitte Access Economics, ‘Economic Effects of Ridesharing in Australia, cited in Victorian Government, [Report of the Inquiry into the Victorian On-Demand Workforce](#)’, Industrial Relations Victoria, Department of Premier and Cabinet, 2020, p. 97.

²⁸⁴ DPC, [Report of the Inquiry into the Victorian On-Demand Workforce](#), p 84.

²⁸⁵ Productivity Commission, [Aged Care Employment: Study Report](#), Productivity Commission, Australian Government, 2022, p 100.

absence of this data the department has used owner managers in unincorporated and incorporated enterprises without employees as a proxy for independent contractors. The ABS description of each of these forms of employment share many similarities:

- Owner-managers of incorporated or unincorporated enterprises without employees are people who operate their own enterprise or engages independently in a professions or trade.
- Independent contractors are persons who operate their own business, and contract to perform services for others without having the legal status of an employee.

ABS data shows that the majority (69.6 per cent) of independent contractors were owner managers without employees.²⁸⁶ A further 20.4 per cent were owner-managers with employees, but as these workers are unlikely to be in scope of the proposed policy, their earnings have not been considered in the average earnings outlined below.

Earnings data in the Census is only available in weekly income ranges, making the construction of an hourly earnings rate problematic. The department has restricted the population to full-time workers only, to control for the lower weekly wages that those working part time would record. As the majority of independent contractors in the road transport sector work full-time (75.5 per cent) this method is also the most likely scenario. The median income band has been calculated for this population, giving a median weekly wage range of \$1,000-\$1,249 per week for owner managers in the road transport sector in 2021.

Interpretive principle

Option 4 proposes including an interpretive principle in the Fair Work Act applying to the meaning of ‘employee’ and ‘employment’. The principle would require a Court, in determining a workers’ status as an employee or independent contractor, to have regard to the totality of the relationship. This would not affect a significant number of workers and businesses and is unlikely to impact digital platform workers, noting that under the multi-factorial test previously applied in determining a workers’ status, workers in the digital platform economy were generally not found to be employees. Instead, it would ensure a fairer test applies where a Court is required to determine the status of a small number of workers on the fringes between employment and independent contracting who may have been determined to be employees under the multi-factorial test previously applied by Courts.

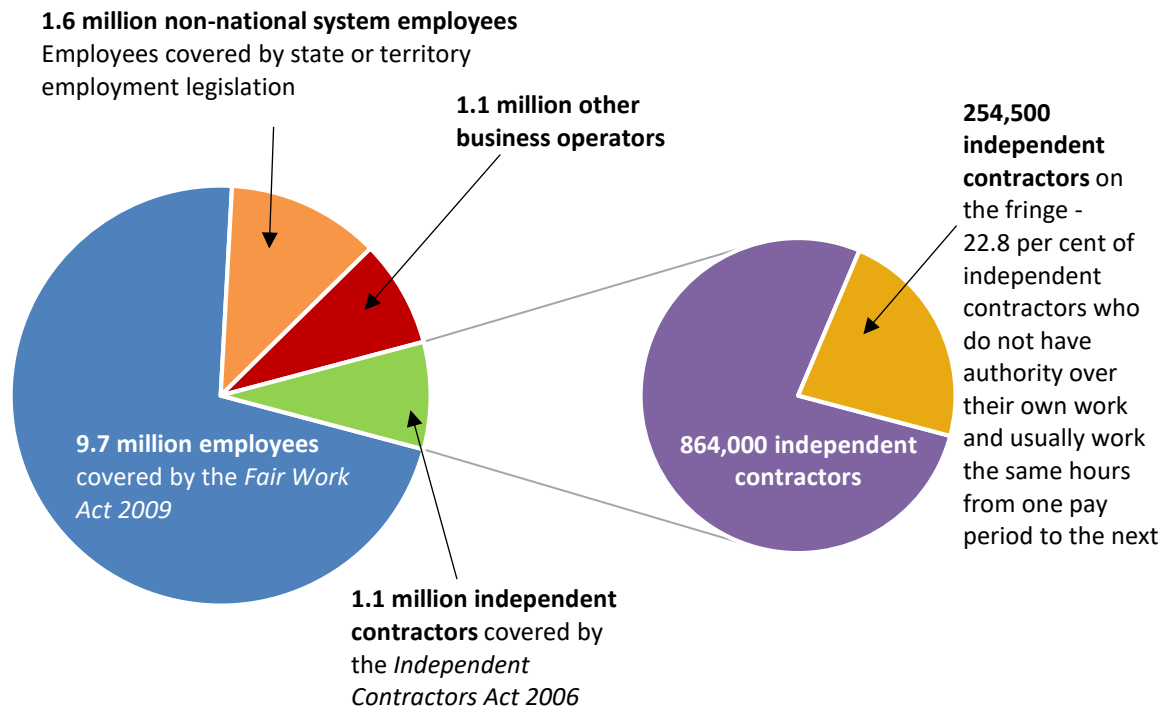
There is no clear data showing the number of workers in this cohort. However, the department has arrived at an estimate of a maximum number of workers in this category based on the likely characteristics of these workers. These may include being engaged by a single business for a long period, working regular hours, while not having authority over their own work.

The department has estimated the size of a possible cohort of workers on the fringes of employment and independent contracting by defining this group as independent contractors who did not have authority over their own work and who usually worked the same hours from one pay period to the next. This is a group of **254,500 workers**, or 22.8 per cent of the total 1.1 million independent

²⁸⁶ Australian Bureau of Statistics (ABS), [Characteristics of Employment, August 2022](#) [TableBuilder]

contractors.²⁸⁷ As this figure is considered to be an upper bound, it is possible that the actual number of workers who would be impacted by this proposal will be much lower.

Figure 3 – Estimates of workers who could be impacted by an interpretive principle in the Fair Work Act (ABS, Characteristics of Employment, August 2022, published and unpublished Tablebuilder data)



The status quo is relatively new, following the High Court’s 2022 decisions in *Jamsek* and *Personnel Contracting*. As this decision was handed down recently, it is difficult to examine whether there has been any impact on the number or proportion of independent contractors. The proportion of independent contractors in Australia has been broadly stable over the last 10 years, with latest data showing that the proportion of independent contractors stood at 8.3 per cent in August 2022.²⁸⁸ However, the incidence of independent contractors may increase in future. For example, Professor Andrew Stewart predicts that while independent contractors currently comprise approximately 8 per cent of all employed persons, it is likely to gradually increase, given the experience of other countries with ‘weak’ definitions of employment.²⁸⁹

²⁸⁷ Australian Bureau of Statistics (ABS), [Characteristics of Employment, August 2022](#) [TableBuilder].

²⁸⁸ Australian Bureau of Statistics (ABS), [Characteristics of Employment, August 2022](#) [TableBuilder]. Data is for form of employment in main job.

²⁸⁹ Andrew Stewart, ‘Tackling Insecure Work: Assessing the Albanese Government’s Reform Agenda’, speech given at Melbourne Law School, May 8, 2023.

Table 7 – Consistency with Guiding Principles – Option 1

Guiding Principle	Rating	Explanation
Australia's workplace relations system must reflect modern working arrangements and be capable of evolving with emerging forms of work and business practices.	Poor	Australia's workplace relations system developed prior to the digital platform economy. The emergence of new forms of digital platform work has created a cohort of workers who are employee-like but cannot access protections and entitlements under the workplace relations system. Current regulatory frameworks in Australia have not been capable of providing these to these workers. As a result, the ability of the status quo to meet this guiding principle is poor.
All workers should have access to minimum rights and protections regardless of whether they are characterised as an employee or an independent contractor, including access to freedom of association and dispute resolution.	Poor	National regulation does not allow for the extension of minimum standards or dispute resolution to workers who are not classified as employees. The current common law definition of employment relies heavily on the terms of the workers' contract, rather than focusing on the totality of the relationship.
Businesses should benefit from a level playing field among industry participants while promoting competition and innovation.	Poor	Unlike businesses engaging independent contractors, businesses that engage employees are subject to a comprehensive system of employment regulation, including the requirement to pay minimum wages. This undermines even competition between businesses offering similar services, including digital platforms that engage employees and 'traditional' employing businesses in the same sector. Due to this uneven competition, the rating for this guiding principle is poor.
The Fair Work Commission should set minimum standards that:	Poor	The Fair Work Commission cannot set minimum standards for digital platform or road transport workers under the status quo.

• are fair, relevant, proportionate, sustainable and responsive • reflect workers' independence and flexible working arrangements, for example choosing which tasks to accept and refuse, how to undertake their work, where and when they work, and which businesses to contract with • mitigate to the greatest extent possible unintended consequences for workers, businesses, consumers and other aspects of the labour market		
The standard-setting framework should be accessible, transparent, fair and offer a high degree of certainty to affected parties.	Poor	There is no standard-setting framework under the status quo.

Option 2: Empower the Fair Work Commission to set minimum standards for digital platform workers

Direct regulatory impacts

Compliance

Compliance with minimum standards

The compliance cost of introducing minimum standards will fall on digital platform businesses. This cost will be estimated as a comparison to the baseline established under the Status Quo Option, which is **nil**.

The department estimates that digital platform businesses are likely to face the following compliance costs under Option 2:

- Initial costs of ensuring that contracts and systems are compliant with new minimum standards.
- Ongoing compliance costs of record-keeping and ensuring compliance with varied standards

There is no existing data on the number of digital platform businesses in the digital platform economy. Therefore, the compliance cost is expressed as a cost per business.

As technology companies, digital platforms are likely to have robust IT systems to implement new minimum standards. They are also likely to have standard form contracts applying to their workers. Therefore, the department assumes that the likely regulatory cost of ensuring compliance with new minimum standards will include:

- Understanding new obligations and regulation.
- Updating their service contract and other documents to ensure it incorporates new minimum standards. This process is also likely to look at other necessary steps the business needs to take, such as updating websites and their app to ensure that information on pay rates is accurate.
- The cost of updating IT systems (such as algorithms setting pay rates for workers) to ensure compliance with new minimum standards.

Understanding new obligations

There are no publicly available estimates of how long it would take businesses to understand new obligations. Taking into account that there are different orders that could be made which could range from those that may be simpler to understand, to those that may be more complicated, the department estimates that it would take a business on average 20 hours to understand their new obligations. These 20 hours of work are likely to be undertaken by a legal professional. This estimate factors in that the Fair Work Commission is likely to take some time to make a Minimum Standards Order, and that prior to making an Order, the Fair Work Commission would consult with affected

entities including digital platforms. Digital platform businesses would be able to access fact sheets and other information published on the Fair Work Commission and Fair Work Ombudsman's website.

Updating contracts and other key documents

Given this is a new jurisdiction, there is no publicly available documentation available on how long it would take business to update contracts and key documents to comply with Minimum Standards Orders. The different types of orders, different levels of maturity of platforms and different business models also make it challenging to accurately estimate. Given this complexity, the department assumes that as an initial cost, it would take a business 100 hours to ensure their contracts and processes (for example services contracts provided to workers) are compliant with the new minimum standards that are implemented. This is a deliberately generous estimate given the highly variable costs that may be involved in responding to a new type of Minimum Standards Order. It may well cost less depending on the specific circumstances, such as the terms of the Minimum Standards Order.

This work is also estimated to be undertaken by a legal professional. The estimate that this will take a legal professional 100 hours factors in that compliance with minimum standards is likely to be a significant change to these businesses' existing arrangements, and that ensuring that contracts and processes are compliant will be a complex task. If standards are varied in the future, this cost is likely to be significantly lower and primarily involve ensuring compliance with a new pay rate. The department estimates that this will take 10 hours every time a Minimum Standards Order is varied given that it will be a less complex task to update documentation for an order already in place.

Updating IT systems

Again, there is no publicly available documentation available on the likely regulatory burden for updating IT systems in response to Minimum Standards Orders. Discussion with the department's IT team indicates that it is challenging to provide an accurate estimate of the hours required to update IT systems, as it will depend on a number of factors, including the complexity of the IT systems, whether the IT systems already deal with the concepts in the Minimum Standards Orders, and whether the digital platform has responded to similar regulatory environments overseas.

For example, if a platform simply needs to update a minimum hourly rate where it already sets one, the amount of time taken will be minimal. However, if the platform needs to incorporate a completely new element into a complex system it could potentially take weeks of work from a team of coders. This was supported by feedback from platforms during consultation, including that the implementation cost of minimum standards would depend on the extent to which it differs from their existing business model. They also advised that it could take a long period of time to update systems to implement any changes.

The department's costing assumptions are based on minimum standards introducing changes that would not fundamentally shift platforms' business models. Given the views put forward by platforms, if these changes were more significant, compliance costs would be likely to be higher.

