Response to request for answers from the

Senate Standing Committees on Education and Employment
Investigating the
Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (The Bill)

26 November 2023

This document responds to the request from Senator David Pocock for answers to the following two questions arising from SEA's appearance before the Senate Standing Committee on Education and Employment on 10 November 2023.

Pages 1-3 provide substantive answers to the questions.
Pages 4 -15 provide supporting evidence from the Bill.

Question 1. You warn that this Bill will damage competition and result in a concentration of power in the hands of big business. Can you explain your concern for the fate of small business and competition in Australia in relation to this Bill?

Answer: The Bill

- by design removes the right of Australians to be small business operators—particularly to be self-employed, independent contractors, to be their own boss.
- forces every self-employed person to be an employee whether they wish to be an employee or not. The Bill is oppressively dictatorial in removing choice.
- captures all self-employed people, including all trades people, consultants and so on, but doubles down on capturing self-employed owner-drivers and anyone wishing to earn an income using digital (gig) platforms.

In doing this the Bill forces every person to earn their income through an 'employer'. It eliminates the ability of people who wish to be a micro/small business person from being just that. As such there could be no greater legislative formula for the destruction of competition at the core of the Australian economy. The inevitable outcome is the favouring of big business.

But the Bill goes further. It creates mechanisms to facilitate, sanction and 'legalise', collusion to control prices at the individual and sectoral levels where currently small business people operate and where they are entitled to, and do, compete. In doing this, the Bill will facilitate an immense concentration of economic power in the hands of big businesses.

Some practical outcomes

Our assessment of the practical outcomes of the Loophole Bill is based on decades of experience in, and knowledge of, the micro/small business, self-employed, independent contractor community. We assess the practical outcomes to include at least the following:

- The owner-driver sector will be wiped out over time. Large numbers of self-employed owner-drivers will go broke. Suicides will likely occur as a result. Numbers affected: 40,000 to 50,000 people at least.

- Large numbers of digital (gig) platform participants will find that the Loophole regulations will make their businesses commercially unviable and will exit the market over time. This will impact most heavily the 97 per cent of people who use the gig economy for top-up income. Numbers affected: 970,000 people plus.

- IT, management and other such consultants will progressively be forced to provide their services through dominant, large consultancy firms. This problem already exists but will get worse as self-employed consultants will have increased difficulty contracting directly with clients.

- Tradespeople in the housing sector, in particular, will progressively lose their independence and be forced to work through large construction firms under similar arrangements to those operating in the commercial construction space. Housing construction will, over time, become concentrated in the hands of small numbers of big business builders.

- The cash economy will expand. People denied access to gig-type work will turn to the shadow economy and under-the-table payments. (Note: Because gig work is all on-line transaction managed, payments are transparent and traceable for tax and other regulatory purposes.)

- Big business will have an expanded control of the Australian economy. The suppression of small business activity, and in many cases the elimination of small business, will favour big business. The Bill will create a competition vacuum in the economy into which big business will happily move.

- All self-employed people and the people/businesses who use their services will be faced with massive confusion and uncertainty over conflicting obligations in relation to tax, competition law, corporations law and more. This of itself will trigger a progressive collapse of the small business sector over time and create regulatory (tax etc) enforcement problems.

A moment's reflection should remind us that big business is no friend of small business. History shows us that if big business can 'do over' a small business to gain advantage, this is what routinely occurs.
As examples:

- Security of payment for small businesses remains an ongoing, still-to-be-resolved problem, particularly in the construction sector for tradespeople. That is, big businesses delay payments to small business people, using them as a source of free credit. Big business use their power to oppress and bully small business people.

- Unfair contract laws have been created and boosted to stop big businesses imposing unfair contracts upon small business people. These laws are administered by the ACCC.
  The Loophole Bill creates the capacity for FWC rulings that would create a breach of the unfair contract laws, particularly in relation to price-fixing. And the Loophole Bill would arguably stymie the ACCC from ensuring compliance with the unfair contract laws. This scenario is real. For example:
  - Ex-ACCC Chair Rod Simms investigated and commentated on the capacity of big business to use the FWA as a cover for collusion to harm competitors. (See below at [5] the example of Toll) The Loophole Bill creates triggers for anti-competitive conduct worse than that revealed in the example of Toll.

