Business Chamber QUEENSLAND

We know business matters.

Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

Business Chamber Queensland Submission

October 13, 2023

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Executive Summary

Business Chamber Queensland welcomes the opportunity to make this submission to the Senate Education and Employment Legislation Committee on the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 ('the Bill').

Business Chamber Queensland is the state's chamber of commerce, an independent, not-for-profit organisation, with a rich legacy of putting Queensland business first, providing practical support backed by innovative thinking and powerful advocacy.

We help businesses prosper by supporting, educating, and empowering businesses to capitalise on the extraordinary opportunities on offer in Queensland - now and into the future. We have been at the centre of the state's economic development since 1868 and have a long legacy as the leading business body in Queensland.

These proposed industrial relations reforms have the potential to impact how Queensland businesses engage and manage their workforces and we're concerned these legislative reforms have unintended consequences which are likely to have a compounding impact on an already stretched and stressed business community.

Rather than simplifying Australia's complex employment and workplace relations laws, this Bill may create a more complex, risky, and uncertain business environment. It is essential workplace conditions are carefully considered and all employees work in the best possible conditions.

At the same time, the reforms could represent another layer of complexity for businesses across the state, many of which are already struggling with poor business conditions and significant time and financial costs of complying with existing regulations.

Our recent research shows 70% of businesses say inefficient regulation is limiting their growth while the median business cost of complying with inefficient government regulation, or red tape, is $50,000 a year.

Combine that with record high labour and business operating costs, weak forward economic confidence, the ongoing skilled labour shortages and macroeconomic challenges – and we're really concerned these IR reforms will add another layer of complexity to running a business in Australia.

It's also important businesses aren't prevented from managing their own workforces. Workforce challenges are a top priority for Queensland businesses. We know from our research the ability to attract and retain suitably qualified staff is the most significant constraint on business growth.

It is essential Queensland businesses are equipped with sustainable, future-ready workforces to allow them to capitalize on current and future business opportunities in Queensland. The ability to manage their workforce is one of the ways this can happen.

It is important that Queensland businesses' needs are at the forefront of any legislative changes which impact the way they operate day-to-day and we're committed to ensuring Queensland businesses can manage their workforces and operations not only for today, but also in the future.

Our submission has extensive research and insight from the Queensland business community at its foundation. This consultation has revealed overwhelming concern among businesses to some of the proposed reforms with 70.3% of businesses indicating the proposed changes to casual employment would have a 'damaging' or 'extremely damaging effect', while 50.3% indicated proposed changes to labour hire and 58.9% indicated proposed changes to workplace delegates' rights would also be damaging to their business. For each of these proposed changes, less than 5% said they would positively impact their business.

Table: Summary of IR Reforms Queensland Business Impact Survey Results

Part of Bill	Extremely Damaging	Damaging	No Impact	Positive	Extremely Positive
Casual Employment	40.5%	29.8%	20.2%	2.3%	1.7%
Labour Hire	24.5%	25.8%	33.1%	4.3%	1.8%
Road Transport Industry Reforms	15.4%	27.5%	43.0%	3.4%	1.3%
Employee-Like Forms of Work	18.7%	22.6%	45.2%	0.7%	2.6%
Workplace Delegate Rights	27.0%	31.9%	33.3%	0.0%	1.4%

Source: Business Chamber Queensland IR Reforms Queensland Business Impact Survey 2023

We're encouraging the Federal Government to reconsider these reforms in the context of their potential compounding impact on employers and the wider economy.

Summary Positions and Recommendations

Business Chamber Queensland's submission addresses the main amendments in the Bill, that is, amendments proposed at Part 1, Part 6, Part 7, Parts 9 and 15, Parts 14 and 11, and Part 16.

A summary of Business Chamber Queensland's position is below. For other matters not covered in our submission, Business Chamber Queensland supports the submission of the Australian Chamber of Commerce and Industry.

Business Chamber Queensland's strong recommendation is that, with the in-principle exception to Part 14, the proposed changes should not be made.

However, to avoid the worst consequences of the Bill, Business Chamber Queensland submits the following amendments should be made:

Casual Employees (Part 1 of the Bill)

A. Amendment to ensure where an employee confirms they wish to be employed, or remain employed as a casual employee, they can do so without risk to either the employee or the employer.
B. Amendment to ensure an employer should not be penalised or be found to have misclassified the employment where an employee chooses to work on a casual basis, for example, they do not accept conversion when offered after the first 12 months of employment, or action their own right to request conversion.
C. Amendment to specifically exclude the possibility of any backpay claims, not merely an offset to it.

Closing the Labour Hire Loophole (Part 6 of the Bill)

A. Amendment to exclude, without exception:
    a. Small Businesses;
    b. Service Contracting; and
    c. Training Arrangements

    from Part 6.

Employee-Like Workers (Part 9 of the Bill)

A. Amendment to the definition of "employee-like".
B. Amendment so that independent contractors can only be capable of falling within the definition of "employee-like" if they meet all three criteria.
C. Amendment to the FWC orders power to specify the types of standards that can be set, not what cannot be set.

Road Transport (Part 16 of the Bill)

A. Amendment to restrict road transport minimum standard orders terms to:
    a. payment terms;
    b. record keeping; and
    c. insurance.
B. Amendment to require the FWC to specifically seek advice from the industry and determine how those specific standards and orders will improve road safety prior to setting a standard or making an order.
C. Amendment so the scope and content of the "road transport industry contractual chain orders" are made clear and not left to the Minister via regulation.

Wage Theft (Part 14 of the Bill) and Penalties (Part 11 of the Bill)

A. Amendment that clarifies an intentional act must be tied directly to the underpayment, not to conduct that results with a failure to pay.
B. The Voluntary Small Business Wage Compliance Code
    a. Be prioritised by the Minister;
    b. Be drafted in consultation with relevant stakeholders;
    c. Provide a safe harbour regime for businesses, giving them the ability to avoid criminal investigation if they comply with the Code or enter into a cooperative agreement, giving employers the confidence to self-report underpayments.
C. Amendment to expressly override all criminal offences for wage theft at the state and territory level.

1.0 Introduction

Business Chamber Queensland's submission summarises the opposed elements of the Bill. This is supported with Queensland businesses response to the proposals; specific issues and recommendations to limit the impact to Queensland's business community, productivity, the economy and employment.

2.0 About Business Chamber Queensland

Business Chamber Queensland is the state's chamber of commerce, an independent, not-for-profit employer organisation, representing businesses of every size, in every industry and in every part of the state.

For 155 years Business Chamber Queensland has represented businesses of every industry, every size and in every part of Queensland.

3.0 Our Business Insight

Our research, combined with our decades of data, is among the most authoritative, trusted and timely snapshot of Queensland business sentiment, and business stakeholders look to us to set the business agenda in Queensland.

Further to this, Business Chamber Queensland has conducted extensive consultation with businesses on the degree of support of the Bill's provisions and the impact they will have on businesses.