Given these uncertainties, and noting that the provisions are not intended to change the nature of the worker's engagement, the department estimates that on average, it will take 200 hours (or around 2.5 weeks of two IT professionals) of IT work to implement new minimum standards per digital platform business. As with the cost of ensuring that systems and processes are compliant with new minimum standards, system updates in response to a new Minimum Standards Order are likely to be a more significant change to existing arrangements than updating in response to an order being varied. When updating systems to implement variations to minimum standards (for example, changes to minimum rates), this will be estimated to take 20 hours per variation. This work will also be undertaken by an IT professional.

Relevant pay rates for costing

The Office of Impact Analysis provides an hourly rate of \$79.63 for 'work related labour rates'.²⁹⁰ This rate takes into account an average worker's wage and other business costs associated with employing that worker (an extra 75 per cent loading is added to the base wage to reflect these costs). Given that IT and legal professionals often have a higher average wage, the department has taken the methodology of the Office of Impact Analysis and applied it to the average hourly earnings of IT and legal professionals (i.e. inflating the average hourly wage by 75 per cent). For all other workers, the department has used the Office of Impact Analysis hourly rate of \$79.63.

The department has also used the cost of senior legal and ICT professionals engaged directly by a business. Not all of the work to implement these measures would necessarily need to be undertaken by senior legal or ICT professionals. However, the use of a higher rate recognises that while some platforms may be able to comply with Minimum Standards Orders at a lower cost using in-house or more junior professionals, others will need to engage the services of third-party services such as a legal firm and this may incur a higher cost. The assumptions around the number of hours taken and the seniority of the professionals used intends to balance these different scenarios and provide an average cost for the purposes of estimating the regulatory impact.

For IT professionals, the department has used the weekly wages of a full-time ICT manager, using *ABS Employee Earnings and Hours, May 2021* data (\$3,100.10 per week), and divided that by 35 hours (the number of hours that denotes a full-time worker by the ABS) to get an average hourly rate of \$88.57. Applying the 75 per cent loading to that figure gives an average business cost of \$155.01 per hour for an IT professional. This aligns with the average annual salaries for a range of IT professionals published by Hudson, e.g. platform developers have annual salaries of \$141,000 per year (which equates to an hourly wage of \$77.47). These rates are also broadly consistent with the range of rates that the department pays to ICT professionals engaged to write applications or update online platforms for the department.

To estimate the hourly earnings for an appropriate legal professional, the department has used annual salaries for senior corporate lawyers from Mahlab.²⁹¹ These gave average annual salaries of approximately \$190,000-\$260,000 for senior corporate lawyers with 8-10 years' experience. These approximate average salaries were corroborated by the department's internal lawyers. Using the published mode of \$245,000 for senior corporate lawyers in Sydney, and applying a similar

²⁹⁰ Office of Impact Assessment, [Guidance Note, Regulatory Burden Measurement Framework](#), p 11

²⁹¹ [Mahlab Report](#), July 2022, salary for a corporate lawyer in Sydney with 8-10 years' experience.

methodology as above, the department divided the annual salary of \$245,000 by 52 and then again by 35 to calculate an hourly wage of \$134.62. Then applying the 75 per cent loading the department estimates that the hourly work related labour rate of employing a senior corporate lawyer to be \$235.58.

As above, it is estimated that the Fair Work Commission would set the first Minimum Standards Orders to be implemented in 2025-26, and then vary these every 3 years, the department estimates that each business would face **\$7,018.20** as an annual cost, averaged over the next 10 years.

Table 8 - Compliance costs over 10 years

Year	Understanding new obligations	Updating contract and other documents	Updating IT systems	Total
2025-26	= \$235.58 x 20 hrs = \$4,711.54	= \$235.58 x 100 hrs = \$23,557.69	= \$155.01 x 200 hrs = \$31,001.00	\$59,270.23
2028-29	Nil	= \$235.58 x 10 hr = \$2,355.77	= \$155.01 x 20 hrs = \$3,100.10	\$5,455.87
2031-32	Nil	= \$235.58 x 10 hr = \$2,355.77	= \$155.01 x 20 hrs = \$3,100.10	\$5,455.87
TOTAL	\$4,711.54	\$28,269.23	\$37,201.20	\$70,181.97
Yearly average (10 years)	\$471.15	\$2,826.92	\$3,720.12	\$7,018.20

Compliance with deactivation disputes

There are additional regulatory costs for businesses engaging digital platform workers who will be able to dispute an unfair contract termination or 'deactivation' at the Fair Work Commission. These businesses would face costs associated with implementing new policies and procedures to ensure that terminations of contracts are compliant. For example, this may include steps to afford the other party procedural fairness.

Consistent with the approach taken above for the cost of compliance with a new Minimum Standards Order, the department estimates that it would take a business 20 hours to understand the new obligations and a further 100 hours to develop policies and procedures to ensure that future contract terminations are compliant. The number of hours taken is intended to provide an average level of regulatory burden, but it is likely that the time taken would vary depending on the final form of the deactivation code, the Fair Work Commission's approach to implementation and platform's current approaches to deactivation. This work would be undertaken by a legal professional at the rates outlined above. These would be a one-off cost to businesses.

$$= (20 \text{ hours} \times \$235.58) + (100 \text{ hours} \times \$235.58)$$

= \$4,711.54 + \$23,557.69

= **\$28,269.23 per business.**

There is no available data on how many digital platforms engage independent contractors. The per business cost is estimated as \$28,269.23, including time to understand new obligations and to implement policies and procedures to ensure that any contract terminations are compliant.

This cost will be in addition to the \$59,270.23 compliance cost referred to in Table 8, which is expected to come into effect in 2025-26.

Economic

Economic impact of minimum standards

Despite the benefits that digital platform work has brought to workers, businesses and consumers, this model sees legal and operational risk transferred from business to individual workers, while leading to some workers operating at below the equivalent of national minimum wage.

Introducing minimum standards for digital platform workers will have a direct financial impact on:

- **digital platform businesses** who will have to pay minimum pay rates and entitlements.
- **digital platform workers** who will receive minimum pay rates and entitlements.

Depending on the action taken by these businesses in the face of increased labour costs, it is likely that at least part of this cost will be passed on to the consumers of these platforms. The Actuaries Institute estimated in 2019 that consumers spent \$6.3 billion in the gig economy, and 46 per cent of Australian residents are estimated to have used at least one digital platform as a consumer.²⁹² It will be up to each digital platform to decide how much of these costs they absorb and how much they pass onto consumers through higher prices. This depends on a range of complex factors and the interactions between them, including the profit margins of the digital platforms and various elasticities. It is therefore not possible to estimate how this cost may flow on to consumers.

The department anticipates that there would be an initial impact to these parties created by moving from the status quo to introducing minimum standards, and then further ongoing costs as these standards are varied in the future. Over the next 10 years, the department estimates that the total impact would be \$4.0 billion in a wage bill plus \$96,700.70 per business (initial and ongoing costs). As we do not know how many businesses will be impacted by this policy change, we cannot sum these 2 figures. This is the costs to digital platform businesses and benefits to digital platform workers.

Estimated number of digital platform workers

The number of digital platform workers has been estimated based on the Victorian National Survey by using the proportion of people who had worked or offered services through digital platforms in

²⁹² Actuaries Institute, [The rise of the gig economy and its impact on the Australian workforce](#), Green paper, December 2020, p. 14.

the last 12 months (7.1 per cent as at April 2019),²⁹³ applying it to the number of employed persons at the time this survey was conducted, i.e. April 2019 (12,810,563 persons),²⁹⁴ and then discounting this estimate by the proportion of digital platform workers who worked less than once a month (28.3 per cent).²⁹⁵

Number of digital platform workers = 7.1% x 12,810,563 x (100% – 28.3%)

= **652,147 digital platform workers** (as at April 2019)

Likely scenarios

Food delivery, rideshare, and caring workers are primary areas of focus and consistent with the requirement for workers to be employee-like. Therefore, we consider it a likely scenario that the Fair Work Commission would choose to prioritise setting minimum standards for these cohorts. As such, we have estimated the wage bill of granting minimum standards in the form of the relevant casual award rates for these groups of digital platform workers. The awards listed below in Table 9 are the most appropriate awards in the department’s analysis. There is no data available about how many employees are engaged at each level, so we have chosen level 2 for the purpose of this analysis as a comparator rate. The Fair Work Commission may also account for additional factors when setting minimum standards, for example, independent contractors bear their own operating costs and pay their own superannuation. The actual costs will depend on the decision-making of the Fair Work Commission.

Table 9 – Estimated average hourly pay rates for digital platform workers, compared to award rates, April 2019

	Food delivery	Rideshare	Care (aged care or disability support)
Hourly casual wage under relevant award ²⁹⁶	\$25.28 Restaurant Industry Award, Employee Level 2 ²⁹⁷	\$26.14 Passenger Vehicle Transportation Award, Grade 2 Employee ²⁹⁸	\$26.99 Social, Community, Home Care and Disability Services

²⁹³ P McDonald. et al., ‘[Digital Platform Work in Australia: Prevalence, Nature and Impact](#) (Digital platform work in Australia)’, commissioned by the Victorian Department of Premier and Cabinet, 2019.

²⁹⁴ ABS, [Labour Force, May 2023](#), using the seasonally adjusted estimate for April 2019.

²⁹⁵ P McDonald et al., ‘[Digital Platform Work in Australia: Prevalence, Nature and Impact](#) (Digital platform work in Australia)’, commissioned by the Victorian Department of Premier and Cabinet, 2019, p. 7.

²⁹⁶ Calculated using the Fair Work Ombudsman [Pay and Conditions Tool](#) (PACT), with a calculation date of 1 April 2019.

²⁹⁷ Schedule B – Classification Structure and Definitions, [Restaurant Industry Award](#), as at April 2019. Level 2 – means an employee who has not achieve the appropriate level of training and who is engaged in a variety of tasks, including “performing delivery duties”

²⁹⁸ Schedule B – Classifications, [Passenger Vehicle Transportation Award](#), as at April 2019. Grade 2 employees include a driver of a motor vehicle, limousine or hire car capable of carrying less than 8 persons and used for hire or reward but excluding motor vehicles used for private purposes.

			Industry Award, Home Care Employee Level 2 ²⁹⁹
Average hourly wage for digital platform workers (Victorian National Survey)	\$22.19	\$22.19	\$21.60
Hourly pay gap (\$)	\$3.09	\$3.95	\$5.39

Estimate of weeks worked in a year

The Victorian Government Inquiry found that 27.5 per cent of current digital platform workers engaged with their digital platform at least a few times per week, 24.4 per cent engaged about once a week, 19.8 per cent engaged less than once a week but at least once a month, and 28.3 per cent engaged less than once a month.³⁰⁰ This data is not disaggregated by occupation.

In our estimate of number of gig workers, we have already excluded the group of 28.3 per cent of digital platform workers who engaged with digital platforms less than once a month. We have estimated the number of weeks worked for each of the other 3 groups and weighted these accordingly. For those who worked at least a few times per week, we assumed they worked 52 weeks in the year. For those who worked about once a week, we also assumed they worked 52 weeks in a year. For those who worked less than once a week but at least once a month, we assumed they worked 26 weeks in a year.

Applying these assumptions and proportions gives us an estimate of average weeks worked in a year below:

$$= (27.5\% / 71.7\% \times 52 \text{ weeks}) + (24.4\% / 71.7\% \times 52 \text{ weeks}) + (19.8\% / 71.7\% \times 26 \text{ weeks})$$

= 44.8 weeks in a year

Adjustment of pay gap to reflect 2023 earnings

As the earnings data available is from 2019, we have adjusted the pay gap between the earnings of digital platform workers and the relevant award to be aligned with the Annual Wage Review decisions from 2019-2023. The increases to award wages were 3.0 per cent in 2019, 1.75 per cent in 2020, 2.5 per cent in 2021, and 5.75 per cent in 2023. In 2022, award wages increased by 4.5 per cent but were subject to a \$40 per week minimum increase. For the award rates listed in Table 5 above,

²⁹⁹ Schedule E – Classification Definitions – Home Care Employees, [Social, Community, Home Care and Disability Services Industry Award](#), as at April 2019. Home Care Employee Level 2 - Indicative but not exclusive tasks include: the provision of personal care, supervising daily hygiene, laying out clothes and assisting in dressing, make beds, tidy rooms, preparation and cooking of meals and assistance with meals, dry cleaning, perform gardening duties, undertake basic repairs, clean, fitting and removal of aids and appliances, monitoring medications, fitting and changing of catheters, assistance with communication, accompanying clients on outings, domestics assistance and organising appointments.

