29 September 2023

Committee Secretary

Senate Education and Employment Committees

PO Box 6100

Parliament House

Canberra ACT 2600

via email: eec.sen@aph.gov.au

Dear Sir/Madam,

Comments on Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) appreciates the opportunity to comment on the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023.

Right-sized regulations and proportionate compliance are vital to maintaining the strong contribution of small and family businesses to employment and self-employment. In fact, object 3(g) of the Fair Work Act 2009 asserts that the legislative framework aspires to acknowledge *'the special circumstances of small and medium-sized businesses'*.

Unfortunately, Australia's workplace relations rules are complex, onerous and difficult for small businesses to navigate. Small businesses often lack the specialist expertise and resources needed to engage fully with the legalistic workplace relations system and Fair Work Commission processes.

While the ASBFEO is still examining the breadth and depth of changes proposed by the bill, we provide the following recommendations on key proposals that most immediately affect the 2.5 million small and family businesses that underpin the livelihoods of employees and entrepreneurs. These recommendations are intended to reduce regulatory complexity and avoid unintended adverse consequences for growth and employment, while honouring the Australian Government's policy objective of strengthening protections and entitlements for all workers.

Recommendations to the Australian Parliament

1. Consolidate and enhance the separate small business processes and exemptions contained in the bill, by stipulating that businesses with fewer than 20 employees are:
    a. governed by a clear, supportive and proportionate regulatory code for wage compliance, which directs the Fair Work Ombudsman (FWO) to:
        i. make every effort to educate and assist non-compliant businesses in becoming compliant
        ii. encourage small businesses to seek advice from the FWO, or to notify the FWO of unintentional conduct that might be non-compliant, by clarifying that such voluntary engagement will not result in punitive action

iii. apply civil penalties if notices and guidance from the FWO does not correct behaviour, meaning that penalties are only applied if a small business has been advised of non-compliance by the FWO and has failed to comply

iv. apply criminal penalties only if it is established that the small business intentionally and dishonestly failed to pay the required amount on or before the day it was due to be paid.

b. Consider amendments to proposed:

i. section 327C(1) so proceedings for an offence against 327A(1) (or related offence) can only be commenced on referral by the FWO – otherwise criminal proceedings could commence even though a cooperation agreement has been entered into by the employer, undermining the incentive to self-report

ii. section 327A(1) to require an intention which is dishonest as that term is defined in the Commonwealth Criminal Code, being dishonest according to the standards of ordinary people and known by the person to be dishonest according to the standard of ordinary people

c. exempt small businesses from the proposed notification procedure for casual workers seeking to be reclassified as permanent, noting the current legislation already has a pathway for casual conversion requests for employees that can equally be used by such casual workers employed by small businesses

d. exempt small businesses from regulated labour hire arrangement orders, whether they are a labour hire provider, a host business, a subcontractor to a host, or a contractor in a supply chain that culminates with a host.

The ASBFEO notes that the proposed exemption threshold of fewer than 20 employees is consistent with section 216DC of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*. The proposed threshold is also more reflective of the modern labour market, which, as the Employment White Paper observes, exhibits a 'trend towards part-time employment and more varied and flexible work arrangements'.[1]

2. Affirm that the Parliament will not entertain including 'a contribution payable to a superannuation fund for the benefit of an employee' in the required amount under the proposed wage-theft regime, unless and until the date of payment is defined as the date the employer lodges the contribution, as opposed to the date the contribution is deposited in the worker's superannuation account by the clearing house or superannuation fund (noting that the employer cannot control this timing).

3. Remove the proposed civil penalty provision at section 359A which proposes to impose a penalty on employers if they 'represent' to a current or prospective employee, that their contract is for a casual position if they will not, or are not, working as a casual, to remove the ongoing risk of inadvertent and unavoidable breach by employers, particularly given separate penalties are proposed, under sections 359B and 359C, to capture circumstances where an

[1] Australian Government, *Working Future: The Australian Government's White Paper on Jobs and Opportunities*, 25 September 2023, p. 11.

employer terminates an employee to re-engage them as a casual, or makes false statements to persuade or influence a current or former employee to enter into a casual contract.

4. Ensure that the 'employee-like' provisions avoid capturing self-employed Australians who use digital platforms to provide them with flexibility and choice as to how to make a living, either through a default exclusion from the definitions of "employee-like" worker and "digital labour platform operator", or ability for such self-employed Australian to request to be excluded.

   Self-employed individuals must be distinguished from those gig-economy workers who are 'vulnerable'. Requiring compliance with minimum standards orders that restrict their ability to maintain a high level of control of how they perform their work risks constraining individual autonomy and discouraging entrepreneurial activity.

