Submission to The Senate
Education and Employment Legislation Committee
on the
Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (The Bill)
29 September 2023

SEA provides analysis, commentary and recommendations in relation to the following sections of the Bill: (Pages are from Bill)

- 15AA (page113) Determining the ordinary meaning of *employee* and *employer*
- 15H (Page 123) Meaning of *services contract*
- 15 L (page 126 to 128) Meaning of *digital platform work*
- 15 P (Page 126 to 128) Meaning of *employee-like worker*
- Part 16 (Pages128to139) Regulated workers – Road Transport
- Chap3A (Pages131to190) Regulated worker

and comments on

- 15A (Pages 5 to 21) Meaning of *casual employee*
- 536JX (Page 153) FWC vs ACCC -Competition law

SEA recommends and requests of the Senate
That the Bill be amended to remove the following sections from the Bill:

- 15AA Determining the ordinary meaning of *employee* and *employer*
- 15H Meaning of *services contract*
- 15 L Meaning of *digital platform work*
- 15 P Meaning of *employee-like worker*
- Part 16, Divisions 1, 2, 3 and 4 Regulated workers – Road Transport

And that any other sections of the Bill that relate to, or involve implementation of, the foregoing sections also be removed from the Bill as they will become redundant once those sections are removed. This would apply in particular to:

Comment only in relation to

- 15A Meaning of *casual employee*

SEA provides analysis and commentary for information purposes, but does not provide a recommendation, as this is not within SEA's specific area of interest. That is, *casual employees* are not self-employed independent contractors.

- 536JX FWC vs ACCC -Competition law

Queries if the FWC is to become a competition regulator.

Overview summary of the Bill

The Loophole Bill is massively radical. It proposes a transformation of key, core underpinnings of the Australian economy and society. It is perhaps the most radical change of its type seen since Federation.

The Bill seeks to make commercial transactions subject to industrial relations regulation. It will do this in relation to commercial transactions undertaken by individuals in the earning of their income.

In practical terms, the Bill will outlaw:

- the bulk of self-employment;
- digital (gig) platform operations in Australia;
- self-employed people from earning their income through digital (gig) platforms; and
- self-employed owner-drivers;

plus outlaw

- casual employment.

Further the Bill will

- Damage competition law in Australia creating opportunity for a further concentration of economic power by big business.

In summary the Bill involves an historical making illegal of a huge percentage of small business in Australia. This is why describing the Bill as 'radical' is warranted and accurate.

The Bill achieves this by:

- Overriding the High Court's determinations on 'employee *vs* self-employment'.
- Breaching Australia's International Labour Organisation obligations to protect the status of self-employment.
- Overriding Australia's competition laws and limiting the power of Australia's competition regulator (the ACCC).
- Defining the commercial contract as an employment contract.
- Regulating self-employed people as employees.
- Regulating digital (gig) platforms to remove their commercial basis.
- Regulating owner-drivers as employees.

The points made above are explained below in some detail.

Content

A. Recommendation and Request

SEA asks the Senate to amend the Bill to remove clause 15AA (Determining the ordinary meaning of *employee* and *employer)* from the Bill.

Summary explanation of reasons for request

A 1. Overview

Section 15AA should be removed from the Bill because it will

- Create uncertainty and confusion over the definitions of employee and self-employed, independent contractor.
- Conflict with the High Court.
- Breach ILO Undertakings.
- Create conflict with competition law.

A 2. Core Facts

- Since about World War II, when deciding whether a person is an employee or a self-employed independent contractor, Australian courts have used what is called the '*multi-factorial'* test.
- 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.
  However, it also means that if a written contract is not clear or comprehensive, the multi-factorial test continues to apply. (Note that after examining the written contract in the *Personnel* case, the High Court declared that the worker in question was in fact an employee and not an independent contractor.)
- 15AA of the Bill will subvert and is **intended to subvert the High Court** *Personnel* ruling. It will impact ALL self-employed people.

A 3. Some detail

It seems that the High Court had observed the confusion, complexity and cost associated with the prevailing legal multi-factorial processes.

The Court sought to create certainty, stating:

> *"… It is the task of the courts to promote certainty with respect to a relationship of such fundamental importance." (Paragraph 58 of the HC Ruling)*
> Australian High Court February 2022 (see below for further excerpts).

Clause 15AA (on page 113) of the Bill:

- will undo the certainty created by the High Court;
- reapplies the multi-factorial test by suppressing the written contract in the process;
- reintroduces uncertainty and confusion;
- could likely to be rendered inoperative on High Court appeal.

There are other major consequential policy implications that are discussed below, namely:

- Breach of Australia's International Labour Organisation obligations.
- Creation of conflict with competition law, thus raising regulatory jurisdictional conflict.

