## Analysis, Comment and Recommendations on the

Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (The Bill)

**24 September 2023**

## Paper Number Two (2)

**On the definitions of**
**15H : Services contract**
**15L : Digital platform work**
**15P : Employee-like worker**

## Overview – Summary

These three clauses in the Bill will lead all self-employed independent contractors in Australia who seek to operate through a digital platform to be regulated and treated as employees, thus removing from them their right to be self-employed and to freely engage in commercial transactions through digital platforms.

**These clauses effectively amount to a ban on all digital platform (gig) activity in Australia**
The reason for this is that the gig economy is entirely structured around commercial contracts on a contract-by-contract (gig) basis. Self-employed people work through commercial (not employment) contracts. By treating and regulating commercial contracts as if they were employment contracts, the very nature of commercial transactions is destroyed. Thus, Australia's self-employed people will have removed from them their right to access gig economy activity as a legitimate form of work.

## Recommendation and Request

**SEA asks the Senate to amend the Bill to**

a) **remove clauses 15H, 15L and 15P from the Bill**
and remove related clauses 15J, 15K, 15M and 15N as they will become redundant once the three key clauses are removed; and

b) **insert into the Bill a Code of Practice for digital platforms using the Victorian Gig Platform Code as a template.**

# Explanation

## 1. The value of Gig

The gig economy is an historic economic and contract revolution. It substantially resolves the 'transaction cost problem' that is said to occur where work is organised through large numbers of small, short commercial contracts (see more below). The containment of transactions costs achieved through gig/digital platforms has liberated millions of people worldwide to be their own boss as self-employed independent contractors.

The technology provided through gig/digital platforms substantially fixes problems of marketing, invoicing, payment collection, tax compliance and more that can so complicate and limit the ability of individual people to be their own boss as a micro-business person. Being your own boss means working to earn your income through the commercial contract. Gig platforms facilitate and enable self-employment.

The Bill denies self-employed people access to work through gig platforms because it treats any transactions through platforms as *employment* transactions, thereby destroying the very nature of commercial transactions.

The Bill is a direct attack against self-employed people in Australia. It denies people access to the benefits of the gig platform technological revolution. It sends a message that being self-employed is considered to be illegitimate in Australia.

In the order of **one million Australians** will be affected by this Bill by denying them access to a legitimate and beneficial self-employed work tool.

These points are explained below.

## 2. How 15H, 15L and 15P destroy self-employed, gig work

The full texts of 15H, 15L and 15P (some 1,400 words) are included at the end of this paper with the more important words/terms highlighted.

The following is a simplified explanation of how the three clauses achieve the intent of destroying self-employed, gig work.

First, it is helpful to understand some key terms used in the following clauses:

- *'services contract'*: This is a generic reference used in the Bill for any contract that involves a service or work delivery. It appears to be a new term specifically created by the Bill.
- *'Contract for services':* This is the term used in common law to describe a commercial contract. Self-employed, independent contractors are identified at common law because they use the *contract for services* (the commercial contract).

**a)** **15H** introduces and creates this novel term 'services contract' for the purposes of the Fair Work Act (FWA) and states that a contract for services (commercial contract) is a services contract for the purposes of the FWA. It applies this term—'services contract'—throughout the Bill when individuals are doing work.

15H says

> *(1) A services contract is a contract for services:*
> *(1)(a) that relates to the performance of work under the contract by an individual…*

The outcome is that through a simple legal play with words this clause pulls self-employed people (that is, people using the commercial contract) into the FWA. In other words, the commercial transactions of self-employed people will end up being controlled as if they were/are employment transactions. What this simple sentence does, through a linguistic legal play, is destroy self-employment.

**b)** **15H then references** other sections of the Bill as follows:

> *(3) Part 3A-2 (minimum standards for regulated workers), Part 3A-3 (unfair deactivation and unfair termination) and Part 3A-4 (collective agreements)…*
> and then connects these references to
> *… digital platform work*

Clause 15H therefore:

- Subjects 'commercial' contract terms to the employment regulations that are to be established by the FWA, thus destroying the commercial terms.
- Applies controls over 'deactivation/termination', thus removing the offer and acceptance which is the essence of commercial contracts.
- Subjects the contracts to collective employment-style agreements to be established by the FWA, thus destroying the individual contracts which are at the heart of commercial arrangements.

