# Closing Loopholes Review

CCIWA Submission

**6 March 2026**

# 1. Introduction

The Chamber of Commerce and Industry WA (CCIWA) is a member-based organisation with more than 7,000 members, spanning every sector of the economy, every size of business, and every region across our state. We are committed to developing public policy options that makes WA the best place to live and do business.

Australia's workplace relations system should encourage and support job creation, deliver flexibility for both employers and employees, promote productivity and economic growth, and remain simple and practical. That makes Australia an attractive place to do business.

Since 2022, however, the Federal Government has pursued an agenda that has made the industrial relations system substantially more complex and legalistic for business, especially small businesses, to navigate relationships with their employees.

The package of bills known as the "Closing Loopholes" legislation is a case in point.

Further, while we appreciate the opportunity to participate in this review, we do question the impact these reviews have in addressing the actual pitfalls of legislation. For example, we note that the recommendations of the *Secure Jobs, Better Pay Review Report* to address the issues associated with fixed-term contract changes and employers with government funding are still unresolved.

In what follows, we make comments and propose recommendations related to the following key issues:

- Casual employment and the definition of employment
- Delegate rights
- Bargaining/Enterprise Agreements
- Regulated Labour Hire Orders
- Family and Domestic Violence Leave

There are, however, many issues with this legislation that have been excluded from this submission, because there is limited demonstrated evidence.[1]

For this reason, we consider that a wholesale, independent, review of the industrial relations system must be undertaken, as opposed to the current piecemeal approach.

To achieve this – and in the spirit of the Federal Government focus on productivity - we would welcome the establishment of a Productivity Commission review of the *Fair Work Act 2009* (Cth), and employment related legislation (long service leave, and

[1] For example, the first application for a minimum standards order for employee-like work was made on 17 December 2025. Another example is the Road Transport contractual Chain order which will not see the first piece of evidence provided publicly until 27 February 2026.

superannuation). The terms of reference should be focused on improving labour productivity and simplifying the system of compliance by employers. A report should be handed down by the end of 2027-2028 to give sufficient time for changes to flow through the system.

# 2. Casual employment and the definition of employment

***Definition of Casual Employment***

The changes contained in schedule 1 part 1 of the *Closing Loopholes No. 2 Act* repealed the definition of casual employment, which was legislated in 2021 and reaffirmed by the High Court in *WorkPac Pty Ltd v Rossato* (**WorkPac v Rossato**).[2] The 2021 definition was one that focused purely on the contractual terms of the parties, and one which set out the clear expression of what casual employment was.

This definition ensured that certainty prevailed for both the employer and employee, by following the laws of contract and the enforceable terms, not one based on mere suggestion or expectation.

This issue was encapsulated in the decision of *WorkPac v Rossato*, where Kiefel CJ, Keane, Gordon, Edelmen, Stewart and Gleeson JJ stated:

> *A court can determine the character of a legal relationship between the parties only by reference to the legal rights and obligations which constitute that relationship.* ***The search for the existence or otherwise of a "firm advance commitment" must be for enforceable terms, and not unenforceable expectations or understandings that might be said to reflect the manner in which the parties performed their agreement****. To the extent that Bromberg J expressed support for the notion that the characterization exercise should have regard to the entirety of the employment relationship, his Honour erred.* [3] (Emphasis Added)

The definition legislated in 2024 however has created a scenario that now goes beyond the contract of employment to the "real substance, practical reality and true nature" of the employment relationship.[4] This concept of "real substance, practical reality and true nature" is itself uncertain. This is because it provides weighting to a variety of indicia that do not always rely upon anything more than a subjective expectation of an individual party.

The Fair Work Commission has itself stated that a focus on indicia is ill-defined and requiring "*the application of criteria that do not deliver a clear and unambiguous answer in many cases but, rather, lead to results on which reasonable minds may differ*".[5]

[2] *Workpac Pty Ltd v Rossato* [2021], 271 CLR 456.
[3] *Workpac Pty Ltd v Rossato* [2021], 271 CLR 456, [57].
[4] *Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024* Sch 1 Item 1 (s 15A(2)(a)).
[5] *Telum Civil (Qld) Pty Limited v CFMEU* [2013] FWCFB 2434 at [20]-[21], as cited in *4 Yearly Review of Awards - Casual and Part-time Employment Case* [2017] FWCFB 3541 at [76].

This differentiation of where reasonable minds differ is what makes it harder for employers to appropriately understand when and where their employees may continue to be casuals.

Casuals have the ability to say no to shifts, and if, due to their own personal circumstances, can create scenarios that appear as a continuing indefinite relationship. As a result, under the new definition, a casual employee who may only be able to work one or two shifts a week between a very set allotted time could, in fact, be deemed no longer a casual employee.