The clause in the Bill that we recommend and ask to be removed from the Bill reads as follows:

> **15AA Determining the ordinary meanings of *employee* and *employer***
>
> (1) For the purposes of this Act, whether an individual is an ***employee*** of a person within the ordinary meaning of that expression, or whether a person is an ***employer*** of an individual within the ordinary meaning of that expression, is to be determined by ascertaining the real substance, practical reality and true nature of the relationship between the individual and the person.
>
> (2) For the purposes of ascertaining the real substance, practical reality and true nature of the relationship between the individual and the person:
>
> (a) the totality of the relationship between the individual and the person must be considered; and
>
> (b) in considering the totality of the relationship between the individual and the person, regard must be had not only to the terms of the contract governing the relationship, but also to other factors relating to the totality of the relationship including, but not limited to, how the contract is performed in practice.
>
> Note: This section was enacted as a response to the decisions of the High Court of Australia in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.
>
> (3) Subsections (1) and (2) do not apply to the following provisions of this Act:
>
> (a) Divisions 2A and 2B of Part 1-3;
>
> (b) Part 3-1, to the extent that Part 3-1 applies only because of the operation of section 30G or 30R.

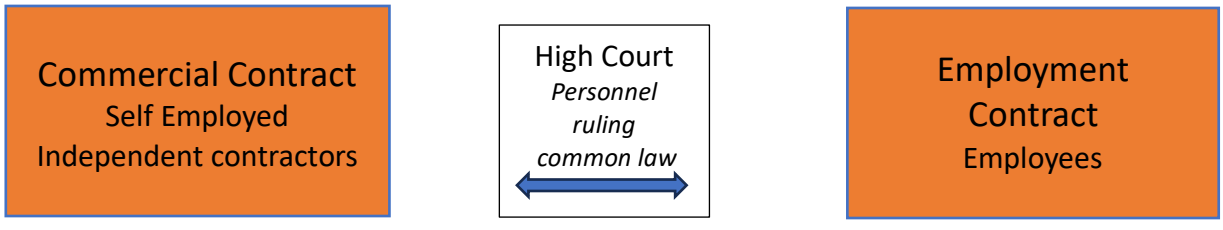
The clause is effectively a re-imposition of the multi-factorial test which will override the certainty that the High Court says is of such importance.

A 4. A straightforward explanation:

The defining difference between an employee and a self-employed independent contractor is surprisingly straightforward.

- An **employee** earns their income using the **employment c**ontract.
- A **self-employed independent contractor** earns their income using the **commercial** contract.

Whether the employment or commercial contract is being used is determined at common law through a process decided on by the courts. This is often referred to as the 'ordinary meaning'.



The *employment* contract is regulated through industrial/workplace relations statutes.
The *commercial* contract is regulated through commercial and competition statutes.

The split between the employment and commercial contract permeates, and is critical to, the operation of the Australian economy. This is why the High Court referred to this as a "relationship of such fundamental importance".

Clause 15AA of the Bill (referenced above) seeks to do something never before done under Australian statute. That is, the clause would remove common law (as ruled by the High Court) as the defining difference between the commercial contract and the employment contract for the purposes of federal workplace relations statute/s.

A 5. Implication – Clash with competition law
The consequences of this are major.

- A contract could readily be declared a commercial contract based on common law and subject to competition and commercial statute and regulation, yet the same contract could be declared 'employment' under 15AA and subject to the statutes and regulation of industrial/workplace relations law.

Competition law and industrial/workplace relations law have fundamentally opposed objectives driving their different processes.

- Competition (commercial) law and regulation are about the prevention of price-fixing and anti-competitive collusion in the economy.
- Industrial/workplace relations are about the implementation of price-fixing (wages) and collusion to enforce that price-fixing.

In other words, self-employed, independent contractors (as defined by the High Court at common law) and the businesses/persons that engage them could (and will) find themselves subject to competition law, yet at the same time be forced or required under industrial/workplace relations laws to breach competition law. This is a scenario that will inevitability occur.

That is, 15AA creates an irreconcilable clash that cannot be resolved. It will create victims who will be caught in a vice between competition and employment regulation.

A 6. Implication – Breaching ILO obligations
The recognition of the fundamental difference between the commercial and employment contracts motivated and underpinned the declarations made by the International Labour Organisation (ILO) in mid-2006 on the 'Employment Relationship'.

The ILO declared that:

- 'Worker' is a general term.
- 'Employee' refers to a worker in an employment relationship (contract).

And that

- ***Self-employment*** *and independent work based on commercial and civil contractual arrangements are by definition beyond the scope of the employment relationship.*

Further, the ILO declared that: (*Page 77 item 8)*

> *National policy for protection of workers in an employment relationship should not interfere with true civil and commercial relationships…"*

Not long after these ILO declarations were enunciated, Australia became a signatory to them (in 2006) thus creating an obligation on Australia to adhere to and implement them. Australia implemented these obligations through the Independent Contractors Act (2006) and the sham contracting laws (2006)

15AA directly breaches Australia's ILO obligation. . That is, 15AA will directly involve employment regulation under the *Fair Work Act*, thereby interfering with genuine and true commercial relationships.