³⁰⁰ DPC, [Report of the Inquiry into the Victorian On-Demand Workforce](#), p. 40.

increases ranged from 4.6 per cent to 4.8 per cent. This assumes that both the earnings of digital platform workers and the relevant award rates increased at the same rate from 2019 to 2023, so the pay gap remains proportionate.

For food delivery drivers and rideshare, the average pay gap of \$3.52 has therefore been adjusted to become **\$4.19**. For caring workers, the pay gap of \$5.39 has been adjusted to become **\$6.40**.

Food delivery drivers and rideshare

As indicated in the 'scenarios for impact analysis', the estimated cohort size for this group is 150,000.

The annual cost of Option 2 is calculated as follows:

= 150,000 x average difference in hourly wage x average hours worked by transport and food delivery workers x estimate of weeks worked in a year

= 150,000 x \$4.19 x 14.5 hours x 44.8 weeks

= 150,000 workers x \$2,721.22 per worker

= \$408,182,524.64 (0.04 per cent of total wage bill)³⁰¹

Uber has also noted that only 7 per cent of drivers and delivery people use the platform for what resembles full-time work (38 hours per week and 48 weeks per year).³⁰² However, there is no data publicly available on average weeks per year worked by Uber drivers and delivery people. We have therefore used the estimate of weeks worked in a year from the Victorian National Survey, noting this may well be an overestimate.

Care (aged care or disability support)

As set out in the 'scenarios for estimating net benefits', the estimated cohort size is 16,304 workers. The annual cost of Option 2 with regard to caring workers is calculated as follows:

= proportion of digital platform workers in 'caring', excluding those in pet caring platforms x number of digital platform workers x average difference in hourly wage x average hours worked by caring workers x estimate of weeks worked in a year

= (7.0% - 4.5%) x 652,147 x \$6.40 x 8.6 x 44.8 weeks

= 2.5% x 652,147 workers x \$2,468.64 per worker

= 16,304 workers x \$2,468.64 per worker

= \$40,247,864.99 (0.004 per cent of total wage bill)³⁰³

³⁰¹ ABS, [Australian National Accounts: National Income, Expenditure and Product, March 2023](#). Calculated using compensation of employees – wages and salaries, seasonally adjusted data.

³⁰² Uber, ['Flexibility works'](#), March 2023.

³⁰³ Australian Bureau of Statistics (ABS), [Australian National Accounts: National Income, Expenditure and Product, March 2023](#), ABS website, June 2023. Calculated using compensation of employees – wages and salaries, seasonally adjusted data.

Total

The number of workers covered by Fair Work Commission's Minimum Standards Orders will be dependent on the scope of the orders, for example, only food delivery drivers, rideshare drivers or personal support carers. We consider that a likely scenario is that transport and food delivery workers and caring sector workers are 2 of the primary areas of concern, so we have used the cost of these two worker groups as an indicative estimate of the wage bill.

The annual cost of Option 2, adding the above 2 totals together, is:

= \$408,182,524.64 + \$40,247,864.99

= \$448,430,389.63 (0.04 per cent of total wage bill)³⁰⁴

Initial one-off impact of introducing minimum standards

This option assumes that a hypothetical minimum standard set by the Fair Work Commission would be set at award rates. Under this option, workers will receive a benefit of \$448.4 million in 2023. The cost to business will be a transfer of their previous benefit to workers, and therefore a cost of \$448.4 million per year. This is only the cost of the additional wages that may be paid to digital platform workers. As previously stated, the department cannot estimate the total compliance costs to all businesses as data on the number of digital platform businesses is unavailable.

Given the assumption that the Fair Work Commission will make a maximum of 3 orders per year, and that there are 3 broad sectors that are likely to be within the scope of the Fair Work Commission's decision-making, the Impact Analysis estimates that a maximum impact will be that of introducing minimum standards covering all of these workers in the first year of the jurisdiction's operation. However, the Fair Work Commission may choose to consider fewer matters or to limit a standard to only certain workers within a sector (for example, only food delivery workers who deliver food by bicycle).

If the Fair Work Commission makes 3 Minimum Standards Orders one year after the jurisdiction commences, to be implemented the following financial year (i.e. based on a 1 July 2024 commencement the first order would be made on 1 July 2025), this initial impact would be in the 2025-2026 Financial Year. The department has adjusted the figure for 2023 to account for the forecast inflation for 2025-26.³⁰⁵ The estimated impact in 2025-26 is:

- Benefit of \$472.3 million for digital platform workers
- Cost of \$472.3 million to businesses.

This is in addition to the additional compliance costs estimated to be \$87,539.46 per business (the estimated \$59,270.23 cost of complying with minimum standards and \$28,269.23 of complying with deactivation protections in 2025-26) for digital platform businesses

³⁰⁴ Australian Bureau of Statistics (ABS), [Australian National Accounts: National Income, Expenditure and Product, March 2023](#). Calculated using compensation of employees – wages and salaries, seasonally adjusted data.

³⁰⁵ [Budget 2023-24](#) CPI forecast for 2025-26

Given the prevalence of low pay rates in digital platform work, this is likely to have a significant benefit to the economic security and livelihoods of the relevant workers. For digital platforms, many of which are large businesses and generally supported the introduction of minimum rates of pay during consultation, these costs will need to be absorbed. These businesses would likely be able to pass on some of these costs through higher prices for consumers or third-party businesses. This may have further effects for the competitiveness of digital platforms who currently rely on lower labour costs to generate a competitive advantage in their industries. Absorption of higher labour costs may have flow-on effects for the total business costs.

Ongoing costs

The department assumes that parties will apply for a variation to a Minimum Standards Order, on average, every 3 years. Similar to the content of initial standards, the impact of varying a Minimum Standards Order will depend on the parties and the Fair Work Commission's decision-making. The department has estimated the cost of an increase in minimum pay rates in line with inflation. This assumes that the increases to minimum pay rates will maintain the real value of wages for these workers. However, this figure will depend on the actions of the parties, economic conditions such as inflation at the time of the variation, and the decision-making of the independent Fair Work Commission.

The 2023-24 Budget papers forecast that inflation is likely to ease in the coming years, with the Consumer Price Index (CPI) forecasted to fall to 3¼ per cent in 2023-24, 2¾ per cent in 2024-25, and 2½ per cent in 2025-26 and 2026-27.³⁰⁶ Given that initial minimum standards are anticipated in 2025-26, variations could occur in 2028-29 and 2031-32. The Impact Analysis will assume that all 3 hypothetical Minimum Standards Orders are varied in that year. While not an indication of a possible inflation rate in 2028-29, the department will use the furthest forecast CPI rate of 2½ per cent as an estimated figure for a possible increase in each year from 2025-26 onwards, with an inflation adjustment of 7.7 per cent in 2028-29 (2 ½ per cent compounded over 3 years). Over the next 10 years, there would be a further possible increase in standards in 2031-32 of 7.7 per cent (again using the compounded rate). It is difficult to forecast inflation rates several years in advance, but in the long-term inflation is expected to return to the Reserve Bank of Australia's inflation target of 2-3 per cent. Given the estimates of inflation do not affect the expected wage bill cost until 2028-29, the 2.5 per cent per year forecast is as robust of an inflation forecast as is achievable.

Using the initial impact estimated, this would suggest that there would be a future economic impact in the form of increased wages to workers of:

- \$472.3 million in 2025-26
- \$508.6 million in 2028-29
- \$547.7 million in 2031-32.

This results in an average annual increase in wages over the next 10 years of \$403.8 million.

³⁰⁶ Treasury, [Budget 2023-24](#), Budget Paper 1, Table 1.1.

Economic impact of deactivation disputes

While there is no available data on the cost to digital platform workers of having their contract terminated, in an employment context job loss can result in significant financial hardship in addition to mental and physical health impacts.³⁰⁷ As digital platform workers can work for multiple platforms, the impact of a contract termination is not the equivalent of a job loss for employees. However, those that are more dependent on platform work for income are more likely to experience significant costs following a deactivation.

Introducing deactivation disputes is likely to have a social and economic benefit for digital platform workers. This includes improved security of income and protection from job loss for the independent contractors that make a successful application to the Fair Work Commission. There are also likely to be flow-on benefits, particularly that legislated protections are likely to discourage unfair terminations from occurring in the first place.

The impact of deactivation rights on digital platform businesses is likely to be compliance-related rather than economic.

There is no data available on how often digital platform workers have their access to a digital platform 'deactivated'. Applying the proportion of all workers who were dismissed from their job (0.2 per cent) to the estimate of the number of digital platform workers gives an estimate of 1,273 digital platform workers per year who may have their accounts deactivated.³⁰⁸ This may not be reflective of the true number of digital platform deactivations due to the difference in legislative protection between dismissal of employees and deactivations of independent contractors, as well as their different characteristics. In addition, digital platform workers who are deactivated from one platform may still be able to engage with other platforms.

Under this option these estimated 1,273 digital platform workers will be able to make an application to the Fair Work Commission to dispute their deactivation. The introduction of these proposed protections may also encourage digital platform businesses to ensure that any 'deactivations' are fair (for example, reviewing reasons for deactivation, developing clear guidelines and processes), which may reduce the number of deactivations that occur.

Broader economic impacts

Estimating the economic impacts of workplace relations reforms is difficult. Specific outcomes are dependent on the approach that independent parties, such as employers, unions, and the Fair Work Commission, take to the provisions. Assumptions would need to be made about the behaviour and decisions of independent parties, as well as the interaction between various other measures being considered and other government reforms. It is also difficult to isolate the impact of these measures from other externalities, such as changes in the economic climate. Accordingly, the department is unable to estimate these flow-on costs, consistent with the approach for other recent legislation, such as the Secure Jobs, Better Pay Act 2022 and the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021.

³⁰⁷ D Lancaster, *The financial cost of job loss in Australia*, Reserve Bank of Australia, 2021.

³⁰⁸ Australian Bureau of Statistics (ABS), *Participation, Job Search and Mobility*, February 2022, [TableBuilder].

While the department is unable to robustly estimate the flow-on costs of this policy due to the reasons mentioned earlier, it is assumed that the introduction of minimum standards would lead to a more reliable income stream and an increase to weekly income for digital platform workers. This could assist digital platform workers to meet elevated living costs, which may also provide a boost to their local economies.

Competition

The emerging digital platform economy allows for the engagement of contractors at scale to meet growing consumer demand for services, without the obligations of an employer. These resulting lower labour costs give digital labour platforms their competitive edge compared to traditional businesses. Evidence provided to the Victorian Government Inquiry indicated that using non-employee digital platform workers to deliver food to consumers can cost half to two thirds the price of employee labour due to a lack of minimum standards.³⁰⁹ This can have a competitive impact on businesses that directly engage employees, who are entitled to minimum pay rates and other employee entitlements.³¹⁰

By giving the Fair Work Commission the power to set standards for workers engaged by platforms, businesses would have the opportunity to compete on a more level playing field, in relation to labour costs. For example, Hireup, a major digital platform in the care sector, engages its workers as employees. This shows that it is possible for a digital platform to operate in the care sector with employee costs. Hireup states that it pays award aligned pay,³¹¹ and the minimum hourly wage for support workers at the time of the Victorian National Survey was \$30.98, excluding super.³¹² The introduction of minimum standards for digital platforms competing with employing businesses such as Hireup may help to facilitate fairer competition by leveling the costs of engaging employees compared to independent contractors.

There is a risk that the impact of compliance with minimum standards may lead to some digital labour platforms exiting the Australian market and a reduction in new entrants due to their inability to absorb or manage the additional costs in a sustainable manner. The implications for firm productivity will depend on a variety of factors, including the extent to which businesses are able to plan and adapt to the changes, and the extent to which costs are passed onto consumers or businesses partnering with digital platforms. The Minimum Standards Objective will require the Fair Work Commission to actively consider the potential impacts of minimum standards on businesses (including their viability), which will help to mitigate this risk.

Additionally, the purpose of this measure is to provide fair terms and conditions for digital platform workers. If platforms find that they are unable to operate within the parameters of fair minimum standards, it may not be appropriate for them to operate and in turn compete with platforms that do. It should also be noted that digital platforms have also exited the market under the status quo, as has been shown by Deliveroo and Milk Run's recent closures.

³⁰⁹ Department of Premier and Cabinet (DPC), [Report of the Inquiry into the Victorian On-Demand Workforce](#), DPC website, n.d. p 84.

³¹⁰ DPC, [Report of the Inquiry into the Victorian On-Demand Workforce](#), p 84.

³¹¹ Hireup, '[Support worker pay rates](#)', 2023.

³¹² Department of Premier and Cabinet (DPC), [Report of the Inquiry into the Victorian On-Demand Workforce](#), p. 89.