5. Advance object 3(g) of the Fair Work Act 2009 – 'acknowledging the special circumstances of small and medium-sized businesses' – by establishing a small business panel to provide advice, direction and considerations for the Fair Work Commission regarding the specific circumstances of small businesses that appear before the Fair Work Commission, and to consider the merits of establishing a small business division to provide an accessible forum to assist generalist small business owners to comply with their obligations.

6. Complement the proposal to grant the Fair Work Commission new powers to deal with disputes about unfair contract terms involving independent contractors earning less than a high-income threshold, by introducing a Federal Small Business and Codes List into the Federal Circuit Court of Australia, to enable small businesses to seek timely and low-cost redress for breaches of the Competition and Consumer Act, Australian Consumer Law and code breaches, as well as for unfair business practices. Such a Federal Small Business and Codes List could potentially also offer a low-cost mechanism to finalise other claims such as unfair dismissal or adverse action claims that are unable to be resolved by the Fair Work Commission through no fault of the employer; for example, because the employee refuses consent to conciliation or arbitration, which would normally progress to the Federal Court.

7. To clarify the protections contained in the bill to protect independent contractors below the contractor high-income threshold, the bill should expressly replicate section 15 of the *Independent Contractors Act 2006,* which empowers the Federal Court of Australia to have regard to:

   a. the relative strengths of the bargaining positions of the parties to the contract and, if applicable, any persons acting on behalf of the parties; and

   b. whether any undue influence or pressure was exerted on, or any unfair tactics were used against, a party to the contract; and

   c. whether the contract provides total remuneration that is, or is likely to be, less than that of an employee performing similar work; and

   d. any other matter that the Court thinks is relevant.

8. Ensure the national regulation of labour hire is right-sized and nationally consistent by:

   a. Adopting the conventional definition of 'labour hire provider' contained in the *Victorian Labour Hire Licensing Act 2018:*

'A person who, in the course of conducting business, supplies one or more of its employees to work in and as part of the business or undertaking of another person (the host).'

b. Working with the states and territories to enable businesses who supply labour hire workers across jurisdictions to apply for a single national license, as an alternative to applying for separate parallel licenses in each jurisdiction.

Contribution of small businesses and entrepreneurs to growth and employment

Small businesses provide jobs for approximately 5.2 million Australians (or two out of five private sector jobs) and account for 43 per cent of all apprentices and trainees in training – nearly double the amount supported by a big business. Female ownership is trending up and now accounts for 35% of all small business owners in Australia – almost double the rate from the 1970s.[2]

Self-employment allows 1.6 million Australians to earn a reliable income while preserving autonomy and choice. Census data suggest that self-employment is particularly attractive to older people and women:

- 22 per cent of non-employing owner managers are aged 60 and over, with the same cohort making up only 9 per cent of employees
- 68 per cent of female owner managers of non-employing businesses work part-time, compared to 47 per cent of female employees.[3]

It is vital that policy settings encourage workplace productivity and entrepreneurship. The Productivity Commission's *Advancing Prosperity* report concluded that Australia is facing 'a seemingly entrenched slowdown in the rate of productivity growth,' with average annual labour productivity growth over the decade to 2020 (1.1.%) being the slowest rate in 60 years, and half the rate recorded in the 1990s (2.2%).[4]

The Certified Practising Accountant (CPA) Australia *Asia-Pacific Small Business Survey 2022-23* found that:

- younger businesses and younger respondents are more likely to innovate
- Australia has the highest percentage of respondents aged 50 and over
- only 14.3 per cent of Australian businesses planned to introduce a new product, process or service that is unique to their market or the world in 2023
  - This was the lowest result of the 11 economies surveyed and significantly below the average of 34.4%.[5]

The ASBFEO's *Small Business Matters* report highlighted that:

- In 2021, only 8 per cent of Australian small business owners were aged under 30, significantly below the peak of 17 per cent in 1976, while almost half (47 per cent) were aged 50 or over

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[2] Australian Small Business and Family Enterprise Ombudsman, *Small Business Matters,* June 2023.
[3] ibid.
[4] Productivity Commission, 5-year Productivity Inquiry: Advancing Prosperity, Inquiry report, volume 1, Report no. 100, 7 February 2023, released 17 March 2023.
[5] CPA Australia, Asia-Pacific Small Business Survey 2022-23; *Asia-Pacific Small Business Survey 2022-2023: Australia market summary,* 21 March 2023.

- approximately 43% of small businesses are not making a profit
- 75% of small business owners take home less than the average full-time adult weekly wage.[6]

1. Criminalising intentional wage non-compliance

The complexity of Australian workplace laws already creates significant compliance costs and administrative burden that is disproportionately borne by small businesses. Small businesses do not always have the legal expertise, time or resources to interpret and apply the rules set out in multiple pieces of legislation, and to correctly identify and apply the appropriate Award. This complexity can – and has – resulted in unintentional non-compliance, despite best intentions and efforts. Even some large employers with internal human resources departments, specialised software and access to expert legal counsel have had notable instances of non-compliance. In any event, access to specialised external or internal resources should not be a prerequisite to operating a business.