Over the period 20 September - 5 October 2023 Business Chamber Queensland conducted an electronic survey on the Industrial Relations Reforms and how they may impact Queensland businesses. 178 businesses completed the survey comprising respondents across all regions, industry sectors and size. These results are the foundation of this submission.

Business Chamber Queensland also ran six interactive IR Reforms Business Briefing webinars on the reforms and their impact on casual employment, wage theft, labour hire, the gig economy, the Road Transport industry, workplace delegates and right of entry. The outputs of these consultation initiatives are included in this submission.

Business Chamber Queensland's IR Reforms Working Group; a group of local and regional Chambers of Commerce, have contributed to our consultation and business sentiment gathering.

The submission has been prepared by Business Chamber Queensland's Workplace Services team; a team which consists of HR and Industrial Relations specialists who regularly support businesses on industrial relations and workplace issues. As such, the team has gained unique insights into the technical and practical aspects of implementing workplace arrangements in the real and everyday workplace.

4.0 Casual Employee (Part 1 of the Bill)

4.1 Overview of Bill Provision

Currently, the definition of "casual employee" in the *Fair Work Act 2009* (Cth) ('FW Act') is defined by reference to the terms of the employment contract.[1]

Under the Bill, the current definition will be replaced with a new definition that considers not only the contract of employment but also the "real substance, practical reality and true nature" of the employment relationship.

[1] s 15A.

Regard will also be had to:

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

Casual employees already have an existing path for conversion to part-time or full-time employment. Under the Bill, a new pathway for conversion is proposed to be introduced where employees who commenced employment as a casual employee and believe their status has subsequently changed, per the proposed new definition, will be able to notify their employer and seek conversion after:

- 12 months, if working in a small business; or
- Six months, if working in any other business.

An employer can refuse a conversion request if:

- The employee still meets the definition of "casual employee";
- Substantial changes to the employee's terms and conditions would be necessary to meet the request; or
- Converting the employee would affect compliance with a recruitment or selection process required under a law of the Commonwealth, a State or Territory.

If the employer refuses the conversion request, they must provide the employee with detailed reasons as to why they are refusing the request and inform them about the FWC's capacity to deal with any related dispute. The FWC will have new powers to deal with disputes that arise when an employer rejects an employee's request to convert from casual to part-time or full-time employment.

Employers will continue to be able to offset any backpay for entitlements which were not provided to employees who were found to technically be permanent by the casual loading. However, new provisions will penalise employers who misrepresent an employee's status, unless they had a reasonable belief the employee was a casual employee. Penalties of up to $93,900 will apply.

4.2 Potential Business Impact

Casual Employee Definition

Business Chamber Queensland contends there is no compelling reason to change the comprehensive definition of casual employee at section 15A of the FW Act. The definition of casual employee currently provided in the FW Act is more than sufficient to provide certainty to employers and employees, and it is consistent with the High Court decision in *WorkPac Pty Ltd v Rossato*.[3]

The Bill proposes a move away from this definition, a move that is unnecessary, and a move that is inconsistent with the flexibility needs of business as well as those of employees who choose to work on a casual basis.

Conversion and Misclassification

A casual employee already has a statutory pathway under the FW Act to convert to full-time or part-time employment. The casual conversion National Employment Standard in the FW Act was introduced on 27 March 2021, and it provides a casual employee who has worked for an employer for at least 12 months and has, during at least the last six months of that time, worked a regular pattern of hours on an ongoing basis, may be entitled to be offered, or request, conversion to full-time employment or part-time employment.

[2] Bill sch 1 item 1 (proposed s 15(2)(c)).

[3] [2021] HCA 23.

In addition, employees have an existing residual right to request conversion to permanent employment in the National Employment Standard.

The Bill's proposed new definition of "casual employee" will in practice, stop casuals from working regular patterns of work. It means a worker whose employment is characterised by "a regular pattern of work" may not be a genuine casual employee. Employers and businesses will be forced, in response to the Bill, to avoid casual employment practices, and to stop offering casual employees regular hours, even where the employee wants the regular work plus the benefit of the 25% casual loading.

Under the Bill's proposed new definition, someone who works, for example, the same hours across the same days per week, each week, for a period, is likely to be re-classified as a permanent part-time employee because of the regularity of those hours worked. That period may be dictated by the employee's own requirements, such as study commitments (e.g., university semester timetable), caring responsibilities (e.g., school terms) or others who are dependent on the casual loading.

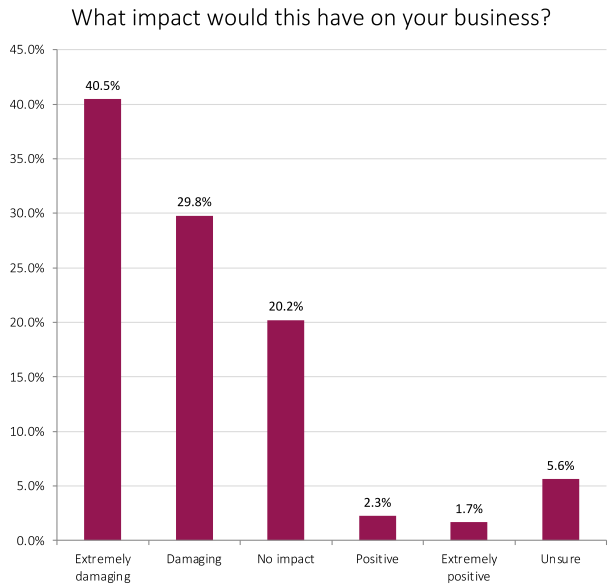
The Bill will likely have a detrimental impact on those groups of employees who depend on casual employment. In addition, should one of those employees refuse casual conversion when offered, or not seek casual conversion per the proposed conversion provisions in the Bill, an employer is at risk of breaching the proposed sham provision, where penalties may be imposed.

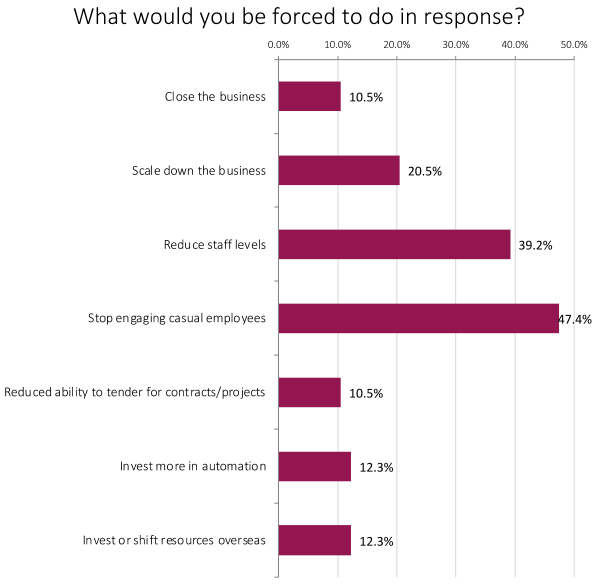
4.3 Queensland Business Responses to the Bill

The majority of Queensland businesses indicate the proposed amendments in Part 1 of the Bill will be either extremely damaging (40.5%) or damaging (29.8%) to their business.