A 7. Implication – High Court challenge

15AA would likely to be rendered inoperative on High Court appeal given the following scenario which we say would inevitably occur at some point.

a) A clear and comprehensive written contract is found to be a commercial (self-employment) contract at common law in (say) a Federal Court ruling. The ruling is consistent with the High Court's *Personnel* ruling.
b) A Fair Work Commission ruling declares that under 15AA the same contract (being a common law commercial contract) is subject to employment regulation based on a multi-factorial test that declares the contract to be an employment contract.
c) The Fair Work Commission's ruling is appealed to the High Court.

Here, then, is the legal question:

> Assuming that the Federal Court ruling is in accord with the High Court's *Personnel* principles, the High Court would have to consider whether the application of the multi-factorial test in the case being considered and ruled on by the Fair Work Commission produced a different outcome (in other words, an employment contract) to that found by the Federal Court.
>
> That is, the High Court would be asked to consider whether the principles it established under *Personnel* were overridden by the multi-factorial test.
> Any outcome is, of course, speculative. But it seems logical that the High Court would more likely find that a multi-factorial test would produce the same result as the *Personnel* principles that the High Court itself established.

Of course, this scenario is speculative. But we say that, given the fundamental assault 15AA presents to the operation of the Australia's commercial economy, it is almost inevitable that 15AA will be subject to a High Court challenge under a scenario such as the one described above.

It would seem logical that on the grounds of consistency the High Court would re-affirm its *Personnel* ruling, thus rendering 15AA inoperative. We say that 15AA is an exercise in futility

inviting major legal complexity. What 15AA will do even before it is tested in the High Court is create huge uncertainty that will damage the economy, particularly for self-employed people.

A 8. Implication – Australian Taxation Office Rulings
The ATO is required to determine tax obligations in the light of whether a person/entity is an employee or self-employed. The principal obligation concerns withholding obligations. That is, which party/s in a payment arrangement/contract must withhold tax and send that tax to the ATO.

Following the High Court *Personnel* ruling the ATO re-wrote its rulings to be consistent with *Personnel*. The two ATO rulings are

- ATO employee or self-employed (2022/D3)
- ATO worker status compliance (2022/D5)

The rulings clarify withholding and other obligations consistent with *Personnel*.

15AA is likely to create considerable confusion. For example, a self-employed person (as defined under *Personnel*) has withholding obligations under the ATO rulings. But if the same self-employed person were to be declared an 'employee' under 15AA for the purposes of the *Fair Work Act*, the self-employed person could well come to believe that they did not have tax withholding obligations, and hold that belief in good faith. That is, they stop sending their required tax to the ATO on a regular basis as would be normally required. This creates the likelihood of significant tax revenue loss and added enforcement requirements for the ATO.

Some additional background/supporting information

A 9. Additional extracts from the High Court *Personnel* case
In the Judgment on *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 *9 February 2022* P5/2021 (Australian High Court February 2022), the High Court made several critical statements that have a direct bearing on Clause 15AA.

In that decision the High Court unanimously affirmed that the distinction between an employee and an independent (self-employed) contractor is clear and well established.

The High Court said that it is essential that there is legal certainty on this:

> …. It is the task of the courts to promote certainty with respect to a relationship of such fundamental importance. Especially is this so where the parties have taken legitimate steps to avoid uncertainty in their relationship. The parties' **legitimate freedom to agree upon the rights and duties** which constitute their relationship should not be misunderstood. (at 58)

Moreover, such certainty is established:

> Where the parties have comprehensively committed the terms of their relationship to a written contract the validity of which is not in dispute, the characterisation of their relationship as one of employment or otherwise proceeds by reference to the rights and obligations of the parties under that contract. (at 59)

The Court said that that certainty cannot be changed, modified or revisited based on social or psychological concepts because such concepts are not law:

> 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)

Intention to subvert the High Court

The statement in 15AA below makes it clear that the intention is to subvert the High Court.

Note: This section was enacted as a response to the decisions of the High Court of Australia in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.

A 10. The International Labour Organisation (ILO)

The ILO (a division of the United Nations) is the peak global body that considers and makes statements of principle on labour policy to guide national law.

From 1996 the ILO had been engaged in protracted debate on the 'problem of the employment relationship'. That is, it was struggling to come to terms with the conceptual challenge to employment/labour law by the apparent rise of independent contracting. That is, where do workers (who are both worker and boss in one) fit into labour regulation that is predicated on the exclusive assumption that that the worker and boss are separate and institutionally predetermined to be in conflict?