The practical effect of this is considerable, particularly for sectors heavily reliant on casuals such as hospitality, and for small to medium businesses. These businesses are more reliant on casual employment due to the significant variation of their times and financial capacity to take on and retain staff.

Further to this, another concern with the definition is what it's attempting to resolve, that is, the apparent scourge of casual employment within Australia, and its alleged impacts on employees.

Data from the Australian Bureau of Statistics (ABS) continues to show that, despite these claims, casual employment continues to be the overwhelming choice for a significant proportion of employees in the workforce. The most recent **ABS** *Characteristics of Employment* release showed that for the last 20 years, casual employment remains roughly around one fifth to one quarter of the labour market.[6]

This data coincides with the ABS' quarterly labour force statistics which shows an estimated 21% casual employment in the November 2025 quarter.[7] In addition, almost three quarters of casual employees preferred casual employment.[8]

The definitional change arguably was a solution in want of a problem, which now results in additional complexity and confusion for employers and employees alike without any substantial protection or benefit to either.

***Changes to Casual conversion provisions***

Alongside changes to the definition, the *Closing Loopholes No. 2 Act* made significant changes to the pathway for casual employees to convert their employment to a permanent role.[9]

[6] Australian Bureau of Statistics (Cth), 'Casual work continues to decline' (Media Release. 12 December 2025).
[7] Australian Bureau of Statistics, *Labour Force, Australia, Details* (Catalogue No 6291.0.55.001, November 2025).
[8] Australian Bureau of Statistics (Cth), 'Casual work continues to decline' (Media Release. 12 December 2025).
[9] *Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024* Sch 1 Item 1 (Division 4A).

Under the previous legislated process, there were two possible pathways for casual conversion, the employer-led pathway and the employee-led pathway.[10]

For the employer-led pathway, the employer was required to write to eligible casuals to offer conversion after 12 months of the casual being employed, and undertake, in the last six months, a regular pattern of hours where the employee could be classified as a full-time or part-time employee.[11] Alternatively, the employee-led pathway affords an employee the opportunity to apply for conversion, unless an employer had already provided reasons for not converting.[12]

While these changes gave all employees the right to convert their casual employment if they wanted, the processes were significantly complex and required some change.

With the *Closing Loopholes No.2 Act 2024,* there were some positive changes, which made it easier for businesses to manage the casual conversion process.[13] However, other changes have resulted in unnecessarily restrictive arrangements for employers.

For example, the most concerning aspect is the removal of the ability to deny conversion due to reasonable business grounds. Under these new arrangements, employers can no longer refuse to accept an employee's request for conversion even when there are foreseeable reasons, such as, for instance:

- The employee's position will cease to exist.
- The hours of work that the employee is required to perform will be significantly reduced; and
- There will be a significant change to the days or times the employee is required to work which cannot be accommodated within the employee's availability.

These changes directly impact the ability of businesses to appropriately manage their workplaces, and this has, in fact, been affirmed by a full bench of the Fair Work Commission already through the Casual Employment Decision handed down as part of the 4 Yearly Review of Modern Awards.[14]

In this decision, the Commission noted that employers should retain such a capacity to refuse conversion on reasonable grounds, and that a position contrary to that approach would be unreasonable.[15]

[10] *Fair Work Legislation Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2022* Sch 1 Item 1 (Division 4A, Subdivision B and Subdivision C).
[11] *Fair Work Legislation Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2022* Sch 1 Item 1 (s66B(1)).
[12] *Fair Work Legislation Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2022* Sch 1 Item 1 (s66F(1)).
[13] *Fair Work Legislation Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2022* Sch 1 Item 1 (Division 4A, Subdivision B and Subdivision C).
[14] *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 354.
[15] *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541, [380].

### *Ability of FWC to arbitrate in all situations*

In addition to the changes above, there were also provisions included which gave the FWC wide power to settle disputes and make various orders about casual employment and the conversion process.[16] For example, this included:

- An order that the employee be treated as a full-time or part-time employee from the first pay period that starts after the day the order is made (or a later date if the FWC considers it appropriate).
- An order that the employee continues to be treated as a casual employee.
- An order that the employer make the employee an offer of casual conversion; or
- An order that the employer grant a request made by an employee for casual conversion.

In addition, it provided applications to be made to the Federal Circuit and Family Court in the small claims' jurisdiction, for a declaration as to whether an employee was a casual, part-time or full-time employee at the commencement of the employment.

It is still unclear why these provisions are necessary, and why the former provisions were deemed ineffective in resolving disputes involving casual employment matters.