Employment

During consultation, some stakeholders raised concerns that minimum standards could lead to job losses for employee-like digital platform workers. However, these concerns appear to be premised on minimum standards containing matters that could impact workers' method of engagement, such as the inclusion of overtime rates or rostering arrangements. Stakeholders raised concerns that these types of entitlements could impact on workers' ability to choose when to work and would risk platforms needing to move towards an employment-like rostering model. By requiring platforms to provide workers with minimum shifts and engagement times, platforms may need to limit the number of workers they engage to ensure they can meet these commitments.

The current policy model addresses these concerns. Following stakeholder consultation, the legislation would provide that the Fair Work Commission must not include terms about rostering or overtime arrangements in minimum standards orders. The legislation would also contain an explicit requirement that minimum standards orders do not contain terms that would change the form of the engagement of regulated workers.

Consumers and third-party businesses of food delivery and rideshare services

If subject to a minimum standards order that increases their operating costs, digital platform businesses may pass on some of this cost to consumers and/or third-party businesses (for example, restaurants that use digital platforms to connect with workers to deliver food to consumers). The size of this impact would depend on the decisions of individual businesses. If prices become significantly higher, it is possible that consumers will reduce consumption from digital platform businesses. However, the Fair Work Commission is required to make balanced decisions, having regard to factors such as the need to avoid unreasonable adverse impacts on business viability and the national economy, which would help to mitigate this impact.

Clients of care services provided through digital platforms

Recent commentary has suggested that proposed minimum standards may raise costs in the NDIS.³¹³ However, the department has assumed that the Fair Work Commission would set minimum pay rates at a level similar to existing award rates. The NDIS' Disability Support Worker Cost Model already accounts for applicable award rates, and other direct on-costs such as superannuation and leave entitlements.³¹⁴

As a result of this existing price model, this measure is unlikely to have a significant budgetary impact if the Fair Work Commission sets rates that are similar to the relevant award. Beyond pay rates, minimum standards may support a level playing field in the sector, for example specifying the obligations that platforms may owe to the workers that use the platforms, such as insurance.

³¹³ For example – Marin-Guzman, D. Industry says Labor gig worker laws will drive up NDIS costs, Australian Financial Review, 2023, p. 4.

³¹⁴ National Disability Insurance Scheme (NDIS), Disability Support Worker Cost Model – Assumptions and methodology 2022-23, 2022.

In addition, the use of independent contractors in aged care and the NDIS, including those engaged through digital labour platforms, is growing.³¹⁵ The introduction of minimum rates of pay may help to attract more workers to the sector, which is an objective of the Government's Aged Care Workforce Strategy.³¹⁶ This would be likely to have a positive impact on the quality and availability of services for clients.

Distributional impacts

Digital platform workers do not receive minimum standards. This has a higher impact on temporary visa holders, unemployed people and students who are highly represented in the cohort of digital platform workers. While the digital platform economy is generally male-dominated, women are overrepresented in care-related work.

There may also be stronger impacts on some cohorts of consumers. During consultation, some stakeholders raised that minimum standards would have a stronger impact on regional and remote areas, where markets are smaller, and on consumers with limited mobility who rely on the convenience of services in the digital platform economy.

Impact on government

The options would impact the Government through increased tax revenue due to increased wages of workers in the sector as well as through an increased burden on the Fair Work Commission and Fair Work Ombudsman. This burden is likely to have the strongest impact on the Fair Work Commission as the primary Government body implementing the proposals.

Fair Work Commission

Under the proposal to introduce minimum standards for digital platform workers, the Fair Work Commission would be required to consider applications for minimum standards applying to eligible cohorts of workers, determine the standards that should apply (if any) and make enforceable orders setting these standards. The Fair Work Commission would be required to set its priorities for standards-setting over time, including priority cohorts, balanced by its existing caseload. As the primary agency implementing the proposed measures, the Government will provide the Fair Work Commission with resourcing to ensure it can meet its new functions.

Fair Work Ombudsman

The Fair Work Ombudsman would be required to educate and advise businesses and workers of their new rights and obligations under the proposal, and to enforce new minimum standards.

Government funding for aged care and NDIS

³¹⁵ Australian Government Productivity Commission, [Aged Care Employment](#), 2022, p 2.

³¹⁶ Australian Government, [A Matter of Care: Australia's Aged Care Workforce Strategy](#), *Report of the Aged Care Workforce Strategy Taskforce*, 2018; McDonald, F. [Unacceptable Risks: The Dangers of Gig Models of Care and Support Work](#), The Centre for Future Work at the Australia Institute, 2023, pp 20-22.

The Government has significant financial responsibility in the aged care and NDIS sectors. However, as indicated above, existing price regulation suggests that there is unlikely to be a significant increase in costs.

Summary of impacts

Compared to the status quo, Option 2 is estimated to deliver \$4.0 billion dollars in increased wages for workers over 10 years. This amounts to \$403.8 million per year. In addition, compliance costs are set out below.

Regulatory burden estimates

Table 10 – Average annual regulatory costs (from business as usual)

	Average annual regulatory costs (from business as usual)			
Option	Independent contractors	Business	Community organisations	Total change in costs
Option 2	Nil	\$9,845.12 per business in compliance costs ³¹⁷	Nil	\$9,845.12 per business

Table 11 – Total regulatory costs over 10 years (from business as usual)

	Total regulatory costs over 10 years (from business as usual)			
Option	Independent contractors	Business	Community organisations	Total change in costs
Option 2	Nil	\$98,451.20 per business	Nil	\$98,451.20 per business

³¹⁷ This figure is the estimated direct increase in compliance costs to affected businesses as a result of the proposal. Due to data constraints that do not allow for an estimate of the total number of businesses impacted by Option 2, this is expressed as a per business cost. This figure is an average annualised cost over 10 years.

Table 12 – Consistency with guiding principles – Option 2

Guiding Principle	Rating	Explanation
Australia's workplace relations system must reflect modern working arrangements and be capable of evolving with emerging forms of work and business practices.	Good	This option would ensure that Australia's workplace relations system can provide minimum standards to digital platform workers, responding to the emergence of new forms of work in the digital platform economy.
All workers should have access to minimum rights and protections regardless of whether they are characterised as an employee or an independent contractor, including access to freedom of association and dispute resolution.	Fair	This option expands access to minimum standards and dispute resolution, including around deactivation, for digital platform workers. Stakeholder consultation and the independent reviews found these workers to be a key cohort in need of minimum rights and protections. However, this option does not address road transport independent contractors, which independent reviews and stakeholder consultation identified as being a cohort in need of minimum standards. In addition, this option will not address the common law definition of employment. By not assessing the totality of the relationship when determining whether a worker is an employee, this may result in some workers being inappropriately classified as independent contractors. Independent reviews and stakeholder consultation identified that addressing the current heavy reliance on contractual terms under the common law definition as being an essential measure to ensure fairness for workers. In addition, without addressing the common law definition, introducing minimum standards may have the unintended consequence of businesses shifting from an employment to independent contracting model. Recognising that this option addresses the key cohort where a lack of minimum standards has been identified as an issue, while not addressing

		the heavy reliance on contractual terms established by the current common law definition, the rating for this option is fair.
Businesses should benefit from a level playing field among industry participants while promoting competition and innovation.	Fair	As indicated in the 'competition' section above, this would improve fair competition between businesses in sectors with new minimum standards. The measure will help to ensure that certain digital labour platforms do not have an unfair advantage over employing businesses or other businesses (including digital labour platforms) that engage independent contractors under fairer terms and conditions. This will help to facilitate competition on the quality of services rather than lower labour costs. However, other independent contractors, including road transport businesses that compete with digital platforms will not be in scope of regulation. As such, the rating is fair.
The Fair Work Commission should set minimum standards that: • are fair, relevant, proportionate, sustainable and responsive • reflect workers' independence and flexible working arrangements, for example choosing which tasks to accept and refuse, how to undertake their work, where and when they work, and which businesses to contract with • mitigate to the greatest extent possible unintended consequences for workers, businesses, consumers and other aspects of the labour market	Fair	This option would allow the Fair Work Commission to set minimum standards for digital platform workers, while being guided by a Minimum Standards Objective. Without addressing the current common law definition of employment, there is a risk that minimum standards for digital platform workers could result in the unintended consequence of businesses shifting from an employment to contracting model. This would have a negative impact on employees.

The standard-setting framework should be accessible, transparent, fair and offer a high degree of certainty to affected parties.	Good	Parties would be able to participate in matters relating to minimum standards for digital platform workers. The Fair Work Commission would consider the views of affected parties in addition to being guided by a Minimum Standards Objective in legislation.

Option 3: Empower the Fair Work Commission to set minimum standards for digital platform workers and road transport workers

As the impacts for introducing minimum standards for digital platform workers are presented under Option 2, this section will not repeat the methodology used to calculate these costs and will only refer to the additional road transport cohort.

Compliance

Compliance with minimum standards

For road transport workers, the department will use the same methodology as under Option 2, with some adaptations.

The compliance cost of introducing minimum standards will fall on businesses who will need to comply with the new standards. This cost will be estimated as a comparison to the baseline established under the Status Quo Option, which was **nil**.

The department estimates that businesses are likely to face the following compliance costs under Option 3:

- Initial costs of ensuring that contracts, payroll systems and other arrangements are compliant with new minimum standards.
- Ongoing costs of ensuring compliance with varied standards.
- Ongoing administrative costs to comply with record-keeping requirements.

Initial costs

The department estimates that it would take a business 20 hours to understand their new obligations. Businesses would be able to contact the Fair Work Ombudsman for free advice about their new obligations, in addition to accessing fact sheets and other information published on the Fair Work Ombudsman's website.

The department assumes that it would take a business a maximum of 100 hours to update and ensure their service contract or contracts are compliant with the new minimum standards, with more time required within that range for a larger business with multiple contracts. If standards are varied in the future, this cost is likely to be significantly lower. For example, it may simply involve ensuring compliance with a new pay rate. The department estimates that this will take 10 hours every time a Minimum Standards Order is varied.

As outlined in Option 2, the department has used a higher labour cost for legal professionals who will be assumed to perform work to ensure that platforms understand new obligations, update contracts and other documents and to ensure compliance with new termination of contract protections. In all other estimated costs, the department has used the default labour cost of **\$79.63** according to the Office of Impact Analysis' Regulatory Burden Measurement Framework. The department's assumptions in relation to costs incurred by digital platforms to upgrade IT systems has not been applied in the context of road transport businesses, on the basis that these systems are likely to be

less complex and relatively less central to the conduct of the road transport businesses compared to digital platform businesses.

The department assumes that road transport minimum standards will take longer than the minimum standards for employee-like digital platform workers under Option 2. This is because of the additional legislative checks to ensure that road transport minimum standards are gradual and subject to robust consultation with industry. In particular, the longer process required for the Fair Work Commission to make a road transport minimum standards order is likely to extend this timeframe.

The department estimates that the Fair Work Commission would issue its first notice of intent to make an order in 2025-26. As businesses can choose whether or not to adopt non-binding draft orders, we have not costed the impact during the draft order period. Following consultation on the draft order, the department estimates that 2 years after the notice of intent was issued, the Fair Work Commission would be likely to revise the draft order. The department considers a revision of the order to be a likely scenario due to the novelty of the standards and diversity of views amongst road transport stakeholders.

Following the revision of the draft road transport order, the Fair Work Commission would be required to undertake another consultation period for a minimum of 12 months. Based on this timeline, we have estimated that the Fair Work Commission would implement the first mandatory Minimum Standards Orders in 2028-29, and then vary these every 4 years. In addition the Fair Work Commission is not required to accept applications to make minimum standards orders and is not required to make a draft order mandatory.

The department estimates that each business would face **\$3,062.50** as an average annual cost, averaged over the next 10 years. The number of businesses that may be affected by this policy cannot be derived, as while the ABS provides data on businesses and the number of employees they have, it does not indicate how many businesses engage independent contractors and as such would be affected by the proposed policy. For this reason, the department has chosen to represent regulatory costs to businesses on a per business basis.

Table 13 – Costs per business

Year	Understanding new obligations	Updating contract and other documents	Total
2028-29	= \$235.58 x 20 hrs = \$4,711.54	= \$235.58 x 100 hrs = \$23,557.69	\$28,269.23
2032-33	Nil	= \$235.58 x 10 hrs = \$2,355.77	\$2,355.77
TOTAL	\$4,711.54	\$25,913.46	\$30,625.00

Ongoing costs – record-keeping

The department assumes that minimum standards would include a record-keeping component. It is unlikely that this would present a significant burden on businesses. The department estimates that it would take one worker in a business 15 minutes per worker every two weeks to prepare records detailing their payment. Over a year, this would occur 26 times. This is different to the cost estimate for digital platforms as it is assumed digital platforms will include record keeping in their IT system updates, whereas road transport businesses are less likely to have complex IT systems.