That is, commercial contracts remain 'commercial' in name only, but 'employment' in reality.

**c)** **15L** establishes the **meaning of a digital platform.**
The meaning is enormously broad and all-encompassing to the extent that no digital (gig) platform could be conceived to be outside the reach of the Bill.

In other words, every gig-style operation in Australia is caught. The related clauses 15M and 15N then pull in 'platform operator' and 'platform work' in a similar catch-all way.

**d)** **15P** defines what an **employee-like worker** is.
The section states:

> *(1) A person is an employee-like worker if*
> *(a) The person is*

(i) *An individual who is party to a services contract ….. and performs work under the contract*.

It then applies similar provisions to anyone working through their own company, trust or partnership.

The section then takes a further step, stating that to be employee-like:

*(e) the person satisfies one or more of the following:*

*(i) the person has **low bargaining power** in negotiations …*

*(ii) the person receives **remuneration at or below** the rate of an employee…*

*(iii) the person has a **low degree of authority** …;*

*(iv) the person has such other characteristics as are **prescribed by the regulations**.* [Emphases added]

The effect of this is that any self-employed, independent contractor (as defined at common law, a *contract for services*) is declared to be under a *services contract* (as per 15H above) and hence within the ambit of the FWA and is employee-like under any one of the assessments (i to iv) which are all highly subjective. Not only are the assessments subjective, but 'prescribed by the regulations' means that other, as yet unknown assessment criteria, are likely to be applied.

For practical purposes the upshot of the 'employee-like' definition is that self-employment, independent contracting is effectively being outlawed as a form of work in Australia.

## Discussion and comment

### 3. Overview effect

In our first paper (Number One, 18 September 2023) analysing and commenting on the Loophole Bill, we discussed clause 15AA of the Bill. That clause seeks to redefine the common law meaning of the commercial contract with the express intent to override the High Court.

We made three key points that 15AA:

- Will undo and was intended to undo the certainty of contract that the High Court sought to create in the *Personnel* case.
- Breaches Australia's International Labour Organisation obligations in relation to the definition/s of employment and independent contracting.
- Wil create an insoluble jurisdictional clash between employment law regulation under the FWA and commercial and competition law regulation under the ACCC.

The sections discussed in this paper—15H, L and P—compound and reinforce these three outcomes. That is, the Loophole Bill has a multi-tiered approach to destroying the ability of Australians to be self-employed, independent contractors, to be their own boss.

The follow discussion adds to the points made in paper Number One.

## 4. The High Court

In our briefing paper Number One on *Redefining the 'ordinary' meaning of employee and employer* (15AA), we referenced the High Court in the *Personnel* case saying:

> *"… It is the task of the courts to promote certainty with respect to a relationship of such fundamental importance."*

The High Court also said in *Personnel*:

> The **employment relationship** with which the common law is concerned must be a *legal* relationship. It is **not a social or psychological concept** like friendship. There is nothing artificial about limiting the consideration of legal relationships to legal concepts such as rights and duties.
>
> By contrast, there is nothing of concern to the law that would require treating the relationship between the parties as affected by circumstances, facts, or occurrences that otherwise have no bearing upon legal rights. (at 22)

In this statement the High Court gave an important elucidation about what the employment and commercial contracts actually are. They are 'not a social or psychological concept', yet this is exactly what the Loophole Bill is doing. The Bill ignores or does away with the legal relationships and legal rights that are the very substance of contract. This is most clearly demonstrated in 15P, the employee-like definition, something that relies entirely on social and/or psychological concepts that deem to 'second guess' and usurp the rights and duties of the parties that have been freely entered into.

## 5. Gig platforms resolve transaction cost issues

Gig platforms provide services which connect independent contractors directly to consumers and provide a contract management service to both the independent contractor and the consumer.

Gig platforms challenge the orthodoxy of the Coasean theory of the firm. Coase argued in 1937, and it's been assumed to be true late into the 20th Century, that only the employment-structured firm could manage and contain transaction costs. That is, that the control mechanisms embedded in the employment contract enabled efficiencies in the delivery of goods and services that could not be achieved through other contract models.