More than 47% of business respondents said they would stop engaging casual employees. Again, this is not beneficial for businesses who require casual employment, nor does it benefit the existing casual who wants to remain casual because they either prefer to receive, or are reliant on receiving, the 25% casual loading.

Businesses have also indicated the impact of the Bill would result in staffing levels reducing in their business (39.2%). Queensland businesses who believe this provision will impact their business negatively indicate the mean number of employees whose employment will be jeopardised is 4.





Source: Business Chamber Queensland IR Reforms Queensland Business Impact Survey 2023

Other expected impacts arising from Part 1 of the Bill include:

- Scaling down their business - 20.5% of business responders;
- Invest or shift resources overseas - 12.3% of business responders; and
- Reducing the ability to tender for contracts/projects - 10.5% of business responders.

The results represent a level of concern among the state's business community, the economy and employment levels.

Qualitative responses included:

- *Despite owning a business, I am regularly engaged in a casual or contactor capacity and these reforms could seriously affect those who may engage me*
- *Impossible to comply. We have workers who are casual but work 40 weeks a year during school terms. So, while they are regular hours we can't do 52 weeks a year.*
- *Reduce flexible work offerings to employees - employee choice*
- *Will impact on how we engage project workers. This are typically highly paid workers placed with clients for specific project. This is a small group of employees who prefer casual arrangement.*

The Bill will likely result in an increase in administrative requirements for businesses. The increase in pecuniary penalties which may be imposed in circumstances of, for example, misclassification of employees could be significant for businesses. Small and medium sized enterprises may be severely impacted by the changes proposed, especially those involving changes to casual employment. For this and other reasons addressed in earlier in this submission, businesses have expressed their opposition to Part 1 of the Bill.

4.4 Business Chamber Queensland Position

Business Chamber Queensland opposes the proposed changes to casual employment. The existing FW Act definition is sufficient, and consistent with common law, and the existing conversion requirements for employers and available to employees is an adequate pathway to permanent employment.

Part 1 of the Bill may have a significant and negative impact on Queensland businesses. It may likely also increase the administrative burden on businesses.

In the alternative, should Part 1 of the Bill be accepted as necessary, Business Chamber Queensland strongly urges the following practical amendments to avoid the worst consequences of Part 1:

1. Amendment to ensure where an employee confirms they wish to be employed, or remain employed as a casual employee, that despite regular hours of work, the employee be allowed to remain a casual employee without:
    a. The risk of the employee being deemed to be a permanent employee;
    b. The risk of the employer being exposed to penalties for misclassification for enabling the employee's request and preference.

2. Amendment to ensure an employer should not be penalised or be found to have misclassified the employment where an employee chooses to work on a casual basis, for example, they do not accept conversion when offered after the first 12 months of employment, or action their own right to request conversion.

3. Amendment to specifically exclude the possibility of any backpay claims, not merely an offset to it.

    As discussed, the possibility of employer liability for back pay claims for misclassifying permanent employees should be clearly and explicitly ruled out to prevent legal claims, including class actions, against employers. That an employer may be penalised for misclassifying a permanent part-time or full-time employee by inadvertently treating them as a casual, and subsequently liable for a pecuniary penalty of up to $93,900, will have far reaching consequences for Queensland businesses.

5.0 Closing the Labour Hire Loophole (Part 6 of the Bill)

5.1 Overview of Bill Provision

The Fair Work Commission ('FWC') will be given new powers to make orders in relation to labour hire arrangements.

The new orders will broadly apply to arrangements where one business supplies, either directly or indirectly, one or more employees to another business to perform work, and the business to whom the labour is being supplied ('the host employer') is covered by an Enterprise Agreement or similar instruments (but not a Modern Award).

The new orders can only be made upon application by an affected party or a union, and after consideration of the matters, including submissions from parties, the FWC can make an order which requires the host business to ensure the supplied employee is provided with no less than the "protected rate of pay".

The protected rate of pay is proposed to be the full rate of pay, as defined at FW Act[4]. This means the protected rate of pay is the full rate of pay that would be payable to an employee employed directly by the host business under the applicable Enterprise Agreement or similar instrument.

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

Limited exclusions from Part 6 include:

- Host businesses that are small businesses; and
- Host businesses of employees covered by training arrangements or performing short-term arrangements (e.g., for less than three months).

The FWC will be able to deal with disputes relating to orders about these arrangements. New anti-avoidance provisions will apply to prevent circumvention of the new laws.

5.2 Potential Business Impact

It cannot be assumed labour hire workers supplied by a labour hire provider employer are exploited and should be remunerated according to the terms of a separate or different host employer's operational Enterprise Agreement for its directly engaged employees. Queensland employers must retain their managerial prerogative and discretion to manage their own workforce according to their own business' requirements in accordance with the current FW Act and other employment and workplace laws.

The use of labour hire and specialist services contracting is an integral feature of Queensland's mining and agricultural industries. As such, this reform threatens Queensland's competitiveness in these as well as other important industries. The impact of this provision will spread much further throughout the Queensland economy. Labour hire businesses operate and supply labour hire workers in sectors of the Queensland economy like community care, aged care, and disability care.

If the FWC is given the power to make a "regulated labour hire arrangement order" in respect to such workers under the proposed section 306E described in this part of the Bill, their employers, which may be smaller and medium sized labour hire businesses, could be adversely impacted by increased costs, making it harder for them to remain competitive and to continue to operate.

Labour hire providers are employers too, meaning they, and their workforce are covered by industrial instruments, and the FW Act. It also means they can bargain with their own workforce for terms and conditions. Creating a situation where a labour hire worker's entitlement could change regularly due to different contracts with host employers. This could lead to financial uncertainty for those labour hire workers.

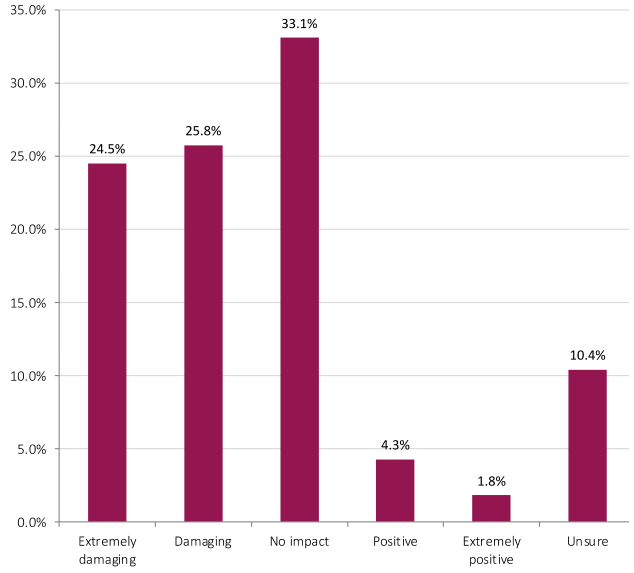
[4] S 18.