Question 2. Does this Bill impose any risks on the viability and autonomy of relatively well paid independent contractors?

Answer: Yes. By design, the Bill re-defines every self-employed person as an employee, thus legislatively removing their right to be a self-employed, independent contractor, their 'own-boss'. The Bill is limitless in its reach and unrestrained by income level or any other factor. The Bill's operational mechanisms have the capacity to directly attack the viability and autonomy of any independent contractor, no matter what their pay or income level.

A.
Technical detail

The balance of this document provides evidence from the sections and wording of the Loophole Bill that causes us to draw our conclusions and comments stated above.

1. Layperson's Overview

To repeat, as stated above the effect of the Loophole Bill is to neuter competition law in significant ways, thus doing damage to small business people. It will cut across competition law and will make price-fixing, market manipulation and collusion to price fix and manipulate markets legal, where those things are currently illegal. In doing this, the Loophole Bill cuts across the jurisdiction of the Australian Consumer and Competition Commission in its efforts to prevent collusion, market manipulation and price-fixing. This will directly and negatively impact small business people.

In layperson's language, the Loophole Bill does this by:

a) At the very broad level
   - Declaring the commercial contract to be an employment contract for the purposes of the Fair Work Act.
   - Giving the Fair Work Authority powers over those commercial contracts (now declared to be employment contracts) to fix prices and contract arrangements across entire industry sectors.

b) And then over-layering the broad level (a) with specific declarations about commercial contracts that are to be regulated and controlled as employment contracts, namely:
   - Creating a definition of 'employee-like' to pull the gig economy (digital platforms) into the authority of the Fair Work Act and regulating those commercial contracts as employment contracts.
   - Declaring owner-drivers who operate through commercial contracts to be regulated as employees under the Fair Work Act.

c) Then delivering to the Fair Work Commission new powers to regulate commercial contracts as employment contracts.

d) And finally has specific provisions to override competition laws to ensure that collusion, market manipulation and price-fixing authorised under the (Loophole) Fair Work Bill/Act are not restricted by competition laws.

The outcome of this is that the competition laws and the authority of the ACCC are compromised and neutered in areas where the Fair Work Commission makes rulings.

Further, there will predictably be circumstances where the Fair Work Commission has authorised anti-competitive activity, where such activity may continue to be illegal under competition law.

This is so because although the Loophole Bill declares commercial contracts to be employment contracts for the purposes of the Fair Work Act, that does not change the fact that the contracts are still commercial contracts for the purposes of competition law. That is, an anti-competitive activity under a commercial contract made 'legal' under the fair Work Act will/can still be illegal under the competition laws. This will set up a clash between the statutory obligations of the ACCC and the statutory powers of the Fair Work Commission.

2. Sections of the Loophole Bill that cut across competition law

Issue	**Detail**	**Sections**	**Pages**
Commercial contract redefine	Overriding the High Court 2022 *Personnel* ruling	15AA	113
Commercial contract redefine	Turning the commercial contract into an employment contract	15H, 15J, 15K	123
Gig economy redefine	Removing the gig economy as a commercial operation and turning it into an employment operation	15l	126 to 128
Owner Drivers - regulator	Creating Road transport advisory group	Part 16 Div 1-4	128 to 130
Gig and owner drivers -regulations	'Minimum standards for regulated workers' Details on removing both gig and owner-driver work from commercial operations into employment operations	Chap 3A	131 to 190
Redefining commercial unfair contract terms	'services contracts' unfair terms Amending Independent Contractors Act	Part 3A-5	191 to 213
Competition law	Changes to competition law cutting across the powers of ACCC and 'legalising' anti-competitive conduct	536Jx 536JT	153

B.
Specific Provisions of the Loophole Bill that outlaw self-employment and neuter competition law

The following highlights and discusses the specific terms and phrases from the Bill explaining why those terms and phrases produce the predictable outcomes we explain above.
Warning: The Loophole Bill is a highly convoluted and complexly worded 284 pages with a 500 plus page Explanatory Memorandum. The explanations below try to provide some understanding to the complexity.