We are especially concerned by the introduction of criminal charges where existing complexities result in unintentional non-compliance. The case study contained in the appendix demonstrates the complexity of calculating wages for an apprentice employed by a small business in the construction sector.

In practice, underpayment of wages is more often due to error or a misunderstanding payment amount required (for example, under the applicable Award), rather than malice. The guiding policy principle behind the proposed offence, to reduce instances of underpayment to employees, is well-intentioned and appropriate. However, to properly achieve this outcome there must be a focus on a positive compliance culture, supported by an educative approach which encourages transparency by businesses. The threat of criminal sanctions, including imprisonment, disincentivises employers from self-reporting instances of non-compliance, for fear of criminal charges, rather than encouraging back-payment to employees and providing a supporting framework within which employers can do this.

The ASBFEO considers that criminal penalties should only apply where a non-payment or underpayment is clearly demonstrated to be deliberate and dishonest. Further, when the FWO is assessing the nature of apparent non-compliance, it should give due weight to a business' capacity to comprehend complex industrial instruments, as well as its record of compliance. If the non-compliance appears to be unintentional or accidental, the FWO should adopt an educative and supportive compliance approach.

An instructive analogy is provided by the Australian Taxation Office's compliance and enforcement pyramid. Under this model, the regulator initially makes every effort to educate and assist non-compliant businesses in becoming compliant. Civil penalties only apply if notices and guidance from the regulator do not correct behaviour; and criminal penalties only apply if wilful, deceitful or persistent non-compliance is established.

It is important that small business owners feel comfortable engaging with the FWO to self-report cases of potential non-compliance. We are concerned that small businesses will be discouraged to self-report unintentional or potential non-compliance to the FWO, if it is also responsible for referral for criminal penalties for non-compliance and has insufficient discretion to guide and assist the small business back to compliance.

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[6] Australian Small Business and Family Enterprise Ombudsman, *Small Business Matters,* June 2023.

Although the Bill provides that the FWO will not refer instances of underpayment to the Director of Public Prosecutions or the Australian Federal Police where the Voluntary Code is complied with or a Cooperation Agreement entered in to, it is ultimately the DPP and AFP that will investigate and determine whether to prosecute. Refraining from referral does not prevent criminal sanctions separately being reported and pursued through the DPP and AFP.

A prescriptive or punitive approach would risk fostering a culture of non-disclosure and increased levels of unintentional non-compliance. The Australian Government should ensure regulators provide a clear and proportional framework for wage compliance and incorporate incentives for self-reporting.

Recommendation 1a: Consolidate and enhance the separate small business processes and exemptions contained in the bill, by stipulating that business with fewer than 20 employees are governed by a clear, supportive and proportionate regulatory code for wage compliance, which directs the Fair Work Ombudsman to:

i. make every effort to educate and assist non-compliant businesses in becoming compliant

ii. encourage small businesses to seek advice from the FWO, or to notify the FWO of unintentional conduct that might be non-compliant, by clarifying that such voluntary engagement will not result in punitive action

iii. apply civil penalties if notices and guidance from the FWO does not correct behaviour, meaning that penalties are only applied if a small business has been advised of non-compliance by the FWO and has failed to comply

iv. apply criminal penalties only if it is established that the small business intentionally and dishonestly failed to pay the required amount on or before the day it was due to be paid.

Recommendation 1b: Consider amendments to proposed:

i. section 327C(1) so proceedings for an offence against 327A(1) (or related offence) can only be commenced on referral by the FWO – otherwise criminal proceedings could commence even though a cooperation agreement has been entered into by the employer, undermining the incentive to self-report

ii. section 327A(1) to require an intention which is dishonest as that term is defined in the Commonwealth Criminal Code, being dishonest according to the standards of ordinary people and known by the person to be dishonest according to the standard of ordinary people.

Recommendation 2: Affirm that the Parliament will not entertain including 'a contribution payable to a superannuation fund for the benefit of an employee' in the required amount under the proposed wage-theft regime, unless and until the date of payment is defined as the date the employer lodges the contribution, as opposed to the date the contribution is deposited in the worker's superannuation account by the clearing house or superannuation fund (noting that the employer cannot control this timing).

2. Regulating casual employment and conversion to permanent employment

The new notification pathway introduces additional complexity to the casual conversion process which, absent an exception for small businesses, would require them to simultaneously understand and properly apply the tests of the two separate processes for conversion.

The eligibility for conversion, grounds for refusal and outcomes from each of process differ, even where the circumstances of the employee and employer are the same.