5.3 Queensland Business Responses to the Bill

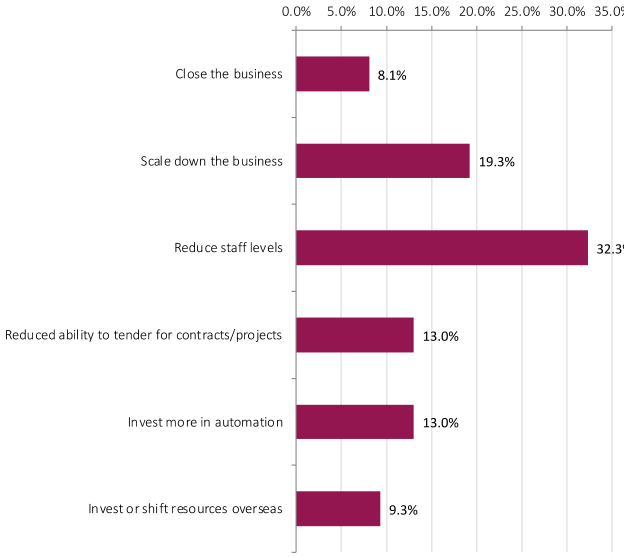
Queensland businesses indicated the proposed changes to labour hire arrangements are likely to substantially compromise their operations. Whilst many businesses indicated this aspect of the Bill would not impact on them due to not being a labour hire provider employer, or a host employer, 24.5% of those business who will be impacted indicated it would be extremely damaging, and 25.8% indicated it would be damaging.

Queensland businesses who expect to be negatively impacted indicate the mean number of employees whose employment will be jeopardised is 5.

What impact would this have on your business?



What would you be forced to do in response?



Source: Business Chamber Queensland IR Reforms Queensland Business Impact Survey 2023

Queensland businesses qualitative responses to this element of the Bill included:

- *Maybe not engage a temp if the cost is too high once their fees are added, so go without*
- *Stop using labour hire services*
- *Labour hire used for surge capacity - will become too hard and expensive*

5.4 Business Chamber Queensland position

Business Chamber Queensland opposes this part of the Bill.

Labour hire is a legitimate form of work and the basis for this part of the Bill is flawed. This aspect of the Bill will create a complex new FW Act regime regulating labour hire industry, which will hinder and impede the ability of businesses to source and manage their workforce on a cost-effective and competitive basis.

In the alternative, to avoid the worst consequences of this part of the Bill, Business Chamber Queensland strongly urges the following practical amendments:

- That small businesses are expressly excluded from Part 6;
- That all service contracting is expressly excluded from Part 6; and
- That training arrangements are expressly excluded from Part 6.

6.0 Definition of Employee (Part 15 of the Bill)

6.1 Overview of Bill Provision

Currently, the FW Act uses the common law definition of "employee" which is determined solely by reference to the terms of the contract.[5] The Bill proposes to introduce a new statutory definition of employee into the FW Act, and this definition would look beyond the contract to the "real substance, practical reality and true nature" of the relationship.

The Bill proposes a return to a "multi-factor test" and to undo the two precedent High Court decisions that rejected this totality of the relationship test. Currently, the FW Act distinguishes between an employee working under a contract of service and an independent contractor working under a contract for services. Workers who are independent contractors are not employees for the purposes of the FW Act.

6.2 Potential Business Impact

The new definition may lead to business uncertainty. Many businesses employ employees and also engage independent contractors.

The implication of the proposed new employee definition may mean some workers who currently fall outside the scope of the FW Act because they are independent contractors will now be deemed employees for the purposes of the FW Act. This will apply retrospectively to all existing contractor arrangements.

Due to the new definition, some independent contractors (at common law) will be provided with all the entitlements provided to employees under the National Employment Standards in the FW Act and other rights, such as remedies for unfair dismissal. The test will generate uncertainty for businesses who engage independent contractors because it is imprecise. It will create uncertainty, rather than clarity, about the nature of the employer-employee relationship and when a worker is an employee. The terms of a contract between a business and worker for an independent contracting arrangement should not be overridden by a court or tribunal considering abstract, imprecise and ambiguous matters.

6.3 Business Chamber Queensland Position

Business Chamber Queensland opposes this part of the Bill. There is no imperative for the Government to change what is now an established definition of employee at common law and introduce a new and differing statutory definition.

This change is not needed, and if actioned, it is likely to have a detrimental impact on Queensland businesses.

7.0 Employee-Like Workers (Part 9 of the Bill)

7.1 Overview of Bill Provision

The Bill proposes to introduce a new jurisdiction with the FWC. The FWC will be given new powers that affect "employee-like" workers who are engaged through "digital labour platforms".

The FWC will have the power to:

- Make minimum standard orders affecting pay and conditions for employee-like workers;
- Make minimum standard guidelines for employee-like workers;
- Register consent agreements between employee-like workers and digital platforms;

[5] *Construction, Forestry, Maritime, Mining and Energy Union & Anor v. Personnel Contracting Pty Ltd* [2022] HCA 1; *ZG Operations Australia Pty Ltd & Anor v. Jamsek & Ors* [2022] HCA 2.

- Provide remedies for unfair deactivation of employee-like workers on digital platforms; and
- Deal with disputes between employee-like workers and digital platforms.

The new powers would apply to workers who are:

- engaged as independent contractors;
- perform all or a majority of the work under the contract;
- are engaged in digital platform work;
- are not employees; and
- satisfy one of three criteria (listed below) (i.e., an "employee-like" worker).

Three criteria, only one of which a worker must satisfy, are they:

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

"Digital platform work" essentially includes any work by an independent contractor in connection with a digital labour platform in return for payment. A "digital labour platform" is one that satisfies all three of the following:

- involves an online enabled application, website or system operated to arrange, allocate or facilitate the provision of labour services;
- the operator of the platform engages the independent contractors or acts as an intermediary with users; and
- the operator processes payments in relation to the work.

The scope of the new powers therefore includes both vertical platforms (e.g., Uber) and horizontal platforms (e.g., Airtasker). Once a FWC order is made that covers a class of workers and platforms, they will be bound by its terms irrespective of whether they consent, or had an opportunity to participate in the FWC's standard-setting process.

The following table illustrates the terms which may be included in a minimum standard order for employee-like workers, and those which may not. It should be noted the list of terms which may be included in a minimum standards order are not exhaustive; the FWC has discretion to include any other terms that are not expressly prohibited.

Permissible Terms	Prohibited Terms
• payment terms; • deductions; • working time; • record-keeping; • insurance; • consultation; • representation; • delegates' rights; and • cost recovery.	• overtime rates; • rostering arrangements; • matters that are primarily of a commercial nature that do not 19 affect the terms and conditions of engagement of the relevant workers; • a matter which would convert the relationship to one of employment; • matters relating to work health and safety otherwise comprehensively dealt with by another law; and • matters prescribed by the regulations.