### *Definition of Employment*

Schedule 1 Part 15 of the *Closing Loopholes No.2 Act 2024*, made changes to the test of what is an employee for the purposes of the Fair Work Act.[17]

This created a new statutory definition of "employee" that looked beyond the contract, to the "real substance, practical reality and true nature" of the relationship.[18] This, like the casual employment changes, were reflective of the previous "multi-factor test" that, in successive High Court decisions, had been rejected.[19]

In these decisions, the majority of the High Court held that under the common law, whether a worker is an "employee" is determined solely by reference to the terms (express or implied) of the employment contract.

Importantly, and contrary to some perception, these decisions did not mean the label used by the contract was at all relevant to characterisation. Rather, the High Court held that the legal rights and duties under a contract were determinative.

---

[16] *FW Act* ss 66M- 66MA.
[17] *Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024* Sch 1 Item 15 (Definition of Employment).

[18] FW Act s 15AA(2).
[19] CFMMEU v Personnel Contracting Pty Ltd [2022] HCA 1; ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2.

The High Court's decisions overturned prior Federal Court decisions which held that the "multi-factor" test should be applied taking into account the "totality of the relationship".

The High Court rejected the existence of a "multi-factor" test at common law as well as the notion that non-contractual and post-contractual matters should be considered.

The return to the common law test prior to these decisions creates substantial uncertainty for employers and the independent contractors in which they engage.

The definition requires the consideration of post-contractual matters. The practical effect of this is that even if a business engages a worker as an independent contractor, that contractor could now be converted to an employee.

The Court itself criticised the test on which this new definition lies upon, where they said it was as "necessarily impressionistic" and thereby "inevitably productive of inconsistency".[20] Their Honours stated that the definition "is apt to generate considerable uncertainty, both for parties and for the courts".[21]

## *Recommendations*

To reduce complexity, three key changes are required:

- Revert back to the previous definition of casual employment and approach, which was defined by the High Court and 2021 legislation;
- Provide reasonable business grounds for refusing a request to convert a casual; and
- Revert back to the previous dispute resolution pathways that were legislated prior to the Bill's passage.

### ***Casual definition***

The previous definition legislated in 2021 provided certainty to employees and employees. Subjectivity is removed, and both parties have a clear understanding of the contractual terms of their arrangement.

It would also remove the systematic undermining of casual employment. For example, if the FWC currently orders a conversion of a casual employee to a permanent employee for specific factors, and other employees who have been classified as casual employees have similar factors, there is a potential for an employer to be at risk of breaching the FW Act by not appropriately classifying employees.

For these reasons, we call on the Reviewer to consider the definition of casual employment as defined by the High Court.

[20] CFMMEU v Personnel Contracting Pty Ltd [2022] HCA 1, [33].
[21] CFMMEU v Personnel Contracting Pty Ltd [2022] HCA 1, [33].

### *Casual Conversion*

The removal of the ability for businesses to rely upon reasonable business requirements to deny a request to casual conversion is significantly detrimental.

It is not in anyone's interest to require the conversion of a casual employee to permanent employment if it is reasonably foreseeable that the position won't be available on an ongoing basis or that there will be some change in the hours that can be offered. Such a scenario may even result in an employer being forced to terminate the employee (even though they could potentially have provided further employment as a casual).

For this reason, the Full Bench ultimately decided in 2017 to develop the casual conversion provisions in awards to expressly allow the consideration of reasonable business requirements as a reason to deny a casual conversion request. This does go beyond the scenario provided above as noted by the Commission Full Bench, however it is still required that any decision to refuse is based upon a reasonable and reasonably foreseeable set of facts and not general speculation nor lack of certainty of employment.[22]

For this reason, we recommend that the reviewer consider including a recommendation that provides an avenue for employers to refuse a request for a casual conversion on reasonable business grounds.

### *Reversion to previous dispute resolution*

As noted earlier, the rationale to change the process for dispute resolution was not evident, and the focus on forced arbitration is a concerning trend away from the decentralisation of power from tribunals to workplaces.

Awards and enterprise agreements already require dispute resolutions terms to be present. The process for dealing with similar disputes should not be removed and provided to the Fair Work Commission for arbitration unless both parties agree.

Additional pathways for dispute only creates complexity. We would contend it is more appropriate for disputes to be dealt with in accordance with existing dispute resolution processes available to the parties. In this regard, we would recommend a reversion to the previous provisions is appropriate.

[22] *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541, [380].

**RECOMMENDATION: CHANGES TO THE CASUAL DEFINITION**

The definition of casual employee should revert to the former definition legislated in 2021, and endorsed by the High Court, which established the casual employee is defined by the terms of engagement at the time of employment.

This definition ensures that employers and employees have certainty on how casuals are engaged, providing a substantial benefit to both employees and employers in knowing their entitlements and obligations.