For example, an employee who has worked regular hours for an employer for a period of five months may be able to convert to permanent employment under the new notification process, even where that employer would not have continuing work for them over the next 12 months. Under the existing request process, the same employee would not be eligible to request conversion because they would not have worked a regular pattern of hours for six months, and if they did request conversion after six months, the employer would not be forced to provide conversion if the employee's hours would significantly reduce over the next 12 months.

Maintaining two distinct pathways for conversion creates significant complexity for small business employers who often have limited resources to devote to understanding complex legal requirements and tests. Requiring that these employers understand and properly apply two separate casual conversion tests is likely to lead to confusion and possible inadvertent misapplication of one or both tests.

Exempting small business employers from the notification pathway, both removes this complexity while maintaining the ability for employees who should properly be classified as permanent employees to convert to permanency, if they choose to do so, by using the existing request pathway.

The existing pathway allows employees of small businesses to convert within the same timeframe. Under both pathways employees of Small Businesses can request (or notify) conversion after 12 months of employment.

Aside from the practical complexities attaching to the administration of two simultaneous schemes, the new notification provisions add an additional layer of uncertainty in the interpretation of the meaning of a casual and complicates how employers deal with these cohorts of employees.

Misrepresentation penalty

Section 359A proposes to introduce a new civil penalty provision that would impose a penalty on employers if they "represent" to a current or prospective employee, that their contract is for a casual position if they will not, or are not, working as a casual – as defined by the new definition of casual.

This provision may result in unintended breaches by employers, including small business employers, particularly where an employee decides they do not want to convert to permanent employment, despite no longer meeting the new definition of casual.

In these circumstances, the employer would not be able to represent the employment as casual, as doing so would breach the civil penalty provision, but could also not engage the employee as a permanent employee against the employee's wishes.

The provision does not clearly define what would be considered a "representation" and it is possible it may be interpreted that listing an employee's category of employment as "casual" would be a representation and breach of the provision – even where an employer has done all they can to convert an employee to permanent employment.

This creates an ongoing risk of non-compliance by an employer, throughout the life of a casual's employment.

Acknowledging the importance of maintaining employee's power to choose the type of employment that is right for them, the civil penalty provision should be amended to remove the risk of inadvertent and unavoidable breach.

We suggest removing this penalty provision to avoid the ongoing, inadvertent and unavoidable breaches outlined above, noting separate civil penalties would remain to address the most egregious misrepresentations, for example, where an employer makes misrepresentations to encourage or persuade a person to sign a casual contract.

Recommendation 1c: Consolidate and enhance the separate small business processes and exemptions contained in the bill, by stipulating that businesses with fewer than 20 employees are exempt from the proposed notification procedure for casual workers seeking to be reclassified as permanent, noting the current legislation already has a pathway for casual conversion requests for employees that can equally be used by such casual workers employed by small businesses.

Recommendation 3: Remove the proposed civil penalty provision at section 359A which proposes to impose a penalty on employers if they 'represent' to a current or prospective employee, that their contract is for a casual position if they will not, or are not, working as a casual, to remove the ongoing risk of inadvertent and unavoidable breach by employers, particularly given separate penalties are proposed, under sections 359B and 359C, to capture circumstances where an employer terminates an employee to re-engage them as a casual, or makes false statements to persuade or influence a current or former employee to enter into a casual contract.

3. Empowering the Fair Work Commission to regulate 'employee-like' workers participating in digital platforms or road transport

It is important to distinguish self-employed Australians, who control where, when and how often they work, from vulnerable workers who need to be protected. The emergence of digital platforms is allowing workers to supplement their primary income by choosing their own participation and hours to perform 'gigs'; that is, specific transactional tasks. The Victorian Government's inquiry into platform-based work (which drew on a national survey of 14,000 people) found that:

- only 2.7 per cent of digital workers earned all their income from platform work
- current on-demand workers were found, on average, to perform 10 hours work per week
- the strongest motivation for undertaking platform work was 'earning extra money'
- other key motivations related to flexibility:
  - 'working the hours I choose'
  - 'doing work that I enjoy'
  - 'choosing my own tasks or projects'

- 'working in a place that I choose'
- 'working for myself and being my own boss'

- a common theme of platform work is that workers determine when, how often, and where they work
- more than one-third of people surveyed (35.2 per cent) were working across platforms, including 11.4 per cent registered to work across four or more
- most platforms do not employ workers but arrange work under commercial arrangements
- some platforms' arrangements are highly controlling about what the work is and how it is performed, while others are not
- most platforms do not require workers to perform work at any particular time, or at all. [7]

We appreciate the policy intention to offer protections for vulnerable gig-economy workers and note the government's efforts to provide narrow definitions of 'digital labour platform' and 'digital labour platform operator' to reduce the risk of inadvertently applying this regime to the growing number of small businesses who use digital labour platforms in their business.