The FWC will have the power to deal with disputes relating to deactivations from digital labour platforms, and will be able to order reactivation as a remedy, but not compensation. A person will only be protected from unfair deactivation if they have been engaged on a regular basis for at least six months.

7.2 Potential Business Impact

In relation to employee-like work the current scope of the new jurisdiction is too broad and will capture many independent contracting arrangements in industries where a case has not been made for the need for minimum

standards to be set. This aspect of the Bill is a significant intervention into the commercial arrangements of business owners and the self-employed. It is contrary to the right of independent contractors to set their own rates and conditions and to work flexibly.

While the Bill will give the FWC new powers to make orders for unfair contract terms in independent contracting arrangements, the Bill does not include definition of what will constitute an "unfair contract term". This means the Bill provides inadequate guidance about what will constitute an "unfair contract term". Many factors can be relevant to an independent contracting relationship, for instance, flexibility and non-monetary benefits. These factors may be relevant to the appraisal of the relationship between the independent contractor and the principal with whom the independent contractor contracts to provide its services. These types of factors may effectively compensate the independent contractor for remuneration lower than employees performing the same or similar work. The Bill does not adequately recognise this commercial, or practical, reality.

The lack of guardrails around the new powers will mean the breadth of the minimum standard orders are likely to include a range of matters which may increase business costs, which some businesses may need to pass onto consumers.

Many of the restrictions on what terms cannot be included in a minimum standards order do not curtail the FWC's discretion. For example, the prohibition on terms that would change the status of the workers would only have a very limited relevance for many proposed terms. What constitutes a term which "would change the status of the worker" is contested. For instance, companies could argue penalty rates or leave would constitute such a term, whereas unions have made it clear these are standards they will push through this process for sectors such as food delivery and the care sector.

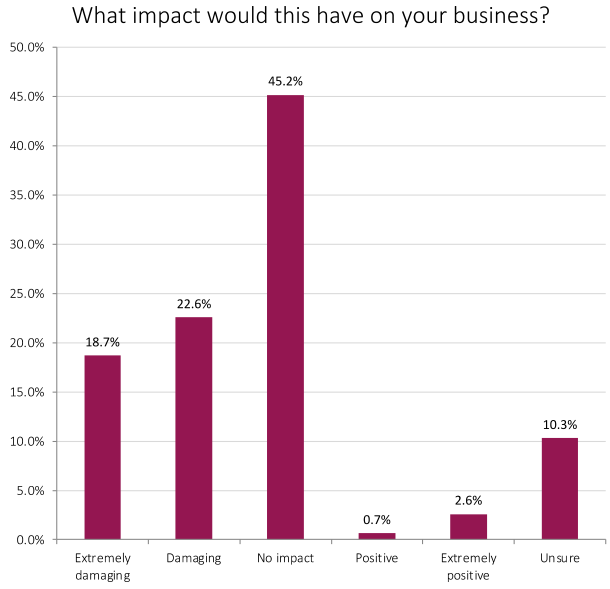
The Bill's statutory test will create uncertainty for businesses who engage independent contractors because it does not adequately distinguish and separate independent contracting arrangements from employment relationships.

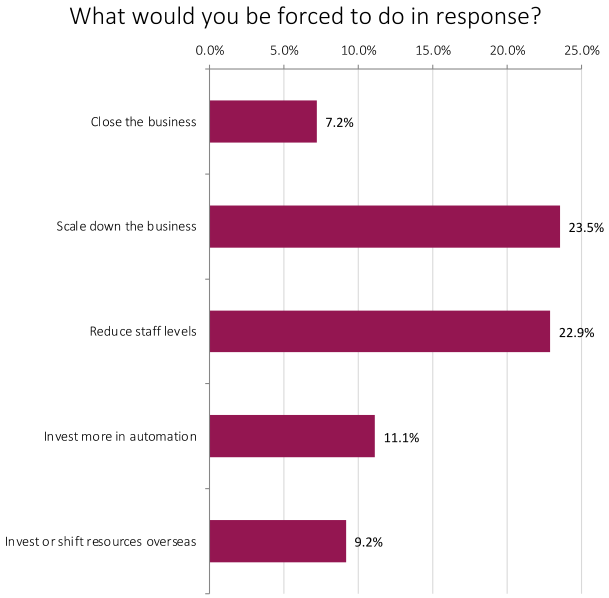
A contract for services for an independent contracting arrangement is inherently different in nature and character to a contract of service for an employment relationship. An employment relationship involving a "contract of service" and an independent contracting relationship involving a "contract for services" should remain distinguishable under the FW Act. This Bill's new definition will change this legal position, and the reform introduced by this part of the Bill will apply retrospectively to all existing independent contractor arrangements.

7.3 Queensland Business Responses to the Bill

The majority of businesses indicated this aspect of the Bill would not impact them, however 18.7% of those who would be impacted indicated the amendments would be extremely damaging, and 22.6% indicated it would be damaging to their business.

The prevalent impact on business was to either reduce their staffing levels (22.9%) or scale the business down (23.5%). Queensland businesses who believe this provision will impact their business negatively indicate the mean number of employees whose employment will be jeopardised is 5.





Source: Business Chamber Queensland IR Reforms Queensland Business Impact Survey 2023

Queensland businesses qualitative responses to this element of the Bill included:

- *Increase prices to the consumer*
- *Independent contractors are engaged with on an as needed basis, and all are in highly qualified roles, so there is already a negotiation process regarding their contractor rate in alignment with relevant Award and Fair Work legislation.*
- *It would limit resourcing opportunities*
- *Raise prices*
- *Stop using sub-contractors as they will cost us more than directly employed staff*
- *This will definitely be detrimental to my business, if it becomes too hard or expensive for clients to engage aged or disability support workers using the platforms such as I use, they will likely not engage anyone at all. This will be very bad for clients not to mention the already crisis ridden aged and Disability sector and I am frightened these changes will force me back into mainstream employment, in which case it won't be in the aged or disability sector as I chose to work for myself because my care standard is far higher than the appalling levels and lack of care for both residents and staff I experienced when working in a nursing home.*
- *With unemployment at low levels independent contractors chose to do this type of work. the government is taking away their freedom of choice.*
- *Won't use independent contractors any more too risky.*

An increase in prices to consumers will directly influence cost of living pressures. This will in turn impact on the ability of a business to operate. This is an unacceptable impact for Queensland business.

7.4 Business Chamber Queensland Position

Business Chamber Queensland opposes the part of the Bill dealing with employee-like work.

To avoid the worst consequences of the Bill, the following amendments should be made:

- Amend the definition of “employee-like” as proposed the definition is too broad.
- Business Chamber Queensland submits that at least, instead of only needing to meet one of the definition criteria, independent contractors should only be capable of falling within the definition of “employee-like” if they meet all three criteria.
- With regard to FWC orders, the Bill’s focus change from specifying the types of standards that cannot be set to specifying the standards the FWC can set.