3. Subverting the High Court

- In February 2022, the High Court (in the *Personnel* case) declared that if a written contract is clear and comprehensive, that the written contract alone should be relied on. This decision is the benchmark for the legal identification of self-employed, small business status.
- 15AA of the Loophole Bill will subvert, and is intended to subvert, the High Court *Personnel* ruling for the purposes of the Fair Work Act. This sets up two opposing processes for the finding of self-employment. This will create conflict and uncertainty.

4. How 15H, 15L and 15P, 15J, 15K, 15M and 15N outlaw self-employment

The full texts of 15H, 15L and 15P run to some 1,400 words (see pages 123 and pages 126 to 128 of the Bill).

The following is a simplified explanation of how the three clauses achieve the intent of turning/treating a commercial contract as an employment contract, thereby treating self-employed people as employees.

a) 15H introduces and creates a 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 Bill. In other words, the commercial transactions of self-employed people will end up being

controlled as if they were/are employment transactions (under the 'regulated workers' provisions).

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 (regulated workers) 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' for the purposes of the Fair Work Act (regulated workers).

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. Self-employment (income-earning through the commercial contract) is 'employment' for the purposes of the Fair Work Act but still 'self-employment as defined at common law for the purposes of commercial, competition and other 'economic' and tax laws.

5. Outlawing owner-drivers self-employed rights

Part 16 of the Bill

- **Division 1 – Overarching road transport matters.**
- **And all subsequent Divisions 2, 3, 4, relating to road transport matters.**

(pages 128 to 130 of the Bill)

This part of the Bill reintroduces a form of the 2012 Road Safety Remuneration Tribunal (RSRT) which, when implemented in 2016, directly threatened the livelihoods of independent, self-employed truck drivers across Australia. It resulted in the bankruptcy and/or near bankruptcy of many and triggered several suicides. We assess these new provisions as worse for self-employed, owner-drivers than the 2012-16 RSRT.

Anti-Competition: The effect of forcing self-employed owner-drivers into the employment regulation industrial relations system will be to reduce competition in the road transport industry. That is, that enforced employment regulation of owner-drivers would significantly reduce the competition that the large, dominant trucking firms face from the thousands of independent, small business trucking enterprises.

There is evidence for this. *(Note: Reference here for answer to Question 1 above*)

In 2015, then ACCC Chair Rod Simms gave a major speech on the issue highlighting specific cases where it could be argued that under the mask of an industrial relations agreement a business had colluded with unions to create agreements that would damage competitors. Rod Simms mentioned several cases, but one case stood out. That case was the transport company, Toll, who had been exposed as entering an industrial agreement with the Transport Workers Union on the condition that the TWU would conduct aggressive action against named competitors of Toll with the intention of harming the competitors. The effect of such action would be to harm competition.

The Simms speech is of major importance. (assess through this link)

Rod Simms said of the Toll case:

> Unions have been given a clear role under the law to represent their members and take action seeking improved wages and conditions. However, this **does not give them or businesses cooperating with them a licence to seek to regulate markets.** They could take themselves outside the above exemptions if they seek to determine which firms may operate within markets, what prices they can charge or how bids for work will be determined.
>
> In a market economy it should be the market that sets prices and determines who participates and who wins work, not unions or businesses. (page 3)

The Loophole Bill's RSRT-like laws would result in the regulation of the road transport market through the backdoor of the industrial relations system. These RSRT-like laws would give unions "…or businesses cooperating with them a licence to seek to regulate markets".

The very structure of the Loophole Bill would result in the outcome that Rod Simms says ought not occur.

The structure of the Bill in destroying road transport competition

To understand the process by which the Bill will outlaw owner-drivers, thus destroying an important competition part of road transport, its necessary to understand the linguistic and legal trickery of the Bill.
Part 16 Divisions 1 to 4 (pages 128 to 130 of the Bill) are the relevant sections.

These sections:

- Give power to the Fair Work Commission to impose transport rates and conditions on self-employed owner-drivers.