What has occurred in the 21st century is that technology has superseded Coase's argument. This is not to say that Coase was wrong. Coase observed a pre-World War II economy where commercial contracts were all paper-based and slow to put into place. Information technology, in all its forms, now enables commercial contract transactions to take place almost instantaneously.

Digital (gig) platforms constitute a revolution because they have very much resolved the transaction cost problem identified by Coase.

Gig platforms:

- Enable service/goods providers (independent contractors) to advertise and offer their services/goods online.
- Enable consumers to search across (often) a vast array of offerings to choose the service/goods they want.
- Facilitate payments processes so that the financial risks to both the independent contractor (of non-payment by the consumer) and to the consumer (of non-delivery of the contracted service/good) are well managed. The financial risk is further managed (generally) through credit card payment transactions.
- Add a layer of quality control where both consumers and providers review each other in a public forum. This is a powerful form of market-based quality monitoring that bureaucratic processes of quality monitoring are probably never able to match.

Digital (gig) platforms are a new business model, one that dispenses with the need for 'employment', but which instead operates entirely on commercial contract transactions made possible because of advances in technology. We see this as exciting, progressive and of huge benefit to individuals and society. It is not only a technological advancement but a social advancement as well.

The Loophole Bill rejects this. The Bill will drag Australian society back into the pre-War view of how humans organise their work.

By rejecting the use of gig platforms as facilitators of commercial contract transactions, the Loophole Bill is really turning its back on and denying several things:

- The ability of individuals to use the platforms to have control over how, when, where and if they work. This is a Bill designed to disempower people in their working lives.
- The ability of Australians to have greater choice as consumers. Gig platforms have proven their popularity with consumers because consumer satisfaction is at the core of what gig platforms deliver. If gig platforms fail on the consumer score, they die. By reverting to the Coasean view of transactions management, the Loophole Bill is saying that consumers must be forced into accepting services that are offered through one form, and one form only, of service delivery—that is, the model of the mid-to-late twentieth century.

## 6. Gig platforms – Some facts

Arguably the best research conducted on the gig economy in Australia is that contained in the Victorian government's Report of the Inquiry into the Victorian On-Demand Workforce released on 15 July 2020.

The research provides important facts that have relevance to assessing the 'wisdom' or otherwise of the Loophole Bill's sections 15H, 15L and 15P as well as the entire approach to regulating commercial (gig) transactions through the FWA.

*Numbers*

The Report shows that:

- Around 7.1 per cent of the workforce (about 1 million Australians) use gig platforms to earn income.
- Only 0.19 per cent of the workforce (26,000 Australians) use gig platforms for their full-time income.

That is

- 97.3 per cent (approximately 973,0000 Australians) use gig for top-up income. That is ancillary income.

Note: The percentages quoted are from 2020. The percentages have been applied to the ABS Australian total workforce stats of 14,096,100 (August 2023).

The report says (page 16):

> Platforms are commonly used by workers to generate additional or supplemental income to that earned through other activities. This may be a 'traditional' job or other platform work. The high flexibility of platform work: in terms of when and where it is done, means that it can be done around other commitments, and therefore provides access to 'additional' opportunities to generate income.

*Motivations*

On people's motivations for earning income through gig platforms the report says (page 31):

- 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', and 'working for myself and being my own boss'.

*The nature of gig work*

The report says (page 37):

- "Platform work is highly flexible and enables workers to choose their own participation and hours."
- "Most platform workers are not working 'full-time' with any one platform."
- "People can earn additional, supplementary income by accessing work via platforms."

The type of work performed by gig workers (percentages) is as follows (page 34):

| **Type of digital platform work** | | **%** |
|---|---|---|
| Transport and food delivery | Taxi services; food delivery; package delivery or goods delivery | 18.6 |
| Professional services | Accounting; consulting; financial planning; legal services; human resources; project management | 16.9 |
| Odd jobs and maintenance | Running errands; general maintenance; removalist work | 11.5 |
| Writing and translation | Academic writing; article writing; copy writing; creative writing; technical writing; translation | 9.0 |
| Clerical and data entry | Customer service; data entry; transcription tech support; web research; virtual assistant | 7.8 |

| | | |
|---|---|---|
| Creative and multimedia | Animation; architecture; audio; logo design; and multimedia photography; presentations; voice overs; video | 7.7 |
| Software development and technology | Data science; game development; app, and technology software or web development; server maintenance; web scraping | 7.2 |
| Carer | Aged or disability care; pet care; pet services; babysitting; nanny services | 7.0 |
| Skilled trades work | Carpentry; plumbing; electrical work | 5.8 |
| Sales and marketing support | Social media; marketing; ad posting; lead generation; search engine optimisation; telemarketing | 5.0 |
| Education | Tutoring; teaching; mentoring; online coaching | 1.2 |
| Personal services | Sport / fitness coaching; massage; adult entertainment; tattoo and piercing | 0.9 |