Table 15 – Ongoing compliance cost per worker per business

Compliance cost (per worker)
= \$79.63 x 15 minutes x 26
= \$517.60 per year

As above, it is expected that this cost will come into effect in 2028-29 and be incurred every year from 2028-29 onwards. This gives a ten-year total cost of \$2,587.98 and an average annual cost of \$258.80.

Compliance with unfair contract termination protections

There are additional regulatory costs for businesses engaging road transport workers who will be able to dispute an unfair contract termination at the Fair Work Commission. These costs would include implementing new policies and procedures to ensure that terminations of contracts are compliant. For example, this may include steps to afford the other party procedural fairness.

Consistent with the assumptions set out in Option 2, the department estimates that it would take a business 20 hours to understand the new obligations and a further 100 hours to develop policies and procedures to ensure that future contract terminations are compliant. This work would be undertaken by a legal professional. This cost is expected to be incurred only once.

There is no available data on how many businesses engage independent contractors. However, the per business cost is estimated as \$28,269.23, including time to understand new obligations and to implement policies and procedures to ensure that any contract terminations are compliant.

= (20 hours x \$235.58) + (100 hours x \$235.58)

= \$4,711.54 + \$23,557.69

= **\$28,269.23 per business engaging independent contractors.**

Total compliance costs

The department estimates that the total impact would be a maximum business cost of \$5,889.42 per business and \$258.80 per worker per year over 10 years (combination of the initial and ongoing costs).

This figure is calculated by adding the initial costs of \$30,625.00 per business to the ongoing costs of record keeping of \$2,587.98 per worker (total cost over the ten years), and the compliance with unfair contract termination protections of \$28,269.23 per business. This totals to \$58,894.23 per business plus \$2,587.98 per worker, giving an average annualised estimate of \$5,889.42 per business and \$258.80 per worker.

Economic impact of minimum standards

Introducing minimum standards for road transport workers will have a direct economic impact on:

- **entities engaging independent contractors providing road transport services** who will have to pay minimum pay rates and entitlements.
- **independent contractors providing road transport services** who will receive minimum pay rates and entitlements.

The department has estimated the impact of the Fair Work Commission issuing a hypothetical order to set pay rates for a subset of last mile delivery workers at the level of the permanent full-time employee rate under the Road Transport and Distribution Award 2020. This is an illustrative example to show the difference in pay rates between the award rates and minimum standards. The actual costs will depend on the decisions that are made by the Fair Work Commission. However, as indicated in 'Scenario 3', the department estimates that this cohort is likely to become the subject of a Fair Work Commission road transport minimum standards order. This is due to its competition with the digital platform economy and feedback received during stakeholder consultation suggesting that this may be a priority cohort for minimum standards. Consequently, this cohort has been chosen to estimate the impacts of the regulation.

There is also no data available on how many employees work at specific pay points of the award, so Transport Worker Grades 1 and 2 has been used as a comparator as a potential option for the minimum standards. The permanent employee hourly rate has been used rather than the casual hourly rate due to additional checks and balances applying to the proposed road transport jurisdiction, compared to those applying to digital platform workers. In particular, as legislation would provide that the Fair Work Commission must be satisfied that any Road Transport Order would not unduly impact viability in the road transport industry, a lower estimated rate is appropriate. Additionally, independent contractors in this sector are much more likely to be working full-time, in a manner closer to a permanent employee.

Given that the median rate of pay for full-time last mile delivery owner managers without employees³¹⁸ is \$1,000-\$1,249, and that the full-time permanent weekly award rates over the same period were \$818.30 - \$838.90, the department has also compared the full-time casual weekly award rate to the median earnings derived from the Census (see table below). Both the permanent and casual full-time weekly award rate is lower than the median earnings of owner managers in the last

³¹⁸ 'last mile delivery' here is defined as the Postal and courier pick-up and delivery services industry.

mile delivery sector,³¹⁹ although at least one-sixth (18.5 per cent) of this cohort had weekly earnings below the full-time permanent weekly award rate.

Table 16 – full-time weekly pay rates for owner-managers in the last mile delivery industry

Relevant standard or estimate of rates paid	Minimum weekly full-time rate for employees under the Road Transport and Distribution Award 2020	Minimum weekly full-time rate for employees under the Road Transport and Distribution Award 2020	Estimate of average weekly full-time rate for workers in last mile delivery contractors who are owner managers of unincorporated and incorporated enterprises without employees
Weekly rate of pay	\$818.30 (permanent) \$1,022.88 (casual) Transport Worker Grade 1 (courier – foot or bicycle)	\$838.90 (permanent) \$1,048.63 (casual) Transport Worker Grade 2 (driver)	\$1,000-\$1,249

However, Census data shows that 1,900 full-time owner managers without employees working in the last mile delivery sector currently receive less than the permanent full-time award rate of \$838.90. This amounts to 18.5 per cent of full-time owner managers without employees in the last mile delivery sector who recorded income in 2021. Due to the varied nature of part-time worker hours, the department is unable to determine how many are currently being paid less than the relevant award rate. Instead the proportion of full-time workers who were paid below the award has been applied to the number of part-time independent contractors in the last mile delivery sector.

The average annual cost to entities engaging last mile delivery independent contractors has been estimated using the follow formula:

= (Full-time weekly permanent employee pay rates under the Road Transport and Distribution Award 2020 – upper band of full-time weekly pay rates for independent contractors who work in the last mile delivery sector but are paid less than the award) x (number of full-time last mile delivery workers who are independent contractors and paid less than the award + (18.5% x number of part-time independent contractors in the last mile delivery sector)) x 52 weeks

³¹⁹ It should be noted that the median hours worked for owner managers in the last mile delivery sector exceed the full-time hours noted in the award (40-44 hours per week compared to 38 hours). As such, the negative wage gap between these earnings and the award may be larger than an hourly comparison would estimate.

$$= (\$838.90 - \$799) \times (1,900 + 1,000) \times 52^{320}$$

= at least **\$5,988,946.60 per year**

This amounts to 0.0006 per cent of Australia's total wage bill.

Using the initial impact estimated, and adjusting for inflation as in Option 2, this would suggest that there would be an annual maximum further economic impact in the form of increased wages to workers of:

- \$7.5 million from 2028-29 to 2031-32³²¹
- \$8.3 million in 2032-33.³²²

In addition, this option would allow the Fair Work Commission to consider advisory standards. The Victorian Government's guidance rates (referred to above) are relevant here as an example of the types of content that may be included. Guidance rates vary according to the type of vehicle driven and work conducted but would not have a direct economic impact.

Table 17 below shows the expected costs of the wage bill in the next 10 years. As mentioned above, we expect the Fair Work Commission to implement the first mandatory Minimum Standard Orders in 2028-29, and then vary these in 2032-33.

Table 17 - Expected costs of wage bill of Option 3

Year	Wage bill
2028-29 to 2031-32	\$7,538,100.70
2032-33	\$8,320,652.72
TOTAL	\$38,473,055.50
Yearly average (10 years)	\$3,847,305.55

Broader economic impacts

While not included in costings, there are likely to be further economic impacts in the road transport industry. For example, the Fair Work Commission will have the option of making non-binding guideline standards for the road transport industry, in consultation with industry stakeholders to

³²⁰ Note that these figures have been rounded for ease of reading. Unrounded figures have been used for calculations in this section which may affect totals.

³²¹ This figure includes the 2021-22 AWR decision increase of \$40 per week for relevant award rates, and the 2022-23 AWR decision increase of 5.75 per cent, and a further increase of 2.75 per cent (the forecast inflation rate in 2024-25), and 2.5 per cent (the forecast inflation rate) from 2025-26 to 2028-29 when the minimum standards are predicted to take effect.

³²² This figure assumes the Fair Work Commission makes an update to the award to reflect the projected rate of inflation over the period from 2028-29 to 2032-33.

identify areas of agreement. This could have the potential to drive behaviour, while not presenting direct costs.

Non-binding standards on matters such as pay can indirectly impact workers by improving the information available to them about operating costs or assisting them in contract negotiations. Workers across the road transport industry may also be indirectly impacted as greater attention is given to the working conditions of transport workers.

Consumers

As in Option 2, depending on the action taken by these businesses in the face of increased labour costs, it is likely that at least part of this cost will be passed on to the consumers of businesses operating in the road transport industry. In addition, as road transport is a derived cost for many types of goods, there may be flow-on impacts to other goods and services in other industries. As such, the costs outlined in this scenario are likely to be borne by consumers and businesses, including down the supply chain, however it will be up to each business to decide how much of these costs they absorb.

Impact on workers

As mentioned in Option 2, the department is unable to estimate and quantify the flow-on costs of an increased wage bill. However, the department assumes that the introduction of minimum standards outlined in Option 3 may lead to a more reliable income stream and an increase to weekly income for road transport workers. This added income security and increases to pay would allow road transport workers meet elevated living costs which may provide a boost to their local economies.

Independent contractors in the road transport industry are more likely to be male, work full-time, and born overseas when compared to all independent contractors. Given that much of the road transport industry is located in or passes through regional Australia, improving incomes for road transport workers may have a positive flow on impact to regional economies.

In addition, improved working conditions may attract more workers to road transport, which would respond to a key need of the industry. Australian logistics companies have identified the difficulty of attracting and retaining workers as a key issue facing the road transport industry. For example, a 2021 report by Australian Industry Standards found that there is a lack of new entrants to the industry, with a higher average age (45.6) than other major industries and an ageing rate that is 2.2 times faster than other industries.³²³ Road transport industry representatives have raised concerns that there will be a workforce supply crisis in the next 10 to 15 years as these workers retire and demand for the industry increases.

Cost to government

As under Option 2, this option would have an impact on the Fair Work Commission and Fair Work Ombudsman and there would be an increase in income tax revenue collected.

Fair Work Commission

³²³ Australian Industry Standards, *Industry Outlook: transport and logistics*, 2021.

Under the proposals to introduce minimum standards for digital platform workers and road transport workers, the Fair Work Commission would consider applications for minimum standards applying to eligible cohorts of workers, determine the standards that should apply (if any) and make enforceable orders setting these standards (with more checks and balances for road transport workers). The Fair Work Commission would also need to consult with road transport stakeholders, including to consider guideline standards for other areas in the road transport industry.

Fair Work Ombudsman

The Fair Work Ombudsman would be required to educate and advise businesses and workers of their new rights and obligations under the proposal, and to enforce new minimum standards.

Summary of impacts

Compared to the status quo, Option 3 is estimated to deliver \$4.1 billion dollars in increased wages for workers over a ten year period. This amounts to \$407.7 million per year. In addition, compliance costs are set out below.

Regulatory burden estimates

Table 18 – Average annual regulatory costs (from business as usual)

Option	Average annual regulatory costs (from business as usual)			
	Independent contractors	Business ³²⁴	Community organisations	Total change in costs
Option 3	Nil	Road transport businesses \$5,889.42 - compliance cost per business impacted by Option 3 + \$258.80 per worker (ongoing compliance per affected road transport worker) Digital platform businesses \$9,845.12 – compliance cost per business impacted by Option 2	Nil	\$5,889.42 per business + \$258.80 per worker, or \$9,845.12 per business

³²⁴ This figure is the estimated direct increase in compliance costs to affected businesses as a result of the proposal. Due to data constraints that do not allow for an estimate of the total number of businesses impacted by the options, this is expressed as a per business and per worker cost. Only businesses within the scope of each option will be impacted by these estimated costs, including digital platform businesses and businesses engaged affected road transport workers.

Table 19 – Total regulatory costs across the 10 years (from business as usual)

Option	Total regulatory costs across the 10 years (from business as usual)			
	Independent contractors	Business	Community organisations	Total change in costs
Option 3	Nil	• Road transport businesses \$58,894.23 - compliance cost per business impacted by Option 3 + \$2,587.98 per worker (Ongoing compliance per affected road transport worker) • Digital platform businesses \$98,451.20 - compliance cost per business impacted by Option 2	Nil	\$58,894.23 per business + \$2,587.98 per worker, or \$98,451.20 per business

Table 20 – Consistency with Guiding Principles – Option 3

Guiding Principle	Rating	Justification
Australia's workplace relations system must reflect modern working arrangements and be capable of evolving with emerging forms of work and business practices.	Good	This option would ensure that Australia's workplace relations system can provide minimum standards to digital platform workers, responding to the emergence of new forms of work in the gig economy.
All workers should have access to minimum rights and protections regardless of whether they are characterised as an employee or an independent contractor, including access to freedom of association and dispute resolution.	Fair	By allowing the Fair Work Commission to set minimum standards for both road transport and digital platform workers, as well as including 'deactivation' and unfair contract termination protections, this option expands access to minimum rights and protections. Although it does not extend minimum standards to all workers, it addresses the needs of sectors where a lack of minimum standards has been identified as a concern while not regulating other sectors where there is less of a need. When combined with the unfair contracts preferred option (to allow the Fair Work Commission to resolve disputes for independent contractors), the options will ensure that a level of protection is provided to independent contractors more broadly. However, this option will not address the common law definition of employment. By not assessing the totality of the relationship when determining whether a worker is an employee, this may result in some workers being inappropriately classified as independent contractors. Independent reviews and stakeholder consultation identified that addressing the current heavy reliance on contractual terms under the common law definition as being an essential measure to ensure fairness for workers. In addition, without addressing the common law definition, introducing minimum standards may have the unintended consequence of encouraging businesses to draft contracts with a view to avoiding relationships of employment.