In 2003, after considerable debate, the ILO resolved the definition of 'worker' at its peak global forum on the issue as follows:

> *The **term employee** is a legal term which refers to a person who is a party to a certain kind of legal relationship which is normally called an employment relationship.*
> *The **term worker** is a broader term that can be applied to any worker, regardless of whether or not she or he is an employee.*
> ***Self-employment** and independent work based on commercial and civil contractual arrangements are by definition beyond the scope of the employment relationship.*
> Report of the Committee on the Employment Relationship (page 52)

Then again, in 2006, the ILO Recommended that:

> "National policy for protection of workers in an employment relationship should not interfere with true civil and commercial relationships…" (page 77, Item 8)

The effect of the 2006 Recommendation and the 2003 Conclusion is that the ILO affirms that self-employment operates within commercial legal contracts. This is entirely consistent with the subsequent Australian High Court *Personnel* ruling of 2022.

Following the 2006 ILO Recommendation, the Federal Parliament passed and enacted the *Independent Contractors Act* 2006 which locks in the common law definition of self-employment under statute. The Australian Act conforms with, and is in accord with, the ILO obligations of 2003 and 2006.

15AA would set up two parallel common law tests for employee *vs* self-employed—one being determined by the High Court, the other being determined by statute. This would effectively mean that the statute (Workplace Relations) was intruding into the commercial contract, as determined by the High Court. This would create a breach with the principles established by the International Labour Organisation.

A 11. Conflict with Competition law – Price fixing and collusion

The ramifications of having industrial relations law intrude into competition law and regulation are major.

The reason that this issue is of such profound importance stems from the basic thesis—namely, the sharp difference between the commercial contract and the employment contract. The two contracts have totally different functions.

As an overview

- At the heart of competition law is the prevention of collusive price-fixing of goods and services.
- At the heart of employment/industrial relations law is a system of sanctioned, legal price-fixing (of wages).

Significantly, competition laws include a specific provision that prevents the ACCC from interfering in employment contracts and the price-setting/fixing that occurs as a normal course of events in industrial relations (employment) matters. This restriction on the ACCC is imposed even though there have been glaring examples where the industrial relations system has been used to mask collusive commercial price-fixing, and the manipulation and rorting of competition.

The ACCC is restricted as follows

Section 51(2)(a) of the Competition and Consumer Act 2010, (CCA) says:

> (2) In determining whether a contravention of a provision of this Part other than section 45D, 45DA, 45DB, 45E, 45EA or 48 has been committed, regard shall not be had:
>
> (a) to any act done in relation to, or to the making of a contract or arrangement or the entering into of an understanding, or to any provision of a contract, arrangement or understanding, to the extent that the contract, arrangement or understanding, or the provision, relates to, the remuneration, conditions of employment, hours of work or working conditions of employees; [Emphases added]

This potential for the rorting of competition law under the guise of industrial relations agreements is not some theory. It has raised the concern of the ACCC in the past.

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. In his speech Rod Simms explained the limitations on the ACCC to stop such arguably anti-competitive behaviour.

The Simms speech is of major importance. We believe it should be studied in relation to 15AA and also the 'employee-like' of the 'Loophole' Bill if the competition implications of the 'employee-like' agenda are to be understood.

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)

Using the Toll example (and others) Rod Simms commented on the ACCC's jurisdiction saying:

> The effect of this IR carve out is that the ACCC does not have jurisdiction to deal with agreements, or aspects of agreements, that relate to employment conditions. (Page 4)

As a matter of law, the FWC is currently restricted to employment matters, that is those matters pertaining to contracts of services. The FWC does not currently have jurisdiction over contracts for services. Likewise, the ACCC does not have jurisdiction over contracts of service, as explained above.

15AA is a measure that will ''obliterate' this sharp and necessary regulatory divide between competition and employment. It is a huge leap.

When this sharp distinction between the regime to outlaw price-fixing and the regime to sanction price-fixing is understood, 15AA is seen in a disturbing light.

That is, the implementation of 15AA and the 'employee-like' agenda involves the setting and fixing of commercial prices in a way that is illegal under competition law.

B. Recommendation and Request

SEA asks the Senate to amend the Bill to remove the following clauses that apply definitions as follows

15H : Services contract
15L : Digital platform work
15P : Employee-like worker

Further
to remove related clauses 15J, 15K, 15M and 15N as they will become redundant once the three key clauses are removed.

B 1. 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.

B 2. 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.

B 3. How 15H, 15L and 15P destroy self-employed, gig work

The full texts of 15H, 15L and 15P have 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 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.

B 4. Overview effect

In Part A of this submission (above) we cover 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 make 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 Part B—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.

B 5. The High Court

In Part A we reference 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.

B 6. 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.

B 7. 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.

B 8. Comment – These facts and the Loophole Bill 15H, L and P
B.8 a. 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.