The report says (page 47):

- Platforms provide highly flexible opportunities for work.
- Platforms have generated new job opportunities.
- Platforms have relatively low barriers to entry and provide a diverse range of entry-level and skilled job opportunities.

The report says (page 64):

- Platform workers can choose when, or if, to accept work via the platform.
- Natural peaks in demand impact on these choices.

*On Income*

On income the report says (page 54):

- Income generated from platform work varies, with some workers (particularly skilled ones), earning relatively well.
- Conversely, some platform workers get less than the 'federal minimum wage' (whatever methodology is used to arrive at the rate).
- Most platform workers are paid per completed task.
- Most workers don't get an hourly rate and may not estimate or convert their income this way.
- It is hard to work out equivalent 'rates' of pay to enable a direct comparison with minimum wages paid to employees for a range of reasons, including factoring in costs and 'real time' worked.
- Other factors impact on platform earnings, including workers' skill levels and performance and their choices about how often and when to work, and platforms' settings.

*Dispute resolution*

On dispute resolution the report argues (page 71) that gig workers do not have access to dispute resolution services and can be refused work by gig platforms.

## 7. Comment – These facts and the Loophole Bill 15H, L and P

*7.1 Underpayment*

These facts probably point to a major arguable justification for the Loophole Bill that its proponents would use to justify it—namely, that some gig workers earn less than the minimum wage. Even though the report indicates that there is complexity in calculating this, the issue is legitimate. But the counter-argument is as follows.

Gig work is commercial work. The Loophole Bill accepts that. By seeking to regulate all commercial gig work as employment—that is, to control wages, and terms and conditions—the Bill is rejecting a fundamental underpinning of the way our society makes use of commercial contracts and commercial transactions. Society accepts that when people engage in commercial contracts that sometimes people make losses. A shopkeeper who trades poorly and makes losses definitely earns less than the minimum wage. But this is accepted as part of engaging in commercial activity. People are not banned from running a shop because they might make a loss. Consumers are not forced to buy things from the shopkeeper or forced to pay a certain price by regulation to ensure the shopkeeper earns the minimum wage.

But this is the likely effect of the Loophole Bill. The Bill is saying that commercial activity conducted through gig platforms is socially unacceptable and is to be destroyed (through institutional control of the commercial contract). In essence, the Bill challenges and repudiates the very basis of commercial activity in Australia.

In destroying this commerciality, the consequence will be that the gig economy itself will cease to exist in its current form. The benefits that the gig economy brings to Australians wanting to earn an additional income will, we say, wash out.

It is important to note, however, that even in pointing out this fundamental issue (of some people receiving low remuneration) the Victorian government has not travelled down the route of the Loophole Bill. The Victorian government has instead proceeded with a regulatory approach that fits with commercial activity. We discuss this below.

And it must be remembered in this context that 97.3 per cent of gig workers do not use gig as their primary source of income. It is top-up income. This would raise hugely complex issues if the Loophole Bill were to be implemented. The FWA primarily structures wages and conditions policy around the assumption of full-time work. This does not fit the reality of how people doing gig work actually work or want to work. How will the Bill accommodate the motivations of gig workers? How will the Bill accommodate the huge variety of job types? We say that the outcome of the Loophole Bill will be the strangulation of the benefits that the gig economy brings to people who want to work through gig.

*7.2 Independent Contractors Act 2006 – Underpayment action*

The *Independent Contractors Act* has provisions under unfair contract clauses to prevent underpayment. The relevant section reads:

> 9.(1)(f) the contract provides for remuneration at a rate that is, or is likely to be, less than the rate of remuneration for an employee performing similar work;
> (g) any other ground that is substantially the same…

There have been at least two successful actions under the Act of which we are aware:

- AB Warehousing 2008. An independent contractor working in a warehouse was awarded $36,000.
- Riteway Case 2010. Three independent truck drivers won their case for unfair contract terms.