**RECOMMENDATION: INCLUDING "REASONABLE BUSINESS REQUIREMENTS" FOR REFUSAL TO ACCEPT CASUAL CONVERSION REQUEST**

The reasonable business requirements for refusing to accept a request for casual conversional must be re-instated. This would ensure businesses have the capacity to refuse conversion on reasonable grounds, including if there is reasonable foreseeability for the position to not be available on an ongoing basis.

**RECOMMENDATION: REVERSION TO PREVIOUS DISPUTE RESOLUTION CLAUSES**

Reversion to the previous dispute resolution legislated in 2021 will ensure that businesses and employees can continue to utilise their current dispute resolution processes; and not be usurped from the new provisions under the Act.

Arbitration should always be a last resort, and one that is only done on a joint consent basis.

### *Definition of Employment*

The concerns with the "definition of employment" are substantial, by creating considerable uncertainty and being inconsistent with modern workplaces and work arrangements.

The multi-factorial test has been criticised through numerous court decisions over time for its inability to reflect modern work arrangements, and not providing certainty to businesses and workers.[23]

For these reasons, it is unlikely that these concerns would be addressed by amendment to the test. As recommended by the High Court, the Government should remove the multi-factor test, and allow the common law definition of employment to be reinstated.

As noted by Kiefel CJ, Keane and Edelman JJ in *CFMMEU v Personnel Contracting.*

[23] Examples include: Sweeney v Boylan Nominees Pty Ltd [2006] HCA 19 ; Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2020] FCAFC 122, [76]; CFMMEU v Personnel Contracting Pty Ltd [2022] HCA 1, [26].

> "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."[24] (Emphasis added)

The Federal Government must promote certainty, which can only be achieved by removing the multi-factor test.

**RECOMMENDATION: REVERSION TO COMMON LAW DEFINITION OF EMPLOYMENT**

The Federal Government should repeal the definition of employment that has been legislated, and revert to the common law definition of employment as set out through the recent High Court Cases of *CFMMEU v Personnel* and *ZG Operations Australia Pty Ltd v Jamsek*.

[24] CFMMEU v Personnel Contracting Pty Ltd [2022] HCA 1, [58].

# 3. Delegate rights

CCIWA has long-standing concerns about the introduction of workplace delegates rights provisions within the Fair Work Act, and subsequently all modern awards and Enterprise Agreements.

We continue to oppose the unilateral creation of special rights and privileges attached to a union delegate within a workplace, and the shoehorning of their protections into enterprise agreements and awards.

There are two main reasons for this:

- Employee representatives are already protected under the Fair Work Act, and penalties applied if there was adverse action taken against a union delegate/employee representative; and[25]
- The issue of creating a "privileged class" of employees, who by their nature of being a workplace delegate gained additional rights and protections that the rest of the workforce did not have access to.

Unfortunately, the provisions that were legislated as part of the Closing Loopholes Act has created such a scenario.[26]

CCIWA members are concerned about situations where a union delegate will be paid for by the company to do work wholly connected to their union duties', including representing workers in the enterprise who are not connected to the employer.

Concerningly, despite attempts by the Fair Work Commission to narrow the broadness of the provisions legislated, the Full Court of the Federal Court of Australia held that any efforts to narrow was in contravention of the intent of the Act.[27]

The Full Court stated that the Parliament intended for union delegates to be given powers that "*Hinder, Obstruct and Prevent'* the performance of work.[28]

This is in direct conflict with the intention of the bill which is "closing loopholes" and instead has seen the Government create a substantial loophole. A union delegate can now work full time on union business, be paid by an employer and impact the performance of work. This is all the while having significantly more favourable rights and protections than all other employees in the workforce.

[25] Protection was provided through being covered as an officer of Industrial association through s 12(b) of the FW Act, and thus enlivening sections 346 and 347 of the FW act, which deal with adverse action.

[26] *Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024* Sch 1 Item 1 (Part 7- Workplace delegates' rights).

[27] *Construction, Forestry and Maritime Employees Union v Australian Industry Group [2025]* FCAFC 187, [2] – [7].

[28] *Construction, Forestry and Maritime Employees Union v Australian Industry Group [2025]* FCAFC 187, [90] – [95].

The broad nature of these provisions, as articulated through the Full Court of the Federal Court of Australia Decision, showed the concerns of employers were valid. [29]

As seen with the reporting on the Construction, Forestry, Maritime Employees Union (CFMEU) and Victoria's Big Build, these positions are often misused, held to reward supporters of a specific union official, and in some cases have seen taxpayers impacted.[30]

While this example is extreme, the concept of employers paying for a union delegate who does not participate or undertake any form of work for the business beyond "union business" is deeply concerning.

It is also concerning that there are no provisions in place to prevent delegates being paid by one business while undertaking union delegate work across an entire enterprise or project, including sites involving multiple contractors.