We also note the government's intention to provide gig workers with protections both at the commencement and during their engagement, including from unfair deactivation from digital platforms. However, such protections must fall within a targeted framework that supports the choice of individuals as to how they work and be able to address broader grievances and disputes that may arise throughout the course of engagement (see section 5 below).

To avoid impinging on secondary jobs, individual autonomy and entrepreneurial activity, the broad power to regulate 'employee-like' forms of work must be clarified to avoid conflating commercial and competition matters with employment matters. In particular, the multifactorial test for the treatment of workers must be clearly distinguished to avoid capturing self-employed Australians working on a digital platform for additional income, during the hours they choose and on the tasks that they choose.

The bill gives the Fair Work Commission powers to put into place binding 'minimum standard orders' or non-binding 'minimum standard guidelines' that:

- may address payment terms, working time or deductions
- must not address overtime rates, rostering arrangements, or change the form of engagement.

Introducing a set of working standards for individuals who are purposefully not employees may unintentionally limit the flexibility and autonomy sought by individual contractors. This sector has largely created a workforce organically driven by the hours, tasks and independence the work offers. By capturing 'employee-like' in the bill enshrines a multi-factorial employment test discourages a choice of irregular and spontaneous work for those that seek it.

Self-employed individuals should be excluded from being required to comply with any minimum standards on how they perform their work. Alternatively, we suggest allowing truly self-employed Australians to apply to be excluded from a minimum standard order.

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[7] Victorian Government, *Report of the Inquiry into the Victorian On-Demand Workforce*, June 2020.

Recommendation 4: Ensure that the 'employee-like' provisions avoid capturing self-employed Australians who use digital platforms to provide them with flexibility and choice as to how to make a living, either through a default exclusion from the definitions of "employee-like" worker and "digital labour platform operator", or ability for such self-employed Australian to request to be excluded.

Self-employed individuals must be distinguished from those gig-economy workers who are 'vulnerable'. Requiring compliance with minimum standards orders that restrict their ability to maintain a high level of control of how they perform their work risks constraining individual autonomy and discouraging entrepreneurial activity.

4. Small business expert panel

One of the objects of the Fair Work Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national prosperity and social inclusion, including by acknowledging the special circumstances of small and medium-sized businesses.

Many of the proposed changes will increase the time and cost involved for a small business to comply with its workplace obligations. To support small business compliance and reduce the disproportionate impact on the sector, we suggest the Australian Government guide the Fair Work Commission to initially establish a small business expert panel, which would both provide specialist advice, direction and considerations for the Fair Work Commission regarding the specific circumstances of small businesses that appear before the Commission and would consider and advance the establishment of a Fair Work Commission Small Business Division (or a Small Business Commissioner).

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth) (Secure Jobs, Better Pay Act)* recognised the importance of acknowledging the specific challenges and characteristics of sectors and workplaces by establishing three new expert panels. It is not unprecedented to take active steps to acknowledge the specific circumstances of a sector, and in the case of small business we suggest this would be best done by establishing a specific small business expert panel to, in the first instance advise the Commission on matters impacting small businesses and secondly consider the suitability of a Small Business Division.

The small business expert panel should consist of people who directly understand the unique circumstances of these businesses. This would ensure it is best placed to provide practical advice and assistance to the commission on matters affecting small business, as well as having an understanding of the unique challenges faced by small businesses and their employees which would enable it to consider how this could be better served by a small business division.

There are number of points of tension in the interactions between small businesses and the Fair Work Commission. The following concerns were raised in the 2018 report to the Fair Work Commission: *Working better for small business: Report from the Connect and Engage small business consultation program*:

- 'The consultative process revealed many positive interactions with the Commission, its Members and staff.' However, 'Smaller employers viewed "Fair Work" (i.e. the Commission) as having a very significant impact on their workplaces yet it is uninformed of the day-to-day challenges and operational pressures experienced by small business …

- 'There is a strong belief in the small business community that maintaining and demonstrating a contemporary working understanding of the relevant industry and enterprise environments will build greater confidence in the Commission's deliberative processes …
- 'The perceived disposition, determinations and procedures of the Commission and experiences with the Commission's processes, can have a direct impact on smaller employer's preparedness to recruit, invest and expand their operations in Australia …
- 'There seemed to be limited understanding of the precise remit of the Commission and the FWO, where they cross over and, where they diverge, and equally not much concern about understanding the difference.'[8]

Instituting a specific Small Business Division, focused on small business needs, would mitigate the tension outlined above. Significant changes have already been made to Australia's workplace laws in 2022 and 2023. Ensuring that the compliance regime is set up to assist generalist small business owners to comply with their obligations – rather than emphasising punishment of non-compliance – will result in better outcomes for both employers and their employees. An accessible forum will only bolster compliance by small businesses, and ensure employees are afforded their full entitlements.