		Recognising that this option addresses cohorts where a lack of minimum standards has been identified as an issue, while not addressing the heavy reliance on contractual terms established by the current common law definition, the rating for this option is fair.
Businesses should benefit from a level playing field among industry participants while promoting competition and innovation.	Good	This option would facilitate fair competition between businesses that employ workers and digital platforms that engage independent contractors. It would also allow for fair competition between digital platforms and non-digital businesses that engage independent contractors in the road transport industry.
The Fair Work Commission should set minimum standards that: • are fair, relevant, proportionate, sustainable and responsive • reflect workers' independence and flexible working arrangements, for example choosing which tasks to accept and refuse, how to undertake their work, where and when they work, and which businesses to contract with • mitigate to the greatest extent possible unintended consequences for workers, businesses, consumers and other aspects of the labour market	Good	This option would allow the Fair Work Commission to set minimum standards for employee-like digital platform workers and road transport workers. The Minimum Standards Objective and Road Transport Objective will help to ensure that any standards reflect the criteria set out in this Guiding Principle. This is noting that without addressing the current common law definition of employment, there is a risk that minimum standards for digital platform workers and road transport workers could result in businesses shifting from an employment to contracting model. However, as this option will ensure that the Fair Work Commission can set minimum standards addressing the criteria set in this guiding principle, the rating is 'good'.
The standard-setting framework should be accessible, transparent, fair and offer a high degree of certainty to affected parties.	Good	Parties would be able to participate in matters relating to minimum standards for employee-like digital platform workers. The Fair Work Commission would

		consider the views of affected parties in addition to being guided by a Minimum Standards Objective in legislation.

Option 4: Empower the Fair Work Commission to set minimum standards for digital platform workers and road transport workers, with an interpretive principle

This option includes all **impacts estimated under option 3, with the following additional costs:**

Compliance

Businesses engaging independent contractors who are on the fringe of employment and independent contracting would face an initial cost to determine whether their engagement as an independent contractor rather than employee is compliant. The department has not estimated costs for businesses engaging workers who are not in this cohort, as they are likely to already have clarity about the work status of their workers.

For businesses engaging such workers, the department considers there would be a one-off cost of reviewing the contract applying to their workers, with regard to the totality of the employment relationship. For example, this could include reviewing the reality of the working arrangement and contractual terms governing the relationship. As the ABS does not publish data on the number of businesses that engage independent contractors, it is not possible to determine the number of businesses that would be impacted. Instead, the regulatory burden is estimated on a per business basis.

Business cost for existing workers on the fringes

Different businesses will have a different mix of contracting arrangements, with some using the same standard contract terms for most or all workers and some using a mixture of different contracts. Given the variety of arrangements, and that the interpretive principle seeks to return to what was commonly understood to be the common law test less than 2 years ago, the department estimates that it would take a senior corporate lawyer 10 hours to determine whether the service contract a business is using is compliant. The department has used the senior corporate lawyer costs identified in Option 2 of the Minimum Standards options, which is \$235.58 per hour.

Cost per business

= Time required x labour cost

= 10 hours x \$235.58³²⁵

= \$2,355.77 per business

³²⁵ The department has conducted this analysis using an hourly rate that is more detailed than the 2 decimal point rate outlined here. This results in minor differences between the per business cost outlined here, and what would be calculated by multiplying the figures as they appear in this section.

As it is expected that each affected business will need to do this assessment once for its workforce, rather than individually for each worker, this cost has been considered as a per business cost. It is expected that this cost will only need to occur once, which means the average annual cost per business is \$235.58.

Ensuring workers are appropriately classified as employees or independent contractors

The change would benefit those of the estimated 254,500 workers on the fringe of employment and independent contracting whose work status may have been impacted by the contract-centric approach set out in *Jamsek and Personnel Contracting*. The number of workers whose work status is likely to be affected by the measure is not likely to be significant, demonstrated by the fact that the number of independent contractors has not yet significantly changed following the High Court's 2022 decisions.

The primary benefit will be that a fairer test will apply where a Court is required to determine whether a relationship is one of employment or of principal and contractor. Decision makers will be able to have regard to the practical reality of the relationship, and not simply what has been formally agreed. This will discourage businesses from attempting to avoid a relationship of employment via carefully drafted contracts and ensure that workers are classified appropriately in the future.

Impact on Government

This option may have a minor budgetary impact as the Government collects more tax per employee than per independent contractor. As the cohort of workers likely to be impacted by this option is small, any revenue increase is likely to be very minor.

Summary of impacts

Compared to the status quo, Option 4 is estimated to deliver \$4.1 billion dollars in increased wages for workers over ten years. This amounts to \$407.7 million per year, which represents 0.04 per cent of the total wage bill.

Regulatory burden estimates

Table 21 – Average annual regulatory costs (from business as usual)

Option	Average annual regulatory costs (from business as usual)			
	Independent contractors	Business	Community organisations	Total change in costs
Option 4	Nil	\$235.58 per business impacted by Option 4 only Digital platform businesses – maximum of \$10,080.70 –	Nil	\$235.58 per business, or up to \$6,125.00 per business + \$258.80 per worker, or up to \$10,080.70 per business

	Average annual regulatory costs (from business as usual)			
Option	Independent contractors	Business	Community organisations	Total change in costs
		compliance cost per business impacted by Option 2 and Option 4.³²⁶ • Road transport businesses – maximum of \$6,125.00 - compliance cost per business impacted by Option 3 and Option 4 + \$258.80 per worker (ongoing compliance per affected road transport worker).		

Table 22 – Total regulatory costs over 10 years (from business as usual)

	Total regulatory costs over 10 years (from business as usual)			
Option	Independent contractors	Business	Community organisations	Total change in costs
Option 4	Nil	• \$2,355.77 per business impacted by Option 4 only	Nil	\$2,355.77 per business, or up to \$100,806.97 for digital platform

³²⁶ Data constraints do not allow for an estimate of the types of business engaging workers whose status is on the margins of employment and independent contracting. The department considers that the majority of businesses impacted by an interpretive principle would not also be impacted by proposed minimum standards. The maximum of \$10,080.70 per digital platform business or \$6,125.00 + \$258.80 per worker per road transport business is to account for the possibility that a business would engage workers whose status is uncertain and also become subject to a minimum standards order. This figure includes the maximum initial compliance cost for businesses to implement minimum standards (\$9,845.12 or \$5,889.42 plus \$258.80 per worker) with the additional \$235.58 estimate of complying with a new interpretive principle. This would only be an initial cost as businesses clarify their new obligations. While it is not likely that an existing digital platform business would be impacted by this option, these costings account for the maximum possible costs a business would face (for example, for a new digital platform which engages workers who are more likely to be found employees under a new interpretive principle).

	Total regulatory costs over 10 years (from business as usual)			
Option	Independent contractors	Business	Community organisations	Total change in costs
		• Digital platform businesses - maximum of \$100,806.97 - compliance cost per business impacted by Option 2 and Option 4.³²⁷ • Road transport businesses – maximum of \$61,250.00 per business + \$2,587.98 per worker		businesses, or up to \$61,250.00 + \$2,587.98 per worker for road transport business

³²⁷ Data constraints do not allow for an estimate of the types of business engaging workers whose status is on the margins of employment and independent contracting. The department considers that the majority of businesses impacted by an interpretive principle would not also be impacted by proposed minimum standards. The maximum of \$100,806.97 per digital platform business or \$61,250.00 + \$2,587.98 per worker per road transport business is to account for the possibility that a business would engage workers whose status is uncertain and also become subject to a minimum standards order. This figure includes the maximum initial compliance cost for businesses to implement minimum standards (\$98,451.20 or \$58,894.23 + \$2,587.98 per worker) with the additional \$2,355.77 estimate of complying with a new interpretive principle. This would only be an initial cost as businesses clarify their new obligations. While it is not likely that an existing digital platform business would be impacted by this option, these costings account for the maximum possible costs a business would face (for example, for a new digital platform which engages workers who are more likely to be found employees under a new interpretive principle).

Table 23 – Consistency with Guiding Principles – Option 4

Guiding Principle	Rating	Explanation
Australia's workplace relations system must reflect modern working arrangements and be capable of evolving with emerging forms of work and business practices.	Good	This option would ensure that Australia's workplace relations system can provide minimum standards to digital platform workers, responding to the emergence of new forms of work in the gig economy.
All workers should have access to minimum rights and protections regardless of whether they are characterised as an employee or an independent contractor, including access to freedom of association and dispute resolution.	Good	By allowing the Fair Work Commission to set minimum standards for both road transport and digital platform workers, as well as including 'deactivation' and unfair contract termination protections, this option further expands access to minimum rights and protections. Although it does not extend minimum standards to all workers, it addresses the needs of sectors where a lack of minimum standards has been identified as a concern while not regulating other sectors where there is less of a need. When combined with the unfair contracts preferred option (to allow the Fair Work Commission to resolve disputes for independent contractors), the options will ensure that a level of protection is provided to independent contractors more broadly.
Businesses should benefit from a level playing field among industry participants while promoting competition and innovation.	Good	This option would facilitate fair competition between businesses that employ workers and digital platforms that engage independent contractors. It would also allow for fair competition between digital platforms and non-digital businesses that engage independent contractors in the road transport industry.
The Fair Work Commission should set minimum standards that: - are fair, relevant, proportionate, sustainable and responsive - reflect workers' independence and flexible working arrangements, for example choosing which tasks to	Good	This option would allow the Fair Work Commission to set minimum standards for digital platform workers, while being guided by a Minimum Standards Objective. Introducing an interpretive principle into the Fair Work Act will help to prevent unintended consequences arising from businesses restructuring their operations towards an independent contracting model.

accept and refuse, how to undertake their work, where and when they work, and which businesses to contract with mitigate to the greatest extent possible unintended consequences for workers, businesses, consumers and other aspects of the labour market		
The standard-setting framework should be accessible, transparent, fair and offer a high degree of certainty to affected parties.	Good	Parties would be able to participate in matters relating to minimum standards for digital platform workers. The Fair Work Commission would consider the views of affected parties in addition to being guided by a Minimum Standards Objective in legislation.

Access to dispute resolution of unfair contracts

Option 1: Status quo

Under the status quo, independent contractors can challenge unfair contracts under the Independent Contractors Act or the Australian Consumer Law by applying to the court, as outlined in Section 3.

Prevalence of unfair contracts

There is no data on the prevalence of unfair contracts, outside of anecdotal evidence. Data provided by the Federal Court shows that independent contractors only made 68 unfair contract terms applications from the introduction of the Independent Contractors Act from 2006 to 2023, with most of these matters being discontinued or withdrawn.

As the current provisions in the Independent Contractors Act do not provide a simple and low-cost method for resolving any disputes relating to unfair contracts, it is likely that the majority of unfair contracts go unchallenged, or unresolved. This is especially true as the presence of an unfair contract term set by one party to the contract suggests that there is an imbalance in bargaining power between the parties. The impacts of working under unchallenged unfair contract terms can include low pay rates and inadequate protections (for example, around dispute resolution), which can harm workers' livelihoods.

Cost of disputing an unfair contract

As outlined above, there is a lack of data around the prevalence of unfair contracts. The cost of making an application to a court is highly variable, as it depends on the specific circumstances of the application and the conduct of the parties. While this cost cannot be quantified, compared to a tribunal, court applications are costly. For example, the relevant filing fee for independent contractors in the Federal Circuit and Family Court of Australia is \$735.³²⁸ When including further costs, such as engaging a lawyer and additional court fees, court applications can be prohibitive. This is particularly the case where they relate to unfair terms imposed on low-paid workers.

³²⁸ ⁷⁵ Federal Circuit and Family Court of Australia, “”, Federal Circuit and Family Court of Australia website, n.d..].