B 8. B. 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.

B 9. 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. The six standards under the Victorian Gig Code can be viewed in the link above.

B 10. Tax Compliance
We repeat and expand a little on the points we made at A8 on 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.

C. Recommendation and Request

SEA asks the Senate to amend the Bill to delete

Part 16 Provisions relating to regulated workers in relation to owner drivers particularly

- **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)

C1. Summary

This part of the Bill reintroduces a form of the 2012 Road Safety Remuneration Tribunal (RSRT) that when implement 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.

C 2. Background : The Loophole Bill reintroduce the 2012 Road Safety Remuneration Tribunal agenda

Let there be no pretence, the Loophole Bill contains a reintroduction of the disastrous 2012 Road Safety Remuneration Tribunal (RSRT) but is done through a re-configured legislative format.

The 2012 RSRT lay in limbo until 2016 when it was fully implemented. In operation, it threatened the livelihoods of up to (on some estimates) 80,000 independent truck drivers across Australia. The RSRT triggered the bankruptcy, or near-bankruptcy, of many of those independent drivers before the RSRT was abolished.

The Loophole Bill's reintroduction of the RSRT has a particular emotional resonance for Self-Employed Australia. In 2016, SEA went to the High Court to challenge the constitutional validity of the RSRT under section 92 of the Constitution (interstate trade). In doing this we raised funds from independent truck drivers themselves. Our submissions to the High Court included affidavits and supporting testimony from some 24 independent truck drivers across Australia. These people were just some of a larger network of drivers with whom we were involved.

On Friday 15 April 2016, we appeared before the Chief Justice of Australia (French CJ). His Honour on that day remitted the matter to the Federal Court stating, *"The constitutional case may be arguable…"* On 19 April Tuesday 2016, the Australian Senate voted to repeal the RSRT. Its abolition received Royal Assent that evening. On Friday 22 April, SEA received the disturbing and upsetting news that two of the independent truck drivers in our network

had committed suicide due to RSRT stress. The repeal of the RSRT came too late for them. These were people we knew and had worked with over the High Court appeal.

On 29 April 2016, the ALP announced it would reintroduce RSRT-like laws on attaining government. The Loophole Bill is the delivery of that ALP undertaking.

The Bill potentially raises constitutional questions on a number of grounds.

We predict that if the Loophole Bill's RSRT-like laws are reintroduced, that again tens of thousands of self-employed, independent truck drivers' livelihoods will be threatened. Based on the experience of the RSRT we should expect bankruptcies in the sector and the potential for suicides.

C 3. Why the Australian Labor Party and the Transport Workers Union (TWU) persist with efforts to create 'safe rates' legislation

For several decades the TWU has promoted an argument that truck drivers drive unsafely and have road crashes if (and because) the rates they are paid are low, however 'low' is defined.

The TWU has persistently argued that truck drivers will only drive safely if the rates they are paid are controlled by an employment regulatory body. The TWU has further long argued that because owner-drivers are self-employed and hence not covered by employment regulations, they are consequently unsafe.

The answer, the TWU says, is to force all owner-drivers into employment regulation as this will make owner-drivers safe drivers. The ALP has sought to implement this on a national basis, in the first instance with the RSRT, described above (2012 to 2016). The Loophole Bill now seeks to implement this agenda, again using an RSRT-like legislative structure under the authority of the FWC.

The decision as to whether to support or reject the Loophole Bill's provisions for the road transport sector hinges entirely, we say, on whether the TWU's argument about 'safe rates' is accepted as valid or not.

C 4. SEA says the TWU 'safe rates' argument is wrong

For almost as long as the TWU has been running the 'safe rates' argument, SEA has been arguing that the 'safe rates' thesis does not hold up as valid. We comment as follows:

Road safety in general: Road safety is affected by many things: the quality of vehicles, the state and quality of roads and the behaviour, performance, and capability and culpability of drivers.

Drivers in particular: The safe rates arguments claims that if drivers are 'underpaid' (however defined), that they are forced or induced to drive long hours leading to fatigue, to take (upper) drugs to stay awake, to speed, to overload their vehicles and generally to drive unsafely. That is, that driver behaviour is a consequence of (and caused by) low pay rates.

Road regulations: However, we observe that road regulations are heavily imposed on all truck drivers and effectively enforced. This includes load limits, required standards for trucks to be registered, strict speed limits, compulsory logs to record driver hours, drug and alcohol testing and so on. In our view, these regulations and their enforcement are vastly more powerful in effecting safe driving than are pay rates organised through the industrial relations system.

Income determines safe driving? An argument could be raised that if the safe rates argument holds valid for truck drivers, should this not also apply to all drivers on the road? That is, that whether any driver on the road drives safely or not, can be, and is pre-determined by, their income level. It's a nonsense idea.