8.0 Road Transport (Part 16 of the Bill)

8.1 Overview of Bill Provision

The FWC will be given new powers relating to the Road Transport Industry.

The Bill proposes to give the FWC the power to:

- Make "road transport industry contractual chain orders" that confer rights and obligations on participants in the road transport industry supply chain. The scope and content are both defined by the Minister via Regulation;
- Make minimum standard guidelines for the road transport industry;
- Register consent agreements for participants in the road transport industry;
- Provide remedies for unfair termination of services contracts of road transport contractors;
- Deal with disputes between participants in the road transport industry supply chain, even if they are independent contractors (i.e., businesses) rather than employees or employees-like.

The powers relate not only to drivers in the road transport industry, but essentially anyone who is "connected with the road transport industry" or who meets requirements prescribed in regulation by the Minister. The "road transport industry" has a much broader definition than merely the transport of goods by road. It will also include:

- the transport of passengers by motor vehicle, limousine, bus, coach or hire car;
- the handling, recycling and disposal of any waste material;
- the receiving, handling or storing of goods, wares, merchandise, material etc in a distribution facility; and
- the wholesale transport and delivery by road of meat from abattoirs, slaughterhouses, and wholesale meat depots.

Once an order is made that covers a class of persons and/or businesses, they will be bound by its terms irrespective of whether they consent or had an opportunity to participate in the FWC's standard-setting process. The following table illustrates the terms which may be included in a minimum standards order for the road transport industry, and those which may not. It should be noted that the list of terms which may be included in a minimum standards order are not exhaustive; the FWC has discretion to include any other terms that are not expressly prohibited.

Permissible Terms	Prohibited Terms
• payment terms; • deductions; • working time; • record-keeping; • insurance; • consultation; • representation; • delegates' rights; and • cost recovery.	• overtime rates; • rostering arrangements; • matters that are primarily of a commercial nature that do not 19 affect the terms and conditions of engagement of the relevant workers; • a matter which would convert the relationship to one of employment; • matters relating to work health and safety otherwise comprehensively dealt with by another law; and • matters prescribed by the regulations.

Workers in the road transport industry will have the ability to challenge the termination of contract if it is unfair and inconsistent with a new regulatory code prescribed by the Minister.

A new advisory body will be established, called the "Road Transport Advisory Group" (RTAG). The RTAG will advise the FWC on Modern Awards, orders and matters which affect the road transport industry.

The new powers relating to the road transport industry are given on the basis they will improve road safety, where the imbalance in power between participants within the road transport industry supply chain has led to unsafe acts by those with lower bargaining power.

8.2 Potential Business Impact

These changes effectively re-establish the Road Safety and Remuneration Tribunal (RSRT). Mirroring the RSRT, the new arm of the FWC will set minimum standards for independent contractors in the road transport industry, handing over broad regulatory powers over an entire supply chain to a tribunal which is designed to deal with employment matters.

The new powers are unlikely to have a meaningful positive impact on road safety. The demonstrated effects of regulation in state systems has only shown improvement where there has been with historically below average road safety outcomes, and not forecasted improvements beyond their current baselines [6]. Further where there have been improvement in road safety over time, those primary improvements have been the result of other interventions, including the enforcement of speed limits and the wearing of seatbelts. When compared to the negative impact of the previous RSRT, the new powers are unlikely to have a net positive impact on road safety when compared to other measures that could be taken.

This Bill also gives extremely broad powers to the Minister to regulate an entire industry, without adequate checks and balances, including:

- Defining the scope and content of broad "road transport industry contractual chain orders" which the FWC can make;
- Defining which businesses and workers can be covered by the regulations and order;
- Imposing penalties for contraventions of any of the regulations prescribed by the Minister; and
- Deciding the conditions which must be met for a business to lawfully terminate a contract in the industry.

As the new powers to make orders affecting the road transport industry will be designed by the Minister through Regulation and then enforced by the FWC, stakeholders are prevented from the ability to input into Regulation that can impact their industry.

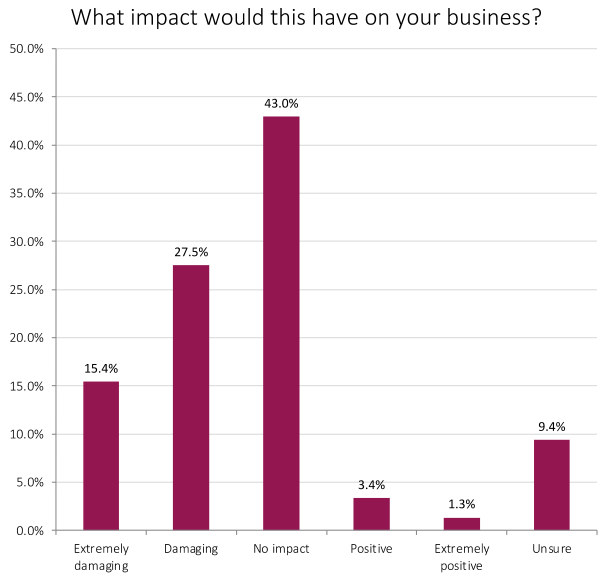
The lack of guardrails around the new powers will mean the breadth of the minimum standard orders are likely to include a range of matters which increase costs for businesses which some businesses may pass onto consumers. The Regulatory Impact Statement (RIS) estimates the cost per business impacted by these changes will be $58,894.23. It also estimates an average annual increase in wages over the next 10 years of $403.8 million. Additionally, the RIS notes: "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".

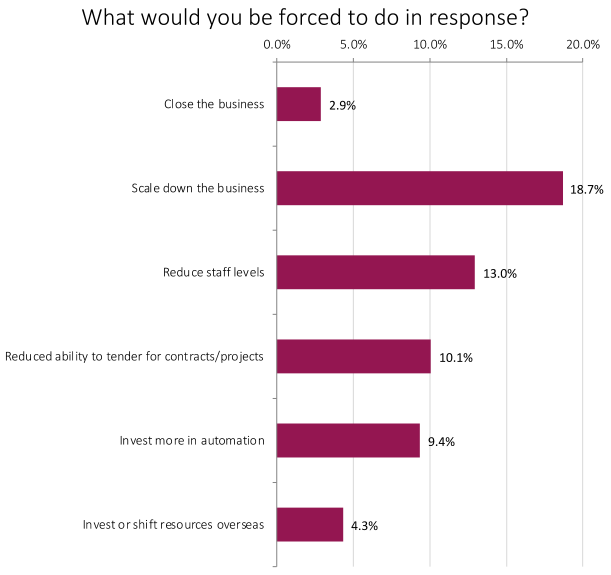
8.3 Queensland Business Responses to the Bill

The majority of Queensland businesses indicate this aspect of the Bill would not impact their business. However, for those that will be impacted, 15.4% indicated it would be extremely damaging to their business, and 27.5% indicated it would be damaging to their business.

The primary way Queensland businesses will respond is to scale down their business operations. Queensland businesses who believe this provision will impact their business negatively indicate the mean number of employees whose employment will be jeopardised is 5.