It is important to understand that this protection through the *Independent Contractors Act* sits within the commercial regulation space, which is where it should be. We do believe that there is a strong argument to have better, quicker and cheaper processes for enforcement of these protective provisions. But this should be done within the commercial space. We suggest that if would be worthwhile seeking views from the Federal Small Business Ombudsman and the States' Small Business Commissioners on how improved dispute resolution may be achieved. These bodies have significant experience with assisting in small business dispute resolution upon which they can draw.

**8. The Victorian regulation model – We support and recommend this**

In May 2023 the Victorian government released a code for 'Fair Conduct and Accountability Standards for Platforms.

Self-Employed Australia strongly recommends this as a basis for development of a national code for gig platforms. This should be under the jurisdiction of the ACCC and could operate in a similar manner to the existing Franchising Code. Attached are the six standards under the Victorian Gig Code.

**9. Tax Compliance**

If the Loophole Bill were to become law, there is significant potential for confusion over tax obligations for gig workers. This needs to be factored into considerations. Under PAYG arrangements, self-employed people have income declaration, income withholding and GST obligations (if over the threshold).

After the High Court *Personnel* decision, the ATO upgraded its Tax Rulings (in late 2022) covering these requirements. Further, to ensure compliance, the ATO is currently implementing the Sharing Economy Reporting Regime which came into effect in July 2023. This requires digital (gig) platforms to report to the ATO the payments they make to people who earn income through the platform—that is, self-employed gig workers. That is, the ATO has and is taking considerable initiative to ensure that the gig economy is embraced within the tax system.

As a general observation, self-employed people are not tax or contract law experts. To comply with the law, they need simplicity and certainty. Based on our experience and knowledge of self-employed people, we expect the Loophole Bill, if passed, to create confusion over tax obligations. If a self-employed person is regulated as an employee under the FWA, there is significant risk that many will believe that they do not have income tax, withholding, or GST compliance obligations. We predict significant compliance problems in this area.

# Relevant sections from the Bill

## (Page 123 of the Bill)

### 15H Meaning of *services contract*

*General meaning*

(1) A ***services contract*** is a contract for services:

(a) that relates to the performance of work under the contract by an individual; and

(b) that has the requisite constitutional connection specified in subsection (2) or (3).

Note: Conditions or collateral arrangements relating to a services contract may be taken to be part of the services contract: see subsection (4).

*The requisite constitutional connection*

(2) A contract for services has the requisite constitutional connection if:

(a) at least one party to the contract is:

(i) a constitutional corporation; or

(ii) the Commonwealth or a Commonwealth authority; or

(iii) a body corporate incorporated in a Territory in Australia; or

(b) one or more of the following subparagraphs is satisfied:

(i) the work concerned is wholly or principally to be performed in a Territory in Australia;

(ii) the contract was entered into in a Territory in Australia;

(iii) at least one party to the contract is a natural person who is resident in, or a body corporate that has its principal place of business in, a Territory in Australia;

(iv) the work concerned is done in the course of constitutional trade or commerce.

Note: In this context, Australia includes Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands (see the definition of ***Australia*** in section 12).

(3) For the purposes of Part 3A-2 (minimum standards for regulated workers), Part 3A-3 (unfair deactivation and unfair termination) and Part 3A-4 (collective agreements) to the extent to which those Parts relate to digital platform work, a contract for services also has the requisite constitutional connection if the contract was arranged or facilitated through or by means of a digital labour platform, where the operator of the digital labour platform is:

(a) a constitutional corporation; or

(b) the Commonwealth or a Commonwealth authority; or

(c) a body corporate incorporated in a Territory in Australia; or

(d) a natural person who is resident in, or a body corporate that has its principal place of business in, a Territory in Australia.

Note: In this context, Australia includes Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands (see the definition of ***Australia*** in section 12).

*Conditions and collateral arrangements*

(4) A condition or collateral arrangement that relates to a services contract is taken to be part of that services contract if, were the condition or arrangement itself a contract for services, it would have the requisite constitutional connection.