Presumably to accept this would mean that low-income drivers would be unsafe drivers in comparison to high-income drivers who would be safe drivers. We know that this is not reality. A driver's income does not predetermine whether a driver drives safely or not.

We say that the TWU 'safe rates' argument is patently illogical at its core. No matter how the TWU seek to 'prove' their thesis with 'supporting' reports, research and heavy media coverage, we say that the TWU engages in serious misinformation.

Essentially the TWU argument is that pay rates determine whether or not an individual adheres to or breaks the law. It could be said for example that low paid taxi drivers will speed out of a desire to boost their income. This may happen. But equating law breaking to the pay rates of people is not a basis upon which law in Australia is made.

Award/EBA pay rates determine 'safe' driving: The TWU 'solution' to alleged unsafe rates, is to require all truck drivers to be employees or (as in the Loophole Bill) to be regulated as employees. The belief/view must presumably be that all employee drivers are safer drivers that self-employed owner-drivers. This of itself is also illogical. A persons legal status does not presuppose whether or not they will break the law. Australian law does not presuppose or assume to predetermine a person's behaviour based on their status.

Again, SEA has long rejected these arguments as unsustainable and illogical.

Anti-Competition: We hold the view that 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.

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. We believe it should be studied in relation to the Loophole Bill's RSRT-like law.

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)

We assert that 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, on our analysis, give unions "…or businesses cooperating with them a licence to seek to regulate markets".

We say that the very structure of the Loophole Bill would result in the outcome that Rod Simms says should not occur.

C 5. The structure of the Bill in relation to owner-drivers

The industrial relations system has a perfectly legitimate role in setting wages and conditions for employees (as defined at common law). We say that this 'employment' regulation does not of itself make employee drivers any better or worse than self-employed owner-drivers.

The industrial relations system does not have a legitimate role in regulating self-employed owner-drivers—that is, persons conducting their trucking business using commercial contracts (as defined at common law). To do this is to intrude into the legitimate small business enterprises of owner-drivers. This denies individuals the right to be their own boss and effectively neuters or overrides competition law. This is what the Loophole Bill does in Part 16 Divisions 1 to 4 (pages 128 to 130 of the Bill).

These sections of the Loophole Bill:

- 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. These FWC rates are to be applied following 'advice' from transport unions (TWU) and transport business representatives.

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 as 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).

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 in a big trucking business. This is the legislated death of small business, independent truck drivers.

D. Recommendation and Request

To amend the Bill to remove all of Chapter 3A – Minimum standards for regulated workers (pages 131 to 190 of the Bill).

This section becomes redundant when recommendations A, B and C herein are implemented.

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' 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

Once these definitions of regulated workers are removed from the Bill, Chapter 3A becomes redundant, except for common law employees (as defined by the High Court). In this instance it would be best to remove all of Chapter 3A with a view to its reconstruction, if needed, to apply only to common law employees.

E. Analysis for information

On the definitions of
15A : Meaning of casual employee
359A : Misrepresenting employment as casual employment

E 1. Overview – A statutory form of wage theft

Section 15A (redefining casual employment) combined with the penalties for incorrect application under Section 359A amounts to an **effective ban on the bulk of casual employment in Australia.**

The result is a **statutory form of wage theft.**

This is because casual employees earn around 6 per cent more than full- or part-time employees. With businesses being (effectively) forced to have only full- or part-time employees, the **loss of income for any person** who would prefer to be a casual employee is

- If on the **minimum rate of pay of $23.23** an hour, could be up to **$3,063 per year.**
- If on the **average pay of $40.65** an hour, could be up to **$5,355 per year.**

E 2. For information

Self-Employed Australia normally restricts its recommendations and requests to the Senate on the Loophole Bill to issues that we believe have a direct impact on self-employed, independent contractor, small business people. However, of the approximately 2.2 million self-employed in Australia, some 800,000-plus employ other people.

The redefined casual employee definitions will not affect the status of being self-employed, but they will directly impact on those small business people who run their business and who want or need to employ people as casuals. Therefore, we offer the following assessment and analysis of the Bill's casual employee definition to assist Senators in their considerations.

E 3. Understanding the financial advantage of being a Casual rather than Full- or Part-time employee

E 3.a Overview

The claim that casual employees do not receive holidays is an exercise in misinformation. This is so because casuals receive their holiday pay in small 'bits' instead of accumulated lump sums.

The facts are as follows:

- A full/part-time employee has income taken away from them and held by the employer. The withheld money is only paid to the employee when the full/part-time employee actually takes holidays.
- A casual employee is paid a total amount (on an hourly basis) that includes an allowance for holidays plus additional amounts. In all, it can be calculated that a casual employee is around 6 per cent better off financially than a full/part-time employee doing the same work.