[6] Peetz, D 2022, 'Road Transport Regulation, Safety and Prospects for the 'Gig Economy'', *Australia Journal of Labour Law*, vol. 35.





Source: Business Chamber Queensland IR Reforms Queensland Business Impact Survey 2023

Queensland businesses qualitative responses to this element of the Bill included:

- *Cost effective transport is vital for our business. We find the best operators are small logistics companies who are able to determine their own pricing, and usually can out compete the bigger operations extremely well. We don't need government regulations adding to costs and inflation - we really could do without their interference altogether.*
- *If costs rise then my prices will have to rise*
- *Increase cost would be passed onto consumers*
- *Increase prices and hence add to inflation*
- *increase prices to cover increased freight charges*
- *Rises in transport/freight costs results in increased charges passed on to customers*

8.4 Business Chamber Queensland Position

Business Chamber Queensland opposes this part of the Bill. It introduces added complexity without achieving the intended goal of improving road safety, and it should be scrapped in its entirety.

However, in the circumstance of the Bill being accepted as necessary, Business Chamber Queensland urgently calls for the following amendments to avoid the worst consequences of the Bill:

- Rather than specifying which types of standards the FWC cannot set and providing general discretion about which types of standards can be set, the legislation should specify the following as the types of standards the FWC is authorised to set for independent contractors in the road transport industry:
  - Payment terms;
  - Record keeping; and
  - Insurance.

- Before setting a standard or making an order, the FWC must specifically seek advice from the industry and determine how those specific standards and orders will improve road safety. It would be inappropriate to make an order if it would have no specific impact on improving road safety.

- The Bill should be amended so the scope and content of the "road transport industry contractual chain orders" are made clear and not left to the Minister via Regulation.

9.0 Delegates Rights (Part 7 of the Bill)

9.1 Overview of Bill Provision

This part of the Bill proposes to introduce a number of amendments in relation to union delegates (an employee in the workplace who is appointed a delegate for a union).

They include, in summary, four new rights for union delegates, and a new mandatory term introduced into Modern Awards operating at 1 July 2024. The FWC would be provided with discretion to design and activate the new term into all Modern Awards which provides special rights for union delegates. This new term must then be replicated into, or expanded in, all Enterprise Agreements.

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

- Unreasonably failing or refusing to deal with union delegates;
- Knowingly or recklessly making a false or misleading statement to a union delegate; or
- Unreasonably hindering, obstructing or preventing the exercise of the rights of union delegates.

Employers will bear the onus of proof under these protections.

Union delegates employed in workplaces will be given new rights under the FW Act:

- A right to represent the industrial interests of any person eligible to be (but not yet) a member of their union;
- A right to reasonably communicate with any person eligible to be (but not yet) a member of their union;
- A right to reasonable access to the workplace and its facilities; and
- A right to reasonable access to paid time off for training during normal working hours.

Employers will face significant penalties for hindering, obstructing or preventing the exercise of the above rights.

In addition to the above referred to new rights, the general protections provisions in the FW Act will be amended to protect those rights.

9.2 Potential Business Impact

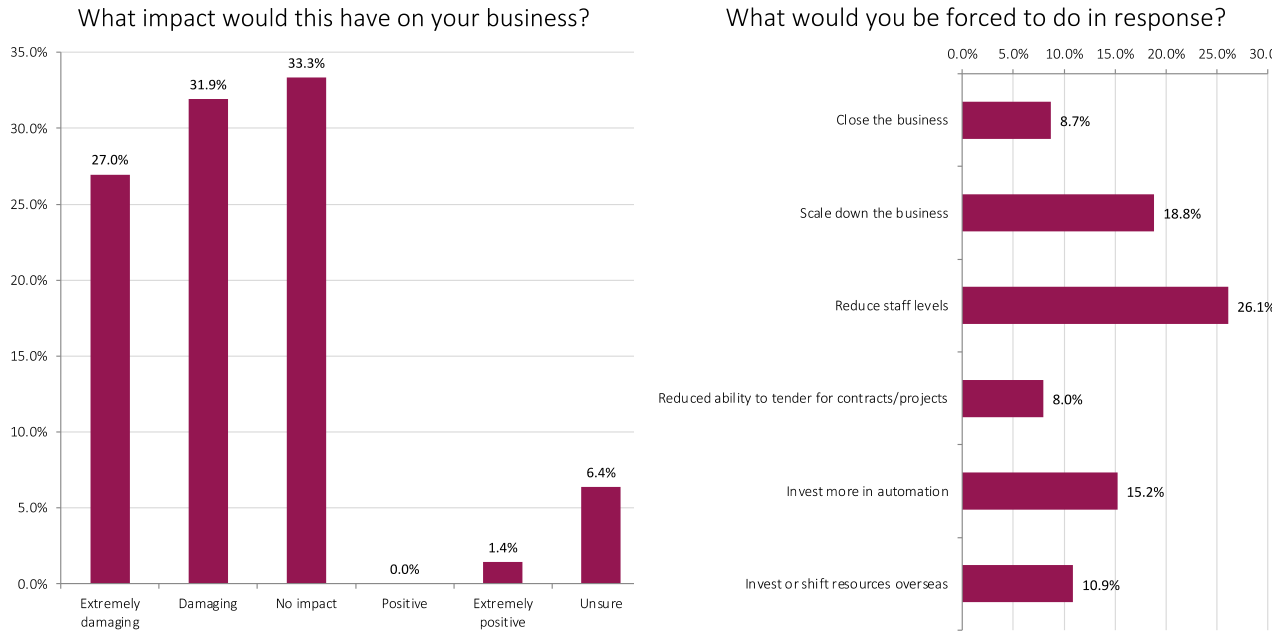
The new powers of the FWC are unfettered without constraints. Concerns include:

- Unions can unilaterally determine the number of delegates in any workplace and the amount of time required for training, thereby subjecting the operation of the new rights and protections to their discretion which will be disruptive for businesses and may impact business productivity;
- The new rights and protections for union delegates under the FW Act would mean that they are given more rights and protections than employees who exercise their right to freedom of association and decide not to join a trade union;
- The proposed protections:
    - Have the potential to completely undermine an employer's ability to manage all employees in the same way as necessary for operational reasons.
    - Have the potential to impede legitimate management activities in workplaces.

Delegates already have the benefit of certain protections in the FW Act. Given the significant impacts on normal day to day operations for a business operator, a case has not been made out in support of the proposed amendments.

9.3 Queensland Business Responses to the Bill

The majority of businesses indicated this aspect of the Bill would be either extremely damaging (27.0%) or damaging (31.9%) to their business.



Source: Business Chamber Queensland IR Reforms Queensland Business Impact Survey 2023

Reducing staff levels was the more significant of the responses to how business would respond to the implementation of the proposed amendments at 26%, followed by the scaling down of the business (18.8%).

Either of those actions are concerning and will not foster a positive and confident business community.