The small business division would enable the Fair Work Commission to provide a simpler and more streamlined jurisdiction, support an educative posture towards compliance, enforcement and engagement, and ensure right-sized processes and procedures. The new division should comprise people who have direct small business experience and understanding.

Having a small business division composed of those with small business experience would ensure a more accessible dialogue between the Fair Work Commission, employers and employees when issues are brought before it – rather than the current state where the Fair Work Commission may assume a level of understanding, knowledge and sophistication that small businesses do not have. This would both ensure the process is accessible for small business employers, and also facilitate a quicker and smoother resolution of matters for employees.

Recommendation 5: Advance object 3(g) of the Fair Work Act 2009 – 'acknowledging the special circumstances of small and medium-sized businesses' – by establishing a small business panel to provide advice, direction and considerations for the Fair Work Commission regarding the specific circumstances of small businesses that appear before the Fair Work Commission, and to consider the merits of establishing a small business division to provide an accessible forum to assist generalist small business owners to comply with their obligations.

5. New unfair contract term provisions

The bill creates a dedicated and accessible mechanism for the Fair Work Commission to deal with disputes over unfair contract terms for independent contractors earning below the new contractor high-income threshold, while retaining the application of the *Independent Contractors Act 2006* for independent contractors performing work that is remunerated at an amount that exceeds the threshold.

[8] The Hon Bruce Billson, founder and principal, Agile Advisory, *Working better for small business: Report to the Fair Work Commission from the Connect and Engage small business consultation program*, 6 July 2018, p. 8ff.

However, the commission may only make orders where it is satisfied that a services contract includes one or more unfair contract terms which, in an employment relationship, would relate to workplace relations matters (broadly replicating section 8 of the Independent Contractors Act). This means that other matters pertaining to contractual performance between businesses will not be covered, irrespective of the income level of the independent contractor.

Our experience points to numerous examples of grievance and disputation that can arise during the course of the engagement, that would not be addressed by the proposed Fair Work Commission jurisdiction. Seeking to address the limitations of the commission's jurisdiction by expanding its scope into commercial considerations would be imprudent and discordant with the commission's remit and general level of commercial acumen and expertise.

As it seems clear that it is the government's intention to expand the Fair Work Commission's jurisdiction into matters of independent contracting rather than address enforcement shortfalls of the current Independent Contractors Act – namely the obstacles presented by pursuing matters in the Federal Court – action is still required to ensure grievances concerning independent contracting that are outside the commission's jurisdiction can still be pursued in an accessible, timely and cost-effective manner.

Some specific case examples that the ASBFEO Assistant function has dealt with include:

- payment disputes with third parties supplied by the small business where platforms simply reverse payments on the complaint by the third party without small businesses being able to effectively appeal/have their matter reviewed (or through use of bank chargebacks, so the dispute actually gets 'lifted' off the platform and becomes one between small business, bank and ultimate customer)
- being on multiple platforms that can result in exclusion from a particular platform depending on how a small business arranges its affairs (also allegations of sharing accounts with family members or others)
- insurance/accident issues where equipment (e.g. trucks) are damaged and there is a question who should pay for damage/excess
- faulty/fraudulent reviews/complaints that can also result in exclusion from platform
- exclusion from platform based on perceived type of business (e.g. may be viewed as 'dodgy' or may compete with other activities of the platform owner).

The ASBFEO and state small business commissioners have an important and established role in resolving disputes for independent contractors and the self-employed through mediation and other forms of alternative dispute resolution. Specifically, the ASBFEO responds to requests for assistance from small businesses and family enterprises that are in dispute with other businesses or Australian Government agencies. We provide:

- information about dispute resolution options
- access to mediation and other forms of alternative dispute resolution
- alternative dispute resolution processes under the Franchising, Horticulture, Dairy and Oil Codes of Conduct
- assistance with disputes with the Australian Taxation Office.

We are alive to the fact that when small businesses do not obtain satisfaction through mediation, the option of pursuing the matter through the Federal Court is likely to be expensive, lengthy and impractical. Accordingly, the ASBFEO proposes that the Australian Government introduce a Federal Small Business and Codes List into the Federal Circuit Court of Australia, to provide small businesses with more feasible and timely means of enforcing legal rights, as well as facilitate enforcement action by regulators.

This jurisdiction would also cover matters that fall outside the Fair Work Commission's jurisdiction and provide a holistic timely and cost-effective resolution mechanism.