The Bill does this by:

- Establishing a 'Road Transport Advisory Group' (Div3) with an 'Expert Panel' (Div2) that together will advise the Fair Work Commission on creating and imposing rules covering parties in the road transport industry. (Div1 40C)
- In other words, the Bill will cover not only employees and employers, but 'regulated road transport contractors'—that is, self-employed, independent contractor owner-drivers as well.
- The FWC is to then establish 'standards' that apply across the industry. These standards are supposed to 'ensure that the road transport industry is safe'. (Div2 40D)

The standards are concerned with (40E):

> (a) the making and varying of modern awards that relate to the road transport industry;
>
> (b) the making and varying of road transport minimum standards orders and road transport guidelines;

with the Advisory Group to consist of transport unions and transport business representatives. (40F(2)

** That is, the FWC is to be given the power to dictate and impose rates on owner-drivers, overriding the commercial decisions that owner-drivers currently make as part of the normal running of their small business enterprises.

The FWC-established standards are to apply across the entire 'road transport industry contract chain.' (Div4) The FWC is to "…make orders, to be known as road transport industry contractual chain orders,…" (40J(2)(a)

And "…civil penalties for contraventions…" will apply up to 600 units (which could amount to $187,800 for a "body corporate" as each penalty unit is currently $313.).

** That is, the entire contract chain in the road transport sector is to be covered. This would presumably result in coverage extending beyond trucks themselves to warehousing, and goods collection and delivery points, including farms, shops, mines and so on.

Owner-drivers
The Bill is clearly targeted to include self-employed owner drivers. The Bill states that matters to be dealt with will include "…an employee-like minimum standards order…" and "employee-like guidelines…" (Div2, 241(10D)(a)&(b).

** That is, these sections of the Bill are linked to, and rely on, the 'employee-like' definitions under the Loophole Bill (Sections 15HLP) for their authority. Self-employed owner-drivers are also captured under the 'regulated worker' definitions and 'services contract' definitions. (See SEA paper Number 2 on 15HLP.)

The Bill defines a "regulated worker" where (15G):

"(a) the person is an employee-like worker ; or
(b) the person is a regulated road transport contractor…"

And defines a "regulated road transport contractor" where (15Q):

"(a) the person is:
(i) an individual who is a party to a services contract in their capacity as an individual…"

And includes individuals under company, trust and partnership arrangements.

The Bill also refers to collective agreements.

Div3A 'Definitions relating to regulated workers' at 15B says:

"A ***collective agreement*** means the following:
(a) an employee-like worker collective agreement …"

The Bill refers to a "…contractor high income threshold…" (15C) as well as "minimum standards guidelines" (15D).

Conclusion: In other words, 'collective agreements' are to be imposed on 'employee-like' workers (owner-drivers in this instance) such that the individual nature of each owner-

driver's enterprise is to be eliminated. Through this mechanism individual owner-drivers will be denied their individuality and be forced to be treated like an employee. This will ultimately force owner-drivers from the transport sector of force them to work for a big trucking business. This is in effect the creation of market control via 'legalised' collusion organised through the Fair Work Act and the effective outlawing of self-employed owner drivers.

6. Imposing controls over 'regulated workers' (self-employed people)

Chapter 3A (pages 131 to 190 of the Bill).

Explanation

Chapter 3A, being all of pages 131 to 190 of the Bill, lays out the procedures for controlling and imposing regulations on 'regulated workers' (self-employed) as defined in the Bill.

Regulated workers as defined in the Bill include:

- Common law employees as determined under the multi-factorial test—that is, individuals working under a *contract for services* and included in the definition of *services contract.*
- All self-employed persons working under a services contract (15H).
- All self-employed persons working through a digital (gig) platform (15L).
- All self-employed persons defined as 'employee-like' (15P).
- All owner-drivers captured under Part 16.

7. FWC vs ACCC – Competition law

section 536JX (approx. page 153 of the Bill)

The minimum standards objective (Chapter 3A) leads to the question: Is the Bill attempting to turn the Fair Work Commission into a regulator of competition in the Australian economy?

The section appears below. We have recommended that all of Chapter 3A be removed from the Bill, However, we think it worthwhile making comment on (a) (iv)(v), (b)(iii) and (c)(i)(ii) as highlighted below.

536JX The minimum standards objective

In performing a function or exercising a power under this Part, the FWC must take into account the need for an appropriate safety net of minimum standards for regulated workers, having regard to the following:

(a) the need for standards that:

……..