Queensland businesses qualitative responses to this element of the Bill included:

- *Depends what the site access is like, and how long and frequent this is to happen. Too often it becomes a burden*
- *Giving Unions even more power increases costs and adds to inflation*
- *Increase costs for consumers to pay for additional cost of training and nonproductive time that delegates will consume. In small companies with no limit on what's reasonable training time etc this could be up to 2 weeks which means about an 8% cost impact being paid training for delegates plus replacement staff to continue running services. Small business need to be exempt from this provision or clear indication that reasonable is up to 3 days a year training for small employers. Delegate are entitled to resources they should also have obligations written into the legislation that clearly shows they are to respect freedom of association and that industrial espionage or false reporting safety issues can lead to serious personal responsibility. The training for delegates should be done for complying training that is reviewed and authorised by the FWO*
- *People should have their own choice to join or be represented by union. Not be pressured by those delegates to become part of union*
- *Would need to increase prices to cover extra time spent managing this as a business*
- *Would require extra staff being engaged if an employee a rep*

9.4 Business Chamber Queensland Position

Business Chamber Queensland is opposed to this part of the Bill dealing with delegate rights as it is likely to impact businesses by increasing costs for business operators, by reducing productivity, and by leading businesses to review their structures and capacities without improving outcomes for employees.

10.0 Right of Entry (Part 10 of the Bill)

10.1 Overview of Bill Provision

Currently a union official is required to provide at least 24 hours written notice of entry to a workplace. The FWC has the power to issue an Exemption Certificate that waives the notice period where the FWC reasonable believes that advance notice of the entry might result in the destruction, concealment or alternation of relevant evidence.[7]

Part 10 of the Bill proposes to introduce a new Exemption Certificate circumstance. This circumstance would be where, on application by a union, the FWC is satisfied that the suspected contravention involves the underpayment of wages, or other monetary entitlements of a member of that union, and advance notice of entry might result in the destruction, concealment or alteration of relevant evidence.

10.2 Potential Business Impact

There is no justification for giving entry to a workplace without notice where there is no apparent threat of destruction, concealment or alteration of evidence.

The changes are purportedly intended to "enhance the ability of permit holders and organisations to effectively investigate suspected contraventions", however, it is not clear why notice should not be given to employers when a union official is entering a workplace.

Business Chamber Queensland contends the current right of entry provisions in the FW Act are more than adequate. There is no need to change section 487 of the FW Act.

10.3 Business Chamber Queensland Position

Business Chamber Queensland is opposed to this aspect of the Bill.

11.0 Wage Theft (Part 14 of the Bill) and Penalties (Part 11 of the Bill)

11.1 Overview of Bill Provisions

The Bill proposes to introduce a criminal offence for wage theft at the federal level. This part of the Bill proposes a new criminal offence for wage theft, making it an offence for a national system employer to fail to pay certain amounts to, on behalf of, or for the benefit of, a national system employee.

The Government has explained the proposed new criminal offence for wage theft applies to intentional conduct.

The new offence would hold employers criminally liable for intentionally underpaying employees with the offence prosecutable by the Commonwealth Department of Public Prosecutions (CDPP) or the Australian Federal Police (AFP). The maximum penalties for the offence will be 10 years imprisonment or the greater of three times the amount of the underpayment and $1,565,000 ($7,825,000 for body corporates), or both.

The Minister will have the power to introduce a voluntary small business wage compliance code which, if it is complied with by a small business, would allow them to avoid referral for criminal investigation. If a business is referred to the Fair Work Ombudsman in regard to a suspected underpayment, the FWO may enter into a cooperative agreement, which would also allow the business to avoid referral for investigation.

Increases to civil penalties are also proposed at Part 11 of the Bill.

[7] *Fair Work Act 2009* (Cth) ss 487 and 519.

11.2 Potential Business Impact

Wage Theft (Part 14)

Business Chamber Queensland supports measures that protect employees from direct intentional wage theft, however, as provided at part 11.3 of this submission, the wage theft scheme as proposed in the Bill requires amendment.

Importantly, the intentional act must be tied directly to the underpayment. What should be relevant is if there is a direct intention to underpay. The current wording of the Bill is such that there needs to be intentional conduct and further conduct then results in a failure to pay. There could, for example, be a situation where a business is found to have breached this section because it took deliberate action to implement to a new payroll system, and the payroll system then fails, resulting in a "failure to pay the required amount". In such a situation, the employer has not engaged in deliberate or intentional conduct to not pay an employee.

Increase to Civil Penalties (Part 11)

Business Chamber Queensland is concerned about the increase in penalties from $18,780 to $93,900 for contraventions and from $187,800 to $939,000 for serious contraventions. The proposed increases in pecuniary penalties introduced by this part of the Bill are significant. We note there is no evidence to suggest increasing civil penalty provisions in the FW Act will increase compliance with the FW Act and industrial instruments.

The changes introduced in the Bill should address the underlying cause of underpayments in Australia, namely the overcomplexity of the federal employment and workplace relations system.

11.3 Business Chamber Queensland Position

Wage Theft

Business Chamber Queensland recognises the importance addressing wage theft, and preventing its occurrence, and confirms a wage theft scheme should only occur to deliberate and intention actions, as opposed to an unintentional mistake.

Business Chamber Queensland's position in this regard is contingent on the government addressing the interaction of wage theft at a federal level with other state and territory wage theft schemes (refer to *Interaction with Other Wage Theft Schemes* heading below).

Business Chamber Queensland reaffirms an intentional act must be tied directly to the underpayment, not to conduct that results with a failure to pay.

Business Chamber Queensland supports the concept of a Voluntary Small Business Wage Compliance Code ('Code') referred to at proposed s 327B of the Bill. Accordingly, we call for the Minister to:

a. Prioritise the drafting of the Code;
b. Consult with relevant stakeholders on the development of the Code;
c. Ensure the Code provides a safe harbour regime for businesses, giving them the ability to avoid criminal investigation if they comply with the Code or enter into a cooperative agreement, giving employers the confidence to self-report underpayments; and
d. Declare the Code as applicable.

Interaction with Other Wage Theft Schemes

In Queensland, wage theft laws were introduced in September 2020, with the same intention to criminalise deliberate and intentional actions to not pay an employee their entitlements.

Business Chamber Queensland calls on the Government to amend the Bill to expressly override all criminal offences for wage theft at the state and territory level.

Increase to Penalties (Part 11)

Business Chamber Queensland opposes an increase to penalties scheme. Existing penalties are appropriate and increasing them to the extent proposed in the Bill will not achieve what is it is proposed to achieve.

12.0 Conclusion

Business Chamber Queensland would like to thank the Senate Education and Employment Legislation Committee for the opportunity to make a submission on the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023.

Business Chamber Queensland is concerned the many changes to the FW Act proposed in the Bill may make it harder for businesses to operate and remain profitable, and harm productivity by increasing costs and complexity.

It is in this context Business Chamber Queensland urges the government to reconsider and reassess the proposed amendments contained in the Bill.

If there are any further enquiries in relation to the submission, please contact:

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