Disputes appearing on the list could be capped at $1 million (award or fine) and delivered via online hearings including pre-hearing mediation, significantly reducing the time and cost burden on a small business. The list could also operate on an 'own costs' basis and allow application for 'no adverse costs' orders, like that of Part IV of the *Competition and Consumer Act 2010.*

The ASBFEO's reform proposal would strengthen the enforcement of competition law and help address unfair business practices not addressed by the bill. An unfair business practice typically arises where there is an imbalance of power. It refers to conduct by one business (or a related party) that disadvantages another business and is not reasonably necessary to protect its legitimate commercial interests. Commonly, such practices do not follow the intent of the agreement; and they could constitute an unfair contract term if written.

Recommendation 6: Complement the proposal to grant the Fair Work Commission new powers to deal with disputes about unfair contract terms involving independent contractors earning less than a high-income threshold, by introducing a Federal Small Business and Codes List into the Federal Circuit Court of Australia, to enable small businesses to seek timely and low-cost redress for breaches of the Competition and Consumer Act, Australian Consumer Law and code breaches, as well as for unfair business practices. Such a Federal Small Business and Codes List could potentially also offer a low-cost mechanism to finalise other claims such as unfair dismissal or adverse action claims that are unable to be resolved by the Fair Work Commission through no fault of the employer; for example, because the employee refuses consent to conciliation or arbitration, which would normally progress to the Federal Court.

Recommendation 7: To clarify the protections contained in the bill to protect independent contractors below the contractor high-income threshold, the bill should expressly replicate section 15 of the *Independent Contractors Act 2006,* which empowers the Federal Court of Australia to have regard to:

a. the relative strengths of the bargaining positions of the parties to the contract and, if applicable, any persons acting on behalf of the parties; and
b. whether any undue influence or pressure was exerted on, or any unfair tactics were used against, a party to the contract; and
c. whether the contract provides total remuneration that is, or is likely to be, less than that of an employee performing similar work; and
d. any other matter that the Court thinks is relevant.

6. Regulation of labour hire

Labour hire involves an agency on-hiring the services of a worker to a host business for a service fee. While the agency remains the employer of the worker, the host business controls the work they perform, and the worker may work alongside the employees of the host business.

In contrast, service contracting and subcontracting entail the delivery of services to a client within an agreed scope of work. Contractors provide expertise and often plant and equipment; and they have a high level of control over the work they perform.

The ASBFEO understands that the intent of the bill is to prevent employers from using labour hire to deliberately avoid or undercut enterprise agreements made with their employees. In its current form, however, the bill risks entangling contractors in third-party industrial instruments, including small business subcontractors and specialist suppliers.

Under the bill, employees and their representatives will be able to apply for a regulated labour hire arrangement order, which the commission will be required to make, if is 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.

Further, the bill states (s306E(3)) that in making a regulated labour hire arrangement order, it does not matter:

a. whether the supply is the result of an agreement, or one or more agreements; or

b. if there are one or more agreements relating to the supply – whether an agreement is between:

    i. the regulated host and the employer; or

    ii. the regulated host and a person other than the employer; or

    iii. the employer and a person other than the regulated host; or

    iv. any 2 persons who are neither the regulated host nor the employer; or

    v. whether the regulated host and employer are related bodies corporate.

While small businesses who are regulated hosts will be exempt from the provisions, small business who supply labour to a host will not. Accordingly, there is a risk that non-labour hire service providers – such as small business subcontractors performing specialist work on a building site – might fall within the scope of a regulated labour hire arrangement order, given the broad parameters afforded to the commission to determine the scope of a labour hire service provider.

To achieve the intended policy objective without generating adverse unintended consequences, the ASBFEO recommends that the bill clarify that a regulated labour hire arrangement order be confined to labour hire arrangements as stipulated in section 7 of the *Labour Hire Licensing Act 2018 (Vic)*. This definition limits the provision of labour hire to circumstances where one or more individuals are supplied 'to perform work in and as part of a business or undertaking of the host'.

Adopting this wording would provide a high level of confidence that the policy would exclude service contracting and subcontracting. This is borne out in guidance provided by the Victorian Labour Hire Agency, which clarifies that the following examples of arrangements would *not* require registration with the authority:

- an accounting firm that provides an accountant to prepare a client's tax documentation at the client's premises
- a self-employed vet who provides veterinary services to a farm under a direct engagement
- a drilling company that provides specialist services at a mine site, alongside other contractors coordinated by the mine owner
- a home-care business that supplies a personal care assistant to an individual eligible for government assistance.[9]

The same precise definition – and clear exclusions – should be incorporated in the Australian Government's proposed single national framework for labour hire regulation.

A small technology business that provides labour hire workers across Queensland, Victoria and the ACT has advised the ASBFEO that it has to apply for three separate labour hire licenses. The government should work with the states and territories to enable businesses who supply labour hire workers across jurisdictions to apply for a single national license.