(iv) **do not change the form of the engagement of regulated workers from independent contractor to employee; and**

(v) do not give preference to one business model or working arrangement over another; and

……..

(b) in addition to the other matters provided for in this subsection, the need for standards that deal with minimum rates of pay that:

……..

(iii) do not change the form of the engagement of regulated workers;

(c) the need to avoid unreasonable adverse impacts upon the following:

(i) sustainable competition among industry participants;

(ii) business viability, innovation and productivity;

……

There is an inherent contradiction between the objectives (above) and the structure of the Loophole Bill. In effect. the structure of the Bill prevents these objectives from being met.

On: (a) (*iv) do not change the form of the engagement of regulated workers from independent contractor to employee* – yet the definitions in the Bill turn an independent contractor into an employee.

On: (a) *(v) do not give preference to one business model or working arrangement over another* – yet the definitions in the Bill force the adoption of the 'employee' model as the only business model and outlaw digital (gig) platforms as a business model.

On: (c) (*i) sustainable competition among industry participants* – The Bill will destroy competition between industry participants—specifically by removing small business competition against large businesses and by removing digital (gig) platform work as a competitor against other traditional business models.

On: (c) (ii)*business viability, innovation and productivity* – The Bill will destroy the viability of self-employed small business models, owner-driver models and digital (gig) platform business models.

C. Extract from the Minerals Council of Australia Submission on the Loophole Bill

Explanation:
In looking through the some 168 publicly available submissions to the Senate enquiry we had difficulty finding other submissions that commented on the competition implications. It is as if 'everyone' is viewing the Bill through the narrow prism of industrial relations law and failing to see the broader issues. The only competition analysis and commentary we found in submissions is contained in submissions from the Minerals Council. We reproduce below the relevant section from the Minerals Council for the purposes of additional insight.

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

The Bill states that once an MSO is made, or a 'collective agreement' is rubber stamped by the FWC, it is automatically exempt from a range of anti-competitive conduct prohibitions in the *Competition and Consumer Act 2010*.[22]

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

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

Over-riding the *Competition and Consumer Act 2010*

The Bill provides:

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

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

- It expressly excludes certain provisions of the *Competition and Consumer Act 2010* (CCA) relating to restrictive trade practices, including corporate conduct that would substantially lessen competition, and

- It expressly allows for a collective agreement to include terms and conditions that apply to subcontracted road transport contractors, with minimal notice required.

These provisions give effect to the longstanding ambition of certain unions to rig prices in their industry, increasing their power. This ambition is made explicit in TWU enterprise agreements, such as the following with one of the largest corporate players, Toll:[23]

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

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

The consequences – what is currently illegal becomes legal

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

- A corporation entering agreements or engaging in concerted practices that substantially lessen competition (s 45)
- A union engaging in a secondary boycott on the basis that two or more of its members or employees engage in conduct in concert with each other (s 45DC)
- A corporation with substantial market power engaging in conduct that has the purpose or likely effect of substantially lessening competition (s 46)
- A corporation engaging in exclusive dealing, i.e. using corporate transactions to determine who or where goods or services should be sold and thereby (or along with other conduct) substantially lessening competition (s 47)
- Resale price maintenance (s 48), and
- A corporation directly or indirectly acquiring shares or assets that would or be likely to substantially lessen competition (s 50).
-

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

Allowing the TWU to rig entire supply chains

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

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

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

The only exception to this broad scope for permitted content is that terms will have no effect 'to the extent that it deals with matters that are primarily of a commercial nature that do not affect the terms and conditions of engagement of regulated workers covered by the agreement'.

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

Specific provisions of the *Competition and Consumer Act 2010* that will be suspended Example scenario	**Potential competition law contraventions which would be exempted**
Multiple transport companies enter into an agreement with the TWU requiring them to pay drivers an hourly rate of more than $50	• • _The fact that the agreement involves multiple companies that would compete to acquire contractor drivers (not employees) would mean it is likely to constitute price fixing cartel conduct (s45AD(2) CCA) which is a criminal offence. • • _It is also likely that this would be seen as an agreement that fixes or controls the

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