As a major project State, WA stands to be heavily impacted by this new loophole created. In major projects it is not uncommon for multiple contractors to work on a single major project, covering hundreds, if not thousands of employees at one time on site.

Noting that just 8% of private sector workers are union members, it's difficult to see the rationale for this special class of employee, especially when rising costs and productivity is on the Federal Government's agenda.

## *Recommendations*

For the reasons outlined above, CCIWA continues to oppose the introduction of these provisions, and recommend they be repealed for the following reasons:

- All employees should have the same rights and privileges.
- It is entirely inappropriate that a union delegate can be paid the same as an employee, and perform no work for the betterment of the enterprise. Should an employer choose to create such a position, they can do so through the bargaining process.
- The additional protections also go well beyond what is reasonably required.

[29] *Construction, Forestry and Maritime Employees Union v Australian Industry Group [2025]* FCAFC 187.

[30] Examples include: Nick McKenzie, David Marin-Guzman, Ben Schneiders 'Bikies, Underworld figures and the CFMEU takeover of construction' *The Australian Financial Review* (13 July 2024); Nicole Asher, 'CFMEU Delegates sacked, investigation launched into alleged Metro Tunnel wage scam' *ABC News* (07 March 2025).

**RECOMMENDATION: REPEAL OF WORKPLACE DELEGATES PROVISIONS**

The Workplace Delegates provisions encapsulated within section 350 of the FW Act should be repealed, and the requirement for Awards and Enterprise Agreements to have a clause should be repealed.

# 4. Bargaining/Enterprise Agreement amendments

The amendments to Bargaining captured under this package of bills were:

- Enabling franchisees to access the single-enterprise stream.
- Transitioning from multi-enterprise agreements; and
- Amendments to the intractable bargaining workplace determinations.

These are discussed in turn.

***Enabling franchisees to access the single enterprise stream***

These changes are supported by CCIWA, however, they were only necessary due to the introduction of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (**SJBP Act**).

With the introduction of multi-employer bargaining through the **SJBP Act**, franchisees were no longer able to bargain together under the single interest employer stream for a multi-enterprise agreement with significant ease.

For franchisees that wished to bargain together under the single interest employer scheme, they were required to satisfy the following:

- that some of the employees would be represented by an employee organisation;[31] and
- that bargaining representatives have had the opportunity to express their views to the FWC.[32]

Consequently, these tests prevented franchisors with multiple stores from having a single enterprise agreement organised with ease.

While CCIWA welcomed and supported the changes in the "Closing Loopholes" legislation to address this critical flaw, it remains deeply concerning how such legislative drafting could result in locking out businesses from accessing enterprise bargaining.

***Transitioning from Multi-Enterprise Agreements***

The provisions legislated in the "Closing Loopholes" were to make technical amendments to address issues with the multi-enterprise bargaining provisions as part of the **SJBP Act**.[33]

These changes were largely technical in nature, however, aspects of it went far beyond the clarification of mistakes in the previous Act.

---

[31] FW Act s 249(1)(b)(i).
[32] FW Act s 249(1)(b)(ii).
[33] *Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024* Sch 1 Item 1 (Part 4).

For example, it legislated:

- unions having the right to veto employers and employees who wish to make a single enterprise agreement (and exiting the multi-enterprise agreement or relevant authorisation); and[34]
- the better off overall test (BOOT) for the single enterprise agreement against the multi-enterprise agreement rather than the safety net provided by modern awards and the National Employment Standards.[35]

The changes to the BOOT are inappropriate because this gives multi-enterprise agreements special treatment over single enterprise agreements, despite the latter being preferred by the FW Act.

When bargaining for a single enterprise agreement to replace another single enterprise agreement that has expired, the new agreement only needs to ensure that the employees are better off overall relative to the modern award. Under these changes, the existent multi-enterprise agreement becomes the new benchmark.

The multi-enterprise bargaining laws were introduced in 2022 with undertakings that such agreements were not intended to create a new level of awards, however, these changes to the BOOT partly vindicate that concern.

These changes disincentivises employers from transitioning from multi-employer instruments, because of the higher threshold test. As a result, employers are locked into terms and conditions that may result in declining productivity, business failure and loss of jobs.

As a case in point, recent reporting suggests the Electrical Trades Union is attempting to create a multi-employer agreement to cover all of NSW and the ACT.[36] In this situation, any business covered by that agreement will not have the ability to have an enterprise specific agreement, and will be forced into terms and conditions that may put at risk the business and jobs.

Furthermore, by forcing businesses and their employees to have the consent of unions before transitioning from a multi-enterprise agreement, the Government is creating significant barriers for employers to make decisions appropriate to their long term interests of the company and its employees.