Recommendation 1d: Consolidate and enhance the separate small business processes and exemptions contained in the bill, by stipulating that business with fewer than 20 employees are exempt from regulated labour hire arrangement orders, whether they are a labour hire provider, a host business, a subcontractor to a host, or a contractor in a supply chain that culminates with a host.

Recommendation 8: Ensure the national regulation of labour hire is right-sized and nationally consistent by:

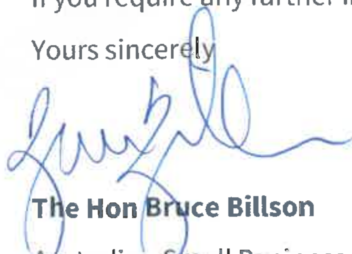
a. Adopting the conventional definition of 'labour hire provider' contained in the *Victorian Labour Hire Licensing Act 2018:*

   'A person who, in the course of conducting business, supplies one or more of its employees to work in and as part of the business or undertaking of another person (the host).'

b. Working with the states and territories to enable businesses who supply labour hire workers across jurisdictions to apply for a single national license, as an alternative to applying for separate parallel licenses in each jurisdiction.

If you require any further information, please do not hesitate to contact advocacy@asbfeo.gov.au.

Yours sincerely



The Hon Bruce Billson

Australian Small Business and Family Enterprise Ombudsman

[9] Victorian Labour Hire Authority, *General definition of labour hire services*, viewed 26 May 2023.

APPENDIX

Case study: Complexity of determining the take-home pay for one worker employed under the Building and Construction General On-site Award 2020.

The worker in question is a second-year construction apprentice who left school at 16 after completing year 10. They are now 17 years old. They are expected to work underground in the car park of a two-storey apartment complex 4 days a week. They are expected to work a simple roster from 8:00am to 4:30pm Monday to Friday.

Assuming the worker takes their allocated breaks, they are working for 8 hours a day (including 0.4 hours per day to contribute to their regular rostered day off). This also assumes these hours include the necessary time spent at a registered training organisation. This includes a half hour unpaid meal break that must be taken between 12pm and 1pm (unless it is varied by agreement). It also includes a 10-minute paid crib break between 9am and 11am.

The Building and Construction General On-Site Award 2020 stipulates overtime rates are payable at the rate of double time for Employees required to work through their daily scheduled half hour meal break (clause 29.6(a)).

The minimum rate of pay for this employee is $940.90 a week or $24.76 an hour. However, as a second-year apprentice who did not finish year 12, they are only owed 60 per cent of this rate. However, they are also owed the general building and construction industry allowance of $56.45 per week. They are also owed $16.94 per week as part of the underground allowance. However, if they are only expected to work underground for 4 or fewer days per week this allowance drops to $3.76 per day or shift. Note that every 19 days this employee also earns a rostered day off (RDO). Being asked to work on this RDO will incur overtime rates – although an employee under the age of 18 cannot be compelled to work overtime.

Then consider, this employee is asked to work late one day. Firstly, any employee under the aged of 18 can only work overtime by agreement. However, if the employee agrees to work overtime, they will then be owed 150 per cent of the ordinary hourly rate for the first 2 hours and 200 per cent thereafter. However, if they reach that two-hour threshold they will then be entitled to an extra 20 minutes of crib time – which if they do not take will be added to their shift as time worked.

This means that for this week, this employee will be paid:

- Weekly rate (60%) = $564.54
- General building and construction industry allowance = $56.45
- Tool Allowance = $34.87
- Ordinary Time Hourly Rate = $17.26 x 38 = $655.88 weekly
- Underground allowance (4 days a week) = $15.04
- First 2 hours of overtime (by agreement) = $44.57 ($74.28 x 60%) $17.26 x 1.5 = $25.89 x 2 = $51.78
- 3rd hour of overtime = $29.71 ($49.52 x 60%) $17.26 x 2 = $34.52

- 1 x Meal Allowance (after 1.5 hours overtime) = $16.37
- 20 minutes of crib time paid as overtime = $9.9 ($29.71/3) $17.26 / 3.33 = $10.36
- 4 x Daily Fares Allowance @ $17.29 per day = $69.16 (plus reimbursement of travel costs incurred on training day – value unknown)
- Total weekly earnings: $720.57 = $853.11

This example indicates the difficulty of accurately calculating wages for one employee, for one week; it does not include other considerations such as annual and personal leave, superannuation, or any other workplace entitlement such as long service leave that may be governed by other workplace instruments or legislation. A small business owner may be required to undergo this process for multiple different employees who may not work uniform rosters or be entitled to uniform conditions because of various licenses, qualifications or duties. This case study demonstrates how small business owners might make accidental errors in their administration and compliance of wages and entitlements – despite their best endeavours.