E 3.b Money withheld from a full/part time wage

The calculations work something like this:

The number of days in a year	365
Subtract weekend days in a year	104
The potential days available to work	261

A full-time employee has 'entitlements' which can be expressed as a percentage of days available days to work:

4 weeks holiday x 5 day leave	20	=	7.7% of 261
Public holidays (say)	11	=	4.2% of 261
Paid sick days available	10	=	3.8% of 261
Holiday leave loading – 17.5% of 20		=	1.7%
Long service leave -1 week for 60 weeks of work		=	1.7%
	Subtotal		19.1%

(Notes: We've overloaded this calculation with items that may or may not apply. That is, only small numbers of employees have holiday leave loading depending on their award or EBA. Employees only receive long service leave after 10 years (or more), so very many employees are never entitled to LSL payment. However, we've included these for demonstration purposes, rounding this out to 19 per cent for the calculations below.)

For a simple example, take a full-time person who has earned $100.
The employer has withheld amounts of money as follows:

	$100.00
For holiday pay	$ 7.70
For public holidays	$ 4.20
For sick days	$ 3.80
Leave loading & LSL	$ 3.30 (30pprox..)
	$ 19.00
The FT employee has really earned	$119.00

But, that $19.00 is only paid to the FT employee when the employee takes holidays or is sick, and so on. That is, 'entitlements' are really money withheld from the employee.

Casuals receive more

Casual employees receive (almost always) 25 per cent extra.
That is, taking the $100 example above, a casual receives $125.00

That is the casual receives $6 more than the full/part-time employee but no money is withheld from the casual employee.

This simple calculation shows that the claim that casuals do not receive holiday pay is misinformation because the claim is a contortion of the facts. Casuals receive their 'holiday pay' in their hourly rate. And casuals receive even more.

E3.c How much extra do casuals receive?

Casuals earn more money than full/part-time employees because of the extra 'loading' (25%). In addition, it is usual for casuals' superannuation to be based on their higher income and they therefore receive more superannuation.

The table below shows the extra money that a casual could receive when compared with a full/part-time employee. These are maximums. Actual differences will depend on each individual situation.

	FT employee	*Casual employee*	*Casual's benefit ($)*
Hourly Minimum Rates Award	$ 23.23		
Plus 19 per cent	$ 4.41		
Wage comparison (hourly)	$ 27.64	$ 29.04	$ 1.40
Wage comparison weekly (38 hrs)	$ 1,050.32	$ 1,103.52	$ 53.20
Wage comparison annual (52 wks)	$ 54,616.64	$ 57,383.04	**$ 2,766.40**
			$ -
Add super			$ -
Superannuaation (11 per cent)	$ 3.04	$ 3.19	$ 0.15
Wages + superannuation (hourly)	$ 30.68	$ 32.23	$ 1.55
Wages + superannuation (weekly)	$ 1,165.84	$ 1,224.74	$ 58.90
Wages + superannuation (annual)	$ 60,623.68	$ 63,686.48	**$ 3,062.80**

	FT employee	*Casual employee*	*Casual's benefit ($)*
Average Income*	$ 40.65		
Plus 19 per cent	$ 7.72		
Wage comparison (hourly)	$ 48.37	$ 50.81	$ 2.44
Wage comparison weekly (38 hrs)	$ 1,838.06	$ 1,930.78	$ 92.72
Wage comparison annual (52 wks)	$ 95,579.12	$ 100,400.56	**$ 4,821.44**
			$ -
Add super			$ -
Superannuaation (11 per cent)	$ 5.32	$ 5.59	$ 0.27
Wages + superannuation (hourly)	$ 53.69	$ 56.40	$ 2.71
Wages + superannuation (weekly)	$ 2,040.22	$ 2,143.20	$ 102.98
Wages + superannuation (annual)	$106,091.44	$ 111,446.40	**$ 5,354.96**

* *Note* : Sourced from https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions

That is, a casual employee on the

Minimum pay rate is up to **$2,766 per year better off** than being a full-timer.
And up to **$3,063 better off** after superannuation.

Average wage is up to **$4,821 per year better off** than being a full-timer
And up to **$5,355 better off** after superannuation.

E 4. The Loophole Bill will almost certainly eliminate casual employment

E 4.a Overview

Section 15A applies a new definition of casual employment and significant fines are introduced (see below) for employing a casual who does not strictly meet the definitions. On our assessment the definitions are so convoluted, complex and subjective as to be indecipherable by the ordinary business person and possibly even by competent lawyers.

Further, fines of up to $93,900 apply for employing a 'casual' in a way that does not fit the definitions. Presumably, a fine would apply per breach per employee. And these fines would apply retrospectively. That is, if a business employed a 'casual' who was subsequently found not to be a casual, the business would be fined.

Our analysis of the new definitions in conjunction with the fines leads us to conclude that few business people, particularly small business people, could or would take the risk of employing anyone as a casual.