***Intractable bargaining changes***

Section 270A provides that in any arbitration of a bargaining dispute, any disputed term that relates to a term in an existing enterprise agreement (e.g., terms about hours of

---

[34] FW Act s180B(2)(a).
[35] FW Act s193(1)(b).
[36] David Marin-Guzman, 'Salvos fired in fight over militant union's bid for blanket agreement' *The Australian Financial Review* (28 January 2026)

work, shifts, rosters etc) cannot be changed in the arbitration to make the term less favourable to the employees or a union than the current enterprise agreement.[37]

The only exception to this requirement relates to wage increases, which are exempt from the operation of section 270A.

These changes removed the ability of the Fair Work Commission to make considered, because of the need to disregard:

a) Any clause which may be less favourable than an existing enterprise agreement between parties; and
b) Decisions that the parties have allegedly already agreed to.

Rather than considering any bargained outcome in its totality, and on its own merits, the Fair Work Commission must ensure each term it arbitrates (on a term-by-term basis) is either as favourable or more favourable for employees and any relevant union bargaining representatives.

We hold deep concerns about the one-sided nature of arbitration, in particular, the way unions are disincentivised from making compromises in the bargaining process. Instead, they are, in effect, encouraged to drag out bargaining to have the matter arbitrated before the Fair Work Commission where they will almost always be better off.

This would be a disappointing outcome as our system should encourage proper "agreement" making between the parties at the enterprise level, and not a system where more matters are determined by a third party (the Fair Work Commission). Arbitration should be a last resort for both parties, not something regularly sought by one party because of the additional benefits it will likely provide.

This change, alongside the re-introduction of compulsory arbitration and other changes introduced by the Government, only serve to increase conflict in our workplaces (i.e. multi-employer bargaining without consent). As a result, employers face the very real prospect of returning to the days of compulsory conciliation and arbitration, where the employment tribunal, not the enterprise, sets terms and conditions of employment. This would be a productivity hit for Australia's economy.

[37] FW Act s270A.

## *Recommendations*

CCIWA members are deeply concerned about the privileged position handed to the union movement with respect to the terms and conditions of employment.

As a result, the Government must ensure the Fair Work Act prioritises and places primacy on single enterprise agreement making. This would reinstate the true intention of enterprise bargaining and ensure that wherever possible, single enterprise agreements are prioritised over multi-employer agreements.

To support this, CCIWA recommends removing the requirement for union consent to switch from a multi-employer agreement to a single-enterprise agreement.

Unions have a role in the workplace, but their interests should not take precedence over the interests of the direct workforce. This is the anthesis to a productive and well-functioning industrial relations system, and as such it should be removed as a matter of urgency.

To support bringing forward a similar and fair approach of multi-employer agreements becoming new industry standards, they should not become the benchmark for the Better-Off-Overall test (BOOT).

The BOOT should only be applied against the relevant awards for which the workforce is covered by. This was the case prior to this bill's introduction.

By changing this process for multi-employer agreements does nothing but lock businesses into agreements that they and their staff may not want and removes the integral benefit of enterprise bargaining away from the workplace.

As such, section 193(1)(b) should be amended to follow the legislative drafting of section 193(1)(a), which deals with single-enterprise agreements. Including this, section 193(1A) should be removed to continue to allow employers and employees to make new agreements as market conditions and business profitability change. The current arrangements do not provide this option, and the use of the public interest test in section 189 is limited in such situations.

In addition, CCIWA also recommends the BOOT should only be applied against the safety net and award in all circumstances, and not the currently applied model.

For intractable bargaining, while the full regime should be removed as the concept of compulsory arbitration is antithetical to agreement making, section 270A should be repealed as a matter of urgency.

This provision only serves to encourage unions to drag out bargaining, and once the required 9-month period has been reached, apply for an intractable bargaining declaration and have the matter arbitrated so conditions can be 'ratcheted up'.

Current case examples only serve to support this assertion.[38] It is also why, former Victorian Treasurer, Hon Tim Pallas MP, sounded the alarm when this section was being debated in Federal Parliament.[39]

**RECOMMENDATION: RECONFIRMING SINGLE ENTERPRISE BARGAINING AS THE PRIMACY**

Changes should be made to both the Fair Work Act Objects, and Part 2-4 of the Fair Work Act to confirm that single enterprise bargaining is the primacy for bargaining under the Fair Work Act and is intended to be the main form of enterprise bargaining.

**RECOMMENDATION: REMOVING UNION SPECIAL PRIVILEGE OVER EMPLOYEE CHOICE**

The Fair Work Act should be amended to remove section 180B(2)(a), which currently allows unions to deny employers and employees covered under a multi-employer agreement from transitioning to a single-enterprise agreement.