Summary of impacts

Table 24 – Consistency with Guiding Principles – Option 1

Guiding Principle	Rating	Justification
Australia's workplace relations system must reflect modern working arrangements and be capable of evolving with emerging forms of work and business practices.	Poor	The emergence of the gig economy has created a group of employee-like digital platform workers without protections from de-activation. This compares to employees who have legislated protections from unfair dismissal or dismissal on discriminatory grounds.
All workers should have access to minimum rights and protections regardless of whether they are characterised as an employee or an independent contractor, including access to freedom of association and dispute resolution.	Poor	While there are unfair contracts provisions in the Independent Contractors Act and Australian Consumer Law, independent contractors rarely access these protections. Independent contractors have few dispute resolution options before applying to a court which can be prohibitively costly.
Businesses should benefit from a level playing field among industry participants while promoting competition and innovation.	Poor	Businesses (including businesses that engage employees) can experience unfair competition with businesses that set unfair terms for their workers, that are in the business' advantage.
The Fair Work Commission should set minimum standards that: are fair, relevant, proportionate, sustainable and responsive	N/A	This factor relates to standard-setting and is out of scope of this option.

• reflect workers' independence and flexible working arrangements, for example choosing which tasks to accept and refuse, how to undertake their work, where and when they work, and which businesses to contract with • mitigate to the greatest extent possible unintended consequences for workers, businesses, consumers and other aspects of the labour market		
The standard-setting framework should be accessible, transparent, fair and offer a high degree of certainty to affected parties.	N/A	This factor relates to standard-setting and is out of scope of this option.

Option 2: Allow the Fair Work Commission to resolve disputes about unfair contracts for digital platform workers and road transport workers

This option would deliver a more cost-effective process for independent contractors to challenge unfair contracts. However, it will otherwise have limited impacts given that it will simply involve providing a role for the Fair Work Commission to settle disputes about existing unfair contracts protections.

Lower costs of dispute resolution

These workers (whose earnings fall below a high income threshold) would benefit from low-cost and accessible dispute resolution, compared to the status quo of needing to apply to the court. For example, Fair Work Commission application fees in 2022-23 are \$77.80 (which changes on 1 July each year).³²⁹ By comparison, the relevant filing fee for independent contractors in the Federal Circuit and Family Court of Australia is \$735.³³⁰ This will result in savings for applicants and respondents and produce a jurisdiction that is more effective in providing remedies for unfair contractual terms than the Independent Contractors Act.

As indicated in the status quo option, there is no data on the prevalence of unfair contracts. To estimate the number of independent contractors that may benefit from the changes, the department sought data on comparable jurisdictions in the Fair Work Commission to estimate the number of applications to dispute an unfair contract. The closest available comparators were dispute resolution relating to unfair dismissals and general protection dismissals, which the department does not consider to be equivalent jurisdictions. This data was, however, useful to estimate the costs of deactivation and unfair contract termination disputes under the minimum standards options.

Regulatory impacts

The Office of Impact Analysis's Guidance Note on the Regulatory Burden Measurement Framework advises that certain costs are excluded from the Regulatory Burden Measurement Framework and are not required to be considered when quantifying an estimate of burden. Relevantly, this includes 'Non-compliance and enforcement costs', including costs incurred in court and tribunal processes.

In accordance with this advice, regulatory costs associated with the dispute resolution through the workplace tribunal, the Fair Work Commission', are not included in the costings. Specific outcomes may depend on the approach that independent parties – such as employers, unions and the Fair Work Commission – take in response to the provisions.

Employers and employees will only utilise the Fair Work Commission's dispute resolution processes in circumstances where a party is of the view that an action taken by another party is not consistent with their legislative obligations – for example if an independent contractor believes that their contract has unfair provisions. The time and financial cost would vary from dispute to dispute but

³²⁹ Fair Work Commission, *Fees and costs*, FWC website, n.d., .

³³⁰ Federal Circuit and Family Court of Australia, *General federal law fees*, Federal Circuit and Family Court of Australia website, n.d. <https://www.fcfcoa.gov.au/gfl/gfl-fees>.

noting that the Fair Work Commission is a tribunal it would be lower cost and quicker than court processes.

As this is a new policy, there is no available data on the rate at which disputes would occur as a result of allowing the Fair Work Commission to rule on these matters, or the resource cost and the time taken to resolve such disputes.

Given the inherent uncertainty in how independent parties will respond to the unfair contracts policy, and also uncertainty in the extent to which the best available comparators (unfair and general protections dismissal), the department has determined that estimations of the dispute costs would not be sufficiently robust to contain a meaningful estimate of the costs.

Distributional impacts

By improving access to dispute resolution, the proposal would benefit workers who face barriers to equal negotiating power, including women, people with disability and migrant workers.

As outlined, the proposed changes would impact digital platform and Road transport workers. While these groups are not homogenous, they both have higher rates of migrant and male workers (for a detailed breakdown of these cohorts please see pages 42-44). Migrant workers especially are more likely to be underpaid or subject to unfair working conditions.³³¹

Encouraging fairer contracts

There may be further flow-on benefits for independent contractors. Improving access to dispute resolution may create a real or perceived higher likelihood that an independent contractor would make a dispute against a business alleging that their contract is unfair. This may influence behaviour by encouraging businesses to ensure that their contracts do not contain unfair terms, which could result in more favourable contractual terms for independent contractors. This could include higher incomes or improved working conditions for this cohort.

Impact on Government

The Fair Work Commission will have responsibility for implementing the option. This includes receiving, managing and considering applications for unfair contract dispute resolution.

Limiting the capacity to deal with unfair contract applications to identified areas of need in the road transport sector and (in relation to deactivation protections) the digital platform sector means that expected application numbers are relatively small. A high-income threshold applying to both unfair contract terms disputes and termination claims will further confine the scope of the jurisdiction.

The courts may see a very small number of additional matters under the new provisions as there will be an appeal rights from decisions made by the Fair Work Commission. However, as outlined above, the cost of taking court action under the provisions is prohibitively expensive for the types of disputes, so the increase is likely to be negligible.

³³¹ For example, see Coates, B., Wiltshire, T. and Reysenbach, T., 'Short-changed: How to stop the exploitation of migrant workers in Australia', the Grattan Institute, 2023.

Summary of impacts

Regulatory burden estimates

Table 25 – Average annual regulatory costs (from business as usual)

	Average annual regulatory costs (from business as usual)			
Option	Independent contractors	Business	Community organisations	Total change in costs
Option 2	Nil	Nil	Nil	Nil

Table 26 – Consistency with Guiding Principles – Option 2

Guiding Principle	Rating	Justification
Australia's workplace relations system must reflect modern working arrangements and be capable of evolving with emerging forms of work and business practices.	Good	This option would ensure that the workplace relations system can provide digital platform workers and road transport workers with access to unfair contracts dispute resolution. This ensures that workers in new forms of work in the digital platform economy have access to dispute resolution.
All workers should have access to minimum rights and protections regardless of whether they are characterised as an employee or an independent contractor, including access to freedom of association and dispute resolution.	Fair	This option improves access to dispute resolution of unfair contracts for independent contractors in the road transport sector and digital platform workers. The impact of this option would not be significant as it does not introduce new protections, but instead reduces cost barriers to accessing existing protections. While this improves dispute resolution for a cohort of independent contractors, it does not extend access to dispute resolution beyond digital platform workers and road transport workers. Due to the low expected impact and limited cohort of workers with improved access to dispute resolution, this option's consistency with the Guiding Principles is 'fair'.
Businesses should benefit from a level playing field among industry participants while promoting competition and innovation.	Fair	This option could make competition fairer between businesses competing in the road transport sector and digital platform economy by helping to ensure that businesses in these sectors do not gain an unfair advantage from deliberately setting unfair contractual terms. However, this impact is not expected to be significant as the measure proposes to improve access to existing protections. As such, the rating is 'fair'.
The Fair Work Commission should set minimum standards that: are fair, relevant, proportionate, sustainable and responsive	N/A	This factor relates to standard-setting and is out of scope of this option.

• reflect workers' independence and flexible working arrangements, for example choosing which tasks to accept and refuse, how to undertake their work, where and when they work, and which businesses to contract with • mitigate to the greatest extent possible unintended consequences for workers, businesses, consumers and other aspects of the labour market		
The standard-setting framework should be accessible, transparent, fair and offer a high degree of certainty to affected parties.	N/A	This factor relates to standard-setting and is out of scope of this option.

Option 3: Allow the Fair Work Commission to resolve disputes about unfair contracts for all independent contractors, subject to a high income threshold

The impacts under this option would be as under Option 2 but applied to a broader cohort of independent contractors.

Independent contractors

There are 1.1 million independent contractors, of which those with incomes below a proposed high income threshold would become eligible to dispute an unfair contract at the Fair Work Commission.

Businesses engaging independent contractors

As under Option 2, the regulatory cost of this measure is nil.

Summary of impacts

The flow on impacts, such as distributional impacts, improving fairness and costs to government, are likely to be similar to those outlined in Option 2, but applicable to a broader range of independent contractors.

Regulatory burden estimates

Table 27 – Average annual regulatory costs (from business as usual)

Option	Average annual regulatory costs (from business as usual)			
	Independent contractors	Business	Community organisations	Total change in costs
Option 3	Nil	Nil	Nil	Nil

Table 28 – Consistency with Guiding Principles – Option 3

Guiding Principle	Rating	Justification
Australia's workplace relations system must reflect modern working arrangements and be capable of evolving with emerging forms of work and business practices.	Good	This option would ensure that the workplace relations system can provide all independent contractors (subject to a high income threshold) access to appropriate protections and dispute resolution.
All workers should have access to minimum rights and protections regardless of whether they are characterised as an employee or an independent contractor, including access to freedom of association and dispute resolution.	Good	This option provides all independent contractors (subject to a high income threshold) with improved access to dispute unfair contracts. This significantly improves access to rights and protections for workers, regardless of their work status.
Businesses should benefit from a level playing field among industry participants while promoting competition and innovation.	Good	This option would increase the fairness of competition by helping to ensure that businesses in any sector do not gain an unfair advantage from deliberately setting unfair contractual terms.
The Fair Work Commission should set minimum standards that: • are fair, relevant, proportionate, sustainable and responsive • reflect workers' independence and flexible working	N/A	This factor relates to standard-setting and is out of scope of this option.

arrangements, for example choosing which tasks to accept and refuse, how to undertake their work, where and when they work, and which businesses to contract with mitigate to the greatest extent possible unintended consequences for workers, businesses, consumers and other aspects of the labour market		
The standard-setting framework should be accessible, transparent, fair and offer a high degree of certainty to affected parties.	N/A	This factor relates to standard-setting and is out of scope of this option.

8. Preferred options and implementation plan

Preferred options

The preferred minimum standards option is **Option 4** (minimum standards for digital platform workers and road transport workers, with an interpretive principle to determine the meaning of ‘employee’ and ‘employment’). For improving access to dispute resolution of unfair contracts, the preferred option is **Option 3**. The department considers these options to have the best net benefit, defined as their consistency with the guiding principles balanced by the estimated regulatory burden.