There are 2.7 million casuals in Australia (Aug 2022). We would anticipate that the considerable bulk of existing employees would need to be transferred to full-time employment, or more likely, part-time employee status. The consequence of this is that all of these people denied casual employment will be transferred to a lower wage/income than if they had remained as casual.

E 4.b The definition specifics

The relevant section of the Bill that we see as creating complexity are highlighted below and as follows:

To be casual there must be at first instance

- 15A (1) (a) "….an absence of a firm commitment to continuing and indefinite work…"

Comment: The terms 'absence' 'firm commitment' 'continuing and indefinite work' all involve highly subjective interpretations. What these terms may mean to someone who is running a business dealing with the day-to-day demands of customers and associated work flow will almost certainly be different from the meanings attached by a lawyer, a union rep or a Fair Work Commissioner reviewing the work. This will become both highly complex in legal terms and expensive to test.

This predictable complexity and uncertainty is demonstrated in how the Bill defines "….an absence of a firm commitment to continuing and indefinite work…". The Bill says that to identify '…absence of a firm commitment…' it's necessary to discover

- 15A (2)
  (a) ….the real substance, practical reality and true nature of the employment relationship;
  (b) …. Form of a mutual understanding or expectation between the employer and employee…

I(i) …inability of the employer to elect to offer work…

(ii)….having regard to the nature of the employer's enterprise … reasonably likely that there will be future availability of continuing work…"

(iv) whether there is a regular pattern of work…

And says

- 15A (3) To avoid doubt

(a) ….may be inferred from conduct of the employer and employee…
(c) a pattern of work is regular … even if it is not absolutely uniform and includes some fluctuation …

Further

15A (4)…an employee is not a ***casual employee*** … if
(a) … the contract of employment includes a term that provides the contract will terminate …
(b) …the period is not identified by reference to a specified season…

Comment: When combined, Sections 15A (1,) (2), (3) and (4) create a legal test such that there would be very few casual employment situations under the existing legal test that would pass this new test.

Referring again to the High Court's comment on contract at A9 above

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. …

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)

The casual definitions above apply social and psychological concepts and 'circumstances, facts and occurrences that otherwise have no bearing on legal rights. That is the Bill is removing long-established common law (as explained by the High Court) as the definition of casual employment. This demonstrates again the radical nature of the Bill.

E 4.c Punishment for getting the definition wrong

359A creates an offence for getting the definition wrong when employing a casual.

359A says:

(1) A person (the ***employer***) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for casual employment…

But offers a defence being

F. Subsection (1) does not apply if the employer proves that, when the representation was made, the employer **reasonably believed** that the contract was a contract for employment as a casual employee.

And then imposes fines for 'getting it wrong'. See Subsection 539(2) which applies up to 300 penalty units. Each penalty unit is currently $313. That is, fines of up to $93,900 are possible per breach per worker.

E 4.d Conclusion: Casual Employment effectively outlawed

We can only conclude that under these new definitions it is hard to conceive of casual employment situations that would safely pass these tests. Those that would pass would, in our view, be very small in number across the Australian economy.

Further, on any reading of the Bill, any business—particularly small business people, including the self-employed—could never know for certain if their 'casual' engagement of others was legal. The huge uncertainty coupled with large fines would create a situation where any business person would face unacceptable risk in employing casuals.

E 5. Statutory wage theft

One of the very strange aspects about the debate over casual employment of the last decade-or-so is the near total absence of recognition that casual employees earn more, quite a bit more, than full- and part-time employees. It is even stranger to us that the question is not raised as to why would businesses employee casuals when it costs them more? Surely simple 'cost accountant maths' would indicate that no business would employ casuals?

In our view the answer is quite simple. Business people must respond to shifts in the demands and desires of their customers, whether the customers are other businesses or consumers. Those shifts in demand are never-ending. In order to respond, it's necessary that the firm's workforce and management arrangements are both dynamic and flexible. Casual employment is an important part of that dynamic mix.

The Loophole Bill rejects this reality of how business people must operate and how the economy operates. The Bill effectively asserts that it knows more about running an organisation from a distance than do the people themselves who actually run them.

What the Loophole Bill would do is impose on Australian society almost one form of employment arrangement—namely, full- or part-time employment. The consequence of this would be to force organisations to employ the huge bulk of current casual employees as full- or part-time employees. This would mean large-scale reduction in the incomes of those converted ex-casual employees. As stated earlier, there are 2.7 million people at risk of major reduction in their incomes.

What is strangest of all is that in a time where 'wage theft' is a major issue which (deservedly) attracts much attention, this issue in the Loophole Bill is not being recognised for what it is.

This is why we label this section of the Loophole Bill as Statutory Wage Theft.

F. Analysis for information
FWC vs ACCC – Competition law

We comment on 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;

……..

Comment

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* – 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* – the definitions in the Bill force 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.

(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.