**RECOMMENDATION: TRANSITIONING FROM MULTI-EMPLOYER BOOT CHANGES**

The Fair Work Act should be amended to ensure that businesses moving away from multi-employer agreements have their new single-enterprise agreement Better Off Overall Test benchmarked to the award, and not the previous multi-employer agreement.

**RECOMMENDATION: BOOT APPLIED ONLY AGAINST AWARD, NOT AGREEMENTS.**

The Fair Work Act should be amended to ensure that the application of the BOOT is only benchmarked against the award and NES, not any previous agreements.

**RECOMMENDATION: REMOVING SECTION 270A**

The Fair Work Act should be amended to remove section 270A, which incentivises arbitration by the Fair Work Commission.

[38] *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd* (2024), FWCFB 287, and *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd* (2024), FWCFB 305

[39] Vic Government (2024), *Letter from Treasurer, and Minister for Industrial Relations to Minister for Employment and Workplace Relations*, (16 January 2024) - Letter-from-Minister-Pallas-to-The-Hon-Tony-Burke-MP-dated-16.01.24-(1).pdf

# 5. Regulated Labour Hire Orders

Regulated Labour Hire orders or colloquially known as 'Same Job Same Pay' orders are contained in Schedule 1 Part 6 of the *Closing Loopholes Act 2023.*[40] These changes are some of the most concerning within the passage of bills as they impact and demonise one type of work.

Labour hire is a legitimate model for businesses to use to access essential labour, including to meet fluctuating demands, and acquire skills and expertise that may not be present in their current workforce.

These arrangements are used in a wide variety of sectors, not just WA's mining industry, but also in agriculture, community care, aged care, and disability care.

We contend the new provisions impact WA's competitiveness at time when we can least afford, and when capital deepening is critical. As a result, the impact of this provision will be felt not just throughout WA's economy, but nationally as well.

The key issue is the way the provisions impact an employee's ability to make agreements with their employer and to have them respected.

The idea that labour hire workers supplied by an employer (i.e. a labour hire provider) are exploited, and should be remunerated according to the terms of a separate or different host employer's operational enterprise agreement for its directly engaged employees is a challenging concept.

Employers must retain their managerial prerogative and discretion to manage their own workforce according to their own requirements and in line with obligations under the FW Act and other employment and workplace laws.

Employers and employees who may work in an industry where labour hire is utilised now have lost the determination of deciding their own terms and conditions of employment. This is a concerning development.

As outlined above, the industrial relations system must ensure both the employer and employee, at the workplace level, have the ability to make agreements that they believe work for each other.

As noted by Paul Keating in 1993 about enterprise bargaining.

> *It is a model under which compulsorily arbitrated awards and arbitrated wage increases would be there only as a safety net. This safety net would not be intended to prescribe the actual conditions of work of most employees, but only to catch those unable to make workplace agreements with employers…*

[40] *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* Sch 1 Item 1 (Part 6- Workplace delegates' rights).

*...These agreements would predominantly be based on improving the productive performance of enterprises, because both employers and employees are coming to understand that only productivity improvements can guarantee sustainable real wage increases."*[41]

The changes with respect to labour hire workers were not targeted, and despite the promise of exemptions for service contractors, they are not exempted as shown in recent test cases.[42]

These provisions simply re-regulate the employment relationship, and concerningly add costs, including administration, to meet compliance. With a significant productivity issue, this comes at a time when Australia can least afford it.

## *Recommendations*

CCIWA does not support the regulated labour hire provisions, however, it is unlikely the Government will repeal these provisions.

Therefore, our recommendations seek to address the most problematic aspects of these provisions. These are discussed in term.

***Service contractor exemption***

The service contractor exemption is contained in section 306E(7A), which sets out a multi-factorial test that is applied and determined by the Commission.

These provisions do not go far enough to protect employers that engage contractors to gain technical or specialist services. These specialist services are essential for industries and sectors vital to WA's economy, such as mining, construction, and major infrastructure projects.

As shown within the recent decision of *BHP Coal Pty Ltd v Mining and Energy Union [2025],* the service contractor exemption is not working as intended.[43]

The Full Court decision, re-affirmed the Full Bench of the Fair Work Commission rationale on what is the provision of services for the purposes of the proposed "service contractor exemption".[44] This makes the provision of services substantially riskier, and goes beyond just the areas of mining and aviation.

For this reason, technical and specialist service contracting needs to be, expressly and clearly, exempt from this part of the regulated labour hire orders.

---

[41] Hon. Paul Keating MP, 'Speech to the Institute of Directors Luncheon' (Speech, Melbourne 21 April 1993).
[42] FW Act ss 306E(1A), 306E(7A).
[43] *BHP Coal Pty Ltd v Mining and Energy Union* [2025] FCAFC 194.
[44] *BHP Coal Pty Ltd v Mining and Energy Union* [2025] FCAFC 194, [43] – [51], [54] – [62].