Summary of impacts

Minimum standards

Table 29 – Average annual wage increases for workers (from business as usual)

	Average annual wage increases for workers (from business as usual)			
Option	Independent contractors	Business	Community organisations	Total change in costs
Option 1 (Status Quo)	Nil	Nil	Nil	Nil
Option 2	\$403,803,268.07 per year	Nil	Nil	\$403,803,268.07 per year
Option 3	\$407,650,573.62 per year	Nil	Nil	\$407,650,573.62 per year
Option 4	\$407,650,573.62 per year	Nil	Nil	\$407,650,573.62 per year

Table 30 – Average annual regulatory costs (from business as usual)

	Average annual regulatory costs (from business as usual)			
Option	Independent contractors	Business	Community organisations	Total change in costs
Option 1 (Status Quo)	Nil	Nil	Nil	Nil
Option 2	Nil	\$9,845.12 per business	Nil	\$9,845.12 per business

Option	Average annual regulatory costs (from business as usual)			
	Independent contractors	Business	Community organisations	Total change in costs
Option 3	Nil	\$5,889.42 per business + \$258.80 per worker, or \$9,845.12 per business	Nil	\$5,889.42 per business + \$258.80 per worker, or \$9,845.12 per business
Option 4	Nil	\$235.58 per business, or up to \$6,125.00 per business + \$258.80 per worker, or up to \$10,080.70 per business ³³²	Nil	\$235.58 per business, or up to \$6,125.00 per business + \$258.80 per worker, or up to \$10,080.70 per business

Table 31 – Consistency of each option with Guiding Principles

Guiding Principle	Option 1	Option 2	Option 3	Option 4
Australia's workplace relations system must reflect modern working arrangements and be capable of evolving with emerging forms of work and business practices.	Poor	Good	Good	Good
All workers should have access to minimum rights and protections regardless of whether they are characterised as an employee or an independent contractor, including access to freedom of association and dispute resolution.	Poor	Fair	Fair	Good
Businesses should benefit from a level playing field among industry participants while promoting competition and innovation.	Poor	Fair	Good	Good
The Fair Work Commission should set minimum standards that: - are fair, relevant, proportionate, sustainable and responsive - reflect workers' independence and flexible working arrangements, for	Poor	Fair	Good	Good

³³² Further detail is included under Section 6, Option 4 (Minimum Standards).

example choosing which tasks to accept and refuse, how to undertake their work, where and when they work, and which businesses to contract with mitigate to the greatest extent possible unintended consequences for workers, businesses, consumers and other aspects of the labour market				
The standard-setting framework should be accessible, transparent, fair and offer a high degree of certainty to affected parties.	Poor	Good	Good	Good

Access to dispute resolution for unfair contracts

Table 32 – Average annual regulatory costs (from business as usual)

	Average annual regulatory costs (from business as usual)			
Option	Independent contractors	Business	Community organisations	Total change in costs
Option 1	Nil	Nil	Nil	Nil
Option 2	Nil	Nil	Nil	Nil
Option 3	Nil	Nil	Nil	Nil

Table 33 – Consistency of each option with Guiding Principles

Guiding Principle	Option 1	Option 2	Option 3
Australia's workplace relations system must reflect modern working arrangements and be capable of evolving with emerging forms of work and business practices.	Poor	Good	Good
All workers should have access to minimum rights and protections regardless of whether they are characterised as an employee or an independent contractor, including access to freedom of association and dispute resolution.	Poor	Fair	Good
Businesses should benefit from a level playing field among industry participants while promoting competition and innovation.	Poor	Fair	Good

The Fair Work Commission should set minimum standards that: • are fair, relevant, proportionate, sustainable and responsive • reflect workers' independence and flexible working arrangements, for example choosing which tasks to accept and refuse, how to undertake their work, where and when they work, and which businesses to contract with • mitigate to the greatest extent possible unintended consequences for workers, businesses, consumers and other aspects of the labour market	N/A	N/A	N/A
The standard-setting framework should be accessible, transparent, fair and offer a high degree of certainty to affected parties.	N/A	N/A	N/A

Implementation

The Government will introduce legislation to amend the Fair Work Act. The amendments to the Fair Work Act will:

- Establish new powers for the Fair Work Commission to set minimum standards and resolve disputes about 'deactivation' or unfair contract termination for digital platform workers and road transport workers
- Establish a Road Transport Expert Panel in the Fair Work Commission
- Establish a Road Transport Advisory Group in the Fair Work Commission comprised of worker and business representatives to issue recommendations to the Expert Panel to assist in the standard setting process
- Introduce an interpretive principle for determining the meaning of 'employee' and 'employment'; and
- Allow the Fair Work Commission to deal with unfair contracts disputes.

These legislative amendments to the Fair Work Act will be implemented through the Fair Work Amendment (Closing Loopholes) Bill 2023, with a proposed commencement of 1 July 2024.

Role of the Fair Work Commission

Depending on the passage of legislation, there would be a 6-month period starting on 1 January 2024 allowing the Fair Work Commission to set up the jurisdiction. Following the commencement of the

jurisdiction, it would begin considering applications for minimum standards, registering consent collective agreements or considering applications for remedy for an unfair contract term or unfair contract termination or deactivation. Fair Work Commission Members would be supported by Fair Work Commission staff to provide case management, administrative and research functions.

Minimum standards for digital platform workers and road transport

The Fair Work Commission will determine priority cohorts for minimum standards through research and consultation. It would accept applications or begin matters on its own motion. Once a matter has commenced, the Fair Work Commission will accept submissions from parties to a matter, including relevant businesses and their representatives and workers and their representatives. After considering evidence and the views of parties, the Fair Work Commission may make a binding order setting minimum standards.

A new Road Transport Expert Panel will also be established in the Fair Work Commission, with the capacity to set priorities in relation to the making of orders, based on consultation with the Advisory Group.

The Fair Work Commission will also be empowered to register consent collective agreements in relation to digital platform workers and road transport workers.

Disputes in relation to unfair contracts, unfair contract terminations and 'deactivation'

The Fair Work Commission will accept applications from individual independent contractors and their representatives to dispute an unfair contract term. Consistent with other dispute resolution jurisdictions in the Fair Work Commission, applicants will be required to pay an application fee. The Fair Work Commission will be able to deal with unfair contracts claims by conciliation, mediation or compulsory arbitration.

Limiting the capacity to deal with unfair contract termination claims to identified areas of need within the road transport sector and (in relation to deactivation protections) the digital platform sector will mean that the impact of the introduction of these protections on the application numbers in the Fair Work Commission is expected to be relatively small. A high-income threshold applying to both unfair contract disputes and termination claims will further confine the scope of the jurisdiction.

Role of the Fair Work Ombudsman

The Fair Work Ombudsman will have responsibility for educating and assisting independent contractors and businesses engaging independent contractors on their new rights and obligations. It will also be empowered to enforce new minimum standards, including through litigation. As an independent statutory body, the Fair Work Ombudsman will develop its own policies and procedures to meet these new responsibilities.

8. How will you evaluate your chosen options against the success metrics?

The metrics for success will be the ability of the chosen options to meet the guiding principles. The department will monitor the operation of the new jurisdiction, including by monitoring Fair Work Commission matters and providing legal and policy advice to Government to ensure it is working as intended. Similar to its involvement in the Fair Work Commission's Annual Wage Review, the department will prepare submissions to minimum standards application processes and participate in hearings as required.

The ABS began collecting information on digital platform workers in the Multi-Purpose Household survey from 2022-23 and expects to, in time, introduce a dedicated module within the 'Characteristics of Employment' supplementary topic in the Labour Force Survey.³³³ The forthcoming publication of this data will assist the department to monitor the implementation of the proposed measures and their impact on digital platform workers.

Any further initiatives to improve data collection relating to the digital platform economy, road transport industry and unfair contracts would need to be balanced against the introduction of new regulatory burdens on individuals and businesses. For example, imposing reporting requirements on independent contractors and entities that they contract with would improve data on this cohort, however, would also introduce a new burden.

The department will monitor the implementation of the measures, including in consultation with the Fair Work Commission and the Fair Work Ombudsman. After it has been in operation for two years, the department will undertake an evaluation of the operation of the provisions. This is likely to look at matters such as the number of Minimum Standards Orders, agreements and dispute applications, and an assessment of the extent to which the changes have advanced the guiding principles.

³³³ Australian Bureau of Statistics (ABS), [Employment arrangements – Labour Statistics: Concepts, Sources and Methods](#), ABS, Australian Government, 2021, .

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For discussion purposes only

**ROAD TRANSPORT CONTRACTUAL CHAIN ORDER-
FUEL COST RECOVERY**

1. Circumstance in which this Order is made

This Order relates to the circumstance of the fuel supply chain disruption resulting from, or which continues to be affected by:

- 1.1 the significant reduction in shipping through the Strait of Hormuz; and
- 1.2 conflict in the Middle East.

2. Definitions

In this Order:

Act means the *Fair Work Act 2009* (Cth).

Digital labour platform - has the meaning set out in s 1SL of the Act.

Digital labour platform operator - has the meaning set out at s 15M of the Act.

Fuel means any liquid or gaseous energy source used to power vehicles for the performance of work in the transport industry, including petroleum and diesel products.

Increased cost of fuel means the difference between the cost per litre for the type of fuel used to perform the relevant work in the road transport industry at any given time and the cost as it was on 6 March 2026.

Order means this road transport contractual chain order.

Primary party is a person in a road transport contractual chain as described in s 15RA(2)(a) of the Act.

Rate means the contracted, standard, ongoing or usual rate or amount paid by one person covered by this Order to another for the performance of work in the road transport industry at or around 6 March 2026, including an hourly rate, a running rate, a total amount, or any other form of payment or combination of the foregoing.

Regulated road transport contractor has the meaning set out in s 1SQ to the Act.

Regulated worker has the meaning set out at s 15G of the Act.

Road transport business has the meaning set out in s 1SR of the Act

Road transport contractual chain has the meaning set out in s 15RA(1) of the Act;

Road transport employee-like worker has the meaning set out in s 1SRB of the Act.

Road transport industry has the meaning set out in s 15S of the Act.

Secondary party means a person in a road transport contractual chain as described in s 15RA(2)(b) of the Act.

3. Coverage of this Order

- 3.1 This Order covers all work in the road transport industry.
- 3.2 This Order covers the following persons in road transport contractual chains involving the performance of work in the road transport industry:
- (a) primary parties;
 - (b) secondary parties;
 - (c) road transport businesses;
 - (d) digital labour platform operators in the road transport industry;
 - (e) road transport employee-like workers performing work in the road transport industry; and
 - (f) regulated road transport contractors performing work in the road transport industry.

4. Obligations on primary and secondary parties

- 4.1 Primary parties must, at least each fortnight (or monthly if there is a monthly or longer pay period) from the date of commencement of this Order, adjust the rate they pay to any secondary party for the performance of work in the road transport industry by the amount necessary to ensure that the secondary party recovers the increased cost of fuel calculated:
- (a) by reference to any pre-existing contractual fuel benchmark; or if none exists
 - (b) by reference to the Australian Institute of Petroleum Index; or
 - (c) otherwise as agreed.
- 4.2 Primary parties in a road transport contractual chain must take all reasonable steps to ensure that secondary parties engaging regulated road transport contractors or road transport employee-like workers in the same road transport contractual chain adjust the rate they pay to such regulated road transport contractors or road transport employee-like workers for the performance of work in the road transport industry by the amount necessary to ensure that the road transport contractors or road transport employee-like workers recovers the increased cost of fuel.
- 4.3 Secondary parties must, at least each fortnight (or monthly if there is a monthly pay period) from the date of commencement of this Order, adjust the rate they pay to any other secondary party, regulated road transport contractor or road transport employee-like worker for the performance of work in the road transport industry by the amount necessary to ensure that the secondary party, regulated road transport contractor or road transport employee-like worker recovers the increased cost of fuel, calculated:
- (a) by reference to any pre-existing contractual fuel benchmark; or if none exists
 - (b) by reference to the Australian Institute of Petroleum Index; or
 - (c) otherwise as agreed.

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4.4 The adjustments required under clauses 4.1, 4.2 or 4.3 of this Order may be made as an adjustment to the rate, the introduction of a fuel increment or levy, or a direct reimbursement of money expended upon the increased cost of fuel.

4.5 In respect of contractual relationships governed by State or Territory industrial instruments, collective agreements, individual contracts or arrangements, the adjustment of rates pursuant to any "rise and fall" rate adjustment mechanism for which any such instrument, agreement or contract provides will satisfy the obligations in clauses 4.1, 4.2 or 4.3 provided that this takes into account the increased cost of fuel.

4.6 Where before the commencement of this Order, a secondary party has implemented an arrangement to adjust the rate they pay to any other secondary party, regulated road transport contractor or road transport employee-like worker for the performance of work in the road transport industry by the amount necessary to ensure that the secondary party, regulated road transport contractor or road transport employee-like worker recovers the increased cost of fuel this will satisfy the obligations in clauses 4.1, 4.2 or 4.3 provided that this takes into account the increased cost of fuel.

4.7 The obligations in this Order shall not apply where a secondary party has declined to have their rate of pay (in whole or part) adjusted in accordance with this Order.

5. Commencement, operation and cessation of this Order.

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- 5.1 This Order will take effect on 20 April 2026.
- 5.2 This Order prevails over any minimum standards order which takes effect while the obligations in clause 3 apply.
- 5.3 The obligations in clause 3 will cease to apply on the occurrence of the earlier of the following:
- (a) the weekly average national terminal gate price for diesel, as measured in the weekly diesel price report of the Australian Institute of Petroleum, falls below \$2.00 per litre;
 - (b) six months from the date of the commencement of this Order.

6. Dispute settlement

- 6.1 This clause sets out the procedures to be followed in relation to disputes concerning the implementation or operation of Order.
- 6.2 The parties to the dispute must first try to resolve the dispute as between themselves.
- 6.3 If the dispute is unable to be resolved between the parties, a party to the dispute may refer the dispute to the Fair Work Commission.
- 6.4 The Fair Work Commission may use any method of dispute resolution it is permitted by the Act to use that it considers appropriate to resolve the dispute.
- 6.5 If the dispute is unable to be resolved, the Fair Work Commission may arbitrate the dispute with the consent of the parties.
- 6.6 Any party to a dispute may be represented by an industrial association at any stage of the dispute settlement process including in proceedings before the Fair Work Commission.