### 15J Prospective regulated workers

A reference to a regulated worker, in relation to a services contract, includes a reference to a person who may become a regulated worker for a services contract.

### 15K Effect of Chapter in determining whether a person is an employee or an employer

For the purposes of ascertaining the real substance, practical reality and true nature of the relationship between an individual and a person for the purposes of determining:

(a) whether the individual is an ***employee*** of the person within the ordinary meaning of that expression; or

(b) whether the person is an ***employer*** of the individual within the ordinary meaning of that expression;

the effect upon the relationship of a minimum standards order, minimum standards guidelines or a collective agreement applying to, or covering, the individual or the person is to be disregarded

**Gig**
**Page 126 to 128 of the Bill**

## Subdivision B—Digital platform work

### 15L Meaning of *digital labour platform*

(1) A ***digital labour platform*** means an online enabled application, website or system operated to arrange, allocate or facilitate the provision of labour services, where:

(a) the operator of the application, website or system:

(i) engages independent contractors directly or indirectly through or by means of the application, website or system; or

(ii) acts as an intermediary for or on behalf of more than one distinct but interdependent sets of users who interact with the independent contractors or the operator via the application, website or system; and

(b) the operator of the application, website or system processes aggregated payments referable to the work performed by the independent contractors.

(2) A ***digital labour platform*** also means an online enabled application, website or system that is prescribed by the regulations for the purposes of this subsection.

(3) A ***digital labour platform*** does not include an online application, website or system prescribed by the regulations for the purposes of this subsection.

(4) For the purposes of this section:

(a) an online application, website or system may be specified by name or by inclusion in a specified class or specified classes;

(b) an online application, website or system may be specified in respect of all forms of digital platform work, or in respect of specified forms of digital platform work.

### 15M Meaning of *digital labour platform operator*

A ***digital labour platform operator*** means the operator of a digital labour platform, being an operator that enters into or facilitates a services contract under which work is performed by employee-like workers.

## 15N Meaning of *digital platform work*

(1) ***Digital platform work*** means:

(a) work performed by an independent contractor, where:

(i) the work is performed under a services contract through or by means of a digital labour platform, or the services contract under which the work is performed was arranged or facilitated through or by means of a digital labour platform; and

(ii) payment is made for that work; or

(b) work prescribed by the regulations for the purposes of this subsection.

(2) ***Digital platform work*** does not include work prescribed by the regulations for the purposes of this subsection.

(3) For the purposes of paragraph (1)(b) and subsection (2), work may be specified by name or by inclusion in a specified class or specified classes.

## 15P Meaning of *employee-like worker*

(1) A person is an ***employee-like worker*** if:

(a) the person is:

(i) an individual who is a party to a services contract in their capacity as an individual (other than as a principal), and performs work under the contract; or

(ii) if a body corporate is a party to a services contract (other than as a principal)—an individual who is a director of the body corporate, or a member of the family of a director of a body corporate, and performs work under the contract; or

(iii) if a trustee of a trust is a party to a services contract in their capacity as a trustee (other than as a principal)—an individual who is a trustee of the same trust and performs work under the contract, whether or not the individual is a party to the contract; or

(iv) if a partner in a partnership is a party to a services contract in their capacity as a partner (other than as a principal)—an individual who is a partner in the same partnership and performs work under the contract, whether or not the individual is a party to the contract; and

(b) the person performs all, or a significant majority, of the work to be performed under the services contract; and

(c) the work that the person performs under the services contract is digital platform work; and

(d) the person does not perform any work under the services contract as an employee; and

(e) the person satisfies one or more of the following:

(i) the person has low bargaining power in negotiations in relation to the services contract under which the work is performed;

(ii) the person receives remuneration at or below the rate of an employee performing comparable work;

(iii) the person has a low degree of authority over the performance of the work;

(iv) the person has such other characteristics as are prescribed by the regulations.

(2) In this Part, a reference to an independent contractor includes a reference to an individual who is an employee-like worker within the meaning of subsection (1).

(3) Regulations made for the purposes of subparagraph (1)(e)(iv) may specify that a person must have all or only one or some of the characteristics prescribed.

(4) For the purposes of determining whether an individual satisfies the criteria specified in paragraph (1)(e), the effect of a minimum standards order, minimum standards guidelines or a collective agreement applying to, or covering, the individual is to be disregarded.