**RECOMMENDATION: A TRUE SERVICE CONTRACTOR EXEMPTION**

The Fair Work Act should be amended to introduce a true service contractor exemption, where the performance of work for the host is wholly or principally for the provision of a service, rather than the supply of labour.

### *Regulated labour hire orders on staff not doing "similar work"*

In addition to this, concerns remain around how these regulated labour hire orders can cover workers who may not actually be doing similar work, as defined in this Act.

Employment instruments often are very broad classification structures that are based on levels of skill and not identifying specific occupations or jobs within the enterprise.

This can and does result in scenarios where employees within classifications, who are unlikely to have ever been envisioned to be employed, could be captured within a regulated labour hire order.

**RECOMMENDATION: ONLY ALLOWING REGULATED LABOUR HIRE ORDERS FOR TRUE "SIMILAR WORK"**

The Fair Work Act should be amended to restrict regulated labour hire arrangement orders being applied to host organisations where they do not ordinarily directly hire the type of workforce that would be proposed to be covered.

This would ensure scenarios where a security guard, or gardener who may be technically covered through classification, but has not been directly hired by the host organisation for a period of time.

### *Exemption period for regulated labour hire orders*

The time period for the exemption for short term work is also a key issue. We argue that the exception for labour hire arrangements of up to three months needs to be extended to at least 12 months.

This would ensure that the majority of true seasonal work is protected, and it is reasonable, noting the level of compliance involved in a regulated labour hire order. Changing payroll configurations for a three-month period of engagement is unrealistic. In addition, the time periods in the exemption provisions for short-term work should

relate to work that is carried out for the regulated host on a continuous basis, not on an intermittent basis.

Many businesses provide services to client businesses through ongoing contractual relationships between businesses. Often, the employees of a business will carry out work for a substantial number of client businesses, with each deployment being for short periods. In such circumstances, multiple deployments should not be counted as one period when calculating the length of time that an employee has performed work for a regulated host.

If multiple deployments are counted as one period, businesses that supply labour are likely to be forced to comply with numerous regulated labour hire arrangement orders for the same employee. This is unfair and unworkable.

For this reason, we recommend that an exemption that stops the FWC from bringing forth a regulated labour hire order for work less than 12 months continuously.

**RECOMMENDATION: PROPER EXEMPTION FOR SHORT TERM ENGAGEMENT**

The Fair Work Act should be amended to introduce that the Fair Work Commission cannot put a regulated labour hire order on a business without a minimum of 12-months continuous work being undertaken within a host employer. This should include preventing the FWC from having the ability to shorten or remove that exemption.

# 6. Family and Domestic Violence Leave

The Family and Domestic Violence Leave changes were legislated in the second half of 2022 and have been previously reviewed.[45] CCIWA holds the view that family and domestic violence (FDV) is unacceptable and inexcusable in all its forms.

Federal, State and Territory Governments have implemented various payments and other measures to assist employees experiencing family and domestic violence. Governments have an important role to play in providing such a social safety net and it is appropriate that they continue to do so.

CCIWA and the business community supports long overdue community-wide recognition of FDV, community-wide measures to combat FDV and better support for those exposed to FDV, overwhelmingly women and children. Broadly, the changes have worked relatively well for businesses, and many take a flexible and compassionate approach to supporting employees experiencing family and domestic violence.

However, there are some outstanding issues, which further guidance would address. In particular, there is currently a lack of understanding of when employees can use FDVL, such as for court hearings and for medical appointments, years after FDV has been present.

Further guidance on when this can be accessed would assist to ensure both employees and employers apply leave appropriately and in a timely manner. As such, we would support the development of further guidance in the *Fair Work Regulations 2009* for such scenarios.

**RECOMMENDATION: CLEARER REGULATIONS ON APPROPRIATE FDVL USAGE**

The Fair Work Regulations should be amended to provide additional guidance on when an employer is required to provide FDVL in scenarios where employees are undertaking medical appointments and court hearings years after FDV was experienced by the individual.

In addition, CCIWA continues to hold concern with the way this section is drafted, and that it may enable requests for leave by perpetrators of FDV. While we understand this is not the intent, there should be explicit provisions excluding perpetrators of FDV from having access to the leave.

[45] Review undertaken by Seymour, K., Marmo, M., Cebulla, A., Ibrahim, N., Esmaeili, H., Richards, J., & Sinopoli, E. 2024. Independent review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009. Adelaide: Australian Industrial Transformation Institute, Flinders University of South Australia.

**RECOMMENDATION: PROPER EXEMPTION FOR PERPETRATORS OF FDV**

The Fair Work Act should be amended to explicitly exclude perpetrators from accessing FDVL through amending section 106A of the Act.